R v PW [2009] NTSC 08

PARTIES:	THE QUEEN
	v
	PW
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20713041
DELIVERED:	23 MARCH 2009
HEARING DATES:	16 MARCH 2009
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CRIMINAL LAW – sexual offences – maintaining sexual relationship with child under 16 – whether s 131A(2) of the Criminal Code requires 3 or more offences against the same provision of the Code

EVIDENCE – admissibility – recent complaint – whether evidence admissible

EVIDENCE – admissibility – Evidence Act s 26E – whether evidence admissible as evidence of facts in issue

Statutes:
Evidence Act (NT), s 26E, s 26F, s 26F(1), s 26L
Criminal Code (NT), s 131A, s 131A(1), s 131A(2), s 131A(4), s 131A(5)
Criminal Code (Qld), s 229B
Crimes Act (Vic), s 47A, s 47A (2A)

References:
Cross on Evidence, 4th Aust ed, Butterworths, Sydney, 1991- (loose-leaf edition)

Citations:
Applied:
R v Manager [2006] NTSC 85

Followed:
R v Wojtowicz (2005) 148 NTR 24

Referred to:
GJB (2002) 129 A Crim R 479
KBT v The Queen (1996-1997) 191 CLR 417
Macfie [2000] VSCA 173
R v Thompson (1996) 90 A Crim R 416
S (1989) 168 CLR 266; 45 A Crim R 221

REPRESENTATION:

Counsel:

Plaintiff:	M Stoddart and B Wild
Defendant:	P Maley

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	Peter Maley Solicitors

Judgment category classification:	B
Number of pages:	12

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

R v PW [2009] NTSC 08
No. 20713041

BETWEEN:

THE QUEEN
Plaintiff

AND:

PW
Defendant

CORAM: MILDREN J

REASONS FOR RULINGS

(Delivered 23 March 2009)

[1] The accused is charged with two counts of indecently dealing with his stepdaughter, a child under the age of 16; one count of committing an act of gross indecency without her consent; and two counts of having had sexual intercourse without her consent. The offences are said to have taken place between 24 April 2005 and 24 April 2007 at Alice Springs and at Palmerston in the Northern Territory. There is also a sixth count which is based on s 131A(2) of the Criminal Code, namely that:

> "Between on or about 24 April 2005 and on or about 24 April 2007 at Alice Springs and Palmerston in the Northern Territory [the accused] maintained a relationship of a sexual nature with MJC, a child under the age of 16 years."

[2] At the commencement of trial a voir dire was conducted pursuant to s 26L of the Evidence Act concerning the admissibility of the evidence of three witnesses. It was submitted by counsel for the prosecution that the evidence of the witness JT was admissible as evidence of recent complaint and also was admissible pursuant to s 26E of the Evidence Act as evidence of the facts in issue. In relation to the witness AM and the witness HM, counsel for the Crown did not submit that the evidence was admissible as evidence of recent complaint, but submitted that their evidence was admissible in each case under s 26E. After hearing submissions, I ruled that the evidence of JT was admissible as recent complaint, but was not admissible as evidence under s 26E. I also ruled that the evidence of AM was inadmissible as evidence under s 26E and that the evidence of HM was admissible under s 26E. I said I would provide my reasons later. These are those reasons.

[3] Count 4 on the indictment relates to an allegation that the complainant was in her parent's bedroom watching a movie on Austar when the accused came in and lay on the bed next to her. After watching the movie for a short while, he then put his hands into the complainant's pants and inserted his finger into her vagina.

[4] The Crown intends to call JT, a friend of the complainant, who is also a child. According to JT she was told by the complainant that when she was living in Alice Springs two men had raped her and that the accused had been raping her lately as well. This conversation was said to have occurred during December 2006 or January 2007. The conversation as related by JT is

different from the evidence of the complainant who said that she sent an MSN to JT during the holidays in 2006–2007 in which she told her that the accused had touched her on her vagina and on her breasts. Subsequently during the trial, the complainant gave evidence in cross-examination that there was a conversation similar to that referred to by JT in which she said that she told JT that she had almost got raped twice and that the accused had been touching her recently.

