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ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE COMPLAINANT, HER FAMILY MEMBERS AND HER BOYFRIEND.

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 49/2019
[2021] NZSC Trans 3

PETER HUGH McGREGOR ELLIS
Appellant

V

THE QUEEN
Respondent

Hearing: 25 March 2021

Coram: Winkelmann CJ
Williams J
Glazebrook J
O'Regan J
Ellen-France J

Appearances: R A Harrison, S J Gray, B L Irvine and K D W Snelgar for the Appellant
J R Billington QC and A D H Colley for the Respondent

ORAL HEARING

MR BILLINGTON QC:
Tēnā koutou e ngā Kaiwhakawā, ko Billington and ko Ms Colley e tū nei mō te Karauna. If the Court pleases, I appear with Ms Colley for the Crown in support of the application.

WINKELMANN CJ:
Tēna koutou Mr Billington and Ms Colley.

MR HARRISON:
E Te Kōti Mana Nui, ko Harrison, Irvine, Gray, Snelgar. Ko ngā rōia mō te kaipīra. May it please the Court, counsel's name is Harrison. With me is Ms Irvine, Ms Gray and Mr Snelgar. We appear on behalf of the appellant.

WINKELMANN CJ:
Tēnā koutou. Before we get underway, I just remind everybody present that there are suppression orders in place in this case and in particular, suppression orders in respect of the proposed witness and any identifying particulars. Mr Billington.

MR BILLINGTON QC:
If the Court pleases, I think I have now disposed of the most stressful part of this hearing for me.

WILLIAMS J:
You did very well Mr Billington.

WINKELMANN CJ:
Yes well done Mr Billington.

MR BILLINGTON QC:
Time moves on doesn't it and it is good to be part of the movement actually so I appreciate it. Now if the Court pleases, I have distilled this down to what I think is a very short argument. I am not really now attempting to persuade you or argue a point of view. This matter has evolved, and it has evolved through the submissions that have been filed. The first submissions we filed in support of the application were largely conventional in that the Crown sought leave to introduce propensity evidence and it is propensity evidence to a degree. We relied then on the *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 principles, also enunciated in the *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 hearing. That the evidence was to be credible, it was to be fresh in the legal sense and significantly, evidence that may have impacted on the safety of the verdict. That is the conventional approach and that was the approach that was encapsulated in our submissions which appear in COA6.

The matter moves slightly in our reply submissions before the last hearing, which were filed on 4 November and there we referred, in particular, to memory evidence because it is my submission that this is a memory case. And we referred there to some recent judgments of the Court of Appeal where the Court of Appeal initially had admitted, in particular circumstances, evidence from some of the witnesses in this case in relation to the memory issues. More recently in its judgment of *P (CA470/2017) v R* [2020] NZCA 304 which appears in the authorities, the Court indicated that a

cautionary approach should be adopted. That the science of memory was an evolving science and recognising also; two things really. One is that the Court wasn't to be seen by its previous judgments as encouraging the practice of receiving memory evidence and secondly, that memory in the end, in the Court's view at least at that point, was within the experience of the trier of fact and the reason those submissions were made was to give a context to this application.

The submissions that we filed on the 5th of March of this year largely replicate what would be the oral submissions that I would have made had the matter proceeded in November and that is the focus then on the fact that this a memory case. If one looks at the grounds of appeal, there are three, two of which directly impact on memory and challenges to the memory and therefore the safety of the evidence and the verdict as a consequence and that is Professor Hayne's evidence and her conclusions are that the evidential interviews fell well short of best practice and there is a possibility of contamination. There is the subsidiary ground that the evidence that was led under section 23G of the Evidence Act 1908 should not have been permitted and would not be permitted today and of course that section has been repealed.

Now that really leads me to where we are today and that is this, it is really a matter for you as to whether you will be assisted by receiving this evidence in the appeal. This is not a case where a party comes to the Appellate Court on the basis that the evidence that is sought to be admitted is evidence that may impact on a verdict. This evidence is sought to be admitted if you deem it helpful to consider whether it assists in the evaluation of the memory evidence that has been given and which will be given when the matter is heard in October. So it is an application to admit evidence which you may or may not deem to be helpful in your consideration of the substantial and substantive issues.

Now I have prepared for this morning's hearing, a brief summary with references, what that evidence is because it may assist you and if your Honours would permit me, I would like to hand up that summary.

WINKELMANN CJ:
Yes. Does that address the claimed inconsistencies and lack of corroborating and surrounding facts?

MR BILLINGTON QC:
Yes it does, it does. And I think when you see it, you will recognise the validity of some of the points that are made. It is broken down into three parts. The first is a timeline of the witness' evidence as to the events that occurred that are key events. The second is a summary of what she says and the third is a timeline of her interaction with the police.

If I can take you through that because I think this is informative and will assist you in what weight you give to this evidence now and whether you consider it would help you going forward or otherwise. Now dealing with the first page, the timeline is taken from the oral interview that was recorded and it starts off with just some basic facts, that she was born in July 1978 and lived at the address in Christchurch until 1996. The key events are alleged to have occurred with the appellant in 1983, who allegedly babysat at the property in Christchurch which was the family home.

The witness then says at age about 10 or 11, a detective came to see her. She did not tell the police then she had been abused. She says the first person she told about being abused was her boyfriend when she was aged about 15 in 1993. In the same week she told her sister and her mother and her sister recounts that evidence in the material before this Court.

When she was asked then was the offender the appellant, she said the name meant nothing to her and that is in 1993. She also says that at about the same time, as a consequence of those disclosures, she spoke to the police at the Papanui Police Station. She said she told a police officer what had

happened to her but she did not name the appellant as the person who had abused her. There is no record of that interview having taken place. That may be unsurprising, given the passage of time and also the fact she did not implicate the appellant. I come to this later, very briefly, but in 2006 the witness made an ACC claim which was processed through the sensitive claims division and involved extensive counselling and she repeated her claims and her relevant history to the ACC counsellors who acted upon it.

