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NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF WITNESSES UNDER 17 YEARS OF AGE PROHIBITED BY S 139A OF THE CRIMINAL JUSTICE ACT 1985.

ORDER PROHIBITING PUBLICATION OF NAME 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
[2020] NZSC Trans 26

PETER HUGH McGREGOR ELLIS
Appellant

v

THE QUEEN
Respondent

Hearing: 11 November 2020

Coram:	Winkelmann CJ Glazebrook J O'Regan J Williams J Arnold J
Appearances:	R A Harrison, S J Gray, K D W Snelgar and B L Irvine for the Appellant J R Billington QC and A D H Colley for the Respondent

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CRIMINAL APPEAL

MR BILLINGTON QC:
The Court pleases, I appear with Ms Colley for the Crown in support of the application.

WINKELMANN CJ:
Tēnā korua.

MR HARRISON:
E Te Kōti, ko Harrison, Gray, me Irvine ngā rōia mō te kaipīra. May it please the Court, counsel's name is Harrison. With me are Ms Gray and Ms Irvine. We appear for the appellant in respect of these matters. Mr Snelgar was due to be with us but unfortunately a bug has removed him from the equation for this hearing. Also present today is Tanya and Mark Ellis, the siblings of Peter Ellis, the appellant.

WINKELMANN CJ:
Tēnā koutou.

Before I call on counsel I just want to mention to members of the public in the gallery that there are presently suppression orders in force in respect of these proceedings. For this hearing today those orders suppress the name of the subject matter of the application for adducing of further evidence and they also suppress the detail of the nature of the evidence – well, the nature of the legal issue I suppose, but we are dealing first with suppression.

Mr Billington, it's your application.

MR BILLINGTON QC:
With the Court's leave, Ms Colley will address the Court on the issue of non-publication.

MS COLLEY:
Tēnā koutou e ngā Kaiwhakawā, kei aku rangatira, may it please the Court. As Mr Billington has pointed out, I will be addressing the matter of suppression and then Mr Billington will address the substance of the evidence before the Court today.

The Crown opposes continued suppression of the proposed evidence that is before this Court. Suppression here is governed by section 205 of the Criminal Procedure Act 2011 and I have copies of section 205 with Madam Registrar that I would like to take the Court to now.

As your Honours will see, section 205 provides the following: "A Court may make an order forbidding publication of any report or account of the whole or any part of the evidence adduced or the submissions made in any proceeding in respect of an offence." Subsection (2) provides that: "The Court may make an order under subsection (1) only if the Court is satisfied that publication would be likely to cause one of several outcomes listed." The Crown submits that none of these outcomes apply here and thus there is no reason for continued suppression of the evidence or the submissions.

I would like to take the Court through each of those outcomes now. Paragraph A provides for undue hardship to any victim. The Crown submits it is a question whether automatic suppression of the new complainant's identity does apply as no charges have or will be laid in this matter. For the avoidance of doubt, the Crown seeks orders under section 202 of the Criminal Procedure Act to suppress the identity of the new complainant and her sister in order to avoid undue hardship to the new complainant from publication of her name or the proposed evidence. Other than suppression to protect the identity of those two persons, the Crown submits that no further suppression of the proposed evidence is appropriate.

In terms of paragraph B of subsection (2), that states that suppression may take place where there is, suppression may be granted where there is a real risk of prejudice to a fair trial. The Crown submits that the appellant will not be tried on the allegations of the new complainant nor will he be retried on the creche convictions and so there is no prejudice of that type here.

Paragraph C specifies that suppression can be in place where the safety of any person is at issue. There is no suggestion that safety of any person is at issue in this case and by this evidence being admitted.

Paragraph D specifies where publication would lead to the identification of a person whose name is suppressed. The Crown submits that suppression of the new complainant and her sister will protect any identification of those individuals and that can be dealt with by suppression of their identities only.

There is no question that paragraph E applies here, that is where the evidence or the submissions would prejudice the maintenance of the law including the prevention investigation and detection of offences. The Crown submits that is not at issue here.

We have seen that paragraph used in another case of *Q v Reddy* [2016] NZHC 1294, [2016] 3 NZLR 666 which this Court will be familiar with, which was about the "Mr Big" technique. Suppression of that evidence was granted

in the High Court to ensure that details about that police technique were not publicised in the media so that detection of offences was not prejudiced in terms of police operations, that is not an issue in this case.

Finally, paragraph F points to suppression where the evidence or submissions may prejudice the security or defence of New Zealand. The Crown submits that is not at issue here.

In the round, the Crown submits that none of those outcomes apply here, therefore there is no reason for this Court to make an order suppressing the evidence and the submissions as a whole. Identification of the complainant, the new complainant and her sister, can be protected by those specific suppression orders to their identity.

WILLIAMS J:
What about the parents and boyfriend whose names might lead to identification anyway.

MS COLLEY:
That is correct, your Honour. The parents of the new complainant and her sister are no longer with us, but if the Court was concerned about identification through her you could suppress the names of the boyfriend.

WILLIAMS J:
It's more the connection.

WINKELMANN CJ:
Well, it's all identifying particulars, it's the standard order, so that would be captured in all identifying particulars.

MS COLLEY:
Yes, correct. Unless your Honours have any further questions those are –

WINKELMANN CJ:

And I suppose you'd rely on the principles of open justice?

MS COLLEY:

Yes, correct. So the presumption is that open justice does apply here and that is why the Crown says since none of those outcomes are in issue apart from identification of the particular persons presumption of open justice says that the evidence should not be suppressed.

WINKELMANN CJ:

And this is a case in which open justice is particularly significant.