[5] Although the accounts in the evidence are different, the complaint evidence is the evidence given by JT. The question then is whether the evidence of JT is capable in law of being a complaint about being raped recently by the accused. In that context it might be open to the jury to understand "raped" to mean simply non-consensual sex of some kind.

[6] One of the difficulties is that the complaint must be made as speedily as could reasonably be expected. However, reasonableness is to be judged by reference to the sensitivities of the complainant and the circumstances under which the particular complainant was placed at the time. As stated by *Cross on Evidence*[1] this may mean that allowance will be made for the fact that a child sexually assaulted by a person in whom the child had trust and confidence will be reluctant to complain.

[7] In this particular case, the accused is the complainant's stepfather. The circumstances were such as to provide a proper basis upon which the jury

[1] 4th Aust ed, Butterworths, Sydney, 1991- (loose-leaf edition), paragraph 17270

might well find that there was a reluctance to complain and why that reluctance was so. The complainant gave evidence as to what those reasons were and then also there was evidence from HM whom she told why it was that she did not complain to her mother. There is a difficulty for the Crown in this matter in that the evidence of JT as to the nature of the complaint made to her uses the word "raping" which may mean sexual intercourse without consent, including penile/vaginal penetration and it also suffers from the difficulty that there may not be identity between the complainant's complaint and the complainant's evidence. Nevertheless, as long as the complaint is capable of supporting the credibility of the complainant's testimony, the complaint evidence is admissible.

[8] In my opinion, the evidence met these criteria and it should be admitted as evidence of recent complaint.

[9] As far as the admissibility of the evidence under s 26E is concerned, s 26E allows the Court to admit evidence of a statement made by a child to another person as evidence of the facts in issue if the Court considers the evidence of sufficient probative value to justify its admission. The relevant authorities were reviewed by me in *R v Manager*[2] in which I endorsed the observations of Martin (BR) CJ in *R v Wojtowicz*[3] where it was said that the Court is required to assess the probative value of the evidence and having regard to the dangers associated with this type of hearsay evidence,

[2] [2006] NTSC 85
[3] (2005) 148 NTR 24 at 30 para [32]

determine whether the admission of the evidence is justified having regard to its probative value and all the circumstances of the case. It is not a requirement that the evidence have significant or substantial probative value, but if the evidence is significant in the sense that it is important or of consequence to the facts in issue, subject to questions of reliability and discretionary exclusion, the evidence would ordinarily possess sufficient probative value to justify its admission.

[10] I note also that under s 26F if the evidence is to be admitted the weight to be attached to the evidence depends upon all of the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement and in particular to the question of whether or not the statement was made contemporaneously with the occurrence of existence of the facts stated and also to the question of whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

[11] The statement made does not necessarily need to be contemporaneous in order to be admissible under s 26E. Contemporaneousness goes to weight not admissibility. Similarly, questions relating to whether or not the complainant had an incentive to conceal or misrepresent facts also go to weight[4].

[12] Nevertheless having said that, contemporaneousness is in my view one of the factors which needs to be considered as to whether or not the Court is

[4] See s 26F(1)

satisfied that the evidence has the relevant probative value. In this particular case, I considered that the evidence did not have sufficient probative value to admit it in this case as it was lacking in any detail as what in fact occurred, when it occurred and where it occurred. It amounted to no more than a mere allegation and nothing more. In those circumstances it is difficult to see how it could be probative of anything.

[13] So far as the proposed evidence of AM is concerned, there were a number of difficulties with this evidence brought about by carelessness on behalf of the investigating police. The evidence sought to be led was secondary evidence of text messages passing between the complainant and AM in which the complainant made a complaint of being molested. Although the police when taking a statement from AM had access to AM's mobile telephone and were able to record accurately what in fact the complainant had texted to AM, no effort had been made to secure the complainant's mobile phone with the consequence that, in the end, the best evidence of the text messages was not obtained and only half of the evidence was satisfactorily recorded in written form.