Events took a significant turn for the purposes of this case in 2007 when the witness saw a documentary on Mr Ellis, the appellant, and she then said she recognised him as the person who had sexually abused her when she was five, which by that stage would have been some, almost 20 years previously. As a consequence in the same year, she went to the Christchurch Central Police Station and spoke to a plain clothes police officer. She misnamed the police officer but that has been confirmed as having occurred. She then wrote a diary in which she recorded the name of her counsellor and her ACC history and she wrote an account then for the first time of the alleged assault. So we have a period from 1983 to 2007 before matters crystallised around the appellant as having been the perpetrator of the assault. After making this statement, she told the police she did not wish to press charges.

Now there is quite an extensive electronic interview. I don't propose to go through it in detail. It is in two parts. The first is an outline of the essential allegations and it is followed by more detail. The matters followed now in paragraphs 13 and following, are those which are the key allegations. She says that when she was about four and a half, she had a male babysitter whom she remembers him asking her to call him Uncle Peter. She said he gave her some lollies, she went to bed but was asked to sneak out of bed and come and see him. She did so, she went to the lounge where she remembers being made to take her knickers off, put her legs apart and then objects were inserted into her vagina. The witness then says that he wanted her to straddle him and he rubbed his penis against her and inserted his penis. It was painful she says. She then said she was told to suck his penis and he ejaculated. She was then told that if she disclosed any of this to the parents or anybody

else, she would die and witches, demons and monsters would come. That is the allegation.

She then says there was a second time when he came and babysat her but nothing happened. She then says her mother worked as a cleaner at **[redacted]** and that is where she thought her mother had met the appellant, although he was a volunteer. There is nothing to substantiate that.

Those are the essential allegations which are then developed in detail in the references which I provide at paragraph 17. If we go back, as I do, in paragraph 18, the Crown submitted at paragraph 17.1 of those submissions of October 2020, that as propensity evidence it shows that the appellant has a propensity to engage in sexual acts with young children in his care, and that is a propensity issue. The appellant was a caregiver who was able to be alone with both the complainant as her babysitter and with creche victims as a staff member. Whilst acting as a caregiver, the appellant is said by the witness to have engaged in strikingly similar behaviour as that which was complained of by the creche victims and in respect of which the appellant was convicted. That includes the threats that were made afterwards if she disclosed the interference.

Now it is acknowledged, as I have effectively by implication previously in this submission, that the central allegations are uncorroborated. Corroboration, as the Court knows, is independent testimony from a party other than the witness, which tends to confirm the version of events given by the witness and which implicates the appellant. There is nothing that falls into that category and satisfied that legal test in relation to this evidence. Having said that, as my friend acknowledges, corroboration is not an essential feature of cases such as this and of evidence such as this and of course the law has recognised that typically such evidence would rarely be corroborated because it happens in a situation of privacy but nonetheless it is a factor which the appellant relies on and I think it is something that the Court obviously needs to consider whether corroboration is something of concern to this Court now.

Also, when the initial complaint was made in 2006, the complainant attributed the sexual assaults to an uncle but she subsequently corrected that in 2007.

Now they are the key facts. There is then a timeline which I provided in the third part of this summary which shows the witness' interaction with the police and the Crown. It is relevant not only to the history of the matter and the nature and quality of the evidence but also it is relevant in terms of fairness to the appellant which is an issue that is raised in submissions. As we know the interaction with the police is said to have commenced in 1993 on the first occasion, 2007 on the second occasion and we then go through 21 February 2019 when the first evidential interview was taken with a detective in Invercargill and the key facts I have just given you come from that interview.

The application for leave to appeal was filed some five months later, on the 5th of June 2019. On the 31st of July, the witness met a detective again. She was advised that the appellant was terminally ill and the police would not investigate further. 4 September, the appellant died. 24 September, the Crown Law Office in Wellington was provided with the police file from Invercargill and then the history of the applications and the hearings in this Court are set out thereafter, with the matter coming to this Court initially at an earlier point in time and again in November last year. So unfortunately there was no ability for the appellant to respond but it is not difficult to anticipate what his response would have been in any event.

Now those are the facts and as I indicated when I commenced the submission, the issue is whether those facts will assist you in relation to the issue. Now before I go on to that and deal with that briefly, I have also made an analysis of the evidence of Professor Rachel Zajac who has filed rebuttal evidence in relation to this particular application and she makes a number of observations which are set out in paragraphs 3.4 to 3.13 of her rebuttal evidence which is COA1618 to 1669.

To a degree, they are equivocal and I will just mention some of them because in a sense they do indicate that issues of knowledge are within our own knowledge or memory of our own knowledge but she says this: "That remembering child experiences introduces an additional layer of complexity." And it is interesting, we must remember here that unlike the creche case, the first recollection of the appellant was 2007. So whilst there is evidence of the recollection of the incidents which were some 20 years earlier, there is a gap there.

The vast majority of adults cannot recall childhood experiences from before the age of around four years and this incident is alleged to have occurred when the witness was aged five. Now as a result, Professor Zajac says that many of the red flags which indicate risk factors which she describes in section 4 are present here. She acknowledges it is of course possible that the complainant is reporting genuine memories formed at the time of the alleged abuse and uncompromised by forgetting a detailed recollection but also be explained in another way. It is impossible for the witness to say whether this is a genuine recollection or not and I think that has to be the case but there are concerns identified in this way. The way in which the witness reports her past but also be distorted by her current mental state and associated personality factors. Now that is a broad statement and from time to time all of us have factors that affect our lives and we may then go and explain things in the past, and the way we behave today, by our past. That is really what is being said and there was a time when this witness was under ACC counselling through the sensitive claims unit. So that may or may not distort the recollection.

Professor Zajac then says there is some evidence that the complainant has been exposed to information about memory that could influence her expectations in the way in which she remembers her past. Recounting an event to others has the potential of it being a distorting influence on memory because we recount information in a manner that is consistent with our goals in the given situation and there it is noted that the complainant was in counselling for some years. So the fact of the counselling required, and this is

correct in fact, every interview repeated the same allegation so there is a repetition of the allegations being made. Now whether that is in relation to the goals that were sought to being achieved or not, one can't say so again it is a qualification and a cautionary note raised by Professor Zajac. So the repetition and discussion with others, Professor Zajac says, can lead to a consensus that is due to memory conformity, rather than independent corroboration. Further potential may have come from the exposure to the news media regarding this particular case and then finally in the same section, Professor Zajac says the complainant was interviewed by the constable in February 2019 and for the most part the interview is conducted soundly.

