ANNEXURE "A"

R v AEM SNR
R v KEM
R v MM

The genesis of this Inquiry

This Inquiry was established[1] in response to intense, and critical, media coverage of a case in which two sixteen year old females, stranded without transport at a suburban railway station at 1am, were picked up by five young males in a car and taken unwillingly to a house where they were both subjected to aggravated sexual assaults of the most atrocious kind. The Court of Criminal Appeal, by which the matter was finally determined, said:- "The humiliation and degradation involved in these offences is almost unspeakable".

Three of the young men pleaded guilty in the District Court to two counts of aggravated sexual assault pursuant to section 61J of the *Crimes Act*, 1900, and in addition had one or more offences for sexual assault committed against the same victim taken into account under section 33 of the *Crimes (Sentencing Procedure) Act*, 1999. In the case of each accused, the Crown tendered a statement of agreed facts together with a

document, Exhibit 1, in which the Crown indicated that it did not dispute certain facts and conceded others. The facts not disputed were:-

1. that the two victims voluntarily returned to the premises with the offender and co-offenders;
2. that no knife was produced in the car in transit to the premises nor any threat made to the victims by the offender or co-offenders at that time.

The matters conceded were:-

1. the offender's guilty plea (to the indictment as finally constituted) was made at the first available opportunity.
2. further to discussions between the parties, early notification of the offender's imminent plea was given by the Crown to both victims so that it was not necessary for them to review their statements at any time prior to the plea.

The judge sentenced the three accused to terms of imprisonment which the Court of Criminal Appeal later held to be manifestly inadequate and contrary to well-established principle, and which it substantially increased.

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[1] See the Attorney General's speech in the Legislative Assembly on 20 September, 2001.

Both the facts not disputed in Exhibit 1 are contrary to the victims' statements to the police. In these each made clear that she did not voluntarily enter the car. The reference to their having voluntarily "returned to the premises" seems wholly inaccurate, since neither victim had previously that night or on any other occasion been to the premises at which the offences were committed.

As to the events immediately prior to the victims entering the car, one of them said:- "I don't really know how it happened but as these males were speaking to us they began moving in closer forcing us closer to the open car doors. No one grabbed me, but I did not want to get in the vehicle. Once we were near the car door, I was still holding onto (her companion's) hand, we were sort of pushed into the back seat. They pushed me from behind and ducked my head …"

The other victim's statement to the police said:- "They grabbed us and put us in the car into the back seat in the middle". A knife was later produced but there is no suggestion that a knife was used in order to induce the victims to get into the car in the first place.

As to how the victims got into the car, the learned trial judge found that they "reluctantly entered" the vehicle. The Court of Criminal Appeal found that, having refused the lift home, the victims eventually "got into the car".

It is very difficult to see how the word "voluntarily" could properly be applied to the manner in which the victims came to enter the car, as described in either of their statements.

As to the second of the facts not disputed, each victim alleged that a knife was produced in the car in transit to the premises, and one of them expressly asserted a threat made in conjunction with production of the knife.

It follows that the facts "not disputed" reject in effect two important allegations, which were no doubt omitted to dispose of any charge of kidnapping, under section 86 of the *Crimes Act*. 1900. In these respects, Exhibit 1 contains a significant departure from the victims' statements. However, it may well be that the Crown Prosecutor formed the view that the Crown probably could not establish beyond reasonable doubt, to the satisfaction of the jury, any charge under section 86, bearing in mind the

different versions given by the victims in their statements upon the issue of how they actually entered, or were induced to enter, the car. Accordingly, the allegations contained in the “facts not disputed” section of Exhibit 1 might have been deliberately withdrawn in return for pleas of guilty to the charges of sexual assault.

At all events, it does not seem to me that the absence of these allegations, notwithstanding their importance, made any difference to the ultimate outcome. The statement of agreed facts represents an adequate and accurate description of the events which took place in the house. Its adequacy as a description of the criminality involved is established by the fact that it enabled the Court of Criminal Appeal to impose sentences far more severe than those imposed by the trial judge. It did not limit the exercise of a proper sentencing discretion. If the Crown had persisted in the charges of kidnapping and had obtained convictions, the sentences imposed would have been less than those ordered for the sexual assaults, and would probably have been made concurrent.

As to the concessions, the first may be correct, and the Court of Criminal Appeal regarded the accused as entitled to claim a discount for their

pleas of guilty. The second concession is subject to some doubt, which I will discuss below.

The media clamour was first rightly provoked by the leniency of the sentences. There then appears to have been some public acceptance of the belief that the victims had been forced into the car at knifepoint, and that this grave allegation had been omitted from the statement of agreed facts. However, as appears from the passages quoted above, neither victim in her statement to the police made any such allegation. As I have indicated, a knife was produced in the car, but there was no suggestion that a knife was produced in order to induce the victims to get into the car in the first place. One of the victims in her victim impact statement did say:- "We were abducted at knifepoint …" This assertion was made, of course, well after the event, and in a document which does not seem to be the sole product of the victim herself, and which was not relevant to the question of guilt.

Notwithstanding the defects to which I have referred in the document Exhibit 1, neither the charge bargain itself nor the statement of agreed facts inappropriately mitigated the degree of criminality which the agreed facts clearly revealed. As is often the case, it was the inadequacy of the

sentence which excited criticism, and this leniency was then incorrectly attributed to the charge bargaining process. However, the charge bargaining procedure left something to be desired, in the way of failure to communicate with one of the victims at least, to explain to her clearly what was happening as the matter proceeded, and to consult her about the pleas of guilty which were contemplated and the contents of the statement of facts to be agreed, and the acknowledgments and concessions in Exhibit 1.

