

interoffice
M E M O R A N D U M

To: MICHAEL BYRNE QC
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

From: Simone Bain - SCP/LPM - ROCKHAMPTON

Subject: NEERKOL - CONSIDERATION OF JOINDER

Date: March 28, 1999

I have already briefly discussed with you the issue of joinder for the remaining 6 complainants for the matter of **DURHAM**. When I spoke with you, you agreed that there was no basis for joining the complainants, [or any combination of the complainants]. This memo and the attached summary and schedules should further clarify matters. I thought that I should formalise your agreement [or disagreement] with my joinder [or lack of joinder] given the difficult background of this matter. It may be that the complainants may take any disagreement with my decision, further.

As you are aware the matter of **BAKER** is also being mentioned next week for the Prosecution to provide the court with the proposed trial indictment. The matter of **BAKER** involves a total of 12 complainants. The charges for the various complainants cover the years from [approximately] 1961 - 1974. Although the year span for the offences for this accused is less than for the accused **DURHAM** [approximately 1948 -1975], the types of offences and manner in which the offences are committed are very diverse.

It will be my suggestion at the end of this memo that each of the complainants, for each of the accused, should be run as separate trials.

There is no issue of the joinder of the accused: they will remain separate from each other.

This potentially means a total of 18 trials. I also suggest that the complainants ^{AYP} [DURHAM] and ^{AYR} [BAKER] should be proceeded with as the next trial matters for each accused as these are the most serious charges. Since the matter involving the complainant ^{AYB} [DURHAM] has been completed, there remains no matter that should be recommended as the next case for reasons of the strength of the case.

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In my consideration of the issue of joinder and similar fact evidence I have had regard to the following cases:

- **PFENNIG** HIGH COURT
- **BRS** HIGH COURT
- **DE JESUS** HIGH COURT
- **WACKEROW** C/A 62 of 1996
- **RILEY** C/A 109 of 1997

I have also had regard to section 567(2) of the Criminal Code: in considering this section I have had regard to the authorities of

- **R. V. CRANSTON** [1988] 1 Qd R 159
- **R. V. ANDERSON** [1994] 2 Qd R 409

As I understand the authorities on the admissibility of evidence for these types of cases, the basis for the admission of evidence from numerous complainants in the one trial would be :

- points of similarity; distinctive features; the "striking similarity" test - PFENNIG test
- evidence of each complainant is admissible on all of the charges of the other complainants - the DE JESUS test
- pursuant to the Code: joinable where the charges form part of a series of offences of the same or similar character.

In the case of **PFENNIG** the High Court was concerned with the admissibility of "propensity" evidence, by which evidence the Crown seeks to prove the offence/s charged by leading evidence of other, usually similar, criminal misconduct by the accused person. The following considerations emerge from PFENNIG:

- propensity evidence which merely shows that the accused is of bad disposition or has committed other offences, but has no other relevance, should not be received into evidence

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- such evidence will be admissible where its probative value in connection with the offence charged is sufficiently high
- to be admitted, the evidence of propensity must have a specific connection with the offence/s charged [a connection which may arise from the fact that the evidence gives sufficient cogency to the prosecution case or some aspect/s of it].
- the trial Judge determines whether/not such evidence is admissible
- the evidence will only be admissible if, when taken with the other evidence in the case, there is no reasonable view of the evidence which is consistent with the innocence of the accused.

WHEN IS THE EVIDENCE OF OTHER MISCONDUCT SOUGHT TO BE LED BY THE CROWN PROBATIVE OF THE OFFENCE/S CHARGED?

WHAT IS THE LOGICAL BASIS UPON WHICH IT IS SAID THAT SUCH EVIDENCE IS PROBATIVE OF THE OFFENCE/S CHARGED?

It is necessary to find something in the evidence or in its connection with the events giving rise to the offences which endows it with a high level or degree of cogency. Often that high level/degree of cogency is found in the **striking similarity**, underlying unity or "signature" pattern common to the incidents disclosed by the totality of the evidence.

The probative force cannot be found in the mere propensity of the accused to commit indecent acts with children.

PFENNIG TEST: For the accused **BAKER** those points of similarity or "system" may be considered as

- use of violence or use of the threat of violence
- preying on children who he meets from his work at NEERKOL
- sexual misconduct against children

For the accused **DURHAM** those points of similarity may be:

- preying on children who he meets from his work at NEERKOL
- sexual misconduct against children

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The similarity [for both accused]: that the children were from NEERKOL: I don't consider that this would be regarded as a distinctive feature. Unfortunately, offences of this kind usually occur in circumstances in which the children in question are either permanently or temporarily, in custody of the accused person. This evidence shows only that the accused have a propensity for taking advantage of opportunities that present themselves.