MS COLLEY:

Given the public interest in this case, yes your Honour.

WINKELMANN CJ:

Thank you, Ms Colley.

MS COLLEY:

Thank you.

MR HARRISON:

Your Honours, my view of this matter is we are still at a stage deciding what is the offence and who is the victim in respect of this proposed evidence. What we have is a situation where there are some allegations made that defence says that they are problematic. We are in a situation where whilst we don't know how the Court decided the final reasons as to why we continue on to the substantive hearing part of the argument in respect of that was concerning tikanga and tikanga principles and the issue of a hara being done to the mana of Mr Ellis. Our point is that we think that there is real concerns about the reliability and the creditability of this evidence and, in essence, to have it published in effect doubles down on the hara done to Mr Ellis and to his mana. The fact that his family would then have to walk carrying an additional burden of allegations that we say are not particularly strong and are full of

significant problems would mean that the hara that we are trying to address here is actually compounded by releasing this information.

So I would suggest that undue hardship to the victim of the offence may well encompass Mr Ellis and his family and we're not sure exactly what the offence is, whether this is a defamation –

WINKELMANN CJ:
Sorry, how do you bring them within undue hardship to any victim of the offence?

MR HARRISON:
Because if this is a created memory and it is presented to the Court as propensity evidence and it is in fact not created, it is in fact a fabrication or a created memory, then to publish that as being valid I think causes further harm to the mana of Mr Ellis and also to his family.

WINKELMANN CJ:
Well, this appeal is proceeding through usual processes and you need to bring yourself within section 205, don't you?

MR HARRISON:
Yes. Well…

WINKELMANN CJ:
And it's hard to see, or do you say there's some free-floating inherent jurisdiction that goes beyond it?

MR HARRISON:
Indeed, I think there always has been, and in fact the usual procedure would be not to have matters published until the end result is known, and I appreciate that that's where we're looking at a potential retrial but in this particular circumstances I don't know it assists the public to know about or

have information of this material when we're not even sure whether that material would survive and actually be in front of the Court in the first instance.

WINKELMANN CJ:

Well, isn't that the essence of the open justice principle though, the public can see that the Court is dealing with this in a way which is fair to all involved?

MR HARRISON:

Your Honour, yes, but at the same time doesn't it also impact on the very reason or potentially one of the reasons why we're continuing, which is addressing a hara done to the mana of Mr Ellis, and doesn't –

WINKELMANN CJ:

Well, that's not the only interest engaged here though, is it?

MR HARRISON:

Sorry?

WINKELMANN CJ:

Not the only interest engaged.

MR HARRISON:

Not the only interest engaged, no, it's not the only interest engaged, but I would say it is a significant one. That's about as far as I can take that, your Honour.

WINKELMANN CJ:

Thank you. Anything by way of reply Ms Colley?

MS COLLEY:

Just two matters to address your Honour. The first in terms of the mana or reputation of Mr Ellis and his family. The Crown submits that is outside the scope of what section 205 provides, that is an exhaustive list, and those are the considerations for the Court. Further, we do not have any guidance about the relevant tikanga principles that may apply to this question of suppression.

All parties agreed at the June hearing that the process of obtaining evidence from tikanga experts was appropriate and positive for understanding what tikanga principles may apply. We do not know in relation to suppression what those principles are and the Crown would discourage the Court from applying tikanga principles in this new context.

The second matter, your Honour, is about an inherent power to suppress and whether that may exist outside the realms of section 205. I would point the Court to this Court's decision in *Siemer v Solicitor-General* [2013] NZSC 68, I will give you the reference for that, [2013] 3 NZLR 441. At paragraph 137 of that decision, this Court found that because of the expressed power to suppress evidence in section 205 as well as the other suppression sections in the Criminal Procedure Act. Arguably the Criminal Procedure Act excludes an inherent power to make orders of those kinds because that power exists.

WINKELMANN CJ:
Did it find that it did exclude that because it upheld a suppression order in terms of the whole judgment?

MS COLLEY:
Correct, your Honour, and it was a statement made in obiter but the Court said that arguably that inherent power is removed where the Criminal Procedure Act expressly provides for orders of this kind. Those are the only matters, your Honour, unless there are any questions.

WINKELMANN CJ:
Thank you, Ms Colley.

MS COLLEY:
Thank you.

WINKELMANN CJ:
The Court is going to retire for a short period of time to consider the issue of suppression and then we will return and announce a decision on that issue.

COURT ADJOURNS: 10.18 AM

COURT RESUMES: 10.25 AM

WINKELMANN CJ:
The Court has decided to rescind the existing suppression orders and in their place to suppress the name and identity of the complainant or members of her family as identifying particulars, of her boyfriend and any other identifying particular. We'll give our reasons at a later date.

Mr Billington.

MR BILLINGTON QC:
If your Honours please, I have been assisted immeasurably in this by Ms Colley. I had some input into the written submissions, I didn't draft them, and I reviewed them afterwards. I don't intend therefore to repeat them, I rely on them in totality. What I would like to do is extend the argument and put it into context.

So my oral argument will proceed under, I hope it will be six headings, I sometimes lose count. But initially I'll deal with the application shortly. Significantly, I deal then with the context of this where it fits into the appeal. context is everything here. The third point is what the Court makes, both in the substantive issue and today, of fresh evidence where there has been a passage of time and the relevant principles, that is, the introduction of fresh evidence following an extensive passage of time. I deal then with some recent Court of Appeal cases that have grappled with the same issue, memory and expert evidence in child abuse cases. I deal briefly with the evidence of Professor Haynes, which is the most controversial in this case, and then conclude with a closing submission. So that is the scheme of how I wish to address you today.

