RSB:SND D1

REVISED

IN THE DISTRICT COURT
OF NEW SOUTH WALES
CRIMINAL JURISDICTION

JUDGE WHITFORD

MONDAY 9 MARCH 2015

2012/00393036 - R v Francis William CABLE

NON PUBLICATION ORDER RE MATERIAL CAPABLE OF IDENTIFYING ANY OF THE COMPLAINANTS

JUDGMENT - On notice of motion to exclude tendency evidence

HIS HONOUR: The accused, Francis William Cable, was called to trial today on an indictment which charges 18 counts alleging various sexual assaults against young males, said to have occurred between the dates 1 June 1961 and 24 December 1967. Those 18 counts are brought in respect of five complainants, Messrs CFN, CFK, Henry, CHE and CFQ.

In the context of that trial the Crown served a tendency notice pursuant to s 97 of the *Evidence Act 1995* New South Wales on 25 March 2014. An amended notice was served on 19 August 2014. The tendency evidence the Crown seeks to adduce falls into the following categories. First, the evidence of each of the complainants in support of the counts with respect to the other complainants. Secondly, the evidence referrable to a particular count with respect to a particular complainant as evidence in support of all other counts referrable to that particular complainant.

The tendency sought to be proved is expressed to be that the accused had a tendency to act in a particular way and to have a particular state of mind. Specifically that he firstly, had a sexual attraction towards young male students aged between ten and 16 years, and secondly, that he engaged in sexual activity with young male students aged between ten and 16 years in various

ways and at various times.

A useful summary of the evidence proposed to be called is set out in the Crown submissions from para 9 through to para 93 and I do not understand, for present purposes at least, there to be any contention about that summary. I adopt and incorporate in these reasons, without repeating here, that summary as it appears in those paragraphs from 9 to 93.

By a notice of motion filed 29 August 2014 the accused seeks to have the tendency evidence excluded on the grounds either that the evidence does not have significant probative value or that the probative value of the evidence does not substantially outweigh its prejudicial effect. Orders are further sought in that notice of motion that, should the evidence not be admitted, there be separate trials for each complainant on the grounds that the offences are not related and the interests of justice require that they be heard separately.

I am satisfied that there is significant probative value in the evidence sought to be led as tendency evidence. The real question at issue is whether the incommensurable prejudicial effect outweighs that significant probative value. The submissions put on behalf of the accused approached that question in stages. First it is submitted that the evidence concerning the complainants CFK and Henry should be excluded from the cases concerning the complainants CFQ, CHE and CFN and the counts as between those two groups accordingly severed. Relying on decisions of the Court of Criminal Appeal, in particular in *Barton* and *Sokolowskyj*, it is submitted that there is a real prospect that the evidence on the CFK and Henry counts will provoke a strong emotional response from the jury due to the more serious and ongoing nature of the allegations. The effect, so it is submitted, will be that the jury is likely to allow the evidence on the more serious and ongoing counts and the

accompanying emotion to overbear their judgment on the less serious isolated counts so as to lead to the real risk that the jury might conclude guilt on those lesser counts on the basis of a general impression rather than focussing upon the necessity for proof of the actual acts charged. The Crown submits that any prejudice which might flow is capable of cure by appropriate directions. Furthermore it is submitted that I should act on the basis that the jury would act in accordance with those directions.

It seems to me that whilst experience suggests that juries can and regularly do act in accordance with directions, situations will arise where for all practical purposes directions will become useless, or at least there is a real risk that they may be disregarded, on account of the extent of the prejudice involved. In making the value judgment I am called upon to make here it seems to me that the nature and extent of the disparity between the conduct alleged in respect of Mr Henry and CFK on the one hand and then the other matters on the other hand is such that it gives rise to the very real risk that no matter how they are directed a jury will conclude guilt in respect of the less serious and more isolated counts without a proper analysis of the evidence particular to those charges. The risk is that rather than by a proper analysis of the evidence relating to those counts the jury will conclude guilt by way of an emotional response engendered by the more serious and ongoing nature of the allegations in the other two cases. Accordingly on balance it is my assessment that the interests of justice favour excluding the evidence in the CFK and Henry matters from the trials concerning the other three complainants and accordingly severing the counts concerning Messrs CFQ CHE and CFN from those concerning CFK and Mr Henry. The prejudice that I found exists flows only one way, however, and it seems to me

it is appropriate to admit the evidence of CFQ , CHE and CFN in the trials of CFK and Henry.

The next layer of the defence submissions concerns exclusion of the evidence concerning Mr Henry from the trial of CFK and separation of the counts concerning each of them accordingly. The basis of the submission arises principally out of concerns about the reliability of Mr Henry's allegations because of the existence of mental health issues that are said to be inextricably linked to the allegations he makes against the accused.

