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### **BACKGROUNDER**

## **Memorandum of Advice**

Read the Memorandum of Advice from RV Hanson QC to Julie Gilbert's solicitor.

Date: **06/07/2004**

The Memorandum of Advice from RV Hanson QC to Julie Gilbert's solicitor appear as images below:

Page 1:

**R V HANSON QC**

26 May 2004

Woodgate Hughes  
Solicitors  
PO Box 55  
INDOOROOPILLY QLD 4068

**MEMORANDUM OF ADVICE**

**RE: MRS JULIE GILBERT**

On 20 February 2003 I advised Mrs Gilbert as to what redress was, or was not, open to her, by reason of the decision of the DPP not to proceed with charges against a Scott Volkens for indecently dealing with Mrs Gilbert when she was 13.

Among the matters I advised on was the fact that it was open to her to apply to the Supreme Court for leave to bring a private prosecution. However, I pointed out that one of the conditions of obtaining leave was that she would be required to give security for any order for costs that might be made in Volkens' favour if he were to be acquitted. I understand that this requirement has provided some deterrence to Mrs Gilbert, although, as I understand it, she has not given up entirely on the idea of seeking leave.

As I understand the situation, since I last advised, the police have re-opened their investigation and have gathered some fresh evidence. The whole brief was then sent

2

by the DPP to the New South Wales DPP for advice on whether or not the charges should proceed.

The Queensland DPP has received the advice from New South Wales and has decided not to proceed.

While Mrs Gilbert was given written reasons by the Queensland DPP for the original decision not to proceed, she has not been given written reasons for the latest decision; nor has she been given a copy of the advice from the New South Wales DPP's office.

However, as I understand it, she has had an interview with the DPP, Ms Clare, at which she was informed orally of some of the reasons advanced by the author of the New South Wales advice for recommending that the matter not proceed. As I understand it, Mrs Gilbert was permitted to tape the interview.

I have been given a transcript of those parts of the interview where the reasoning in the New South Wales advice was explained to Mrs Gilbert.

I have been asked to advise. It is pertinent that I do so for the following reason. If Mrs Gilbert were to go ahead with an application for leave to commence a private prosecution, one of the relevant factors which would need to be placed before the judge hearing the application would be the fact that the DPP has declined to proceed in the matter, and, as far as is known, the DPP's reasons for that decision. That would include the advice received from the DPP's office in New South Wales supporting the

Queensland Director's decision. It would then be necessary, in support of the application, to argue that the reasons given by the DPP for not proceeding are unpersuasive.

Hence, my comments may be of assistance to Mrs Gilbert in deciding whether or not she should seek leave to bring a private prosecution; or, my remarks may do no more than provide her with some comfort, and assist her to cope with her feeling of grievance.

The advice from New South Wales, as far as I can glean from what Mrs Gilbert was told in her interview with Ms Clare, gives reasons for not proceeding which seem to me to fall into two categories:

- (i) legal considerations involving an examination of suggested discrepancies and inconsistencies in the prosecution evidence, including the evidence of Mrs Gilbert herself;
- (ii) arguments going to the improbability of Mrs Gilbert's story being true, which seem to be based on the author's perception of such matters as anatomy, physics, and human sexual behaviour and responses.

As to the first category of reasons given, I am ill-equipped to make any meaningful comments on the merits of the reasons because I have not seen the depositions from the original committal proceedings, nor the further evidence obtained.

What I can say is this. Personally, I am a great believer in using the jury system for

4

determining cases. Where a person complains that a criminal offence has been perpetrated against them or their property, and there are denials, prima facie the matter should be resolved by a jury. Where there are accusations on one side and denials on the other, where there are suggested discrepancies in the complainant's story, where there are suggested inconsistencies between the complainant's evidence and other items of evidence, and where there are suggestions of improbability as to the complainant's story, I believe the matter should be submitted to a jury. That is what juries are for - to consider and weigh those matters, with the aid of seeing the complainant (and possibly the accused) tell his/her story in the witness box.

Naturally, if there are serious doubts about the credibility of the complainant, a prosecuting authority must give anxious consideration to whether or not to proceed. This consideration is catered for by the DPP adopting a test of "reasonable prospect of conviction".

Conscious though I am of my limited knowledge of the evidence in the case, none of the utterances of the Queensland DPP or the advice from New South Wales persuade me that the matter should be taken out of the hands of a jury, and a complainant denied a trial of her accusations. In forming this view I am comforted by the fact that the CMC examined the original decision not to proceed and was critical of it. It was said that too little attention was given to the possibility that a jury may simply believe the complainant. I could not agree more.

I turn now to the other category of reasons given by the author of the New South

Wales advice, i.e., arguments based on anatomy, etc.

Apparently, the author finds it somewhat novel that no complainant alleges that Volkens ever exposed himself or encouraged touching of his genital area.

Comment: What on earth is the relevance of this?

The author finds it unlikely that a 13 year old girl would have experienced an orgasm while being indecently assaulted.

Comment: No grounds for this opinion are mentioned. Is it based on scientific advice, or the author's personal speculation? If it is based on uninformed speculation, then a comment in these terms has no place in a professional, legal advice.

The author observes that Mrs Gilbert was wearing two pairs of tight nylon swimming costumes and a pair of shorts. The advice goes on to suggest that one must envisage that there would have to be sufficient "manual leverage" for Volkens to manipulate the clitoris of a girl who never before had had an orgasm.

Comments: (i) Is this observation based on the evidence in the case, or has there been a measure of surmise? Mrs Gilbert says the swimming costumes were not tight and the shorts were loose-legged. (ii) Has the advisor ever heard of the saying "where there's a will, there's a way"?

The author draws a contrast between Mrs Gilbert's complaint of having an orgasm while being assaulted and the situation of adolescent males experiencing an orgasm while being sexually assaulted. The author finds the latter situation perfectly credible,

6

but finds Mrs Gilbert's account completely inconsistent with the mental state required of a female to achieve an orgasm, particularly for the first time.

Comment: I find this reasoning too silly for words.

Apparently, the author regards the matter as trivial, or minor.

Comment: They must have different standards in New South Wales. I would have thought that most people in Queensland would be outraged if an adult swim coach in a position of trust took a 13 year old girl away from the swimming class and massaged her genitals until she had an orgasm.

The author comments on a complaint from another girl who says that, when 12, while Volkens was massaging her, she felt his hand at the side of her breast. The author muses that "it is legitimate to consider whether 12 year old swimmers even had breasts."

Comment: Do I really need to comment?

In summary, I find this second category of reasons based on non-legal considerations, irrelevant, unprofessional and just plain silly. I would have no hesitation in so submitting to a judge of the Supreme Court should Mrs Gilbert decide to apply for leave to present a private information.

With compliments,

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