The Queen v Joyce [2005] NTSC 21

PARTIES:	THE QUEEN v ANTHONY THOMAS JOYCE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	SCC 20411098
DELIVERED:	26 April 2005
HEARING DATES:	5/4/2005 to 8/4/2005
JUDGMENT OF:	RILEY J

CATCHWORDS:

Evidence – Criminal trial – Expert evidence – Admissibility – Opinion of psychologist on reliability of child complainant – Whether a person without instruction or experience in the area would be able to form a sound judgment on the matter without the assistance of the expert's special knowledge or experience.

Evidence – Criminal trial – Admissibility – Pre-recorded interview of child complainant – Complaint evidence – Exception to hearsay rule – The Evidence Reform (Children and Sexual Offences) Act 2004 – Evidence Act (NT) ss 21B, 26E – Whether of sufficient probative value.

REPRESENTATION:

Counsel:

Applicant:	E. Armitage
Respondent:	J. Tippett QC

Solicitors:

Applicant:	Office of the Director of Public Prosecutions
Respondent:	Northern Territory Legal Aid Commission

Judgment category classification:	B
Judgment ID Number:	ril0505
Number of pages:	32

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Joyce [2005] NTSC 21
No 20411098

BETWEEN:

THE QUEEN
Applicant

AND:

ANTHONY THOMAS JOYCE
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 26 April 2005)

[1] This is an application made pursuant to s 26L of the Evidence Act to determine the admissibility of certain evidence upon which the Crown seeks to rely in the proceedings against Anthony Thomas Joyce.

[2] Mr Joyce is charged with two offences of unlawfully and indecently dealing with a child, J, who was then aged 9 years, contrary to the provisions of s 132(2)(a), (3) and (4) of the Criminal Code. These are "sexual offences" for the purposes of the Evidence Act. The Crown case is that the child stayed with Mr Joyce over a period of days in early January 2004. It is claimed that between 1 January 2004 and 5 January 2004 Mr Joyce

indecently dealt with him by, inter alia, touching him inappropriately on the penis and "parts around his penis" and also by kissing him "on the corner of the lips". Upon his return to his home the child separately told his mother and his brother of the occurrences which he says took place at the home of Mr Joyce.

[3] In the course of the police investigation into the alleged offending two video-taped records of interview were conducted with J. The first of those was between Detective O'Connor and J conducted over a period of approximately 1½ hours on 3 March 2004. The second was an interview with Detective Wurst conducted over a period of approximately 45 minutes on 22 April 2004. In each of the interviews J was taken through the events which are said to have taken place at the beginning of January 2004. The Crown seeks to introduce the two video-taped records of interview into evidence in the trial. It also seeks to lead evidence of the "complaints" made by J to his mother and brother.

The Evidence Reform (Children and Sexual Offences) Act 2004

[4] This Act commenced operation in 2004. It relates to the evidence of children in matters of sexual offences. The purposes of the Act were said, in the second reading speech, to include reducing the trauma experienced by child witnesses in criminal proceedings for sexual offences. The legislative package included amendments to the Evidence Act, the Justices Act, the Oaths Act and the Sexual Offences (Evidence and Procedure) Act.

[5] The amendments to the Justices Act have the effect of requiring the presentation of the evidence of a child at a committal hearing for a sexual offence "by written or recorded statement" (s 105AA(1)). A child who gives evidence in that way "cannot be cross-examined in relation to his or her evidence" (s 105AA(2)). A "recorded statement" is defined to mean a statement recorded on audio tape, video tape or by other visual means. Such a statement may only be admitted into evidence at the committal hearing if it has been made as a statutory declaration under the Oaths Act and it complies with the requirements of that Act (s 105B(2A)). The Oaths Act permits a statutory declaration to be made by audio tape, video tape or other audio visual recording means by including a statement by the person making the declaration that it is true in every particular and that the person is aware that making a false declaration is an offence.

[6] I note in passing that the records of interview conducted by Detective O'Connor and Detective Wurst in these proceedings do not comply with the requirements of the Oaths Act for admission into evidence at committal proceedings.

[7] The amendments to the Evidence Act provide for: the disallowance of classes of questions, the circumstances in which vulnerable witnesses are to be permitted to give their evidence, the pre-recording of evidence of certain witnesses (s 21B), the principles to be applied to child witnesses (s 21D) and for a fresh exception to the hearsay rule (s 26E).

[8] Included in the amendments to the Evidence Act are ss 21D(1) and (2) which identify the intention of the legislature in the following terms:

> "(1) It is the intention of the Legislative Assembly that, as children tend to be vulnerable in dealings with persons in authority (including courts and lawyers), child witnesses be given the benefit of special measures.
>
> (2) If a witness is a child, the court must have regard to the following principles:
>
> (a) the court must take measures to limit, to the greatest extent practicable, the distress or trauma suffered (or likely to be suffered) by the child when giving evidence;
> (b) the child must be treated with dignity, respect and compassion;
> (c) the child must not be intimidated when giving evidence;
> (d) proceedings in which a child is a witness should be resolved as quickly as possible."