There is a plausible basis for the proposition that the allegations are inaccurate, either in whole or in part. By inaccurate, Professor Zajac says, I mean that the complainant might genuinely believe what she says but some or all of it may to have been her experience. The counterfactual is this. The proposition of the memories are accurate enough to meet whatever standard the Court requires, is of course possible as well and I cannot attach any statement of probability to one proposition versus another. Now that is a careful analysis which I invite the Court to consider; the factual and the counterfactual. Neither this witness, or in fact any of this at this stage, can comment on the veracity or reliability of the witness, short of saying this. That there was a passage before the matter crystallised, 1983 to 2007. There is exposure to the media in 2007.

WINKELMANN CJ:
Exposure to the media before it crystallised.

MR BILLINGTON QC:
Yes, that's right, exactly. So the issue then really is this. Taking the statement, there is no reason to say that the recollections are either accurate or inaccurate. The real question then comes down to this. Given the nature of the case, is it evidence that this Court considers, would assist it in relation to the substantive issue you have to hear in October.

O'REGAN J:

That also relates to Professor Zajac's evidence itself doesn't it?

MR BILLINGTON QC:

In that?

O'REGAN J:

If it says well there is not an indicator of truth or untruth.

MR BILLINGTON QC:

I don't understand the professor there is an indicator of truth or untruth. I think the professor is saying that there are a number of red flags that indicate why we should be cautious about this evidence.

O'REGAN J:

But they are matters which would always be the subject of submission from counsel anyway aren't they.

MR BILLINGTON QC:

Yes that's correct.

O'REGAN J:

So do we need evidence to tell us that?

MR BILLINGTON QC:

Not particularly. The concern, and I think what I want to do just to conclude this really is give this a context and that is this, the appellant's case, as I have said, relies on criticisms of what occurred in relation to the creche witnesses at the time. Their case is these events occurred at a specific venue in the main and in a particular way, which have a cross-fertilisation of striking similarities between each of the victims in the creche case, this case. This witness provides a different time and place but a similar modus operandi. There are similarities which may indicate that if this witness is correct, this

appellant had a propensity to engage in the sort of behaviour which saw him being convicted in 1993 or thereabouts.

Now the full challenge in this case which we are yet to confront is what does this Court do with, as I indicated previously, a change in opinion evidence where you have opinion evidence from, what I am going to submit later, there is no secret about this, a school of thought from a group of academics who have worked and published together, as to evidential interviews, how they should be handled and what should happen in court cases both then and now. There was likely going to be a conflict with other witnesses who will comment on the same material in a different way.

Whether this evidence, if you receive it now, is going to inform you in relation to an evaluation of the evidence given by the appellant, is a matter for you. In our submissions we indicated to you that you might, if you consider it is of sufficient relevance, to receive it de bene esse and give it such weight as you choose to give it when the matter is fully ventilated or you can close it out now and that really is, as I say, right now a matter for you but the Crown's position is the evidence has been submitted, it is as Professor Zajac says, it could be credible, it may not be credible. It may genuinely believe, it may not be but it has a relevance in that it describes a similar circumstance for offending, it also impacts on opinions that you will receive in relation to memory and what a court should do with memory evidence, if anything, and how it should be treated or whether these verdicts are unsafe.

Now I have tried to put that as neutrally as is possible because you can see the difficulties with the evidence but equally if it is credible, then it does have a bearing on the considerations that you will need to bring to bear on what is a full attack on the evidence of the victims that were given in the creche case. My submission is that the preferred course at this stage is to receive it, as I say, and deal with the issue of weight when you come to deal with the substantive matters, rather than discount it out of hand now.

ARNOLD J:

I wonder if you look at it at the level of principle first of all. I mean if this were a case like the *Andrews* case that you mention in your submissions where there are a number of complainants who come to light later, who are not connected but have similar stories. From the Court's point of view, the fact that there a number of independent complainants who give a similar sort of account, provides some reassurance about credibility, in the sense that if there is no opportunity for collusion, if the stories have similarities that provide linkage, then it's going to be relevant, I would have thought, given the nature of the issues. The problem here arises because you have got the one person and there are the red flags and so the question is. Does the principle change because of that, if you like, practical problem that you face that there is one individual and there are a number of red flags raised.

MR BILLINGTON QC:

What you say, with respect, is totally correct. I am not sure it is a matter of principle. I think the principle is, do you receive relevant evidence but the fact that there is only one as opposed to a number of post-conviction witnesses is relevant in terms of whether you receive it in your discretion. With respect, your Honour, it is more of a factual analysis which is 100 per cent correct. Obviously the more there are, the more comfortable you would feel about receiving it at this stage or even more so, in terms of considering it, when you come to deal with the substantive issue. If, as you say there is only one, then to put it as a principled matter, the credibility has to be scrutinised a little more carefully.

ARNOLD J:

I suppose the principle I was trying to identify is that in principle the propensity evidence is relevant, given the nature of the issues. But there is the practical problem in a case where there is simply one complainant who comes forward later and all these red flags are raised and so the real issue I think, is what you are saying, it is about the strength of the red flags and whether, in fact, one is going to be able to resolve that in some way.

MR BILLINGTON QC:

I think we need to be a little bit careful. You are quite right, in what propensity evidence is. The question is, what is the purpose of this propensity evidence. Now if this propensity evidence was to go to a jury, then the considerations you are discussing would be seriously engaged. For two reasons really. One is for the practical reasons that you indicated and the second is, does its prejudicial effect outweigh its probative value. Now that is looking at saying, well what would the jury; in particular we are thinking about juries, what would the impact on a jury be. You are the jury for this case. So do I need to say to you or does my friend need to say to you, the prejudicial effect outweighs its probative value when you are the triers of fact on this appeal. You are able to direct yourselves in terms of differentiating between prejudice and probative value, so those principles in my submission are not engaged. It really is an exercise as lawyers to say, is this relevant evidence to the issues that we are going to have to decide. It is really a relevance test more than anything else. And that is the principle that is engaged. So the first issue is, yes it is relevant but the second issue for you really is this. Will it help us? Because not all relevant evidence is admissible although largely it is a prejudicial effect. So are you helped by it or is it something that is really of such marginal relevance it is going to get in the way of your consideration of the real issues. Now you might want to just reserve your position on that, that is really where I get to.