[14] Be that as it may, the reason I rejected the evidence as lacking in any probative value was not dependent solely on this. Principally my reason for rejecting it was the lack of specificity in the complaint. Again, it was not possible to know which count the complaint related to in the indictment, when it was said to have occurred, where it was said to have occurred and so

on. It was merely a bald assertion unsupported by any particulars and therefore, in my view, it had no probative value at all.

[15] The evidence of the witness HM I thought was in a different category. The statement made by the complainant to HM clearly related to count 4 on the indictment or at least it could be taken by the jury to relate to count 4 on the indictment and it did contain more than a mere allegation. The complainant described to HM what had happened on that occasion and, although the details were somewhat lacking, HM was able to give evidence that the complainant had told her that she had been touched by use of the fingers on the vagina and gave her to an account as to why she had not mentioned this to her mother on a prior occasion. It was therefore relevant to two issues in the case, namely the circumstances relating to count 4 and why an earlier complaint was not made to the complainant's mother. Despite the fact that this evidence was given shortly after the complainant had been spoken to by the police for the first time (at which time no formal statement to the police had been taken), I considered it was sufficiently probative to be admitted. I was unable to see any reason to exclude it in the exercise of my discretion.

[16] The other matter on which I made a ruling was whether or not to leave count 6, the alleged offence of maintaining an unlawful relationship with a child, to the jury.

[17] Section 131A provides as follows:

"131A Sexual relationship with child

(1) For the purposes of this section, *offence of a sexual nature* means an offence defined by section 127, 128, 130, 132, 134, 188(1) and (2)(k), 192 or 192B.

(2) Any adult who maintains a relationship of a sexual nature with a child under the age of 16 years is guilty of a crime and is liable to imprisonment for 7 years.

(3) A person shall not be convicted of the crime defined by this section unless it is shown that the offender, as an adult, has, during the period in which it is alleged that he maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child on 3 or more occasions, and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions.

(4) If in the course of the relationship of a sexual nature the offender committed an offence of a sexual nature for which the offender is liable to imprisonment for at least 7 years but not more than 20 years, other than an offence against section 192(8) or 192B, the offender is liable in respect of maintaining the relationship to imprisonment for 20 years.

(5) If in the course of the relationship of a sexual nature the offender committed:

(a) an offence against section 192(8) or 192B; or

(b) an offence of a sexual nature for which the offender is liable to imprisonment for more than 20 years,

the offender is liable in respect of maintaining the relationship to imprisonment for life.

(6) It is a defence to a charge of a crime defined by this section to prove:

(a) the child was of or above the age of 14 years; and

(b) the accused person believed on reasonable grounds that the child was of or above the age of 16 years.

(7) A person may be charged in one indictment with an offence defined by this section and with any other offence of a sexual nature alleged to have been committed by him in the course of the relationship in issue in the first-mentioned offence and he may be convicted of and punished for any or all of the offences so charged.

(8) Where the offender is sentenced to a term of imprisonment for the offence defined by this section and a term of imprisonment for an offence of a sexual nature, an order shall not be made directing that one of those sentences take effect from the expiration of deprivation of liberty for the other offence.

(9) An indictment for an offence against this section shall be signed by the Director of Public Prosecutions.

(10) Section 12 does not apply to the child with respect to whom an offence against this section is committed."

[18] Section 131A is in para materia to s 229B of the Criminal Code (Qld) particularly in the form it was in prior to being amended in 1997.

[19] In *R v Thompson*[5] the Court of Appeal of Queensland in an unanimous judgment said that the "jury was required to be unanimously satisfied beyond reasonable doubt that the appellant had done the same three acts,

[5] (1996) 90 A Crim R 416 at 434

each constituting an offence of a sexual nature against the complainant". This statement seems to indicate that the Court required that the acts in each case be the same and that there could not be different offences of a sexual nature relied upon as constituting the minimum of three offences in order for a finding of guilt to be made under the section.