S 21B of the Evidence Act

[9] Section 21B of the Act provides for the pre-recording of evidence in relation to identified offences including sexual offences. The evidence of a child or a person who suffers from an intellectual disability may be pre-recorded at the election of the prosecution. That pre-recording may relate to the examination in chief of the witness or it may relate to the whole of the evidence of the witness.

[10] If only the evidence in chief is pre-recorded then, except for committal proceedings, the witness must be available for cross-examination if required.

If the whole of the evidence is to be pre-recorded then that evidence must be given and recorded at a special hearing of the court.

[11] It was submitted on behalf of the accused that s 21B(2) did not have application in this case because the section commenced after the dates of both alleged offences and of the recording of the interview. Reliance was placed upon *Maxwell v Murphy* (1956-1957) 96 CLR 261. In my view this section is a procedural provision and does have application. The situation is quite different from *Corkin* (1989) 40 A Crim R 162.

S 26E of the Evidence Act

[12] Section 26E was introduced into the Act along with the other amending provisions relating to vulnerable witnesses, including child witnesses. Section 26E is in the following terms:

> "(1) In a proceeding in relation to a sexual offence, as an exception to the rule against hearsay evidence, the Court may admit evidence of a child's statement to another person as evidence of the facts in issue if the Court considers the evidence is of sufficient probative value as to justify its admission."

For the purposes of the Evidence Act a child is defined as "a person who is under the age of 18 years". A statement is defined to include "any representation of fact or opinion, whether made in words or otherwise". It is clear that such a statement would include, but is not limited to, a statement of complaint made by a child to another.

[13] The complaint made by an alleged victim of a sexual assault to another is a form of hearsay and to receive it into evidence as evidence of the truth of the facts asserted in the complaint would be to infringe the rule against hearsay. At common law evidence of recent complaint is admissible for a limited purpose. In order to be admissible the complaint must be made at the first reasonably available opportunity to someone to whom the complainant may be expected to complain. Where such evidence exists it is admissible for the limited purpose of judging the consistency of the complainant's conduct in making the complaint with the nature of the allegations he or she makes. It is relevant to show that the complainant is a credible witness and the jury is entitled to look at the evidence of complaint to determine whether it is consistent with the evidence in the trial. The evidence of complaint is not evidence of the truth of what happened but rather is admitted in relation to the credit of the complainant: *Lillyman* [1896] 2 QB 167 at 170, 177.

[14] Following the introduction of the amended legislative scheme the evidence of out of court statements made by a child may also be admissible pursuant to s 26E of the Evidence Act. In the present case there is no dispute that the complainant is a child for the purposes of the section and that the identified items of evidence (the complaints and the records of interview) are statements within the relevant definition contained in the Act.

[15] It was submitted on behalf of the accused that the amendments to the Evidence Act do not apply to these proceedings. However the transitional

provisions of the amending Act make it clear that s 26E of the Act does have application.

[16] Section 26E provides for a significant departure from the common law. It permits the court to receive a child's statement to another person into evidence "as evidence of the facts in issue". Section 26E of the Evidence Act creates a legislative exception to the hearsay rule. This is different from the receipt of complaint evidence at common law where the evidence is received for the limited purpose of demonstrating consistency in the evidence of the complainant and to show that he or she is a credible witness. At common law complaint evidence is not admissible as evidence of the truth of what happened.

[17] The effect of s 26E of the Evidence Act is to enlarge the ambit of admissible evidence. In so doing it also has the effect of enlarging the purposes for which some evidence may be received. By virtue of the section a child's statement that is admissible as a recent complaint may, subject to the discretion of the court, now be received as evidence of the facts in issue.

[18] This view of s 26E of the Evidence Act is consistent with the legislative intention as identified in the second reading speech where it was said:

> "The bill also proposes to use out-of-court or hearsay evidence in sexual offence prosecutions that involve a child. In these cases, the court will have the discretion to admit evidence of a child's statement to another person if the court considers the evidence is of sufficient probative value. For example, this will permit the court to admit evidence of a child's initial disclosure of sexual abuse and

> for that to be part of the evidence of the offence. Under the current laws of evidence such statements cannot be admitted as evidence of the offence. The rights of an accused person are protected by the provision that an accused person cannot be convicted solely on the basis of hearsay evidence admitted under the provision."