O'REGAN J:

If we accept it on a de bene esse basis, we would only do that if we would be better informed about its usefulness at the main hearing. What is it you see that we will learn at the main hearing that we don't already know about the relevance of this evidence.

MR BILLINGTON QC:

Probably nothing more in the sense that all you are really going to finish up with is a witness who says, well this happened to me too. Bad choice of words now but it was in different circumstance, but the nature of the offending was the same. So you are not going to hear any more and probably, and I

know my friend won't agree to this, but there is probably not a lot to be gained by even hearing from the witness, I suppose, except you would be able to satisfied yourself that maybe what is in writing, reflects better on her that what would happen in person. I simply do not know the answer to that. But no you are not going to learn any more. It is simply the Crown opposition saying, well yes all these witnesses are attacking the memory evidence as it was at the time for the trial. How do you deal with this? Well we know how they deal with it, because Professor Zajac has already told us. She qualifies and says, it is probably be unreliable but I can't be for sure about that and that is about as far as she will ever be able to go.

WINKELMANN CJ:

So as a matter of principle then, taking it back to Justice Arnold's point. As a matter of principle, if we analyse this, the first issue for us is whether it clears the reliability threshold which is embedded within section 8 of the Evidence Act, to take before we even get to the point of relevance and relevance might be the thing that you hold over to a hearing, if you are satisfied the reliability threshold is cleared.

MR BILLINGTON QC:

That is a reasonable approach your Honour, yes.

GLAZEBROOK J:

Can I just, it seems to me that the assumption that is being placed and the assumption that you were putting was that this Court will be deciding on the truth or otherwise of the allegations. As I understand it, the challenge is rather that the interview techniques were so flawed that this evidence of the victims wasn't reliable enough to go before the jury. In that context, it seems to me we are not talking about whether in fact, and I can understand that at a trial this sort of issues that we are talking about, because it would be a retrial and the propensity evidence would provide more support to the matters and this is where I do think, I do have some sympathy for her position in saying let's wait and see what the actual issues are at the appeal to see whether this is actually relevant or not. Because if in fact the issues at the trial, at the actual

appeal, become wider than were these interviews so flawed, because if the interviews were so flawed, it really doesn't matter, I put to you, that somebody else might have said the same thing because the interviews are still too flawed for that matter to go before it. It's a bit like saying well he had 15 convictions for the same thing but if the evidence is so totally flawed on the 15th, then it should have gone before the jury would be the argument I think. Can you comment on that?

MR BILLINGTON QC:

Yes, if it was as simple as that, with due respect and we like to simplify things in any event, the interviews were so flawed, that's the starting point of the proposition but the real consequence that flows from that is this, that the interviews were so flawed that the memories of the events that are being recounted therefore are unreliable. It is inescapable, this appellant cannot get away from the proposition that the techniques that were used which are criticised, and that will be a matter of debate, are such that the jury could not be expected to rely on the memory that was being recounted by very young children actually. So it is still a memory case and I am going to go through them with you now but I invite you to do so, to look at the executive summary of Professor Hayne's evidence, both at the beginning and the end and in the end what she is saying is that the memories of what is being recounted cannot be relied on. So you will move into memory ultimately and that in my submission is going to be the substantive issue. So the way in which it was done creates the spectre of the potential memories to be so unreliable as not to be relied on. You cannot escape memory.

GLAZEBROOK J:

All right, thank you.

MR BILLINGTON QC:

So that is why this is relevant, because as a minimum you might then say well yes I understand what you are saying Professor Hayne, but I would like to know what you say about this witness who is recounting other events and I know what she will say because we have already got Professor Zajac's

analysis of it and with all due respect I think that's as far as anybody can take it in the end. It might be true, it might not be true.

How you deal with it is another at the hearing. Let's assume for example you do take it on the basis I suggest, de bene esse. Do you hear from the witness in person. My friend is probably going to insist on it but whether that is necessary, I don't know. We do have a hearing that is keeping on growing as you probably know from the applications that came in earlier this week. How far we need to grow it again is a relevant issue but I just feel a little bit, the Crown feels a little bit limited if we can't at least have this on the table so to speak for discussion and we might decide or you might decide you don't want to hear about it when we finally get to the issues and we know what they are but at the moment it just sits out there as perhaps being of some relevance, acknowledging what the Chief Justice says, however, that you might want to consider whether it's got sufficient persuasiveness now to take you over the threshold and I acknowledge that.

WINKELMANN CJ:
Can I ask you another question which I think you need to address which is this issue of fairness to Mr Ellis because the police did not bring this to his attention when he was alive and able to respond to it?

MR BILLINGTON QC:
I don't think I can say any more than this and that I set out the relevant timeline. Yes it was known that he was terminally ill, so one could understand why the police would not want to take it any further. That was a decision they made. Now does that create an unfairness, the whole appeal has got a certain –

WINKELMANN CJ:
Well the issues were still live when the complaint was made.

MR BILLINGTON QC:
Yes.

WINKELMANN CJ:

So at that time there was a hearing date, it was as relevant then as it is relevant now.

MR BILLINGTON QC:

Well you would certainly have to work on the basis that he would deny the allegations. I can't argue against that, the allegations. So these allegations would be denied. The only other issue is could he have added more to his denial than that which has been spoken about on his behalf from his own whānau et cetera. Possibly he could.

WINKELMANN CJ:

Well he would be the best witness on his own work record, wouldn't he?

MR BILLINGTON QC:

He would be his best witness on his own behalf. With due respect your Honour, I think that's just the use of the word "fairness" in the sense that we might use fairness and that's not fair in our common conversation. Whether it's fair in the legal sense I –

WINKELMANN CJ:

No, no, it's "fairness" in the sense of the Evidence Act because it's one of the principles, fairness to the witness and fairness to parties.

MR BILLINGTON QC:

I would submit that it's just fairness in the common sense rather than the legal sense. It's just a fact that emerges in the course of the unfolding of litigation and sometimes things happen that can't be controlled but does it have any element to it that could have been realistically avoided? Does it create a massive disadvantage?

GLAZEBROOK J:

Well there is the principle in terms of putting allegations to people.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

And the natural justice aspect of that which is where the Chief Justice is indicating that fairness actually is embedded in the Evidence Act.

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

So you could say it's not a legal thing.

