IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION) CR 79/93

BETWEEN THE POLICE DEPARTMENT of Rarotonga

Informant

AND AMOA AMOA of Rarotonga, Businessman

Defendant

Counsel: Mr M C Mitchell for Crown
Mr N George for Accused

Hearing: 5 May 1993

REASONS FOR RULING OF QUILLIAM J

The accused is charged with having committed incest with his daughter on 27 March 1992.

Upon the depositions there is evidence from the daughter as to numerous acts of intercourse between herself and the accused. Apart from that there is no direct evidence which would support the allegations made by the daughter.

A sample of the accused's blood was obtained from him by the Police and was sent to New Zealand for analysis, and in particular for the process known as DNA profiling. It is intended by the Crown to offer the evidence of the scientist who tested the blood sample. That sample had been matched with blood taken from the embryo of the baby with which the

daughter was then pregnant. Objection having been taken to that evidence being given, the question of its admissibility was dealt with upon a voir dire in advance of the trial. After hearing counsel and having taken time for consideration I disallowed the objection and admitted the evidence. I now set out my reasons.

The main basis of the objection was that the process of DNA profiling is a complex and novel procedure of a kind almost completely unknown in the Cook Islands, and that before there was any question of a suspect being requested to supply a sample of blood which might be used for DNA profiling there should be evidence that the suspect was fully informed of what was intended so as to have been able to give a truly informed consent to the taking of the sample.

With regard to the principle which should be applied in such a matter, considerable assistance is available from the decision of the New Zealand Court of Appeal in R V Pengelly (1992) 1 NZLR 545. Whether or not that decision is binding in the Cook Islands is not clear, but as a decision of the Full Court it has greatly persuasive influence.

Pengelly was the case of a 17 year old who was convicted of the murder of a 77 year old woman. Bloodstains were found at the scene and were sufficient for analytical purposes. A sample of blood was obtained from the accused and subjected to DNA procedures. The result was a high degree of probability that the blood of the accused and the blood in the house were from the same person. The accused appealed on the basis that his consent to the giving of blood was not an informed consent because he was unaware of the existence and use of DNA procedures. There were other grounds also which are not relevant for present purposes.

Because there is a marked similarity between the argument advanced to the Court of Appeal and that advanced in this case, and also a similarity in the factual situations, I think it is helpful to cite the whole of the relevant passage from Pengelly which appears at pp 548-9:

> "Mr Gibson, counsel for the accused, submitted that the evidence did not show that the blood samples had been obtained by consent. He submitted that consent had to be both informed and voluntary, and that this required not merely asking a suspect to consent to the taking of a blood sample, but also informing him of his right to grant or withhold consent. It was submitted that

Pengelly should also have been told that blood has been found in the house and that the sample would be used to compare this blood with his blood. Because DNA testing is "only one step short of positive proof", it was submitted that the implications of such testing were such that they should have been explained to Pengelly in order to obtain an informed consent. He should have been told that there was a new technology available which would establish almost conclusively whether the blood in the house was his or was from someone else.

In our view, there is no substance in these submissions. It is implicit in the asking for consent that the person asked does not have to give it. At the time of his initial consent the accused was aware that a woman had been murdered in the house that night, that his fingerprints had been found on the window louvres, that there was blood on the windows and that the police believed he had been inside the house. It must have been quite obvious to him that the only purpose of taking blood samples would be to further the police investigtion by ascertaining whether or not the blood stains found at the house could have come from him. That, we think, was in itself

sufficient. We respectfully adopt the trial Judge's view on this matter, which he expressed as follows:

> "I believe it is sufficient to authorise the taking of blood if consent to that course is obtained without artifice or deception as to the purpose for which the sample is required, from a person in a position to give a free and informed consent.
>
> I do not believe that in this context informed consent requires that the person be expressly informed either that he may refuse to consent, or about the methods or techniques which may be used to obtain informtion from the samples given by him."

In the light of these comments of the Court of Appeal it is necessary now to consider the circumstances in which the sample of blood was taken from the accused. This appears from the evidence given at depositions by Inspector Browne who interviewed the accused in the course of the Police inquiry.

Inspector Browne's evidence was that on 8 April 1992 he interviewed the accused at the Police Station in Avarua "regarding allegations of sexual abuse against the

complainant Bridget Jamoune Webb Amoa." He told the accused that the Police had received a formal complaint stating that he had sexual intercourse with his daughter between January and March 1992, and on the last occasion on 27 March 1992. The accused denied the allegations and told the Inspector that his daughter had told him she was pregnant, and that he believed the person responsible was her boyfriend. He also told the Inspector there were various other occasions when his daughter had apparently been associating with men.

There then appears the following passage in the Inspector's deposition:

> "The accused told me that he had no objection to have his blood tested or matched against the child's which the complainant was carrying at the time. He said that he was willing to give blood samples for this test to clear him from these allegations."

The accused was then taken to the hospital where a blood sample was obtained. After that the interview was resumed in the course of which the Inspector has deposed:

> "I told the accused that his blood sample would be forwarded to the Department of Scientific and Industrial Research (DSIR) in New Zealand for matching with the blood grouping of the complainant's child that he was carrying at the time."

The Inspector then deposed that towards the end of October 1992 the Police received the result of the DNA examination, and that on 21 January 1993 he again interviewed the accused who maintained his denial of having had intercourse with his daughter. The Inspector deposed finally in respect of that interview:

> "The accused stated that last year 1992, he voluntarily gave his blood samples to the Police for DSIR and blood grouping examinations - DNA because he maintained that he was innocent and that he did not have sexual intercourse with the complainant,"

At the voir dire this evidence was subjected to some criticism although it must be noted that the Inspector was not required to attend for cross-examination on his deposition. Criticism was directed to the passage last quoted which contains the first and only reference to DNA

testing having been mentioned between the accused and the Inspector. It was argued that, coming as it did after the Inspector knew the result of the analysis, it had the appearance of the Inspector only belatedly having realised the significance of the analysis and that the possibility of such an analysis, and the significance if it should have been told to the accused before the blood sample was taken.

Not having seen the Inspector give his evidence I could not draw any such inference, but I am content to consider the present application by putting aside that final passage in the deposition.

Accepting the rest of Inspector Browne's evidence as being capable of acceptance the position is that the accused gave his consent to the taking of the blood sample knowing that it was to be used for the purpose of matching with that of the embryo. He also knew that the sample was requested in the course of a Police inquiry into allegations against him of having had sexual intercourse with his daughter.

In these circumstances there can, in my opinion, be no basis upon which the evidence of the DNA testing should not be admitted. To adopt the words used in Pengelly, there is no suggestion but that the consent was obtained "without

artifice or deception as to the purpose for which the sample (was) required."

I should add that I have been fully conscious of the great importance to this case of the admission of the scientific evidence. As I have said earlier, apart from the evidence of the daughter, there is no direct confirmation of any act of intercourse between him and the accused. The deposition of the scientist is to the effect that neither of two men advanced as possible fathers of the daughter's child could in fact have been responsible, but that it was 72 times more likely that the accused was the father than that anyone else was.

In these circumstances I have felt it necessary to be very confident that the evidence should be admitted before deciding to admit it.

I should also add that these reasons have been written in full before the commencement of the trial.