[19] The ambit of s 26E is subject to the controlling factor that the evidence is only admissible at the discretion of the court "if the Court considers the evidence is of sufficient probative value as to justify its admission". No guidance is provided within the section or the Act as to matters to be considered in determining whether evidence is of sufficient probative value to justify admission. The use of the adjective "sufficient" indicates that the conclusion that the evidence has probative value is, by itself, not enough. The requirement is that it have sufficient probative value to justify its admission as evidence of the facts in issue. In applying the provision the court is called upon to make a value judgment in circumstances where some, and possibly all, of the evidence in the particular matter is yet to be adduced.

[20] It would not be helpful or wise to endeavour to further define the legislative requirement nor to exhaustively identify the matters which may be of assistance in addressing this issue. Much will depend upon the circumstances of the particular case and the nature of the statement sought to be admitted in the context of those circumstances as they are understood at the time. What is of assistance in one case may not be in another. It is necessary for the court to consider all of the known surrounding circumstances of the particular case in order to determine whether the

evidence is of sufficient probative value as to justify its admission in the circumstances of that case.

[21] A consideration of how a child's statement to another person can have probative value as to the facts in issue raises difficulties. It was argued on behalf of the accused that such statements could have no probative value beyond what they had at common law. It was submitted that in the circumstances of this case the statements of complaint made to the mother and to the brother of the child could prove no more than that the statements were made. They could be used only to show the consistency of the child's conduct in making a complaint and, in that way, bolster his credit. A similar submission was made to the High Court in *Papakosmas v R* (1999) 196 CLR 297 in relation to the application of s 55 of the Evidence Act 1995 (NSW). In their joint judgment Gaudron and Kirby JJ rejected the submission but observed that the common law could provide guidance on the issue. Their Honours said (313):

> "What does emerge from the common law as a reflection of elementary logic is that, without more, evidence that a particular statement was made is probative only of its making and its contents and those inferences which, in the circumstances, may be drawn. On the other hand, it also emerges from the common law, and, again, as a matter of logic, that the circumstances in which a statement is made may sometimes render it probative of the facts asserted."

Their Honours then went on to refer to the res gestae doctrine and to *Ratten v The Queen* [1972] AC 378. Their Honours then continued (314-315):

"The principle expressed in *Ratten* is crucially dependent on the virtual certainty of the statement in question being true and, to that extent, it reflects the common law's bias against the reception of hearsay evidence. That is because it is not logically necessary for the possibility of concoction to be excluded before a statement is probative of the fact asserted in it. Rather, all that is necessary is that the statement be consistent with the fact to be proved and its making so connected to that fact that, when taken in conjunction with other evidence in the case, it bears on the probability of that fact having occurred.

The nature and degree of the connection necessary before a statement is probative of the fact asserted in it will, of course, depend on the nature of that fact and, if it be different, the fact ultimately to be proved. Even so, the connection will ordinarily be found in the close contemporaneity of the statement with the fact in issue and the consideration that the statement is a statement of the kind that might ordinarily be expected from the maker if the fact were true. Similarly a statement that is closely contemporaneous with the fact in issue and is contrary to what would ordinarily be expected if that fact were true rationally bears on the improbability of its having occurred.

The question whether, in the particular circumstances, a statement that is not closely contemporaneous (for example, a subsequent statement to police) is probative of the facts asserted in it can logically only be answered in a case in which those circumstances arise. However, there must be some connecting circumstances because, otherwise, evidence that a particular statement was made is probative only of its making and its contents and such inferences as, in the circumstances, may properly be drawn.

As a matter of logic, the statement is not, as such, proof of the facts asserted. People do make false statements of fact and false accusations. Nothing in the Act requires the admission of a statement unless, in the terms of s 55, it could rationally affect, directly or indirectly, the assessment of the probability of the facts asserted. There has to be more than the fact that the statement is made to produce the conclusion required by s 55 as the price of admissibility. Rationality connotes logical reasoning."

[22] In the same case Gleeson CJ and Hayne J said (309):

> "The legislative provisions in question, in so far as they apply to evidence of complaint, are not limited in such application to evidence of complaint in cases of alleged sexual assault. In that respect, as in other respects, they involve a significant departure from the common law. It is possible to imagine circumstances in which evidence of the fact that a complaint of an alleged crime has been made might be evidence that could not rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue. For example, the nature of the complaint, the circumstances in which it was made, or matters personal to the complainant, might provide a reason why that could be so. However, the present case does not raise an issue of that kind. As the trial judge warned the jury, the fact that an assertion is repeated does not make it any less untrue if it were untrue to begin with. Furthermore, some complaints may be made in circumstances which require particular attention to be given to the danger of fabrication. However, in the circumstances of the present case, it is impossible to deny that the evidence of the complaints made to the three witnesses in question could be regarded by the jury as affecting their assessment of the probability that there was no consent to the intercourse."

[23] I will return to consider the application of s 21B and s 26E of the Evidence Act to the circumstances of this case after I have dealt with a preliminary issue relating to the use which may be made of expert testimony in these proceedings.

