State Reporting Bureau

BUREAU COPY 150897

TRANSCRIPT OF PROCEEDINGS

Copyright in this transcript is vested in the Crown. Copies thereof must not be made or sold without the written authority of the Director, State Reporting Bureau.

Issued subject to correction upon revision.

DISTRICT COURT

CRIMINAL JURISDICTION

JUDGE O'BRIEN

THE QUEEN

v.

GRAHAM LENARD NOYES

BRISBANE

..DATE 18/01/2000

..DAY 1

0001 2082

Telephone: (07) 3247 4360 Fax: (07) 3247 5532

MR R POINTING (instructed by the Queensland Director of Public Prosecutions) for the Crown

MR A J GLYNN SC, with him MR P J CALLAGHAN (instructed by Connollys) for the accused

MR POINTING: If Your Honour pleases, I mention the matter of Graham Lenard Noyes.

HIS HONOUR: Yes.

MR POINTING: There is an indictment before the Court charging Mr Noyes with a total of 53 offences of a sexual nature, the majority of which are indecent dealings and the remainder being sodomy.

HIS HONOUR: There are two indictments, in fact, is that so?

MR POINTING: Yes. We are only concerned with the larger indictment. As I understand it this is an application by the defence pursuant to section 592A to sever these counts on the indictment.

HIS HONOUR: Yes.

MR POINTING: I take it that Your Honour has no material before you?

HIS HONOUR: I have the depositions and I have the indictment.

MR POINTING: What I will hand up to Your Honour is a copy of the particulars which have been provided by the Crown to my learned friends, and which I understand they accept as being a document upon which we are able to proceed today.

HIS HONOUR: That will be marked Exhibit "A" in these proceedings.

MARKED "A" FOR IDENTIFICATION

MR POINTING: The other document which I will hand up to Your Honour, and again a copy of which I have provided to my learned friends, is a summary of that document. Your Honour will see that is quite a lengthy document.

HIS HONOUR: That will be part of Exhibit "A" also.

MR POINTING: That is a very short summary of each complainant.

HIS HONOUR: I haven't read the depositions.

T802 2081 T0001

MR GLYNN: Can I say that perhaps to help we are prepared to accept that the facts set out in the longer document represent the Crown's facts for the purpose of this hearing, so that Your Honour doesn't, unless Your Honour wants to, need to go to the depositions.

HIS HONOUR: Thank you, Mr Glynn.

MR POINTING: I took it my learned friend would argue against the joinder.

HIS HONOUR: All right.

MR GLYNN: Your Honour, there are, as my learned friend indicated to Your Honour, some 53 counts. The allegations are between 30 and 35 years old, and that is a matter which in my submission will be of some significance in Your Honour's decision. The allegations, as Your Honour would have observed, include touching of genitals, masturbation of the complainant or the accused by each other, oral sex and sodomy in varying combinations, but not always - frequently not always all of those matters occurring. Your Honour, it is my submission that there are a number of fundamental propositions upon which you would operate. The first is the joinder of allegations by up to 10 complainants of sexual misconduct can only engender enormous prejudice. In this particular case the effect of that prejudice is made much worse by the very great delay in the matters coming before the Court. Your Honour's experience would tell you that when there are old allegations there are often significant gaps in the evidence, which frequently are relied upon in the defence of the matter as demonstrating the unreliability of the evidence, and that often can result in acquittal where there is one complainant, but where there are 10 complainants the jury will be swamped by the fact of 10 complainants and the gaps will tend to disappear, or the significance of the gaps will tend to disappear. Usually in a case of this age, in fact almost inevitably, one would expect a Longman direction to be given, but a Longman direction against the background of 10 complainants will really have no effect on a jury's deliberation in reality, so that the delay and the problems created by delay will simply be exacerbated by the number of sets of allegations or complainants.

Your Honour, starting from the proposition that there is prejudice, and in my submission there can be no other conclusion other than that there is prejudice engendered by the number of complainants, such prejudice is impermissible unless - and I put this as a general rule, although specific to this case - the evidence on group 1, if I can refer to them as group 1 to 10 for each of the complainants, unless the evidence on group 1 of offences is admissible in respect of groups 2 to 10, and the evidence on groups 2 to 10 is admissible on group 1. I use the term a "general rule". I don't say there is never an exception to that, but I certainly can't think of any.