WINKELMANN CJ:
Is that the evidence of Professor Hayne or Professor…

MR BILLINGTON QC:
Hayne, Professor Hayne.

WINKELMANN CJ:
Oh...

MR BILLINGTON QC:
Professor Hayne.

WINKELMANN CJ:
Yes, okay.

GLAZEBROOK J:
What's that got to do with this point?

WINKELMANN CJ:
Do you mean Professor Zajac?

MR BILLINGTON QC:
No, Profession Hayne. Because in my submission the – this evidence is sought to be introduced under the rules in a criminal proceeding because it is relevant to an issue, and the issue that it goes to is not a trial issue, it goes to how this Court may deal with the matter on appeal.

Your Honours, this case in my submission highlights what I submit in some respects is a dramatic change in criminal justice in this country, and that is this. We have experienced cases, and I'll refer to those, where on appeal fresh evidence has been introduced of a quantitative nature, for example, DNA evidence, and I'll come back to that. Now the enquiry on appeal obviously is whether there has been a miscarriage of justice, and that is looked through a lens of what would the jury have necessarily decided or not decided, as the case may be, had it had access to that quantitative evidence. And we know from our own experiences that expert evidence of a quantitative kind, such as blood testing, DNA, and other forensic tools, have evolved over

a period of time with the consequence that cases have come before appellate courts both in New Zealand and elsewhere where it has become apparent that with the modern forensic tools the evidence that was given in the original trial is different from and of a lesser quality than that which was given in the appeal.

WINKELMANN CJ:
And you're contrasting that with memory and opinion evidence.

MR BILLINGTON QC:
With opinion evidence.

WINKELMANN CJ:
Memory and opinion evidence.

MR BILLINGTON QC:
Absolutely. Well, there are two elements to this really and they are very significant in my submission. The Court of Appeal has been grappling with them. The first is this, this appeal in its substantive form introduces an argument that over a passage of almost 30 years the opinion has changed as to the means by which evidence of child abuse is given to a trial court. There is a challenge also to the expert testimony given by both witnesses for the Crown and defence at the trial. So, contrasting that or discussing it in the context of quantitative appeals, I compare that with, perhaps express it this way, as qualitative evidence as opposed to quantitative and mathematical evidence.

The second issue is the law as it was has changed and evidence that was permitted to be given under section 23(g) of the Act is no longer permissible. So in short, after 30 years we have an appeal dealing with issues that are confronted in this way: it is contended for the appellant that there is a change in expert opinion as to how evidence –

GLAZEBROOK J:

Mr Billington, is this just reiterating the challenges that were made in the earlier issue as to whether the appeal was continuing or not? Because if so, well, I'm having difficulty seeing what you are doing then.

WINKELMANN CJ:

Yes, and I should say we received no notice that we would be being referred to Professor Hayne's evidence in the submissions, so I'm struggling to see the relevance of what you're doing at the moment?

MR BILLINGTON QC:

Well, the relevance is this, if this Court is going to receive this evidence it has to be relevant to an issue, and the issue that it goes to is not necessarily whether the appellant committed the offences with which he was tried and convicted or necessarily whether the evidence establishes the commission of an offence in relation to the new evidence. What it goes to is the central theme that there were flaws in the evidence given at trial, and here we have on one view of the matter evidence from a victim of the same offender who is unrelated both in terms of connection, place and time but in respect of which there are, to use the old-fashioned phrase, striking similarities. Now that then is an issue that, if this evidence is received, will have to be considered by the experts who are to give evidence in the substantive hearing.

Now this appeal was set on a course long before I became involved, likewise this application. My submission is as counsel now that it is probably premature to rule on the application today or, alternatively, if it is required that leave be given to lead evidence in terms of the bare rule that the question of weight and relevance can be decided when the appeal is heard rather than today, because it is difficult to deal with this matter sensibly, in my submission, without the context of the evidence that is extensive, the extensive evidence that is submitted by the appellant, that is where my argument sits.

GLAZEBROOK J:

So you're really saying that we should delay a decision on this so it can be looked at in full context, is that the submission, rather than an application?

MR BILLINGTON QC:

That's about all my submissions rolled up in about one sentence, your Honour, that's exactly correct. It's difficult, in any form –

WINKELMANN CJ:

Can I just ask you the question I was about to ask you?

MR BILLINGTON QC:

Yes, sorry.

WINKELMANN CJ:

Which is you said that it's not relevant whether it's, the critical issue is not whether it's true or not it's whether what it tells us about the central theme.

MR BILLINGTON QC:

Well, it has to be true.

WINKELMANN CJ:

Exactly, it has to be true.

MR BILLINGTON QC:

It has to be true, well, it has to be credible I think is the better way, as opposed to true.

WINKELMANN CJ:

So your submission is resisted on the basis that it isn't of a sufficient quality to reach an admissibility, whatever admissibility threshold is set, and therefore we wouldn't want to be dealing with that at the principle appeal hearing, would we, because…

MR BILLINGTON QC:

No, it's difficult to deal with that. This is why I have asked the Crown, and they've done it, is to produce the evidence by way of affidavit, so it's now sworn to. Likewise, the other criticism was made was the lack of corroboration, that is now sworn to, you don't have the affidavit but we received it today, so the sister's also sworn to her evidence. So we now have and you will have sworn evidence from the two witnesses, the complainant herself and also her sister, who corroborates the version of events.

