

The Queen v IMM (No 2) [2013] NTSC 44

PARTIES: THE QUEEN

-v-

IMM (No. 2)

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING ORIGINAL
JURISDICTION

FILE NO: 21206228

DELIVERED: 3 JULY 2013

JUDGMENT OF: BLOKLAND J

CATCHWORDS:

EVIDENCE – Admissibility - Out of Court Previous Representations –
Relevance – Hearsay – Exception to Hearsay – “Fresh in the Memory” –
Evidence Admitted

EVIDENCE – Discretionary Exclusion – Probative Value – Evidence Taken
at its Highest – Discretion Not Enlivened

EVIDENCE – Admissibility – Written Previous Representations – Excluded

Evidence (National Uniform Legislation) Act (NT), s 55; s 66(2); s 66(2A);
s 135, s 137

Evidence Act (NT), s 26E

IMM v The Queen [2013] NTSC 9; *Papakosmos v The Queen* (1999) 196
CLR 297; *R v Robertson*; *Ex parte AG* [1991] 1 Qld R 262; *R v XY* (2010) 79
NSWLR 629; *Graham v The Queen* (1988) 195 CLR 606; *LMD v The Queen*
[2012] VSCA 164; *R v BD* (1997) 94 A Crim R 131; *R v Shamouil* [2006]

NSWCCA 112; *R v MK* [2012] NSWCCA 110; *Festa v The Queen* (2001) 208 CLR 593; *Adam v The Queen* (2001) 207 CLR 96; *Stuart v The Queen* [2010] NTCCA 16, referred to

REPRESENTATION:

Counsel:

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| Prosecution: | Mr Nathan |
| Accused: | Mr Berkeley |

Solicitors:

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| Prosecution: | Office of the Director of Public Prosecutions |
| Accused: | Louise Bennett |

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

The Queen –v- IMM (No. 2) [2013] NTSC 44
No. 21206228

BETWEEN:

THE QUEEN

AND:

IMM (NO. 2)

CORAM: BLOKLAND J

Pre Trial Ruling on Complaint and Associated Evidence

(Delivered 3 July 2013)

Introduction

[1] This ruling concerns the question of admissibility of representations or statements made by a young complainant to a number of persons who will be called to give evidence at trial.¹ Since a previous ruling on a stay application and an application to amend the indictment was made,² a *Basha* inquiry has been held and further argument relevant to the question of admissibility has been heard.

¹ The various witnesses are referred to as “SS”, “SW”, “SC” and “KW”.

² *IMM v The Queen* [2013] NTSC 9

- [2] For the reasons that follow, I will admit the evidence of the representations made by the complainant. I will exclude evidence about the complainant writing poems in order to bring attention to her complaint.

Application to Exclude Out of Court Representations

- [3] Although the issues raised here previously would have been dealt with under the relevant common law, (primarily that of recent complaint), the trial is governed by the *Evidence (National Uniform Legislation) Act* (UEA). The Crown primarily relies on s 66: (the permitted exception to hearsay in criminal proceedings if the person who made the representation is available to give evidence about an asserted fact). A condition of admissibility under s 66 is that the occurrence of the fact was fresh in the memory of the person making the representation: (s 66(2)). In determining whether the occurrence of the asserted fact was fresh in the memory, the court may take into account the nature of the event concerned; the age and health of the person; and the period of time between the event and making the representation: (s 66(2A)).
- [4] On behalf of the accused it is argued that the representations are inadmissible as they are irrelevant; secondly as hearsay; and thirdly that they do not conform to the exception to hearsay in s 66(2) and s 66(2A). It is submitted they are not of sufficient probative value to justify admission under an alternative basis, such as s 26E of the *Evidence Act* (NT). In the alternative it is argued the evidence should be excluded under exercise of the discretion under s 135 on the grounds of being unfairly prejudicial, misleading, confusing or result in undue waste of time; alternatively that the

probative value is outweighed by the danger of prejudice to the accused under s 137.