HIS HONOUR: I think that has generally been the approach since de Jesus, anyway.

MR GLYNN: Since that time it really - I hesitate to use the term folk law, but it has established. It has almost become a rule of antiquity in a very short period of time. If I could take Your Honour to the decision of the Court of appeal in Riley. Riley, Your Honour, is unreported. It is CA number 109 of 1997. The Court of Appeal was the then President Fitzgerald, and Justices Moynihan and Dowsett.

HIS HONOUR: Yes.

MR GLYNN: Your Honour, probably on the first point referred to I don't need to detain Your Honour long. They simply confirm the proposition which we just discussed. At page 2 of the President's judgment he says at the first complete paragraph, third line:

> "Ordinarily at least" - referring to the joinder of counts relating to a number of complainants - "that should not be done with counts alleging sexual offences unless all the evidence in relation to all the alleged offences is admissible in respect of each count."

Your Honour, Justice Moynihan said at page 2 of his judgment, referring to the same problem - at the second complete paragraph, second line:

> "Ordinarily that should not occur with counts alleging sexual offences unless all the evidence in relation to all the alleged offences is admissible in respect of each offence",

and His Honour refers to the High Court authority. Justice Dowsett, to whose judgment I will come shortly in more detail, also reaches a similar conclusion, and that was a case where the Court in fact overturned the convictions based on the improper joinder.

Your Honour, it is my submission that evidence in such situations as these is almost inevitably only admitted on another group of offences where there can be said to be, if I can use the term, a striking similarity, although that particular term perhaps finds less favour than it did prior to the decision of the High Court in Pfennig, which is 182 CLR 461. However, in Riley Justice Dowsett, who as I indicated wrote the principal decision, discussed some of the principles at pages 7, 8 and 9.

At page 7 about halfway down the page he says that he considers that in general a trial Judge should be guided by the following considerations which emerge from Pfennig:

> "(A) propensity evidence which merely shows that the accused is of bad disposition or has previously committed offences, but has no other relevance,

should not be received into evidence;

(b) such evidence will, however, be admissible where its probative value in connection with the offences charged is sufficiently high;

(c) to be admitted in evidence the evidence of propensity must have a specific connection with the commission of the offences charged, a connection which may arise from the fact that the evidence gives sufficient cogency to the prosecution case or aspect or aspects of it;

(d) the trial Judge must determine whether or not such evidence is admissible;

(e) 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."

Page 8, the second line, His Honour says:

"Unless the evidence in a particular case can be shown to be relevant in a logical way, it cannot be admitted...If relevance is shown, the trial Judge must decide the question of admissibility by reference to Pfennig."

In my submission, what His Honour is saying there is that the evidence on group 1, for example, must be logically relevant to prove the guilt of the accused on groups 2 to 10 other than by way of merely showing that he is a person likely to commit that type of offence. There must be something in the conduct in relation to the first group which tends to prove the commission of the offences in groups 2 to 10, and that process has to be then approached for every single group in relation to the other groups of offences.

His Honour refers to part of the judgment in Pfennig - that is the majority judgment - at page 9 about halfway down the page. He quotes this passage from Pfennig:

"Whichever ground has been assigned for admitting evidence of similar facts, the Courts have denied that its probative force is to be found in the mere propensity of the accused to commit indecent acts with boys...The distinction between mere propensity on the one hand and 'system' or non-innocent association on the other seems extremely fine. And there may be little distinction between evidence tending to prove the truthfulness of a complainant's evidence and evidence tending to show that the accused was likely to have committed the indecent act to which the complainant testifies."