Sexual Misconduct: BAKER: the type of conduct described by the various complainants includes [see schedule for more detail]:

For complainant#1/male - accused touching complainant's penis, getting complainant to touch accused's penis, complainant performing oral sex on accused.

For complainant #2/male; engaging essentially in a short-term sexual relationship where the accused sodomised the complainant, there was mutual masturbation, the accused inserted rosary beads into the complainant's anus.

For complainant #3/female - digital penetration of complainant's vagina; inserting a stick into the anus of the complainant; rape.

For complainant#4/female - vaginal touching, rubbing gear stick of bus around genital area [on bus], grabbing/twisting of nipples, touching of accused's penis, digital penetration of vagina, simulated intercourse on stomach, digital penetration of the anus, vaginal penetration with a soft-drink bottle.

See schedule for a summary of the allegations by each complainant. I consider that the diversity of the accused's sexual misconduct precludes this from conduct which has a "signature" to it or a "striking similarity". The accused seems not to have a preferred "mode of operation". Rather it seems he took advantage of many children and violated them in an assortment of ways. His abuse is not even confined to male or female. For the purposes of PFENNIG, this type of "similarity" is not sufficient.

Likewise for the accused DURHAM the conduct complained of includes, and ranges from, a limited amount of misconduct/genital touching outside the clothes [for the complainant ^{AZA} ; see summary] to an isolated incident of rape [for the complainant -^{AYP}] to a course of conduct including mutual oral sex and simulated intercourse [for the complainant ^{AYE}].

The distinction must be drawn between mere propensity and "system". The evidence for these matters, does not I suggest show a "system". The significance of propensity evidence will be that it has some logical probative value in connection with the offence/s charged.

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DE JESUS: The High Court was there concerned with the circumstances in which different offences of a sexual nature may be joined in the one indictment. The case is authority for the proposition that in sexual cases, different counts of sexual misconduct ought generally not be joined on the one indictment unless the evidence in respect of each count is admissible on all of the others.

Apart from some overlapping between some of the complainants of some incidents [detailed below] essentially each of the complainants is giving an account of episode/s of sexual misconduct which happened to themselves. Episodes of sexual misconduct were [usually] not performed in a public environment or group setting. There is little shared ground or common theme to the offences apart from

- a general, shared background of physical abuse and/or neglect associated mostly with the conduct of the sisters at the orphanage and their "offsiders" [eg: teachers aides/ groundsman etc]
- the fact that these offences [mostly] occurred at the NEERKOL orphanage while the children were being "cared for" by the residents of the orphanage. [AYB] was the exception to this for the prisoner **DURHAM** [AYE] is the exception for this for the accused **BAKER**].

The only "crossing-over" of evidence follows:

BAKER

[REDACTED] sees the accused BAKER lift the dress of his sister/ the complainant [AYR] and touch her genital area. [AYR] gives a lengthy statement of episodes of sexual misconduct by the accused BAKER against her: her evidence does not specify an incident that matches that described by [REDACTED]. [REDACTED] is also a complainant and describes numerous episode of sexual misconduct against him by the accused BAKER.

[REDACTED] and [AYR] both, separately, describe an incident where they each saw the accused BAKER hit their other sister [REDACTED] in the face. [REDACTED] is a complainant only in relation to this count of bodily harm.

In my assessment of the admissibility of evidence, so far, this would simply result in [REDACTED] only giving evidence of what he saw [re: BAKER lifting [AYR] S dress/touching] in the trial involving the charges where [AYR] is the complainant; and [REDACTED] then, in a separate trial, giving evidence of what happened to him/as complainant. [AYR] & [REDACTED] giving evidence in the trial of [REDACTED] where [REDACTED] is the complainant.

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It cannot be argued that the evidence of each complainant may be admissible on all of the charges for the remaining complainants. So, there can be no submission about the admissibility of the evidence of all complainants in the one trial on a DE JESUS basis.

S.567

It is arguable that the "nexus" required for this section could be the NEERKOL connection; the offences are arguably all "of a similar character" as they are all sexual offences committed against children. Any offences joined under this provision will be subject to severance under section 597A. The risk of prejudice to the accused in the circumstances that all complainants, or a combination of complainants, were joined, is the same risk of prejudice [outweighing probative value] raised in the consideration of the other questions of joinder [above].

RECOMMENDATION: there should be a separate trial for each complainant. [The various charges/matters involving each complainant would be joined in that trial].

Please advise.


S. BAIN