[20] The decision in *Thompson* went on appeal to the High Court[6]. A majority of the Court said in a joint judgment[7]:

> "The offence created by s 229B(1) is described in that subsection in terms of a course of conduct and, to that extent, may be compared with offences like trafficking in drugs or keeping a disorderly house. In the case of each of those latter offences, the actus reus is the course of conduct which the offence describes. However, an examination of subsection (1A) makes it plain that that is not the case with the offence created by s 229B(1). Rather, it is clear from the terms of subsection (1A) that the actus reus of that offence is the doing, as an adult, of an act which constitutes an offence of a sexual nature in relation to the child concerned on three or more occasions. Once it is appreciated that the actus reus of the offence is as specified in subsection (1A) rather than maintaining an unlawful sexual relationship, it follows, as was held by the Court of Appeal, that a person cannot be convicted under s 229B(1) unless the jury is agreed as to the commission of the same three or more illegal acts."

[21] The question then is what is meant by "the same three or more illegal acts". In Victoria, it appears that the view has been taken that it was necessary for the Crown to prove at least three acts of a similar nature or consisting of an offence under the same provision. In *GJB*[8] Winnecke P refers to the history of s 47A of the Crimes Act (Vic) which was of a similar kind to s 131A. His Honour said that the offence was introduced to overcome "perceived

[6] *KBT v The Queen* (1996-1997) 191 CLR 417
[7] Brennan CJ, Toohey, Gaudron and Gummow JJ at 422
[8] (2002) 129 A Crim R 479 at 481

deficiencies in criminal pleading said to have been exposed in the decision of the High Court in *S* (1989) 168 CLR 266; 45 A Crim R 221, in which the young victim of repeated sexual abuse was unable to identify with precision the circumstances and occasions in and upon which the several acts had occurred. However, as this Court noted in *Macfie*[9] the provisions of s 47A have a tendency to 'cut across time honoured concepts of procedural fairness' in the administration of the criminal law which have long established that a person accused of a serious criminal offence is entitled to know with particularity the offence he is said to have committed and the occasion upon which and the circumstances of which he is said to have committed it. It is no doubt these facets of the offence which have caused it and its counterparts in other States, to become the subject of close scrutiny"[10].

[22] His Honour went on to observe that as a result of amendments to the Crimes Act (Vic) passed in 1998, s 47A was amended to include subsection (2A) which provided "it is not necessary that the alleged acts be of a similar nature or constitute an offence under the same provision".

[23] It would appear from the judgment in *GJB* that the view had been taken in Victoria, prior to the amendment in 1998, that the acts relied upon did have to be of a similar nature or against the same section.

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[9] [2000] VSCA 173 at [34]
[10] (2002) 129 A Crim R 479 at 481–482

[24] Counsel for the Crown, Mr Stoddart, submitted that on a fair reading of *Thompson* and of the decision of the High Court in *KBT* that was not what was intended and that it was sufficient if the Crown were able to prove any three of the offences set out in s 131A(1). Counsel for the accused, Mr Maley, did not argue otherwise.

[25] After giving the matter careful consideration, I was persuaded that Mr Stoddart is correct. Moreover, I thought that Mr Stoddart's argument was supported by the provisions of s 131A(4) and s 131A(5) which provide for circumstances of aggravation if, in the course of the relationship of a sexual nature, the offender has committed an offence of a sexual nature for which he is liable for imprisonment for at least seven years but not more than 20 years or any offence of a sexual nature for which the offender is liable to imprisonment for more than 20 years. It seemed to me that if the legislature had intended that it was necessary for the section have the effect that the Crown had to prove an offence against the same section of the Criminal Code on at least three occasions, subsections (4) and (5) would have been quite differently worded.

[26] For these reasons I decided to leave count 6 to the jury.