WINKELMANN CJ:

Yes, well, what…

MR BILLINGTON QC:

It's just not practical, in my submission, to deal then with the issue of whether it's today, whether it's another pre-trial hearing, or whether it's at the hearing, whether this is able to be challenged on the basis that it's simply not believable, because that's the – if we take the *R v Lundy* [2013] UKPC 28, [2014] 2 NZLR 273 test and the sequential steps that need to be followed, in my submission at least we have sworn testimony which has a credibility and which is relevant to the issues, as Justice Glazebrook, thank you, has picked up.

WINKELMANN CJ:

So, Mr Billington, there's quite a major attack on the, I suppose methodology that's being followed here, in opposition to your application. So Mr Harrison makes the point that some information we could expect the police to have to hand is not offered up in corroboration or otherwise of this evidence, for instance the chronology of Mr Ellis' employment, where he was.

MR BILLINGTON QC:

I understand that, as I say. The singular disadvantage I have as counsel is the point of time in which I've come into this and the die was cast to some degree. But I what I have and what the Crown has, in my submission, is sworn evidence. Now, if there is to be – and I know Mr Harrison says, well,

this leads to a mini trial. Whether that's the case or not in my submission remains to be seen, but it is not a matter this Court can deal with or I can deal with today as to whether there is other corroborative evidence that adds to the veracity and tends to confirm the evidence.

WINKELMANN CJ:
But shouldn't the Crown put that up, since it's really within their control whether or not there is, because surely the Crown knows where Mr Ellis was in the relevant periods of time?

WILLIAMS J:
That seems to me to be the crucial step, not necessarily whether the evidence is in but whether the Crown knows there are any problems with this and, if there are, what it proposes to do, so that we're not wasting our time, if that's the result of the investigation.

MR BILLINGTON QC:
Well, it would be. It's my responsibility – no, there is no more at this stage and I haven't asked for it. If we come down to that, is there more that can be given to this Court to satisfy that burden, then –

WILLIAMS J:
Well, it should be relatively easy for a professional investigative outfit like the police –

MR BILLINGTON QC:
It should be.

WILLIAMS J:
– to find out where he was working and all of the other kind of "quantitative", to use your word, evidence that might or might not cast doubt on the story.

MR BILLINGTON QC:
Yes, that ought to be able to be done, yes.

WILLIAMS J:

It would be useful if it was.

WINKELMANN CJ:

Because Mr Harrison has offered up all the evidence that he would have to call to show that there are narrative issues.

MR BILLINGTON QC:

Yes, flaws in it. The police could actually investigate that independently and, if they reached the view there was some traction in it, then that would be the end of the matter.

O'REGAN J:

I mean, this is a bit odd that the Crown made an application, we put it down for hearing, and now you're saying you don't want us to deal with it.

MR BILLINGTON QC:

Well, the Crown made an application to introduce it simply as propensity evidence, and that's what they did.

GLAZEBROOK J:

And they have had quite a lot of time since that was actually initially put forward.

MR BILLINGTON QC:

They have had some time. As I have come more familiar with this case I see it not simply as propensity evidence in the true conventional sense that you would call at trial. So whilst the submissions follow that course, I ask you to accept please the material that I have had to look at which you had to look at to familiarise yourself with the issues, and my submission opens up a much broader issue and that is that it is not might happen at a subsequent trial, it's what actually this Court has before it that will assist it in evaluating the competing opinion evidence. Because this is a unique case, I hope you don't mind my saying so, but it's opened up a Pandora's box in many respects,

because if we have a case that 30 years on opinion apparently has changed and what was regarded as good opinion then is arguably, and I say only arguably, is not now.

WINKELMANN CJ:

Yes. But it's only of assistance if it crosses the reliability threshold, isn't it?

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

And that's the anxiety that one feels when one reads the material as to whether the Crown has done its due diligence.

MR BILLINGTON QC:

Has it done sufficient to satisfy the Court that it is reliable, that's what you're putting back to me I think, which I'm trying to dodge really.

GLAZEBROOK J:

No, I also understand your submission totally that this is “propensity evidence”, in inverted commas, but which is being introduced on appeal, in respect of the particular issues on appeal and particular issues on this appeal in circumstances where, one, there won't be a retrial because Mr Ellis is no longer with us, even if normally there would be a retrial, but in any event where the issues are there’s competing opinion evidence and the helpfulness or not of propensity evidence in respect of that contest, is that…

MR BILLINGTON QC:

That is correct, in its more stark and simple terms it is this. That there is a direct challenge to the evidence given in the interviews and trial based on alleged modern understanding of memory, and memory is a very large feature right now in this jurisdiction, criminal jurisdiction, and it hasn't been addressed in any significant way by the Court of Appeal, although the Court has developed some views about it. Now the challenge to memory is confined to

the complainants who gave evidence at Mr Ellis' trial. This evidence, if it was thought to be credible, goes to the very same issue of memory. Now I accept that as I stand here today more could have been done to satisfy this court of the veracity of it or the truth of it. It hasn't been done, and ultimately I accept responsibility for that, but the application headed off in a narrower way than I had before my involvement.

WINKELMANN CJ:
Can I ask you another question too, because there is another significant issue in the ether on this, which is the issue of fairness. Because as Mr Harrison takes the point that the Crown was aware of this complaint whilst Mr Ellis was still alive but it was not disclosed and he didn't have an opportunity to respond to it.

MR BILLINGTON QC:
I'm informed that the position is this. The complaint was made to the police in February of last year, that it wasn't brought to the attention of the Crown until September of last year and the Crown acted immediately in filing the evidence. It was only a series of coincidences that –

WINKELMANN CJ:
That's from the bar, that's from the bar, Mr Billington. If you were an appellant we'd be asking you to file an affidavit to that effect.

MR BILLINGTON QC:
Yes.

