R v MB [2009] NTSC 47

PARTIES:	THE QUEEN
	v
	MB
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20825784
DELIVERED:	16 September 2009
HEARING DATES:	15 September 2009
JUDGMENT OF:	KELLY J

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – ADMISSIBILITY

Application under section 26L and 26E of the Evidence Act 1939 (NT) – admissibility of evidence at trial – hearsay evidence – contemporaneousness – sexual offence

Evidence Act 1939 (NT), s 26E, s 26 F, s 26L

R v Joyce (2005) 15 NTLR 134; *R v Wojtowicz* [2005] 148 NTR 24; *The Queen v PW* [2009] NTSC 08, followed

Osbourne [1905] 1 KB 55; *Jonkers v Police* [1996] 91 A Crim R 104; *R v Manager* [2006] NTSC 85; *Suresh v The Queen* (1998) 72 ALJR 769, considered

REPRESENTATION:

Counsel:

Plaintiff:	E. Armitage
Defendant:	J. Franz

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	Northern Territory Legal Aid Commission

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v MB [2009] NTSC 47
No. 20825784

BETWEEN:

THE QUEEN

AND:

MB

CORAM: KELLY J

REASONS FOR RULINGS

(Delivered 16 September 2009)

[1] The accused is charged with one count of having sexual intercourse with CD without her consent, a charge to which he has pleaded not guilty and one count of indecent dealing with CD, a person under the age of 16 years, a charge to which he has pleaded guilty.

[2] At the beginning of the trial a *voir dire* was conducted pursuant to section 26L of the *Evidence Act* concerning the admissibility of evidence from MH (an aunt of both the complainant CD and the accused) and evidence from CD.

[3] The Crown seeks to call evidence from both MH and CD about statements made by CD to MH on the evening of 24 April and the morning of 25 April 2008.

[4] Both MH and CD gave evidence on the *voir dire*. In addition extracts from the transcript of the oral committal proceeding were tendered along with a statutory declaration made by MH to police on 16 July 2009 and the transcript of the pre-recorded evidence of CD of 11 May 2009.

[5] Although there are some discrepancies between the evidence of MH and CD, the substance of the evidence sought to be adduced by the Crown is that, on the night of 24 April 2008, when CD was visiting her mother and siblings who were living with MH, MH and CD went to the Palmerston Shops to buy groceries and walked back to MH's unit. During this excursion they had a discussion. MH raised the topic of sex among other things. MH told CD that she wanted her to wait until she was at least 18 before becoming sexually active. CD didn't want to speak about the topic. MH also raised with CD the fact that she had noticed a change in her behaviour over the last couple of years. CD became upset. MH pressed her for information. CD eventually disclosed that she was no longer a virgin and became extremely upset. In response to questioning by MH, CD indicated that she had been forced to have sex. She was crying, sobbing, and too upset to say anything further. MH said she would give her a couple of hours to calm down but that she wanted the full story. They went back to MH's unit and CD went to bed and to

sleep. Sometime later in the very early hours of the morning CD came down to the lounge and told MH that her cousin MB had raped her. She gave some details, namely that it had happened several years before on the night that she was left to baby sit her Uncle Frank (who was then a baby), that it had happened in the lounge room of MH's unit, and that afterwards CD had run upstairs and locked herself in MH's bedroom.

[6] There is less detail of the conversation in the statutory declaration of MH made to police on 16 July 2009 and there are some discrepancies in the evidence of MH concerning the detail of these conversations between the evidence she gave on the committal proceeding and the evidence she gave on the *voir dire*. Likewise there are some differences in detail between the evidence of the conversations given by MH and that given by CD. Nevertheless I consider that, in substance, the two witnesses are describing the same conversations and also that, in substance, they have been consistent in their evidence in relation to the conversations that occurred on 24 and 25 April.

[7] The Crown seeks to adduce evidence of these conversations pursuant to section 26E(1) of the *Evidence Act*. Section 26E(1) provides as follows:

> "**26E. Exception to rule against hearsay evidence**
>
> (1) In a proceeding arising from a charge of a sexual offence or a serious violence offence, the Court may, despite the rule against hearsay evidence, admit evidence of a statement made by a child to another person as evidence of facts in issue if the

Court considers the evidence of sufficient probative value to justify its admission."