Expert evidence – a preliminary issue

[24] The defence objected to the receipt of the video-taped records of interview and the complaints made to the mother and brother of the child and, in so

doing, contended that the evidence was not of sufficient probative value as to justify its admission. In support of this submission the defence called a psychologist to give what was said to be expert evidence in relation to issues concerning the reliability of the information conveyed by J in the course of each of the records of interview and as to the circumstances in which the complaints were made. That evidence was received de bene esse and subject to objection.

[25] I now proceed to deal with the objection to the receipt of that evidence. The fundamental position is that it is a matter for the tribunal of fact to determine whether the evidence of a witness is reliable, reflects the truth and is to be accepted by the tribunal. In determining whether expert testimony should be received in the process the matters to be considered include whether the issue is such that it cannot properly be determined without the assistance of an expert and then, assuming that to be so, whether there is a field of expertise appropriate to the issue. The relevant questions were posed by King CJ in *R v Bonython* (1984) 38 SASR 45 at 46 as follows:

> "(a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and
> (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with

> which by the witness would render his opinion of assistance to the court."

[26] In the later case of *R v* C (1993) 60 SASR 467 at 474 King CJ pointed out that courts should be cautious in approaching the question of whether the subject matter of proposed evidence is so special and so outside ordinary experience that the knowledge of experts should be made available to the courts and juries. He observed that courts must be very cautious in approaching that question in order to safeguard the integrity of the trial process and to protect the capacity of courts and juries to discharge their fact-finding functions from being overwhelmed by a mass of expert evidence on topics which could be judged without the assistance of such evidence. The law jealously guards the role of the jury, or the court where it is the trier of the facts, as the judge of human nature, of the behaviour of normal people and of situations which are within the experience of ordinary persons or capable of being understood by them: *Runjanjic v Kontinnen* (1991) 53 A Crim R 362 at 368.

[27] In the leading authority on the issue, *Murphy v R* (1988-1989) 167 CLR 94, Dawson J (who was in dissent as to the result) said (at 130):

> "The principle is simply that evidence which is put forward to tell the jury something that is within their own knowledge or experience is not helpful and not admissible for that reason. ... But the distinction between helpful and unhelpful expert evidence cannot of its nature be very precise. In the present case the matter cannot be taken much further than to say that opinion evidence concerning the applicant's behavioural characteristics was not admissible unless the significance of

those characteristics could not be understood without the aid of that evidence."

[28] In *Farrell v R* (1998) 194 CLR 286 the High Court considered a case concerned with an adult complainant who suffered from chronic alcoholism and long-term prescription drug abuse. Kirby J expressed similar sentiments to those of King CJ when he said that it was necessary to approach with caution any attempt to call evidence which could have the effect of usurping the jury's function in reaching their ultimate conclusion as to whether a witness was telling the truth. Credibility is a matter for the tribunal of fact and is not to be assumed by expert witnesses offering their opinion on the accuracy, consistency and believability of the testimony in question. However "where established patterns of human behaviour have been studied, analysed and scientifically described, it is appropriate that evidence about them should be available to the decision maker". Kirby J provided a useful summary of the situation as follows (para 29):

> "Therefore, in principle, while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on psychological and physical conditions which may lead to certain behaviour relevant to credibility, is admissible, provided that (1) it is given by an expert within an established field of knowledge relevant to the witness's expertise; (2) the testimony goes beyond the ordinary experience of the trier of fact; and (3) the trier of fact, if a jury, is provided with a firm warning that the expert cannot determine matters of credibility and that such matters are the ultimate obligation of the jury to determine."

[29] In *R v* C (supra), dealing specifically with the evidence of children, King CJ made the following observations (474):

> "Jurors are not ignorant of the behaviour and reactions of children or of the effect on such behaviour and responses, of family relationships. They have been children themselves. Most have experienced, and all have observed, family relationships. The effect of the relationship of the parent on a child's willingness to report abuse, is not, to my mind, beyond the capacity of a juror to appreciate without the assistance of psychological evidence. Neither is the desire of a child for the family relationship to continue and to avoid family disruption, nor is the influence of force or threats, or the beguiling influence of the shared secret, beyond a juror's unaided understanding. That is not to say that child psychology might not be able to contribute insights into such matters. I am far from convinced, however, that those insights are necessary in order to enable a jury to reach a just decision or that their value would outweigh the impairment of the trial process which would result from introducing expert opinion, and probably conflicting expert opinion, into child sexual abuse cases."

[30] In the present case the defence seeks to use such "expert" evidence in order to attack the credibility of the child at the time he made complaint and at the time he entered into the records of interview to which I have referred. I am dealing with the evidence of a young boy. He was 9 at the time of the alleged offending and is now aged 10 years. It is not suggested that there is anything unusual about him that would mark him as different from other boys of his age. He does not suffer from any psychological or physical condition that sets him apart.