that, with respect, highlights the difficulty which confronts a Court, particularly when what is sought is not the joinder of two groups of offences, but really as is sought here, the joinder of 10 separate groups - what the Crown case, in my submission, amounts to here. That is, the Crown's argument in favour of the joinder is that the accused took advantage of opportunity to commit offences of a sexual nature as and when those opportunities presented themselves. That's the very thing that Justice Dowsett said in his judgment at page 15 and following that should not be the basis for admissibility. About halfway down page 15, in reviewing the facts upon which the case depended - and I should say this to Your Honour, there were two groups of offences, each of which had sub-groups. There were the Ridgeway offences and there were the Tripovich offences. After the trial had been under way for some time, His Honour discharged the jury from considering the Ridgeway group of offences, but the evidence of the Ridgeway group of offences remained before the jury. There were four complainants within that group. Within the Tripovich group of offences the jury had to consider three complainants. My reading of Riley is that the Court, without even going to the Ridgeway group of offences, concluded that the joinder was improper simply on the basis of the mis-joinder of the Tripovich offences to each other, and His Honour said at the paragraph to which I referred:

> "Firstly, it was said that some of the children in the Ridgeway group were living with the appellant at the time of the alleged offences against them, as were two of the children in the Tripovich group. Concentrating for the moment on the Tripovich complainants, both Luke and Jessica were living with him at the time of the alleged offences and Naomi may have been living with him at the time of at least one of the offences against her. However that could not be called a distinctive feature. Unfortunately, offences of this kind usually occur in circumstances where the children in question are, either permanently or temporarily, in the custody of the accused person. One imagines that there is rarely opportunity for a man with predatory sexual predilections to find victims wandering at large. This evidence showed only that he had a propensity for taking advantage of opportunities as they presented themselves."

Your Honour, there is nothing in the alleged offending behaviour which gives to the offences some signature or underlying unit, other than that they were offences of a sexual kind and of a varying type to the various groups of offences. They simply represent various groups of offences. What the Crown has to show, really, to put what I said earlier in another way, is that the evidence on counts 1 to 3 is admissible on counts 4 to 53 in accordance with what is said in Riley and the authorities to which it refers, and that the evidence on counts 4 to 53 is admissible on counts 1 to 3, and then that process has to be repeated for each of

the groups of offences.

Your Honour, Cranston is an old decision where the issue was slightly different. Cranston is reported in 1988, 1 QdR 159, and it is probably a decision which Your Honour is familiar with, although not one that is ------

HIS HONOUR: I have encountered it many, many times.

MR GLYNN: I really only want to take Your Honour to Cranston for a particular passage which is to be found at page 164, where at about line 42 or 43 His Honour Justice Macrossan, as he then was, said:

> "The Courts may find that an appropriately liberal exercise of discretion to sever is called for in doubtful cases. Certainly it will be necessary to be cautious in concluding that multiple counts do truly involve a series of offences of a similar character."

Your Honour, the issue here is a slightly different one. What Your Honour principally has to consider here is whether the evidence is admissible one on the other, because if Your Honour concludes that it is not or is not satisfied that it is, then Your Honour would, in my submission, necessarily exercise your discretion in favour of severance, given the nature of the offences. What I, however, simply point to is that there the Court was simply saying because of the consequences of mis-joinder a fairly liberal or sensible approach needs to be taken to avoid all of the consequences of mis-joinder where complainants are called, accused is put to the cost and more particularly the stress of a trial only to have the matter have to come back for rehearing because of the mis-joinder.

Your Honour, those are essentially my submissions.

HIS HONOUR: Thank you, Mr Glynn. Yes, Mr Pointing?

MR POINTING: Your Honour, perhaps if I could begin by drawing out those similarities, those features of the evidence of each of the boys or the complainants which the Crown would point to as making the evidence of each complainant admissible each against the other. As my learned friend has already indicated, the offences in all cases are alleged to have occurred at least 30 years and more ago, and those allegations so far as the whole indictment is concerned cover a period of about five years as I understand it.

All of the complainants involved were prepubescent or in one or two cases at the threshold of puberty. They were all residents of the Enoggera Boys Home, the place at which the accused was a part-time, as I understand the evidence, a part-time carer. All of the boys identify the offender or describe the offender as a police officer. In most cases they speak of a uniform. In most cases it is I think fair

to say described as khaki in colour; some speak of blue. One complainant, I think, speaks of having seen the offender in both colours - that is, khaki and blue - over a period of time, as I understand his evidence. All of the boys recall the offender staying at or in a room just off or in the vicinity of the dormitory in which a lot of these offences occurred. He had his own room just nearby.