MR BILLINGTON QC:

Yes I can say as well, I keep repeating myself, I don't think it's going to make any –

WINKELMANN CJ:

But you're making no headway because it is a legal thing.

MR BILLINGTON QC:

Well it is but it's a question of whether it reaches a certain threshold and in the context of this case in my submission, it just doesn't reach that threshold.

GLAZEBROOK J:

Well it may in the case of the indications of unreliability, I think is the issue here because there are a number of indications of possibility unreliability as you quite responsibly indicate and in that context, if something could have been put to bed by actually disclosing the evidence at the time that it should have been disclosed when Mr Ellis was alive, then that might weigh in the balance. Well I ask for your submission on whether it –

MR BILLINGTON QC:

It's quite interesting that you raise this issue because whilst what's implicit, there's an obligation which is a natural justice obligation to put allegations,

whether that arose in this case but certainly, and I'm sure it's within this Court's experience but in trial courts, the number of times that people are charged with criminal offences and they never had the offence put to them but they still go on trial and the only way to respond is at the trial and this happens day in, day out, and there's no –

WINKELMANN CJ:
Those arguments to be made in a different case I think Mr Billington.

MR BILLINGTON QC:
Well there's no basis upon which you could then say that's unfair and the matter shouldn't go to trial.

WINKELMANN CJ:
Yes but that's a different context. The context here is that the Crown seeks to have this evidence brought as relevant to show that the other memories possibly were reliable which means that it's offering it as evidence of the truth of its contents.

MR BILLINGTON QC:
I can't change the facts, much as I try.

WINKELMANN CJ:
I know, you were trying to move from a different angle.

MR BILLINGTON QC:
Yes.

WILLIAMS J:
The point is a different point I think and that is that if an allegation not put to a defendant ends up with the defendant being on trial, the defendant can choose to give evidence against it.

MR BILLINGTON QC:
Yes.

WILLIAMS J:

And Mr Ellis doesn't have that opportunity.

MR BILLINGTON QC:

He has no opportunity, no.

WILLIAMS J:

So the unfairness or lack of it in this analogy you put is very different to the situation we're in here.

MR BILLINGTON QC:

It's a discretionary matter and it's in your discretion, you've identified it, all I can say is it doesn't reach the threshold, it's just a fact of life in litigation and this is particularly unique litigation which has thrown up all sorts of issues as a result of the passage of time and this is one of them. Now whether you consider in the exercise of your discretion that it is something that ought to exclude it, again it's a matter for you. I can't argue any more than I have. I just simply say it's a part of the nature of this litigation which is – the course of it also rests with the appellant a little bit as well. He has had a number of hearings and a royal commission but anyway that is just going into – I'm digressing and that's not a good idea.

WINKELMANN CJ:

I don't see that it also rests with the appellant.

MR BILLINGTON QC:

No, no. So I can't say. So really in the end, sorry I'm back at you I think, I can't persuade you. I think I wanted to identify the issues, I've tried to be neutral and in the end you decide.

O'REGAN J:

Can I just ask you, I think in the original submission filed last year, there was talk of the possibility of the Court having to address the proviso to section 385 of the Crimes Act 1961.

MR BILLINGTON QC:

Yes.

O'REGAN J:

Is that still the Crown's position?

MR BILLINGTON QC:

Well it has to be I assume. I can't articulate it any more than this at the moment, just to say well it's so hard to see what is happening. Yes this would probably relate to the proviso. I'd overlooked that your Honour.

O'REGAN J:

Well is that a basis on which you say we should admit the evidence? It seems to me unlikely that you're going to be in a position to say. I mean the proviso would only arise obviously if we found for the appellant on the main points.

MR BILLINGTON QC:

Yes.

O'REGAN J:

So it would be the questioning techniques were such that the evidence was unreliable but the Court should nevertheless be satisfied of guilt.

MR BILLINGTON QC:

Because of this other witness and you probably wouldn't never get to that unless you actually heard from this witness and if you heard from them you might –

O'REGAN J:

It just crossed – the proposition seems a pretty hard sell.

MR BILLINGTON QC:

You might have detected by my answer it doesn't sit in head lights in my thinking about the case. But it's difficult to anticipate it, if as would be expected you are asked to hear from this witness. If you admitted it, you

might form a view yourself as to, notwithstanding all the lack of corroborative features, it is highly credible. And I don't know the answer to that and neither do you with respect.

WINKELMANN CJ:
I mean you say this is in the headlights but isn't just another formulation of what you are saying, that even if these techniques are shown as being to produce unreliable evidence, this evidence might persuade us that nevertheless these were reliable accounts.

MR BILLINGTON QC:
It's another way of expressing the same thesis although, yes it is another way of expressing that thesis and we don't know where you are going to land on that unless you hear from the witness but unless you choose on the material that you have, to say you don't want to hear from the witness and close the door now.

WINKELMANN CJ:
Mr Harrison.

MR HARRISON:
Your Honours, the appellant's position is that this evidence doesn't satisfy the test in *Lundy* in terms of the first test of credibility. I have seen the timeline that my learned friend helpfully has given us this morning and I have to say that there is an inherent problem in terms of identification in this case. If we start perhaps with the latest statement from the proposed propensity witness. I think it's at 164 of you case, it's page 2 of 7 of her statement, she says: "I do not know how Peter Ellis came to babysat us but I was later told by my mother's sister's husband, Uncle…", and I will leave those names blank, "that he remembered Peter Ellis used to work at the…", and I will leave the name of the particular institution blank as well. Now that's a contrast to the statement made in February where she said she had met Ellis at that particular institution. So her memory seems to be evolving. Then when we –

WINKELMANN CJ:

So it's in contrast to her earlier statement, can you just go through that.

MR HARRISON:

Yes sorry your Honour, I'll just go back to that now. So in her statement, and I'm not sure what the page numbers will be because I have not received the volume 11 and 12 on the pen drive, so I am just working off a system that's been set up by us. So if I can just go to that page.

1050

O'REGAN J:

I think when we get to the main hearing, we all have to be working off the same book.

MR HARRISON:

Oh indeed Sir. Absolutely, it doesn't help.

O'REGAN J:

This is just not going to work.

GLAZEBROOK J:

As I have discussed with the Registrar, that we need to make sure that we set this up in a form that is going to make it easy for everybody to be working.