WINKELMANN CJ:
But in any case that's another point, but that still leaves the situation, whoever's fault it was, that Mr Ellis didn't have an opportunity to comment whilst he was alive.

MR BILLINGTON QC:

That is just a fact. I spent some time looking at *R v Hanratty* [2002] EWCA Crim 1141, [2002] 2 CR.App.R. 30 the English Court of Appeal decision which you're familiar with and I wasn't until recently.

WINKELMANN CJ:

It's a very interesting read.

MR BILLINGTON QC:

Mr Hanratty had no chance to comment either on the DNA evidence that, on his exhumed body, so these are facts that just have to be confronted. I think, with respect, you're more –

WINKELMANN CJ:

Well, but there was no issue in the *Hanratty* case of failure to do something which would be, you know, reasonable to do.

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

So there was no failure in the *Hanratty* case.

MR BILLINGTON QC:

Well, in terms of timing the time is, as I said, it was only coincidentally the police and the Crown got together on this and when the Crown got it they acted immediately on it. The Crown acted in September.

My real concern is this –

GLAZEBROOK J:

The police though are part of the Crown, aren't they, and I can understand that it mightn't have come to the attention of Crown counsel but even in the initial investigation, well there was supposedly a complaint much earlier that

no one can find and then supposedly another complaint earlier that no one can find which is an issue in terms of the police actions in this that it might be that an investigation can actually draw some light on that.

MR BILLINGTON QC:
I don't know whether people drew the dots. What I'm really troubled about is about the comments you are making to me, the criticism, which I think are well founded. There is more evidence that the Crown could put forward and it's not something that either I or my colleague have considered in the time we've had available. What we did do, and I asked for this specifically, was to get the affidavit sworn because it wasn't evidence until it was sworn, and we've only managed to do that in the last few days.

In my submission I have started on the basis that I think it is premature to rule today. It is relevant if its veracity is established. It really goes to what is in my submission is a brand new issue for this Court in this jurisdiction, and it would be fair for the Crown to have the opportunity to do so. If we are short, and we are from what you are telling me, then that is the responsibility for the Crown for which I accept responsibility, but we do need the time to address the matters that Mr Harrison has raised which I think only came to me as counsel at the end of October, if I recall, the first week in November, so those matters I wasn't aware of until I received these submissions in opposition.

We are as a Court and the counsel together heading off into what is extremely interesting and new territories to what you do with changing opinion evidence, and changes in the law, because the law has changed as well, what do you do with that 30 years on? And if this evidence has some bearing on it – and the reason I mentioned Professor Hayne's evidence is I spent some time looking at that and it's not a matter I'm going to, there are aspects of that evidence which are questionable in terms of its admissibility and relevance, whether on this appeal or otherwise, and it cuts across a lot of jurisprudence the way in which its given in the Court of Appeal as to what it's discussing, and that is the ultimate issue. So all of this is of some interest to experts who are being engaged to review what ought to have happened then, what ought

to happen now, and there is a conflict. There is a conflict between those who practice in the courts as experts and those who write about it. And then there's what does the Court do about it in terms of verdicts that have been given?

Now it's not too long a bow to draw to say, as we know, where DNA has changed people have been convicted on false bodily samples, they get a new trial or they get acquitted. Now here where we've got a practice that the law countenanced under section 23(g), and we don't, and we have changed opinion, what are we going to do with the cases where people were convicted 30 or 40 years ago? So we're going to have to develop some formula to deal with changing knowledge, and this in my submission at this stage goes to the direct challenge that the appellant brings to the change of knowledge and the challenges to the expertise of both defence and Crown experts at the trial.

That is the context in which I was going to address you. What troubles me is the concerns, the legitimate concerns you have now about whether we can do enough to establish the truth of the evidence, and if that's the only loose end – can I put it another way? If the evidence was thought to be relevant, if it was true, and in my submission it must follow, then I would want the opportunity to at least make those inquiries to satisfy you that it has that level of veracity for you to consider it. Whether you give it weight ultimately, given Mr Ellis is no longer here, and whether the passage of time weighs against it, that's a different issue.

WINKELMANN CJ:
Well, are you asking for an adjournment, Mr Billington?

MR BILLINGTON QC:
Yes I am. I'm asking for an adjournment, yes I am. I think that would be more help to you than my covering the rest of the argument. Because if it comes down to that, if you're satisfied at least on what I have told you to date, there is a relevance in terms of what you have to deal with, then I ask for time to try

and satisfy the Crown and the defence that the proper inquires have been made, then I could come back to you on it. Now I was told –

GLAZEBROOK J:
For myself there is probably twofold. We haven't heard the argument on relevance, even if reliable, and so there's certainly an argument to be made on that, but we haven't heard it yet. And there's obviously the argument to be made on reliability and the information that we need, or at least investigation that we need for that.

What I was having some concern about was some suggestion I thought you were making that some of the evidence that's already put before the Court might be, in your submission, irrelevant or not able to be relied on.

MR BILLINGTON QC:
By the appellant?

GLAZEBROOK J:
But that has been already decided against the Crown in terms of the admissibility of that evidence. One can understand arguments as to whether it should be given weight to…

MR BILLINGTON QC:
Well the weight – yes.

GLAZEBROOK J:
But I would be concerned if we're going to be having arguments on admissibility all over again.

MR BILLINGTON QC:
No, it will just be a criticism of the way in which the evidence is expressed, yes.

GLAZEBROOK J:
All right, well that of course is legitimate.

MR BILLINGTON QC:
And there certainly will be criticisms of the way in which it's expressed and the fact that it goes further than a Court, an appellate Court, should hear. I'm not going to say you can't hear it because you can hear any relevant evidence, but certainly what you're looking at, and I know you're very familiar with it, your Honour, it's pretty, it is extensive, and it's far reaching, and it raises a whole –

GLAZEBROOK J:
No, I was just checking that we weren't going to have yet more preliminary arguments, that was all.

