

Interoffice

MEMORANDUM

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Dir. of Public Prosecutions

FILE NUMBER  
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To: Mr RN Miller QC Director of Public Prosecutions  
Brisbane

From: Jeff Clarke  
Crown Prosecutor Rockhampton

Subject: R -v- Kevin Leslie BAKER – Neerkol Orphanage.

Date: 16<sup>th</sup> December 1999

Recommendation: That an appeal be instituted against the ruling of His Honour Judge Robertson.

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6 DEC 1999  
Dir. of Public Prosecutions

As you are aware, I was briefed to prosecute this trial in August: the trial relates to the complaint of AYR, who you will recall meeting after the mistrial and verdicts of acquittal/directed verdict in April 1999.

The re-trial of the remaining four counts commenced before His Honour Judge Robertson in the Rockhampton District Court on Monday the 13<sup>th</sup> December 1999.

At the completion of the Crown case, the Defence made an application that Mrs AYR had not given evidence providing sufficient particulars of the incidents in Counts 1, 2 and 3 (particularly Counts 2 and 3 which comprised one episode in the accused's room at the orphanage).

The application was not made in relation to Count 4: the evidence supporting that count came only from AYR's brother, REDACTED.

In making the application, the Defence relied upon S's case (1989) 168 CLR 266 and on the Court of Appeal decisions of Knuth, (CA No. 64/98) and Rogers (CA No. 445/97: 17/98) and to a lesser extent, Fisher's case (CA No. 439/94).

As you may recall, the Crown case was one where the complainant said that this particular incident in Counts 2 and 3 occurred, and that a number of similar incidents occurred on other occasions in the same time frame. That evidence was quite rightly allowed to be led as "relationship" evidence.

When the complainant gave her evidence (transcript pages 38-43) she clearly gave evidence of the specific incident occurring one day within the time frame alleged, before going on to give the evidence of the other incidents that occurred in his room.

*Re Michael Byrne QC*

*For your consideration and advice*

*4 (7/12)*

She spoke of these incidents being of a similar nature where there would be intercourse, or where there would be touching.

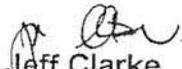
In my view (although the witness was reticent in providing as much detail as I would have hoped for), her evidence did not fall foul of the rule laid down by the High Court in S, and followed in the subsequent authorities.

I submitted to the learned Trial Judge that there was no difficulty with duplicity with the complainant giving her evidence in this way. I further submitted that the Defence were not embarrassed or prejudiced and the accused was not denied the chance of being given a fair trial.

This is especially so when it is considered that a full trial on this same evidence had been previously conducted in April of this year, and when one considers this application was not brought before the re-trial in August, or before the complainant came again to give evidence on this occasion.

You will see a copy of His Honour's ruling, commencing at page 215. You will note in the argument preceding that the Crown were invited to enter a nolle prosequi, so that this matter could be argued before the Court of Appeal, and so that the action referred to by the Honourable Justice Lee in Knuth, (page 13) can be contemplated. That is, that some modification be made by Parliament to the rules relating to particulars that should be relied on by the Crown in cases such as the present one. After seeking the advice of REDACTED, Consultant Crown Prosecutor, I entered a nolle prosequi in relation to Counts 2 and 3. The judge ordered a mistrial in relation to the remaining counts; that was done so that this matter can now be brought before the Court of Appeal to be resolved.

Please contact me to discuss this matter if necessary. I commence leave tomorrow the 17<sup>th</sup> of December, but can be contacted on REDACTED. I return to work on the 10<sup>th</sup> of January 2000.

  
Jeff Clarke  
Crown Prosecutor

16<sup>th</sup> December 1999