MR HARRISON:

I am working off, at the moment, the materials opposing leave to admit propensity evidence, tab 3, which was the bundle of documents filed by the appellant.

ARNOLD J:

So what page of the transcript number.

MR HARRISON:

I am just looking for that now.

WINKELMANN CJ:

It says down the bottom, the number of the transcript. We can use that couldn't we?

MR HARRISON:

So she starts talking about how she came to know him, starting at about page 3 and then through to page 11. So she says, about lines 12 on page 11, that her mother used to work doing cleaning and that is where she met the appellant and then also the mother taking her to the Civic Creche wanting to enrol her sister there. So the identification seems to come, in her later statement, from her uncle's recollection of a comment someone made back I the 1990s and that flies I the face of what the Crown have found out, when they went and interviewed people who had the records and also I think one teacher who had worked at that particular institution and they are confident that Peter Ellis never attended at that creche. So it flies in the face of the uncle's recollection. So there is inherently no linkage of Peter Ellis having any association with this particular family.

There is then the suggestion that perhaps Mrs Ellis worked as a barmaid and therefore met the parents of the propensity witness while she was a barmaid. Affidavits have been filed to the Court from Mrs Ellis' children, who clearly states that she was a teacher in Twizel up until 1985 and she lived in Twizel and I think it is inconceivable that she would be moonlighting from Twizel to Christchurch to work in a bar over the weekends or whatever and the children are absolutely clear that she did not work in a bar. The Crown can assist themselves by looking at the records from the Ministry of Education that will tell them where she was employed, if they are not prepared to accept the statements from her children. So we have no clear association, no connection with that family.

The second point that we come to is the number of variable statements she has made concerning when she knew it was Peter Ellis. So for example there is a statement of when she is a child and the Ellis case came out, peeking

through the doors and seeing Peter Ellis and feeling guilty that she hadn't stopped him, which seems to contrast with the other statements that she made, that she only recognised him in 2007. There has to be some reliability. There is the statement that the first that she made a complaint about this was to her boyfriend when she was 15 and having sex with him and she had a flashback. He went and told her sister, who went and told her mother, who then took her to the police station. So there has been a number of variations on that theme but what is equally clear is that the boyfriend, I won't refer to his name, is absolutely clear that no such event occurred when he was spoken to by the police.

ARNOLD J:
No he said he couldn't remember it but he wasn't saying it didn't happen.

MR HARRISON:
The point I would make, your Honour, is that given the later statement that he was taken to the police station while she was interviewed would make it inherently unlikely that you wouldn't remember such an event. I think that would be an event that would stick to the mind.

So at page 12 she says that: "I do remember when the Peter Ellis case came out and I remember peeking through the gap in the door, watching the news about and feeling so guilty that I hadn't said anything beforehand and I blamed myself for what he had done to those other kids, you know, so that was a big burden on my shoulders as well." Well that seems to fly in the face of other comments she later makes because she's telling us she didn't know that it was Peter Ellis around that time. She's also saying that she only knew it was Peter Ellis in 2007. So those factors, in my submission, are absolutely significant when it comes to considering not whether or not she was abused, but if she was abused, who was the abuser, particularly so when she names an uncle and I appreciate that there's a common Uncle Peter but Peter of itself is not a unique name. So just in respect of whether or not this material is reliable, that alone, in my submission, will say that it is inherently unreliable.

There is no record of her going to the police in 1993 when she was 15 and if, as she has said that her mother was concerned about her and asking her about Peter Ellis, that she takes her to the police station because there has been a complaint about sexual abuse by a babysitter, you might have thought that Peter Ellis' name would have been mentioned.

The other factor that reinforces, apart from Peter Ellis being able to tell us exactly where he was working at the time and who he was associating with, the other factor that in my submission is absolutely significant is that if someone who was charged with the offences that Peter Ellis was and had the profile back in the early '90s that he had, that it is inconceivable that some who was involved in that other child institution, did not alert the police that he had worked there. It would just seem – it is unbelievable that that wouldn't have happened, that some parent or some teacher or someone would've approached the police and said: "Well this person worked here." It's I would suggest impossible. So we have nothing to link him to that family.

So the boyfriend doesn't corroborate, because he can't remember the incident she described. The police have no record back in 1993 of the statement made to them by her. The relevant –

WILLIAMS J:
Sorry I just want to clarify a fact, did you say that the boyfriend was allegedly at the police station too?

MR HARRISON:
Yes, in her last statement I think, the November statement, she states that he and the mother went to the police station. Page 3.

WILLIAMS J:
Page 3 of the?

MR HARRISON:
Of the statement dated 18 November, Sir.

WILLIAMS J:

What is that tab in your material?

MR HARRISON:

That tab in my material is tab 5 so that is line 16. "After I told my mum, she took me to the Papanui Police Station."

O'REGAN J:

Page 5, did you say?

MR HARRISON:

Sorry page 3 of tab 5, your Honour, in our bundle of documents, line 16, and at page 4 she says, "I am sure I did not name Peter Ellis", and that is at line 3, "as I did not know his name until later," which seems to fly in what she said earlier about watching the Ellis case come out. And she also makes a comment at page 5, line 17. "Before I knew for sure it was Peter Ellis that sexually abused me, I used to rack my brain about who it could have been. I initially questioned whether it was a family member but I ruled that out because the person was never in our lives again." So that reliability, in my submission, in terms of who was responsible, is missing.

WINKELMANN CJ:

She says in her statement that her mother made a claim in 1993 with ACC. Are there records of that?

MR HARRISON:

We have to rely on the Crown. We have to ask. Are there any records? No records.

WINKELMANN CJ:

Because she says, "I have recently seen records of that."

MR HARRISON:

Yes. And the other factor is, your Honours, there is the notation that we have in 2007 of the police knowledge. So that is the little computer notation and my learned friend is just finding that for me. But that notation, in that she says –

WINKELMANN CJ:
It is tab 4.

MR HARRISON:
Tab 4, your Honour yes. So she is saying, "He was a civic creche worker at the time". So Peter Ellis didn't start at the creche until September 1986. That is on the Crown evidence from the trial, so she would have had to have been between the ages of eight to 13 years of age over that period of time, that he worked at the creche.

WINKELMANN CJ:
I wonder how significant that is because that would not be her memory, would it. It is some fact that has been added in.