MR BILLINGTON QC:
Yes, no. No, there won't be an issue, it won't be a question you can't look it, it will simply be that you should not give it any weight.

GLAZEBROOK J:
I understand.

WINKELMANN CJ:
As to your application for an adjournment, Mr Billington, I don't think you can proceed on the basis that that's – there are other issues in place as well, so you have to make your choice as counsel as to whether you want to pursue with your application for adjournment.

MR BILLINGTON QC:
What I'm going to do is carry on, but I'm going to shorten what I will say to you because I think you –

WINKELMANN CJ:
So you're not applying for an adjournment?

MR BILLINGTON QC:

I am, but I think you want to hear from me on the issue of whether it's relevant. Because if it is relevant then, with respect, I should get the adjournment, just to satisfy you that in fact there was a relevant quality to the evidence so as to truth, or am I wasting your time doing that?

WINKELMANN CJ:

We will just step outside for a moment, Mr Billington.

COURT ADJOURNS: 10.53 AM

COURT RESUMES: 10.59 AM

WINKELMANN CJ:

So, we just want to hear – we've decided that we should either adjourn at this point, Mr Billington, or hear the whole argument before, so we're just going to ask Mr Harrison on those points.

MR BILLINGTON QC:

Just before you do that, can I just say one thing, and that is this. That these factual issues with which you are concerned first came to our attention for the time in submissions only last week, they were not, because the matter was dealt with on the papers, were not previously raised. So in terms of having time to deal with them and giving them consideration, it's only in the last week that those issues have been raised, and they are not matters that necessarily I was able to deal with in that time. But other than that, I'll defer to Mr Harrison.

MR HARRISON:

Just to address the matter that my learned friend has raised, submissions that we have filed on the 1st of November 2020 are basically a recap of the submissions filed with the Court in 2019 when the origin issue as propensity was raised, they were part and parcel of a response, so there were two sets of submissions in one binding, and they were sent to the Crown in 2019. They

raised the issues that my friend has said “Well, we’ve just become aware of now”, so…

WINKELMANN CJ:
I suppose – and I take your point – I suppose Mr Billington as new counsel might not have picked that up until later but…

MR HARRISON:
Well, I make no criticism of my learned senior.

WINKELMANN CJ:
No.

MR HARRISON:
But the point I want to make is that the Crown have been aware of this for over a year, the police have been aware of this complaint since February of 2019, and yet there has not been any investigation started until the Crown asked for them to start looking at matters to corroborate what the complainant has been saying. And the point I would make is that since they have started doing that this should be capable of corroboration and it should be capable of being done extremely quickly, because she is referring to an investigation, she says, in respect of Ellis that was going in 1992 and ’93, that she walks into a police station and makes a complaint of Peter Ellis sexually abusing her in 1982, and yet there is nothing provided by the Crown to support that, and that raises a real flag, in my submission, because I cannot believe that a complainant would have walked into a police station in Christchurch in 1992 and ’93 complaining about Peter Ellis sexually abusing them and something not happening.

The other concern I have is that in 1992 and ’93 Peter Ellis was, his name and his actions were throughout the new media, certainly in Christchurch and New Zealand, and yet there is not one approach to the police suggesting that he is in some way associated with another kindergarten in 1982. So all those parents and students who went to the [redacted], not one of them approached

the police, that we're aware of – I'm sure the Crown have access to the files so they should be able to tell us had there been a complaint or a concern that Peter Ellis now being investigated in respect of 118 children, and no one comes forward to suggest that he may have been involved with [redacted]?

There is a note of 2007 – so this is, I believe, when the complainant is nearly 20 or around 20 – that she approached the Papanui police because her counsellor advised her that wasn't going to hear anything more from her until she went to the police, and at that stage she doesn't make a statement and that is despite what she says in her later statements to the police in 2019, and she doesn't make a specific allegation but she says it was, the person who did it was working at the Civic Creche at the time. Well, at the time that she was four to five Peter Ellis was nowhere near the Christchurch Civic Creche, he didn't start there until 1986, and she would have been 10, eight, either to 10.

So those are the very basic issues that the Crown have had more than adequate time and resources to bring before the Court to corroborate this particular aspect.

More importantly…

WINKELMANN CJ:
So are you opposing the adjournment?

MR HARRISON:
I'm opposing the adjournment, I'm sorry. Your Honour, I oppose the adjournment.

But, more importantly, the issue that we're looking at or that the Crown are seeking to adduce this evidence on, really doesn't tie in with what we're saying, it's got very little connection with the nature of the issue in dispute. And what the nature of the issue in dispute is is not the credibility of the complainants or the, sorry, the victims, of the Ellis trial, it is the creditability of their evidence that is being looked at. And so what we're saying is is this

evidence, is there a risk in respect of this evidence because of the way it was collated, gathered and put before the Court.

Now, in contrast to *Hanratty's* case where the proposed fresh evidence was definitive of the issue in terms of guilt or otherwise, the DNA was on the cloth that wrapped the firearm –

WINKELMANN CJ:
Yes, but Mr Billington would say if you have a complainant who is sitting outside this process who makes a complaint then it's relevant to show that whatever was wrong with the complaint, these were true statements, that's what he'd say.

MR HARRISON:
Well, in terms of the propensity evidence itself…

WINKELMANN CJ:
So the propensity evidence tends to corroborate the reliability of the complaints that were generated by the process which is under attack?