It was submitted that in assessing the relevant test under s 101(2) of the *Evidence Act* that I would consider the following matters. Firstly, that Mr Henry suffers from a serious mental illness which includes the creation of a false paranoid reality comprising the hearing of voices and experiencing of delusion, images and thoughts that his wife is colluding with imaginary people. Secondly, that it provides him with a false sense of reality. Thirdly, that the complaint was made after the onset of the illness. Fourthly, that it was made in circumstances which suggest the complaint is the product of the illness. Fifthly, that his mental health problems may lead to speculation by the jury that his difficulties arise from the acts he alleges against the accused and therefore use the illness as proof of the facts in issue. In other words, the jury may engage in circular otherwise impermissible reasoning. Sixthly, his evidence is likely to be given greater weight than it deserves. Seventhly, the presence of a mental illness may garner sympathy from the jury and distract them from a proper assessment of his evidence. Eighthly, that Mr Henry's evidence is likely to inflame the jury's emotions and the jury may seek to punish the accused at the expense of a proper assessment of the evidence adduced to prove the elements and finally that cross-examination may not be effective in

ascertaining what parts of his evidence are the product of delusions and what parts of his evidence are a product of reality.

It is further submitted on behalf of the accused that if Mr Henry's evidence is used as tendency evidence to prove the allegations involving CFK then the prejudicial effect would be that Mr Henry's evidence which is said to be inherently unreliable may attract undeserved weight for the reasons set out in the submissions I have outlined just a moment ago. Secondly, that if that occurs then the tendency evidence becomes an undeservedly stronger foundation to infer the accused committed the offences against CFK. Thirdly, the danger that Mr Henry's mental illness and speculation about the cause of the illness may inflame a jury's emotions in relation to the trial of CFK REDACTED. Next, it is submitted that the danger of unfair prejudice, so far as inflaming emotions might be concerned, is exacerbated in the context of a trial alleging child sexual assaults by a Catholic priest at a time when a Royal Commission is investigating institutional abuse and where some of the allegations occurred in Newcastle and child abuse enquiries in Newcastle attracted significant public attention. Finally, in this respect it is submitted on behalf of the accused that there are no directions which could effectively ameliorate the prejudice which arises from Mr Henry's evidence.

There seems to be little room for argument at least on the face of the material before me that Mr Henry has suffered and may well still be suffering from some form of mental illness or impairment. It is submitted there are accordingly real concerns about the reliability of his evidence. Reference was made in the accused submissions to the reasons of Basten JA in the case of XY where his Honour after quoting from Festa v the Queen and R v Shamouil said,

> "Two factors are apparent from these passages. First, in carrying out the weighing exercise it would be necessary for the trial judge to consider where the prosecution evidence fell on the scale of probative value ranging from strong to weak. Secondly, the unreliability of the evidence was a factor to be weighed on the other side of the scale together with the likely effectiveness of warnings about the nature of such unreliability."

As the Crown submits here the question of potential unreliability cannot be considered separately from the consideration of the likely effectiveness of warnings. Whilst it may be true that the issues surrounding Mr Henry's mental state may bear upon its reliability there does seem to be evidence independent of him, in particular from his wife, which potentially supports its reliability.

In circumstances where the reliability of evidence is fundamentally a matter for the jury, it seems to me that the real question whether there is a risk of prejudice to the conduct of a fair trial which outweighs the significant probative value of the evidence turns upon whether the matters relied upon on behalf of the accused are capable of adequate amelioration by directions. In this instance, my judgment is that directions are capable of adequately addressing the matters raised on behalf of the accused.

The evidence of Mr Henry will be admitted as tendency evidence in the trial of CFK and vice versa and I see no reason the two matters cannot go to trial jointly. The final layer of the defence submissions is directed to severing the trials of Messrs CFQ, CHE and CFN on the basis of exclusion of one from the other of the tendency evidence. At the core of the submission is the proposition that the allegations made in each case involve a form of deviant behaviour inherently likely to raise prejudice. In particular it is submitted that the publicity surrounding the ongoing sittings of the Commonwealth Royal Commission into institutional responses to child sexual abuse and the now-concluded New South Wales Special Commission of

Inquiry into matters relating to the police investigation of certain child sexual abuse allegations in the Catholic diocese of Maitland Newcastle is likely to heighten the jury's emotion.

It is noted in that connection that the allegations in respect of Messrs CFN and CFK occurred at Maitland. It is submitted that there is the real danger that notwithstanding directions given to the jury they might reason no more rationally than if the accused assaulted one complainant he must have assaulted the others. It is submitted that emotion not rationality in those circumstances would govern the jury's decision making. Again on balance it seems to me these concerns can be sufficiently met with appropriate directions. Accordingly, there is no basis for rejecting the tendency evidence as between these three complainants nor severing the counts.

Does that leave anything outstanding?

CROWN PROSECUTOR: No.