MR HARRISON:
Yes well I think perhaps it is significant that she is referring to him being a creche worker at the time. So I think I have dealt with the Mrs Ellis scenario and I think perhaps as unequivocal as we can be.

Then we come to the issue of relevance. The issues that the appellant was asking the Court to consider is whether the contamination of the children's evidence and the subsequent interviewing techniques in ground 1, raise a risk of an unfair trial because of the nature of the contamination of the evidence of the children. In my submission this does not assist the Court in that particular aspect and I note that my learned friend only relies on ground 1 and not the other three grounds, there's now four grounds that are before the Court. So it's ground 1 that they are relying on in that respect. So in my submission it has no relevance and cannot assist the Court on the issue that has to be decided.

I come to the unfairness issue under section 8. In my submission that is very pertinent because it is all very well to say that in July the police decided that they were not going to investigate but they had this complaint in February 2019 and on the material that we have received from the Crown, there seems to have been nothing done on that file until the call for the complainant to come into the office and be told that they weren't going to proceed because Peter Ellis had a terminal illness. So there was ample opportunity for them to go and speak to Mr Ellis and put those allegations to him. My understanding is the file was then sent to Christchurch at that stage and again people could have spoken to Mr Ellis and what is clear from the affidavits from his family, is that he was remarkably lucid still, up until very shortly before, hours before his death. So he was able to comment.

The other factor I would make is from the affidavit I think, of his sister, is that they regarded him as the family historian, in other words when they were talking about things that happened in the past, it was his memory that they relied upon. Every family has one I believe, the one that has the most reliable memory of past events. So it wasn't as if he was a man with a bad memory and he would have been in a position to tell them where he'd worked, who he knew, who he did not know, whether he knew this family at all. So that encapsulates the unfairness when the Crown are now seeking to put this evidence before you, either for the proviso or to be added into the general mix.

WILLIAMS J:
You are not suggesting this was cynical are you?

MR HARRISON:
Of the Crown?

WILLIAMS J:
Yes.

MR HARRISON:

Oh no Sir, no.

WILLIAMS J:

There were genuine reasons for not putting this in front of a man who is dying.

MR HARRISON:

I would disagree that it should be here at all but I'm not saying it's a connivance of any sort.

WILLIAMS J:

So the unfairness arises from the facts as they have come up, rather than any attempt to evade?

MR HARRISON:

Yes, I'm not suggesting that they deliberately not spoke to Peter Ellis. I'm not even advancing anywhere near that your Honour. That is the fact of the matter and the shame of it is, is that he would've been able to answer from February, he would've been able to answer.

I have discussed the propensity test in our submissions. I don't propose to go over it in great detail because I think the reliability issue and the credibility issue perhaps answer that and the relevance issue I think answers the other aspect that the Courts look at in terms of –

WINKELMANN CJ:

So what do you say to Mr Billington's suggestion that we just receive this and decide admissibility at the time of the hearing of the appeal, as a part of the resolution of it?

MR HARRISON:

We cannot – the appellant cannot let this evidence go in front of a court without it being challenged and to do that we would require all of the ACC material, not the redacted material, we would require information concerning

the mental state, mental health of the propensity witness. We would also require cross-examination of the other witnesses that have been put forward. Then we would also have to call a raft of witnesses, as best we can, to reconstruct the life of Peter Ellis in the early eighties.

O'REGAN J:
Why would you have to call them if you have put in affidavits already?

MR HARRISON:
Well we would have to cross-examine. I imagine the Crown are not going to accept witnesses that dispute the proposed witness's evidence as to where Peter Ellis was and what he was doing.

O'REGAN J:
All they are saying is this is what we recall. What would you ask them in cross-examination?

MR HARRISON:
Well for a start, it depends if they amend it. But one of them talks about something in their 20s. I have asked them if they were thinking that that was in 2007 when she was 28 or 29.

WINKELMANN CJ:
So the Crown may wish to call them but you cannot say they would.

MR HARRISON:
Yes but we would certainly want to cross-examine. It unduly lengthens this case and I do not think it enhances the case for the Crown at all because I do not think it is relevant at the end of the day.

O'REGAN J:
That is a different issue isn't it?

MR HARRISON:

Sorry?

O'REGAN J:
That is a different issue. There is a relevance issue and there is an unduly prolonging the hearing issue.

WINKELMANN CJ:
And in terms of what I put to Mr Billington. I suggested that the framework really was that we would have to decide; it was sufficiently reliable under section 8 before we could hold it over de bene esse. But you are not saying that? You are saying you would actually want to have a – yes, no that is all right, you are saying that, yes.

MR HARRISON:
Yes what your Honour is saying is that, well let's not make a decision until we have had the substantive argument but as part of that substantive argument we would have to go down that path, is the point I make. And again I come back to the reliability as it is presented.

WINKELMANN CJ:
Right.

MR HARRISON:
I apologise to your Honours for the distracted manner of the materials and will ensure that we are a bit on the top of that in the future. Are there other matters that I can assist the Court with?

WINKELMANN CJ:
No thank you Mr Harrison. Mr Billington, reply?

MR BILLINGTON QC:
Yes I would like to just step you through the correct statutory framework if I may. As I said, earlier my friend mentioned the *Lundy* test. *Lundy* really isn't much help in my submission. This is a question of admissible evidence for a

hearing, so the proposition starts off as all evidence is relevant under section 7. Why is it relevant? It is relevant because it is propensity evidence in terms of the Act. The question for you then is this. Would it be excluded under section 8 at this point if it probative value is outweighed by the risk it will unfairly prejudice the proceeding or needlessly prolong the proceeding. Those are the issues.

GLAZEBROOK J:
But it must be a reliability aspect to this and certainly under our recent analysis of section 7 and 8 there clearly is a reliability analysis.

MR BILLINGTON QC:
Yes it falls within the rubric of those two sections and I agree with that.

WINKELMANN CJ:
Why does *Lundy* have nothing to do with it?

MR BILLINGTON QC:
Well it is really contemplating evidence that will impact on a verdict. This is not a question impacting on a verdict. It is a question of whether it is relevant to the issue which the Court is trying. It is a useful discussion of how reliability is approached, yes.

GLAZEBROOK J:
But the same principles arise to non-fresh evidence that is admitted on appeal. So just because it is an appeal, it doesn't mean that the same principles do not apply in terms of evidence.