MR HARRISON:
Look, your Honour, I accept that if there was a quality to this, that if perhaps for example we had a video tape of this complainant in 1982 or '83 and this occurring, then that of course would be propensity evidence that could properly be before the Court. But it needs to have some reliability before it gets to that stage, and unless it has that reliability, and in my submission this material does not, it shouldn't be before the Court.

WILLIAMS J:
So you accept relevance – subject to, shall we say, quality?

MR HARRISON:
Yes.

WILLIAMS J:

Okay.

MR HARRISON:

And how much relevance, how much probative value, is the point, but it will have some probative value but I'm not suggest it is –

WILLIAMS J:

It gets over the line of relevance?

MR HARRISON:

Yes.

WINKELMANN CJ:

But you maintain your point about the fairness too, I suppose?

MR HARRISON:

Your Honour, yes. And I'm not sure what Professor Hayne's evidence has to do with this particular point, but I think Professor Zajac's evidence is of assistance here and that is, I think, something that the Court needs to look at in respect of looking at the weight and the value of the proposed evidence.

WINKELMANN CJ:

Were we to grant an adjournment, how would you be prejudiced?

MR HARRISON:

Well, I can't say that – well, I don't think we would be prejudiced per se, except for the fact I'd like to see this case over before I retire, and it's starting to…

GLAZEBROOK J:

Well, you would say, wouldn't you –

WILLIAMS J:

It wouldn't be that long.

GLAZEBROOK J:

Sorry. I think you would say, wouldn't you, that if we do grant an adjournment it would be an adjournment where you would be able to bring evidence as to reliability and creditability of this evidence and presumably have cross-examination, and presumably this would be done between now and when the appeal is set down rather than…

MR HARRISON:

Then I would say, your Honours, that the only prejudice that I would indicate is that this branches off into yet another separate and independent point and topic which delays us getting to the substantive issue, that's the only point. We can use that time, we can go out and get evidence, get it into affidavit form and present it to the Court and we can have that evidence called into Court and tested.

WILLIAMS J:

There are two stages here. The first is that the police need to do their own investigation and that may cause them to back off, in which case you don't need to do any more work on it. If it doesn't and that's the signal from the Crown, then perhaps you will.

MR HARRISON:

Indeed your Honour. I mean I don't, I'm not scared of the challenge and I'm not concerned of the challenge but I appreciate that yet again another point but –

WILLIAMS J:

Yes, your best point is, boy, they've had plenty of time and they've got no shortage of investigators.

MR HARRISON:

Yes, we will have to go and ask for additional funding again for all of these matters.

GLAZEBROOK J:

Then you also make in your submissions the argument that is often made in these cases that this would take the focus off the appeal itself, because you're looking at the creditability and reliability of what might be fairly tenuously related events, and I'm assuming you'd still maintain that argument in any – rather than accepting relevance you would say maintain that argument effectively.

MR HARRISON:

Yes, and I think if there's advantage to be had in terms of the Court hearing or having a separate hearing in respect of this particular case, it is the evidence of Professor Zajac and how the Court looks at that and what relevance it sees it has to these issues of historic memory. So I can understand that that would be possibly attractive to the Court in that regard. I mean, it is a point that there are a number of Court of Appeal decisions that look at it, and my learned friend I think addressed the issue of an academic as opposed to a court operating expert. So those are other points that I think would possibly make it attractive to the Court.

WINKELMANN CJ:

Make what attractive to the Court, Mr Harrison?

MR HARRISON:

A separate hearing, a separate hearing in respect of whether or not this material should be before the Court at all.

ARNOLD J:

You filed Professor Zajac's affidavit, but there's no application for leave, is there?

MR HARRISON:

No, and I should have renewed the application. I think the original application because she was Associate Professor Zajac when she swore that document,

Sir, in 2019 and the application was made then. I didn't renew that application.

WINKELMANN CJ:
So you did apply earlier?

MR HARRISON:
Back in 2019 we put in that application.

ARNOLD J:
Okay, so we will have an application somewhere on file?

MR HARRISON:
There should be, and I can place a fresh application before the Court.

ARNOLD J:
Good, thanks.

GLAZEBROOK J:
It might be worth placing a fresh application because it is actually a fresh application from the Crown.

MR HARRISON:
And I will get her to swear it as a full professor as opposed to an associate. Unless there are other matters...

WINKELMANN CJ:
No, thank you, Mr Harrison.

ARNOLD J:
Just one other thing, on the question of delay, when was the appeal, sorry, when was the application for leave to appeal filed in this case, was it around June 2019?

MR HARRISON:

March, I believe, Sir, but I'm not sure when the publicity came on board in respect of that, I just can't recall now, but I believe it was July that we got approval to march on, 31 July. But the application to bring the appeal I think was the 30th of March or June.

WINKELMANN CJ:

Are you raising the possibility that there was some publicity before the appeal was filed?

MR HARRISON:

I don't believe so. I think I was trying to hide at that stage but then we had to announce to the public Peter Ellis' condition and I think that's when the full publicity came in –

ARNOLD J:

So there's no dispute that this complaint pre-dated the publicity about –

MR HARRISON:

Yes, absolutely. This complaint came out, or this complaint to the police in February of 2019 pre-dates any what I would have thought would be any publicity of the application being made, that's absolutely right.

WINKELMANN CJ:

Right, thank you. So, Mr Billington, do you have anything by way of reply on your application for an adjournment?

MR BILLINGTON QC:

Well, I think I'm assisted – and thank you, Justice Williams – because it appears, and if I can go back, one of the concerns I had as counsel was I was going to argue the relevance issue and I hadn't, until it was raised last week, considered the factual issues that were being raised in opposition. I immediately got the affidavit sworn but I have gone not further. So my focus

had been on relevance and the case itself rather than on the underpinning veracity of the evidence beyond having it sworn to.