On some occasions, I just can't recall whether it is about half or approximately half, some of the offences alleged against the offender occurred within that room; otherwise the offences began usually in the bed of the complainant and for those who were indecently dealt with or otherwise mistreated were taken from their beds after initial approach and all of the further offences occurred allegedly in that room.

Many of the complainants also describe or speak of the offender as being a person who drove an EH model Holden motor vehicle. Some describe that as grey; others describe it as blue. Some don't describe a colour. The way in which the offences usually came about was that I think except for two complainants, all of them say that they were in their beds, usually asleep, when they were woken to find the offender touching, massaging the complainant's thigh, or as a precursor to further indecent dealings such as touching of the penis or indeed waking to find the offender actually touching the complainant's genitals, and then the further mistreatment of abuse would continue from that point.

In all cases the accused can be said to be in a position of trust, or perhaps more accurately authority over the boys given the fact that he was a part-time carer at this home, and in all cases another feature that is common to all is that the complainants were or could be said to be vulnerable to the abuse coming - they being in this position, that is, residents of this home.

The Crown says that all of those features show a means by which the offender would recruit subject of his abuse, to use the words I think my learned friend referred to earlier from Dowsett J's judgment in Riley. This was or can be seen to be a 'system' and together the evidence in the Crown's submission should be admitted in order to show a non-innocent association - again to use His Honour Dowsett J's words.

The evidence would also go to the question of identification of the accused as being the offender in each case. The most recent authority, as I understand it, that touches upon this question is that of The Queen v. Gareth Andrew Hooper. That is CA 37 of 1999. That authority sets out the questions that were originally formulated by Mr Justice Thomas, I think, in an authority called O'Keefe. Those questions are stated in this judgment by the Chief Justice. I will hand up a copy to Your Honour.

HIS HONOUR: Yes.

MR POINTING: That particular matter concerned the complaints of two boys. If Your Honour firstly goes to page 3, Your Honour will see set out there about six or seven perhaps similarities which the Crown contended before the Court of Appeal as being evidence of similar facts from each complainant - very general matters, and I suppose not uncommon in many cases of indecent treatment of children. Some of those did not carry a great deal of weight, as I read the judgment, with the Chief Justice, who then reformulated the same number on the following page, page 4, and Your Honour will see that those features which the Chief Justice nominates, some can be seen to be present in this particular case.

I should say this, in that case the two complainants speak of - well, not exactly the same kind of mistreatment on each occasion. They were in the company of the appellant because of an association through basketball. They are the words used by the Chief Justice "common interest in basketball". The offence in relation to the first complainant occurred in 1995 and that was committed during the course of the group of boys - after a game or training, as I understand it - watching a movie; he masturbated the child under a blanket, and then further a little later the appellant compelled the complainant to rub the appellant's penis, then the child ran off, but they returned apparently to the lounge area and further masturbation of the complainant to ejaculation occurred.

In the other case the complainant was 14 years of age - not that there is a great deal of difference in age. These offences occurred two years later and that period of lapse of time is perhaps significant when one compares it to this situation, where we have as I understand the situation when one looks at all of the evidence, offences occurring throughout that five year period that I mentioned.

MR POINTING: Again, it was through an association in connection with the basketball. They were watching a movie and the offence occurred after both the appellant and the complainant went outside to the area of a pool, where the complainant was masturbated and then had oral sex performed upon him by the appellant.

HIS HONOUR: Mr Pointing, if this is a convenient time, I might interrupt you there and break off for lunch. 2.30, please.

THE COURT ADJOURNED AT 1.01 P.M. TILL 2.30 P.M.

THE COURT RESUMED AT 2.38 P.M.

MR POINTING: Your Honour, just as we broke for lunch I was pointing out the points of similarity and dissimilarity, I suppose, between the two complaints of the complainants in the matter of Hooper. As against that, in this instance the Crown's submission is that the evidence of the complainants is distinctly similar in the way in which, for instance, the accused went about touching or mistreating the complainants. That is, often the complainants would be in bed asleep and they would awake to find themselves being touched, or something as a preliminary to that. As I say, in almost all cases that is how the allegations proceed.