[31] The legal representatives of the accused provided materials relating to the evidence of the child to Donald Thomson, a Professor of Psychology, who has a special interest in children's memory. Professor Thomson provided a

written report and he gave evidence on the voir dire. There is no challenge to the expertise of the witness. He has not had the opportunity of interviewing the child.

[32] Professor Thomson divided his report into various sections. In the first part he reflected upon the reliability of the recall of the mother of the child and of his brother, both of whom give evidence of his complaints regarding the conduct of the accused. He observed in relation to each that their recall "of what it was that (J) had told (them) would be suspect". In so doing he relied upon the delay between the date of the relevant conversation and the making of a statutory declaration by the witness. It is, of course, well understood that delay is a relevant consideration in determining reliability of recall. In the course of reaching his conclusion Professor Thomson referred to two studies that relate to situations quite different from those that were to be found in this case. Nothing in the report of Professor Thomson provides any basis for a claim that his evidence would assist a trier of fact by providing a special insight or, indeed, any assistance beyond what is well known and well understood.

[33] Professor Thomson provided a summary of the evidence of the child given in the first record of interview, the second record of interview and before the Court of Summary Jurisdiction. He noted what he said were "significant discrepancies between the accounts" and he identified those discrepancies as being: (a) whether or not the accused had touched the child's penis; (b) whether or not there was one or two occasions when the child had been

kissed by the accused; (c) whether or not the child's shorts had been pulled down; and (d) though not a discrepancy, the fact that the account given in court in the committal proceedings was of much greater detail than the earlier accounts. Whether there were such discrepancies and whether they were significant is, of course, a matter for the trier of fact to determine. For present purposes I accept the description provided by Professor Thomson.

[34] Professor Thomson then looked for explanations as to the difference in accounts and identified four possible explanations, being: firstly that the child was initially reticent in disclosing what happened to him because of embarrassment; secondly, what he described as hypermnesia (which I will discuss shortly); thirdly, suggestibility; and fourthly, that the child had made up the allegations. With respect, it seems the professor has not considered that discrepancies would be expected between accounts given by a young child on different occasions to different people in quite different circumstances and in response to different questions asked of him. It would be surprising if the child gave identical accounts on each occasion.

[35] Professor Thomson went on to consider the possible explanations which he had identified. The first was whether the child had been reticent because of embarrassment. Professor Thomson acknowledged that a male child may have a degree of embarrassment in recounting matters of a sexual nature to a stranger, particularly if the stranger was a female as was Detective O'Connor. The second police interview was with Detective Wurst who was a male and, as Professor Thomson acknowledged, that may account for the

greater detail provided on that occasion. Professor Thomson then noted that the final account given in the Court of Summary Jurisdiction contained greater detail and he noted the circumstances in which that evidence was given, being by closed circuit television, which may create less embarrassment and greater disclosure. In cross-examination he also acknowledged that the greater detail provided by the child at the committal hearing was in response to being guided by the questions asked of him. All of those are propositions which are readily understood.

[36] Professor Thomson discounted the so-called "embarrassment hypothesis" as a factor in this case by reference to a study which he said "indicated that when children are directly asked about abusive behaviour they do not deny that abusive behaviour occurred, rather they tell the interviewer about the abusive behaviour". I am unable to see how that is inconsistent with the child in this case suffering embarrassment. As Professor Thomson subsequently acknowledged, the child did not deny that abusive behaviour occurred. He agreed that his exclusion of the embarrassment hypothesis was effectively based upon his view of the body language of the child as it appeared on the video-taped interviews. It seems to me a trier of fact in this case would also be well able to consider the body language of the child and to determine whether the child felt embarrassment and, if so, whether that provided a reason for any discrepancy that may be found. It is not a matter that is assisted by expert evidence.

[37] Professor Thomson then dealt with the phenomenon which he called hypermnesia. That is that, notwithstanding recall decreases over time, some details not recalled on an earlier interview may be recalled on a later interview. Professor Thomson concluded that the circumstances of the child's recall in the present case "do not match the circumstances under which hypermnesia has been found". He reached this conclusion based on the length of the delay between the events of early January 2004 and the time of recall of those events at the various interviews and at the time of the committal proceedings. The impact of delay upon memory is a commonly understood concept. It is within the ordinary experience of people: *R v Fong* (1981) Qd R 90 at 95. Nothing said by the witness took it beyond that status.

[38] The third matter dealt with by Professor Thomson was suggestibility. This, of course, is a concept which is well known. Professor Thomson referred particularly to "interviewer bias" as the source of a suggestive interview. This bias is found in an interviewer who has "a priori beliefs" about what has happened and shapes the interview to elicit answers consistent with those beliefs. Such interviews are characterised by the interviewer only attempting to gather evidence consistent with his or her beliefs and avoiding investigating any avenues which may provide disconfirming evidence. Save for the introductory remarks of the interviewing officer to the child, I doubt whether the examples given by Professor Thomson of interviewer bias in relation to the interview by Detective Wurst support his contention.