[8] The Crown seeks to adduce evidence of the whole of the conversations that occurred on the evening of 24 and the morning of 25 April. Ms Armitage has submitted that the entirety of the context is admissible. She points to section 26F of the *Evidence Act* which provides as follows:

> "26F. Weight to be attached to evidence
>
> (1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts."

[9] The Crown does not seek to lead evidence of these conversations as complaint evidence. Effectively, the Crown concedes that the complaint was not made at the first reasonable opportunity.

[10] However Ms Armitage contends, correctly, that the requirements for the admission of evidence as complaint evidence are different than the requirements of admission of evidence under section 26E(1).

[11] In *R v Joyce* (2005) 15 NTLR 134, Riley J said at p 140-141:

> "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.

[12] Those comments were approved by BR Martin CJ in *R v Wojtowicz* [2005] 148 NTR 24 at p 29 para [30] and by Mildren J in *R v Manager* [2006] NTSC 85 at [8].

[13] Further, in *R v Wojtowicz* (supra), BR Martin CJ said at p 30 para [32]:

> "In my opinion the Court is required to assess the probative value and, having regard to the dangers associated with this type of hearsay evidence, to determine whether the admission of the evidence is justified having regard to that 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, such evidence would ordinarily possess "sufficient" probative value to "justify" its admission."

[14] The Crown concedes that the statement made by CD to MH was not contemporaneous to the events in issue. However:

> "The assumption that the victim of a sexual offence will complain at the first reasonable opportunity is an assumption of doubtful validity."
>
> *R v Joyce* (2005) 13 NTLR 134 per Riley J at [62], adopting *Suresh v The Queen* (1998) 72 ALJR 769 at 770, 778.
>
> Furthermore,
>
> "The statement does not necessarily need to be contemporaneous in order to be admissible under s26E. 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."
>
> "Nevertheless …contemporaneousness is … one of the factors which needs to be considered …".
>
> *The Queen v PW* [2009] NTSC 08,unreported judgment of Mildren J, 23 March 2009, at [11]-[12].

[15] Although the statements sought to be led are not contemporaneous the Crown submits that they are nonetheless admissible because they possess sufficient probative value to justify their admission. The probative value, it is submitted, arises from the following circumstances: the statement contains detail about what occurred (rape), when it occurred (the night of babysitting) and where it occurred (in the lounge room of MH's unit). The complainant's disclosure was accompanied by significant distress in circumstances where there are no reasons to suggest fabrication. It was the first disclosure to an adult. MH has a detailed recollection of the conversation. It was the catalyst for the complaint to the police and the subsequent investigation and charge.

[16] In all the circumstances the Crown submits that the statement is sufficiently probative to be admitted and there are no grounds for it to be excluded in the exercise of a discretion.

[17] The Crown submits that the statements are directly relevant to and probative of the fact of the rape, the circumstances of the rape, and why an earlier complaint had not been made to the complainant's mother and relies on *The Queen v PW* (supra) at [15] as to admissibility in those circumstances.

[18] The Crown says further that, although not contemporaneous, the reason for delay is explained.

[19] Ms Franz, counsel for the defence submits that the statements do not have sufficient probative value to be admitted under section 26E for a number of reasons.

[20] Ms Franz submits that the correct approach is to assess the reliability of the evidence before even considering its probative value and that the discrepancies between the two witness's accounts and the accounts given by MH on different occasions means the evidence is unreliable.

[21] It seems to me that an assessment of the reliability of the evidence is part and parcel of assessing its probative value.

[22] For the reasons outlined above i.e. that, in substance, it is clear that the two witnesses are describing the same conversations and that, despite some discrepancies in detail, they have been consistent in their accounts of those

conversations, it seems to me that the evidence is reliable. Whether the jury considers it so is, of course, a matter for them. I do not think that there are factors affecting its reliability which lead me to conclude it does not have sufficient probative value to justify its admission.

[23] Ms Franz points to the delay in the making of the complaint. Contemporaneousness is one of the factors to be considered when determining whether or not the evidence has relevant probative value. See *R v PW* [2009] NTSC 08 per Mildren J at [12]. As Ms Armitage of the Crown points out, contemporaneousness is only one of the factors to be considered and, in this case, the delay in making the complaint has been explained. CD gave evidence on the *voir dire* that she had not told her aunt earlier because she was afraid there would be big trouble and family violence. MH says CD also told her she had been afraid family members would not believe her. She also gave an explanation for her decision to speak out in April 2008.