Finding that there was that similarity among the evidence of the complainants, the Court in Hooper, certainly in the Chief Justice's judgment, addressed the test as to whether the joinder could be permitted. The first question there, of course, is as set out on page 2; whether the propensity evidence was of such a calibre that there was no reasonable view of it other than as supporting an inference that the accused is guilty of the offence as charged. The Crown's submission in this case is that that question would be answered in the affirmative, of course.

Then one goes to the second question. If the propensity evidence is admitted, is the evidence as a whole reasonably capable of excluding all reasonable hypotheses. As I think I mentioned earlier, the point of the admission of the evidence would be to show a system of seduction, a system of recruitment of these complainants. It would assist in the identification of the accused as the offender in each instance. It would show a non-innocent association between the accused and the children in each case, given the circumstances that he is a carer in the home and part of his duties, no doubt, would be to check on and care for the children in the dormitory during the course of the night or nights.

As a final submission, the Crown's submission is that these questions would both be answered in the affirmative, given the fact that the evidence looked at in each case bears a striking similarity or unusual feature or underlying unity or system or pattern, as the learned Chief Justice speaks of on page 4. His Honour does also say that the question that is posed is dependent very much upon the matter of impression and, of course, recognises that this is not an easy task to complete.

That case goes on to say that the approach taken by predators in Hooper's case and the combination of the circumstances outlined by His Honour do suggest a particular distinctive approach characteristic of that appellant and that is also the Crown submission in this case and it is the aggregation of those features which warrants that conclusion. Unless there is some particular matter, those are -----

HIS HONOUR: Thank you, Mr Pointing. Mr Glynn?

MR GLYNN: If I could deal with the features my learned friend relies on, he speaks of the fact that the boys are pre-pubescent or at the threshold of puberty. That in itself is a matter of no moment or similarity that distinguishes this from so many other allegations of a similar type. It creates no unique feature.

My learned friend then referred to a couple of matters. He tried, I think, to make identification an issue when identification does not appear to be an issue. He spoke of the fact that in their evidence the people describe him as being a police officer and wearing a uniform. That gives no system. The evidence is, in fact, that the accused was a police officer and therefore wears a uniform. The Crown case was that he lived in the dormitories.

If the Crown say an issue is identification, they aren't relying on the fact that he committed offences against other boys in any particular complainant's case, they are relying on the fact that other boys described him in a particular way. That is not a basis for admitting the evidence of the other boys that they were molested by him. At the very most, I allow the other boys to give evidence that when they were there, the accused was a person who lived there and who wore that sort of clothing. In other words, that would be the limit upon which that would justify any evidence given by the other complainants.

The same applies to the description of him being a person who drove a grey/blue EH Holden. All that is is the usual sort of evidence that this is how you identify this person as being a person who had that vehicle. It does not justify the admissibility of evidence that he molested other boys in any particular case. It is simply evidence to show that he was there at that time and that is how he was remembered. It is not evidence that can be used to justify the joinder of charges on the basis that the evidence would be

admissible on those joinder charges.

Your Honour, the other matters that the Crown referred to, a number of them were location, the position of trust, the complainants' vulnerability as a result of their living in the residence. All of those are simply matters that go to opportunity. They are not matters which are probative of the fact that in any particular case he committed the offences. They are simply matters that go to opportunity, which is the very simplistic approach that was rejected by the Court in Riley's case via Dowsett J's judgment.

My learned friend said that some of the features show a system or non-innocent association. Your Honour, this isn't a non-innocent association sort of situation. Non-innocent association is where a person would have contact with the complainants and it could either be for an innocent purpose or for an unlawful purpose. Here there is a clear innocent connection on the Crown's own case; namely, that he lived in and helped supervise the children.

The question is whether there was an additional purpose and that is not something that gains any benefit from a number of other people saying that he molested them. It doesn't overcome the innocent association because the innocent association is already there, on the Crown case. It is part of the Crown case. It is part of the opportunity evidence.

Perhaps I could give Your Honour an example of the point I am trying to make. If Your Honour were to take my learned friend's summary of evidence particulars - that is the short document that he provided to Your Honour.

HIS HONOUR: Yes.