However, that is not to the point. The issue is one which is able to be readily understood by a tribunal of fact and, if interviewer bias is present, it can be identified by counsel and by the tribunal without the need for expert assistance. The impact of suggestibility upon a child can be understood and appreciated without the assistance of expert opinion. In this case the responses of the child in the interviews demonstrate that he was not suggestible.

[39] The final possibility addressed by Professor Thomson was that the child was guilty of conscious fabrication of the allegations. This is also a concept which is well known and does not require expert assistance to enable it to be understood. The assessment of credibility and addressing issues of fabrication are functions that juries have historically carried out in our courts without the assistance of expert testimony. There is nothing special about this case that would suggest a need for assistance.

[40] Professor Thomson has identified what he describes as four possible explanations for the child's higher level of recall in court 10 months after the event. The possible explanations identified were embarrassment, hypermnesia, suggestibility and conscious fabrication. He overlooked the fact that in the court proceedings the child was subjected to closer questioning. The matters identified and addressed by the witness are each well understood by ordinary people. They are behavioural characteristics which may be understood without the aid of expert evidence. They are matters in relation to which a person is able to form a sound judgment

without the assistance of a witness possessing special knowledge or experience in the area. Whilst the studies to which Professor Thomson refers provide examples of the topics being discussed and may contribute some insight into the issues addressed, to adopt the words of King CJ in *R v* C, those insights are not necessary to enable a finder of fact to reach a just decision.

[41] Whilst Professor Thomson may have relevant expertise in relation to a body of knowledge or experience which is sufficiently organised or recognised to be acceptable as a reliable body of knowledge or experience (an issue I do not determine), it is my view that, in the circumstances of the present case, the subject matter of his opinion is such that a person without instruction or experience in the area would be able to form a sound judgment on the matter without the assistance of his special knowledge or experience. In the circumstances I decline to admit the evidence.

The records of interview

[42] In the present case the intention of the Crown is to introduce the video recordings of the two interviews in effect as the evidence in chief of the child. It is proposed that there will be some additional evidence led from him to clarify certain aspects of the records of interview but the additional material will be limited in scope. J will then be made available for cross-

examination. The intention of the Crown is said to be to limit the stress or trauma likely to be suffered by J when giving his evidence.

[43] The issue for determination is whether there exists a basis upon which the Crown can proceed as it desires. In seeking the admission of the evidence the Crown relied upon the provisions of s 26E of the Evidence Act. It was submitted that each record of interview was a child's statement to another person and was admissible as an exception to the hearsay rule.

[44] The submission is, in my opinion, misconceived. The provisions for taking pre-recorded evidence and the receipt of that evidence are found in s 21B of the Act which is in a part of the Act dealing with the manner in which vulnerable witnesses may give evidence. Section 26E has a quite different purpose. It is found in a part of the Act dealing with miscellaneous rules of evidence. It is a provision directed towards providing a specific exception to the rule against hearsay evidence. The purpose of that provision is to allow the receipt of evidence that would either be inadmissible or admissible for a limited purpose because of the rule against hearsay. The section allows such evidence to be received and to be received as evidence of the facts in issue.

[45] The statements made in the records of interview were made some months after the event and cannot be said to have sufficient probative value as to justify their admission as evidence of the facts in issue. In this case the records of interview are not recent or spontaneous. They are not

contemporaneous with the events to which they relate. There is no connection between those statements and the events to which they relate in the sense discussed by Gaudron and Kirby JJ in *Papakosmas v The Queen.* The records of interview are simply a further recounting of the story by the child witness.

[46] The source of the power to receive the video-taped records of interview of the child is to be found in s 21B(2)(a) of the Evidence Act. As has been observed, that section provides the prosecution with the power to elect that the examination in chief of a child be pre-recorded and given by video tape in "a proceeding in relation to an offence". At present the parties are about to undertake a special hearing as contemplated by s 21B(4)(a) of the Evidence Act. That hearing is a "proceeding in relation to an offence" for the purposes of s 21B(2). In such a proceeding the examination in chief of a child may be presented in accordance with s 21B(2)(a), ie the examination in chief may be given by video tape. The records of interview created by Detective O'Connor and Detective Wurst may be regarded as the examination in chief of the child J and may be received in the special hearing subject to the child being made available for cross-examination as required by s 21B(3) of the Act. Once the child has been cross-examined the whole of the evidence recorded at the special hearing (including the video-taped records of interview) may be used in the substantive proceedings by operation of s 21B(2)(b).