If I am given time to have the Crown investigate the factual narrative as to how this complaint came about and its history, it will do one of two things: it will either dispose of it altogether, as Justice Williams forecast, or alternatively will put us in a position where we have something to deal with that may assist you. I am comforted then by my friend saying: "Well, if we get it into that shape then it is relevant to the issue." Whether you give it weight ultimately is a matter for you, but at least we cross the threshold, which was what I was concerned with, particularly –

WINKELMANN CJ:
You still have to deal with the issue of fairness.

MR BILLINGTON QC:
Yes, correct, I understand those issues, but it certainly –

GLAZEBROOK J:
And for myself I would be interested in the issue of relevance as well. So I wouldn't just assume that we don't have to hear those arguments if there's another stage to this.

MR BILLINGTON QC:
No. What I'll do actually is I'll put my oral submissions in writing, because I have extended them further to deal specifically with how it relates to a substantive issue on appeal, as opposed to a trial for example.

GLAZEBROOK J:
Exactly.

MR BILLINGTON QC:
Yes. So I will do that and that would attenuate oral submissions, and I think we can then focus more on fairness and the underlying veracity of the matter.

WINKELMANN CJ:

Thank you, right.

MR BILLINGTON QC:

So I do formally apply for an adjournment on the basis that the police will carry out the investigations, make the material available in as short as possible timeframe. In terms of bringing the matter back to Court, I've indicated if there's nothing in it then it won't be brought back and if there is it will be brought back, and then the submissions, as I indicated to Justice Glazebrook, I will deal with the relevance issue in writing rather than orally and then deal with the issues of fairness and whether it's really too extensive to deal with on substantive trial itself, which I do think is a matter we do have to grapple with. So that's my position.

WINKELMANN CJ:

So it suggests your additional submissions, if you are to proceed with the application, will address process as to how we –

MR BILLINGTON QC:

Both relevance and process. Relevance, which I know is agreed, but certainly the Court will want to hear on that, and then that will impact on process because the level of relevance will then impact on the view you may take as to whether you want to actually receive it and whether it should go to the experts. Now this should all be done pretty quickly because the experts are currently reviewing the evidential videos. I don't see any reason why we can't have those inquiries made in the next two weeks or so, I would have thought.

WINKELMANN CJ:

All right. So you can't give a timeframe because we don't know how long the police will take to investigate it, all you can give is an assurance of promptness?

MR BILLINGTON QC:

Yes. I would think that reasonably the Crown has to come back to Court by the end of this month at the very latest, at the very latest, which is to take, have the benefit of the adjournment where the obligation is to come back to my learned friend and the Court as soon as possible, but certainly no later than within two weeks.

GLAZEBROOK J:

I think we do have a conference date that we're trying to set and so…

MR BILLINGTON QC:

3 December.

GLAZEBROOK J:

For December.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

So certainly that fits quite well into this timeframe, I think, in terms of taking the matter forward.

WINKELMANN CJ:

So we could set that at – is it 3 December?

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

We could set that, some sort of return to us – what day of the week is 3 December?

GLAZEBROOK J:

I'm not sure we've quite got the date set in early December but we…

MR BILLINGTON QC:

Well, we were offered 3 December…

GLAZEBROOK J:

3 December?

MR BILLINGTON QC:

It works for me if it works for my friend.

WINKELMANN CJ:

Well, what about, we're currently on the 11th, what about the 27th, some sort of report back, at least a report back as to progress?

MR BILLINGTON QC:

Yes, that's fine.

WINKELMANN CJ:

That's Friday week.

MR BILLINGTON QC:

Yes, that's certainly achievable.

WINKELMANN CJ:

Well, that's simply a report back as to progress.

MR BILLINGTON QC:

Yes, no, well, we have to do this, and I'm grateful for my friend's…

GLAZEBROOK J:

And you'd put your submissions in writing as well, is that the plan, before then?

MR BILLINGTON QC:

Yes, I will. Not by then, but I will do that.

GLAZEBROOK J:

Oh, all right. Well, we can set a timetable on the 3rd in any event.

MR BILLINGTON QC:

I can do that after the conference, yes.

WINKELMANN CJ:

All right. Well…

MR BILLINGTON QC:

We've also been offered a hearing date too, which on the face of it is acceptable to the Crown, which is June next year, on two parts.

GLAZEBROOK J:

Yes, part of the issue on the 3rd is how long it was going to take the experts, but June seems an available date in terms of making sure we've got time for the experts. But we can talk about that again on the 3rd of December.

MR BILLINGTON QC:

Yes.

WILLIAMS J:

We'll need to declare away this issue, one way or the other, because it'll take up some time at the main hearing, even if it's dealt with beforehand.

GLAZEBROOK J:

Well, it may be we can deal with that earlier in the year rather than in June, so.

MR BILLINGTON QC:

Yes, there's that, agreed.

WINKELMANN CJ:

Right. Just give us a moment.

So we're going to grant your application for an adjournment, Mr Billington, and we're granting – so the application to adduce this evidence is adjourned to a hearing date to be set, and we're going to do that on the basis that you report back by Friday the 27th of November as to progress, and also I think at that time – well, if the matter is to proceed you should set out what you propose as to the process.

MR BILLINGTON QC:
And I just want to say I apologise to the Court for the inconvenience and to my learned friends for the inconvenience, but events overtook us, and I'm very grateful, thank you.

WINKELMANN CJ:
We will adjourn.

COURT ADJOURNS: 11.21 PM