MR BILLINGTON QC:
No I agree totally. It is just a question of where is the final Court for this evidence. This Court is the final Court. It is not as it was in *Lundy* and *Bain* and co where you look through to the next stage and is the verdict unsafe. It's really in the sense that if you were trying a case de novo, would this evidence assists the trier of fact and then you look at issues of reliability and

all the matters that *Lundy* discussed but the lens through which you look at it is sections 7 and 8 and that if you do that, you may still agree with my friend, the appellant, it's not a question of whether I'm agreeing or disagreeing, it is just a question of what is the proper lens because I am a little concerned, and you did take me a wee bit by surprise Chief Justice, when you mentioned "fairness".

WINKELMANN CJ:
Well it is in the Evidence Act, so I can't imagine you're that surprised.

MR BILLINGTON QC:
Well it's the way in which it is expressed in the Evidence Act and I'll just refresh my memory, as I had to, as a defence counsel I spoke about fairness for years and all sorts of things are unfair but what actually is unfair is something that steps outside the legal framework altogether and I can think of cases, which I won't bore you with, where the Court has excluded evidence because it is intrinsically unfair for the way in which the authorities have acted and there needs to be some control.

WINKELMANN CJ:
Yes you are right.

MR BILLINGTON QC:
We know all that. But here it says: "The purpose of the Act is to promote fairness to parties and witnesses." That's an aspiration to make sure a trial or a hearing is conducted fairly. It is not in my submission an issue of what is fair to the particular witness or the party, except within the context of it. So in my submission it is unhelpful to look at section 6 and graft onto that that things just generally have to be fair. You reach the same answer possibly by the correct application of sections 7 and 8 and that's the only difference I take with you.

WINKELMANN CJ:

Well I think it's as Justice Glazebrook said, it is something we can legitimately take into account where there are red flags about reliability.

MR BILLINGTON QC:

That's where it sits.

GLAZEBROOK J:

No but also I can't imagine that you're saying that we don't apply the same tests that we would apply to admissibility of non-fresh evidence which is really all *Lundy* is saying in terms of – and that's whether it's appeal or trial or anything, I would've thought and I didn't actually understand you to be suggesting any different.

MR BILLINGTON QC:

I'm not, I'm just simply saying that we need to just make sure that we see this as where this evidence is going to be used and what its purpose is.

WILLIAMS J:

Well I thought you were saying something different. I thought you were saying that *Lundy* doesn't apply to triers of fact and in effect we are triers of fact here.

MR BILLINGTON QC:

Not in the way in which that is being used, because *Lundy* is looking through, as those appellate cases are, to will this affect the outcome of a decision to make it unsafe.

WILLIAMS J:

Yes will it affect someone else other than the Court dealing with the non-fresh evidence at appellate level but your point is that this is not the same because we're the someone else.

MR BILLINGTON QC:

That's correct.

WINKELMANN CJ:

So we ask you what's not the same, what part of it do we not apply, what part of *Lundy* do we not apply on your analysis?

MR BILLINGTON QC:

Because you're not, as *Lundy* was, arguing that the conviction was unsafe and this fresh evidence which truly qualifies in *Lundy* as being fresh evidence and *Bain.*

WINKELMANN CJ:

I'm asking you what part of the *Lundy* test we don't apply.

MR BILLINGTON QC:

You're the final trier of fact, as Justice Williams says. So you just apply the normal principles as any trier of fact does, you apply the Evidence Act, section 7, section 8.

WINKELMANN CJ:

So the whole of Lundy doesn't apply?

MR BILLINGTON QC:

So the whole of *Lundy*, it's just as a useful way of approaching the issues that you have to deal with, it's not the same case.

GLAZEBROOK J:

So what you're saying is and I really don't understand the submission, you're saying that it doesn't matter that the evidence isn't fresh, even though it's been proffered on appeal because that goes against all in fact of the evidence tests that have been back since *Bain* in fact.

MR BILLINGTON QC:

It probably doesn't matter in this context that it's not fresh in that sense because it's simply being given in a hearing which is to determine an issue.

GLAZEBROOK J:
Well it's an appeal.

MR BILLINGTON QC:
Yes it is.

GLAZEBROOK J:
Like any other appeal. So it's an appeal and you would normally have a test in terms of evidence that looks at whether it's fresh, then whether it's reliable and then – so I can't understand the submission that says somehow this evidence is in a different category from any evidence would be that somebody is trying to admit on appeal.

MR BILLINGTON QC:
It doesn't matter because it's fresh and it has to be fresh in the sense that it wasn't available at the time. Does it really matter? What really matters is –

GLAZEBROOK J:
Well no but you're saying the principles don't apply.

MR BILLINGTON QC:
As to whether it's fresh?

GLAZEBROOK J:
Well no but you say the *Lundy* test doesn't apply at all, that this is just admissible because we look at the statutory framework. I'm just challenging that.

MR BILLINGTON QC:
No what I'm saying is that *Lundy* is a different case. The principles you extract from *Lundy* obviously do apply but the difference is that you are the final trier of fact and therefore it would be more to apply those principles but as you are the trier of fact you then simply apply the normal rules of admissibility, that is my submission. You don't need to go so far as to

consider the outcome on the verdict, the matters that engage the Courts at that level.

WINKELMANN CJ:

Well it's the last part of *Lundy* I think. Perhaps you're only saying you don't apply the last thread of *Lundy*, which is the Court should assess its strength and it's potential in fact from the safety of its conviction.

MR BILLINGTON QC:

Yes, that's right. That's really where *Lundy* goes further than we need to here. We don't need to go as far, that's all. That's all I'm saying. I can't say *Lundy* is wrong. I mean *Lundy* is not a guide and, yes, the principles absolutely apply, but yes, you are quite right, the matter finishes here. There is nothing further to be done. So you decide then, as judges do, will this evidence assist me. Is it relevant under section 7, or should I exclude it under section 8. That's all really, and I'm not so sure section 6 is fully engaged. I think that's aspirational rather than – and the better home for that is under the reliability issues in sections 7 and 8. That's all. Is there anything else I can not assist you with, or assist you with, as the case may be?

WINKELMANN CJ:

No, thank you counsel for your helpful submissions. We will take some to consider our decision, and we will now retire.