[47] Counsel for the accused submitted that, in the event that I found the evidence could be received into evidence, I should decline to receive it in the exercise of my discretion. Reference was made to *R v Swaffield* (1998) 192 CLR 159 and to the need to ensure a fair trial.

[48] A review of the available material reveals that J, although only 9 years of age, has demonstrated a capacity to give evidence. In the preliminary proceedings he appears not to have been overwhelmed by the experience or to have demonstrated any lack of confidence in his ability to provide his account of what occurred at the relevant time. He was comfortable discussing matters with both counsel. There is no suggestion that the effectiveness of any cross-examination will be adversely affected if the video-taped statements are received into evidence.

[49] In his evidence at the committal proceedings, J reported having given a detailed account of the events to his mother soon after he returned from the home of Mr Joyce. No report was made to the police until late in February 2004. By the time he entered into the electronically recorded interviews of 3 March 2004 and 22 April 2004 the child had discussed the events with both his mother and his brother. There is no evidence that either the mother or the brother placed any pressure upon the child. Although the evidence is not entirely clear, it seems that within three days of his return they each asked what had happened at the home of the accused and the child responded with the complaints to which they each refer. By the time J was first interviewed by police on 3 March 2004 some seven weeks had passed since

the time of his visit to Mr Joyce. After that interview police were informed by the mother that J had referred to further incidents and it was decided to conduct another interview. That interview took place on 22 April 2004, some 16 weeks from the date the events were said to have occurred.

[50] The interviews were conducted by different police officers. It is not suggested that the allegations made by the child in either interview were "so vague and general that it was impossible for an accused to make any sensible answer to them or might be so lacking in coherence and consistency that it would be unreasonable to ascribe any probative value to it, or might have been elicited in its entirety wholly by the use of leading questions or otherwise in circumstances which strongly suggested the contents were not in reality the statement of the child at all": *RPM v R* (2004) WASCA 174 at para 127 per Wheeler J. In the interviews the allegations made by J were sufficiently clear and specific to enable the accused to understand and respond to them. He provided an intelligible and coherent account of events.

[51] At the time of the interviews the events to which they related could no longer be said to be fresh in the mind of the child. By that time he had recounted the story at least twice. When interviewed he was not providing a spontaneous story to the investigating officer but, rather, was responding to the generalised prompting of the officer. On each occasion he was aware of the purpose of the interview. His mind was directed to the issues the officer wished to discuss. At the time of the first record of interview he had been

told by his mother why he was being taken to the interview room. He was reminded by the interviewing officer that he had earlier told his mother about the incidents and he was then asked to tell the officer "all about what happened, what you told your mum". Thereafter he responded to the questions of the interviewing officer. The questions were not leading in nature. At the time of the second interview he was informed that it was taking place so that the accused would not repeat his conduct in relation to other children, providing an unfortunate start to the interview. J thereafter responded to the questions of the interviewing officer. Again there is no suggestion that the officer employed leading questions. The version of events provided by J was volunteered in response to non-leading questions. It was his statement of what occurred.

[52] The issue for me to resolve is whether I should admit the records of interview into evidence in the exercise of my discretion. The material in the two interviews follows, and is consistent with, what the child told his mother and brother shortly after the event. There is no suggestion that he is unable to recount the events in evidence in this court as he has done in another court in the past. What appears in the two records of interview is a further recounting of the events. The submission on the part of the Crown is that this evidence should be received rather than requiring J to repeat the story yet again as his evidence in chief. This is not a case where the Crown seeks to rely upon a written statement but rather reliance is placed upon video-taped recordings of the child making the statements. Those

statements were made some time after the events of which complaint is made but much closer in time to those events than the date upon which any future telling of his story will take place.

[53] By virtue of the video recording it is possible for both the jury and the accused to fully appreciate the way in which the interview was conducted and the physical and facial reactions of the child during the course of the interview. The jury will be able to assess for itself whether the child regarded the process with the seriousness that the occasion demanded and whether he appreciated the need for accuracy and truthfulness. It can be seen that the child was, on each occasion, alone with the interviewing officer in the interview room and, to that extent, was not under the direct influence of any other person. The importance of telling the truth was impressed upon him.

[54] The child will be available for cross-examination in the special hearing immediately following the playing of the video tapes of the interviews. There is no identified reason why the leading of his evidence in this way will in any way affect the cross-examination or cause prejudice to the accused.

[55] The challenge to the admission of the evidence has centred upon the submission that the recording of the statements occurred in circumstances which made the evidence unreliable because, at the time of the recording of

each of the interviews, the child was suggestible and, further, there was a risk of conscious fabrication on his part.