[24] In any event, as was pointed out in *Jonkers v Police* [1996] 91A Crim R104 at 109:

> "We now have a greater understanding that those who are the victims of sexual offences, be they male or female, often need time before they can bring themselves to tell what has been done to them; that some victims will find it impossible to complain to anyone other than a parent or member of their family whereas others may feel it quite impossible to tell their parents or members of their family."

[25] Secondly, Ms Franz submits that the statements made by CD to MH on 24 and 25 April are "mere allegations" lacking in detail. She relies on the statement of Mildren J in *R v PW* (supra) at [12]:

> "A statement which is lacking in any detail as to what in fact occurred, when it occurred and where it occurred, amounts 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."

[26] In this case I do not consider the statements made on 24 and 25 April to be "mere allegations" in that sense. Ms Franz points to the lack of a detailed description of the actual rape. However, it seems to me that there can be little doubt that in the relevant conversations CD was complaining to MH about an act of vaginal sexual intercourse without her consent. She said, "MB raped me". She also said words to the effect that she was no longer a virgin, that she had had sex and that she had been forced. Moreover, in the conversations in question, CD gave details of the occasion upon which the rape took place, and the location, namely on the evening when she had babysat baby Frank in the lounge room at her Aunt, MH's, unit. There is some discrepancy in the various accounts as to what other details were provided but I do not think that this casts any real doubt on the probative value of the evidence. The two witnesses are *ad idem* on the substance of what was said.

[27] Counsel made submissions in relation to the issue of spontaneity. Crown Counsel submits that the issue of spontaneity goes to the question of

whether or not the complaint was tarnished by the circumstances. She says that here there was no suggestion from the questions put to CD by MH as to what the story should be. Ms Franz, for the defence, on the other hand, points out that the complaint by CD that she was forced was given in response to what was essentially a leading question from MH. She says that this has to be looked at in light of the other circumstances, namely MH's statement that CD should refrain from sexual activity until she was at least 18, CD's statement or hint that she was no longer a virgin, and MH's shock at that revelation. Ms Franz submits that the circumstances cast doubt on the probative value of the evidence.

[28] Taking into account the whole of the circumstances in which the statements were made, I do not think that the fact that the statement about being forced came initially as a result of a leading question casts doubt on the probative value of the evidence.

[29] I bear in mind that one of the circumstances relied upon by the Crown was the significant distress displayed by CD in making the revelations to MH, that there may be many causes of such distress, and that it would be dangerous for a jury to rely upon such distress as corroborating CD's story. However, taking into account all of the surrounding circumstances I consider that the statements sought to be led by the Crown have sufficient probative value to justify their admission in the circumstances of the case pursuant to section 26E(1).

[30] I consider that the remarks made by Ridley J in *Osbourne* [1905] 1 KB 55 and quoted in *Jonkers v Police* (supra) at p107 apply equally to the facts of this case:

> "The statement made … was [an] unassisted and unvarnished statement of what happened. That she may have been persuaded to tell her unassisted and unvarnished story there is no reason why the evidence of her having made the statement should be rejected."

[31] There is no suggestion that CD had any incentive to conceal or misrepresent the facts. Under section 26F, this is a consideration to be taken into account in determining the weight to be given to the evidence. However I consider it to be also relevant to the question of the probative value of the evidence.

[32] It seems to me that the statements of CD to MH are clearly probative of the question of whether or not sexual intercourse took place which is the major issue in the proceeding.

[33] The evidence of the circumstances in which the statements were made (i.e. the evidence of the actual events of 24 and 25 April 2008) is necessary to put the evidence of the actual statements in context and to enable inferences to be drawn by the jury as to the accuracy or otherwise of those statements and the weight to be attached to them. Some of that evidence is also probative of the question why an earlier complaint was not made.

[34] I therefore propose to admit evidence from both MH and CD as to the events leading up to the conversation between them on the night of 24 April and the

early morning of 25 April and the statements made by CD to MH during that period of time pursuant to section 26E(1) of the *Evidence Act*.