MR GLYNN: If Your Honour looks at counts 1 to 3, the second paragraph, "The complainant was in bed, woken by the accused massaging his thigh. He placed his hand into his pants, touching the penis. Told to remove pants. Taken to the accused's room, where he was sodomised." Your Honour would have to ask yourself how that evidence from that complainant would compel you to accept the evidence, if you go to the next set of complainants' allegations, in paragraphs 2, 3 and 4. "First showered with the accused rubbing himself against the back of the complainant" - sorry. "First occurred in the shower with the accused rubbing himself against the back of the complainant, he feeling the accused's penis becoming erect. The complainant told to remove accused's penis from pants and perform oral sex on him. The accused ejaculated into the complainant's mouth." Your Honour, that could be repeated interminably, but you have to ask yourself how the first one could compel a jury to accept the second one or the third one or the fourth one.

There is nothing that comes through in these that suggests a unique or striking feature that tends to the view or leads to the view that one group of complaints must be true because of evidence from other complainants of a like

nature, beyond the fact that there is, according to the Crown case, a propensity on the part of this man to commit offences of this type, which is of course a totally impermissible reason for its being admitted.

Your Honour, whilst the Court of Appeal in its judgment in O'Keefe sets out in paragraph 21 of the judgment of Thomas J the two questions to which a Trial Judge must address himself in this situation, those need to be read in the light of what Dowsett J says in Riley at page 7. What Dowsett J reminds us all of is the need for there to be probative value in the connection between the joined offences and the subject offence. That is what I was seeking to do by taking Your Honour to those two paragraphs of the summary.

You have to say to yourself: what is there in those features which leads inevitably or helps to lead inevitably to the conclusion that the second paragraph or the allegations contained in the second paragraph must be true, that he must be guilty of them. What Dowsett J reminds us of is the need for the propensity evidence to be relevant to the particular allegations that are the subject of the count upon which the focus is had.

HIS HONOUR: Yes.

MR GLYNN: Your Honour, it needs to be remembered, of course, what the Chief Justice said in Hooper; namely, that in cases like this it is very much a matter of impression. My submission here is that Your Honour's impression would be that these matters do not have that uniqueness or those striking features that compel you to the idea that because of the propensity evidence, he must be guilty of the subject offence.

Her Honour, the President, in paragraph 3 of her judgment in Hooper returned to what is, in my submission, the fundamental paragraph from the judgment of the majority in Pfennig, where the passage reminds not only of the importance of the probative value of the evidence, but of the concern about the high level of prejudice that comes from evidence of this sort. The Court said that where the propensity or similar fact evidence is in dispute, it is still relevant to prove the commission of the acts charged. The probative value of the evidence lies in the improbability of witnesses giving accounts of happenings having the degree of similarity unless the events occurred.

That is what is lacking in these various accounts. All of them are the sorts of things that one hears on a daily basis in the courts. There is nothing striking or unusual about them that compels that they be considered together. The Court went on:

> "Obviously the probative value of disputed similar facts is less than the probative value those facts would have if they were not disputed, but the

0001 2070

> prejudicial effect of those facts may not be significantly reduced because the prejudicial effect that the law is concerned to guard against is the possibility that the jury will treat the similar facts as establishing an inference of guilt when neither logic or experience would necessitate the conclusion that it clearly pointed to the guilt of the accused. Because propensity evidence is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such, but because it has a prejudicial capacity of a high order, the Trial Judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence which is consistent with the innocence of the accused. Here 'rational' must be taken to mean reasonable and the Trial Judge must ask himself or herself a question in the context of the Prosecution case. That is to say that he or she must regard it as a step in the proof of that case."

If I can go back to what I was doing with the summary, what is contained in the second paragraph under counts 1 to 3 must be regarded as a step in the proof of what is contained in the second paragraph of counts 4 to 14. That can't possibly be the fact. It can't be seen as a step. The Court says:

> "Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect and unless the tension between the probative force and prejudicial effect is governed by such a principle, striking the balance will continue to resemble the exercise of a discretion rather than the application of a principle."

In my submission, Your Honour, this case so lacks the features required to permit joinder that it has to be said that if joinder were justified in this case, there is virtually no case of multiple complainants where joinder would not be justified, because the features here in respect of one complainant do not compel one to the view that he must be guilty in respect of another set of offences other than by virtue of the fact that they suggest that he has a propensity to commit offences of this general description. Thank you, Your Honour.

TAKE IN RULING

2069 T000 1