[56] In relation to the submissions that the witness was, at the relevant time, suggestible and that the interviews were tainted by interviewer bias I do not accept those submissions. I so conclude based upon the state of the evidence at the time of my ruling which, of course, is before the trial has commenced. Ultimately submissions to the contrary can be made to the jury if counsel be so instructed. For the present it is my view that the answers given by the child in each record of interview were inconsistent with him being able to be characterised as a suggestible witness. It is not necessary to review the records of interview in detail. It is sufficient to note that on a number of occasions he rejected suggestions made to him by the interviewer and on others he corrected misunderstandings held by the interviewer. The tenor of his evidence and the content of the records of interview do not reveal a child who is suggestible.

[57] In relation to the suggestion that the child was guilty of conscious fabrication I am, at this time, unable to see any basis for so concluding. It would be inappropriate for me to provide detailed reasons for my findings at this point of the trial. The question will ultimately be one for the jury to consider. However, I note that he gave his evidence to the officers in a straightforward manner. Although there are differences between his recollection of events and those of his mother and brother, those differences are, in all the circumstances, understandable. There is nothing in his

evidence or the evidence of others that would lead me to be concerned, at this time, that he was deliberately fabricating the whole or any part of his version of events.

[58] I consider the evidence to be admissible as the evidence in chief of the child in the special hearing pursuant to s 21B(2)(a) of the Evidence Act. I see no reason to exclude it in the exercise of my general discretion. The whole of the evidence of the child may then be received at the subsequent proceedings pursuant to s 21B(2)(b) of the Act.

The complaints to the child's mother and brother

[59] Upon his return from the home of Mr Joyce the child informed his brother and his mother of some of the events that had taken place. He did so approximately three days after his return. Upon his return, and prior to his discussions with his mother and brother, he was described by his mother as having been upset, stressed and "freaking out". He was agitated and angry. He said to his mother, immediately upon his return, that " I hate Tony, he's gay. I'm never going out there again". He would not elaborate. The evidence in relation to the discussions is not uniform but in general terms it would seem that the mother expressed her concern as to the conduct of J to his brother and asked the brother to find out what was wrong. The brother took J into a room and asked him "What happened at Tony's place?". J then described the conduct of Mr Joyce which is part of the particulars of the

offence alleged against him. Thereafter J had a discussion with his mother in which he repeated the allegations.

[60] The issue for determination is whether those matters are admissible either as recent complaints at common law or pursuant to the terms of s 26E of the Evidence Act. If they are admissible pursuant to s 26E they are received as evidence of the facts in issue. They will be admissible pursuant to that section if the court considers the evidence of sufficient probative value as to justify its admission.

[61] In my view the statements should be received into evidence. Seen in their context, the statements are capable of being accepted as a complaint which emerges in stages: *Lazos* (1992) 78 A Crim R 388 at 396. It starts with the comment by the child shortly after coming home regarding the accused being "gay" in circumstances where the child is upset but unwilling to talk about matters. He then informed his brother of the events that caused his upset. He did so in response to a general question along the lines of "what happened at Tony's place?". Having discussed the matter with his brother he then told his mother.

[62] Although there was some delay between his return home and his discussions with his brother and mother this may be understood in the context of a young boy who claims to have been sexually assaulted. Initial agitation and reluctance to discuss the matter, followed by a disclosure to his brother and then to his mother, is not an unexpected sequence of events. In considering

whether the complaint was made at the first reasonable opportunity it is necessary to look at all of the circumstances including the complainant's age and the nature of the conduct of which he complains. Regard must be had to the subjective situation of the young boy along with factors that operated on him at the time. The assumption that the victim of a sexual offence will complain at the first reasonable opportunity is an assumption of doubtful validity: *Suresh v R* (1998) 72 ALJR 769 at 770, 778. It is necessary to consider the nature of the complaint in the circumstances in which the complainant was placed: *R v Maple* [1999] VSCA 52. In this case, when made, the complaint was an unassisted and unvarnished story of what happened. The brother raised the issue in a general way and the response from the child was otherwise unprompted. There is no suggestion of leading questions or any inducement. The question asked by the brother did no more than dissolve the barrier which had hitherto prevented him from telling his story: *R v Freeman* (1980) VR 1 at 7.

[63] In all the circumstances I regard the observation that "Tony is gay", followed by the complaints made to the brother and the mother, as being admissible pursuant to s 26E of the Evidence Act. They were statements made in circumstances in which statements of that kind and at those times may be expected to be made by a child in that position and, in my view, the evidence is of sufficient probative value as to justify its admission as evidence of the facts in issue. In the circumstances the recency and spontaneity of the complaint once made and its consistency with other

aspects of the demeanour of the child give it probative impact. I see no basis for concluding that the evidence is unfairly prejudicial to the accused. The evidence will be admitted pursuant to s 26E of the Evidence Act.

[64] Although it is, strictly speaking, unnecessary to decide, in all the circumstances I would also admit the evidence as "recent complaint" at common law.
