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Sergeant Roger Newman
Northern Territory Police Service
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Dear Roger

RE: Donald Bruce HENDERSON - 20106328

This matter is listed for oral committal on **5-7 February, 2002**. I have been assigned to prosecute the matter.

I have already mentioned to you a difficulty which I see with the prosecution. I think that the way the multiple counts have been laid offends against the rule in the case **S -v- The Queen** (1989) 168 CLR 266. That is because the complainants do not identify particular incidents but merely describe a type of offending, going on to say that it happened many many times.

In **S -v- The Queen** the High Court said this about laying charges in that fashion:

> *Although each count in the indictment was regular on its face, it referred indifferently to a number of acts of intercourse indistinguishable one from another save as to the different occasions of their occurrence. The facts thus disclosed that, in each count, there was a latent ambiguity which was not removed by particulars, nor by an election by the prosecution to proceed on a particular act falling within the period specified in the count, nor by construing the count as relating to the first of the offences committed within the specified period (as Jacobs J. suggested in Mackay v. The Queen (1977)* 136 CLR 465, *at p 472). To allow the trial to proceed without confining each count to a single act of intercourse was an*

error of law which, subject to the proviso in s.689*(1) of the Criminal Code (WA), entitled the applicant on appeal to an order quashing the conviction: Parker v. Sutherland (1917) 116 LT 820; Johnson v. Miller (1937)* 59 CLR 467.

Per Brennan J at page 269

Had the evidence revealed only one offence in each of the years in question, there could have been no complaint about the form of the indictment. But the evidence disclosed a number of offences during each of those years, any one of which fell within the description of the relevant count. Because of this there was what has been called a "latent ambiguity" in each of the counts: see Johnson v. Miller (1937) 59 CLR 467, per Dixon J. at p 486. That ambiguity required correction if the applicant was to have a fair trial.

There was, I think, obvious embarrassment to the applicant in having to defend himself in relation to an indeterminate number of occasions, unspecified in all but two instances, any one of which might, if it occurred in one of the relevant years, constitute one of the offences charged.

Per Dawson J at page 274

Of course this does not mean that the prosecution must specify a particular date as the occasion on which it relies. But it does mean that, as soon as it appears that a count in the indictment is equally capable of referring to a number of occasions, each of which constitutes the offence the legal nature of which is described in the count, the prosecution should identify the occasion which is said to give rise to the offence charged. This did not happen in the present case nor did the trial judge adequately convey to the jury the difficulties facing the applicant by reason of the failure to do so. The matter was left to the jury on the basis that so long as they were satisfied an act of carnal knowledge occurred during a period specified in a count in the indictment, they could convict the applicant on that count. The trial miscarried for that reason.

Per Toohey J at page 282

I thought that I should forewarn you that there is this difficulty and warn you of the likelihood that the counts will be reduced to one in number for each type of offending. Of course, if the complainants are able to describe particular incidents then we can proceed on each particular incident which they can describe.

The other problem which this raises is the need to be able to describe at least one incident in each case. In the past I have found that complainants can often describe the first episode of a particular type. If not, then inevitably there is one that stands out. For obvious reasons, it is the first incident of its type that usually qualifies.

The statements from these complainants do not indicate expressly that they have a recollection of that sort. I am assuming that to be the case but would like you to take further statements from each of them dealing with that issue.

It is evident from the statement of AJB that prior to his molestation by the accused he was engaged in sexual activity with AJD Mr. AJD, in turn, indicates that he was introduced to this sort of conduct by the accused. I gather from the papers that no charges have been laid against the Mr. AJD Would you please confirm that that is the case and indicate why it was not considered necessary to charge him. Whilst I have not given the matter comprehensive consideration, one of my colleagues has ventured the opinion that this circumstance causes problems for the prosecution. I reserve my own views until I hear what you say about the matter.

Yours sincerely

ANTHONY ELLIOTT
Crown Prosecutor