There is some difficulty in assessing the precise degree of communication maintained by the ODPP with the victims during the course of the proceedings. I have a letter made available to me by JH's father, written to him by JH, and describing certain aspects of the matter. I also had the opportunity to discuss these questions with JH at an interview, and I have a transcript of that discussion. I have not any information from DB (the other victim involved in this incident) and I did not interview her.

I will deal with these questions in a little detail since it is this prosecution, as I have said, which received a good deal of adverse publicity at the time the sentences were imposed in the District Court and

generated this inquiry. JH cannot remember any communication with the ODPP between making her statement to the police on 6 September, 2000 and receiving a telephone call from the police on 5 June, 2001 inviting her to a meeting the following day. However, she says:- "I actually thought that Dad, through all this time that he was getting informed by the police, and I just thought that he didn't want to talk about it". In point of fact, her father was not being informed by the police or by the ODPP about the course of the proceedings. But JH says that she knew "that during the whole case DB's parents were actually informed the whole way through because she used to say 'They talk to my parents'. DB said that to me and they don't talk to me and so here I was thinking that oh well, they're obviously talking to my parents and either Dad doesn't want to talk to me about it and I certainly didn't want to talk about it … I had no idea that through this whole case that he wasn't informed". JH is nearly sure that the police phoned him "before the boys had pleaded guilty".

On 5 June, she says, the police telephoned JH and invited her to meet them the following day for the purpose, as she understood it, of looking over some statements. Apparently JH did not mention this proposed meeting to her father, because if it was merely for the purpose of "just

looking over statements" it did not seem necessary for him to attend. On 6 June DB was present with members of her family. There were one or two detectives present and an officer from the ODPP Witness Assistance Service (WAS).

JH does not have a very clear recollection of what was discussed at this meeting. She does clearly recall however that she expressed considerable apprehensions about having to see the accused. She does not however retain any explanation of the charge bargaining procedure, if it was ever explained to her, save that she recalls that the police officers told her that the accused "were thinking of pleading guilty", and recalls that one of the police officers "actually said that minor charges were going to be dropped and that it was – they would get like a twenty per cent discount for pleading guilty".

According to the ODPP, the conference which JH describes took place with the Crown Prosecutor in charge of the case and the instructing solicitor, and in the presence of an officer of the WAS. The ODPP file note may be summarised in this way:- "She was distressed, said that she was trying to forget the incident, that she had not thought about it since making her statement to police, that she had not read that statement and

would prefer not to have to do so. She said she really did not want to have to give evidence. She said that she did not wish to see the faces of her attackers again and did not want to be in the same building as the relatives of the accused."

I feel that this account may readily be accepted because during her interview JH said:- "At the time I was just thinking I couldn't handle going to court. That's all I kept thinking, what I wanted was to just get out of it – I didn't want to go to court, that's all I just kept thinking, that whole time. The whole time I just thought I don't want to go to court. That's all I had in my mind." The ODPP adds that the charge bargaining process "and possible consequences (the charges to proceed, the material to be provided to the judge) were explained to her". Certainly, I would think that the reference to a discount for pleading guilty came from the Crown Prosecutor rather than from the police.

I doubt that the explanation was delivered with sufficient patience and clarity to convey to JH precisely what was proposed; and I accept that the statement of facts to be tendered to the judge was not shown to her.

The pleas were taken on 12 June, 2001 when Exhibit 1, the victims' statements to the police and the statement of agreed facts were tendered. JH was not present at the court on that day; but she says that she was given notice and told that she could be present if she wished, but "No, I didn't want to go". JH cannot remember whether she was given notice of the sentencing day which was 23 August, 2001.

This prosecution and its resolution is to a large extent paradigmatic. Public criticism developed because of the lenient sentences imposed by the trial judge. JH's father was upset and aggrieved because he was not kept informed by the police or the ODPP and was therefore to a large extent deprived of what he sees as his parental role in supporting and comforting his daughter. However, it is also his understanding that his daughter asked the police not to show her statement to her parents, although JH herself denies having said that. JH's father very perceptively, if I may say so, sums up his daughter's attitude in this way:- "Part of the reason that she wouldn't tell us anything was that she was feeling ashamed because I had told her to keep away from 'tiger country', which was out there, and [she] had this thing of nothing would ever happen to me, she felt immortal …" Lenient sentences such as this not only tend to arouse public criticism, but they have a considerable

effect upon the victims of the crime, who feel denigrated and humiliated by the notion that their experience has been so little valued. One consequence of this is that victims, often highly stressed and apprehensive about the trial which may lie ahead, and who have failed to absorb information often inadequately conveyed to them, tend, after the sentence, to exaggerate defects in the system.

In the present case the evidence suggests that, so far as JH was concerned (although not DB), there was a long period between charge and their meeting with police and the Crown Prosecutor on 6 June 2001, during which no report was made about the progress of the case. Why this should have been so in one case and not in the other I cannot say. Then on 6 June it seems to me that the proposed charge bargain, involving the withdrawal of some charges and the tender of Exhibit 1 and an agreed statement of facts, was not sufficiently explained to JH. But in essence, what went wrong with the case was the inadequate sentences initially imposed.

CONCLUSIONS

- **there was serious failure to maintain adequate communication with JH, although not, it would seem, with DB.**

- **the "facts not disputed" in Exhibit 1 were contrary to both victims' original statement to the police.**

- **The statement of agreed facts, notwithstanding Exhibit 1, did not create an artificial basis for the sentencing, adequately reflected the criminality involved, and enabled the Court of Criminal Appeal to impose appropriate sentences.**