The Particular Representations

- [5] The representations concern broadly, disclosures of sexual misconduct alleged against MM. The representations the complainant made to SS (a young school friend), described by SS in a CFI³ of 30 January 2012, are as follows:

What happened between [the complainant] and her grandfather? Um – he touched her, I’m not quite sure how but when she told me – she told me that he touched her after her- -she didn’t tell me when but it was aft – um when her grandparents spilt up that she come out with the truth

- [6] SS also stated:

She told me – she rang me one night crying ‘cause her grandparents were splitting up, I don’t know why but before they’d spilt up she didn’t tell anyone that she’d been touched, I didn’t even know but when they broke she came out – the truth and just told her mum and her nana that she’d – he’d touched her.

And – um she was crying and that’s pretty much as much as I can remember.

- [7] Police asked SS how long after the complainant’s grandparents had split up did the complainant tell her. SS answered as follows:

She rang me crying one night ‘cause her grandma was in hospital and they were talking about getting a divorce or something and then they split up and then I think she’d just told her mum and she rang me and told me that she’d told her mum what happened.

³ Child Forensic Interview

[8] When asked how many times the complainant had spoken to her about this, SS said:

Um, once I can remember that she told me that they'd reported it and that she'd given my name and they might ring and ask to talk to me. And she just keeps reminding me not to tell anyone.

[9] In cross-examination SS agreed with the proposition that she remembered clearly that the complainant had told her during the conversation that she had told her mum and her nanna before she spoke to her.

[10] In relation to representations made to the complainant's aunty, (SW); SW stated that she was at home with her mother, SC and her son H. The complainant had been in trouble at school, was late home, but she was home when SW arrived home. SW had a critical conversation with the complainant about what was perceived as her poor attitude. A discussion took place in which the complainant said "The things you are trying to protect me from have already happened". When asked what she meant by this, SW stated the complainant shrugged and said "nothing". SW then asked her, "Was it I" "(referring to the accused) and the complainant said "yes".

[11] When SW rang the complainant's mother, (SW's sister), she said "I've just broken (the complainant), she's told me that I's (the accused) been molesting her and I believe her". She also said the complainant did not tell her "any details about times or dates of the things that happened to her with (the accused)".

[12] SC, (the complainant's grandmother) stated that after she and SW were going to speak to the complainant about her behaviour, including her behaviour at school and an issue of inappropriate clothing, SW told the complainant "... we loved her" and the complainant said "no you didn't, you don't really care, you don't really love me, you only pretend to because you haven't been looking after me". SC also said SW had asked whether (the accused) had been touching her; that this is when the complainant started sobbing more and said that they didn't care and can't protect her. The complainant told SW that it had been happening since she was little. SC also said the complainant never said anything and never gave them a description of what the accused did to her.

[13] At the time of these disclosures to SW and SC, the complainant's mother (KW) was away from Darwin. She returned to Darwin the next day (26 August 2011). KW believed, as a result of the phone conversation with SW that something had happened between the complainant and the accused. Taken at its highest, it is submitted the effect of the complainant's representation was that every day, since she was four years old, the accused would lay on her, naked and squash her. When asked directly by KW "was he trying to have sex with you?" the complainant "didn't speak, she shrugged her shoulders at me". She denied penetration.

[14] From this evidence, it is submitted on behalf of the accused that it is more likely that the representation made to SW and SC was the first in time, prior to the representation made to her friend SS, thus arguably diminishing the

value and reliability of the representation to SS. I am unable to make the finding sought on behalf of the accused as to the timing of the representations.

[15] In the CFI, SS is asked by the police whether she understands what she is there for. She says she is there to talk about (the complainant) and what happened between her and her grandfather. When asked what happened between them, she tells police that he touched her; that she (SS) is not quite sure how, but that when she told her, she didn't tell her when it happened, but it was after her grandparents spilt up that she came out with the truth. SS also said (at 19), "Well when she told me, she rang me one night crying because her grandparents were splitting up". She also said her grandma was in hospital. SS also stated that the conversation took place at the end of 2010 or the beginning of 2011.

[16] She also tells of another conversation, obviously a subsequent conversation in which the complainant told SS that it had been reported to police and police may want to speak to SS.⁴

[17] The complainant's evidence in the CFI was that she told SS about what happened and that SS was the first person that she told; that she told her two years prior to the interview. In pre-recorded evidence in cross examination (on 5 September 2012) she said the conversation was three years prior to

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giving that evidence. She also refers to SS telling her that she should tell her mother.⁵

[18] It is to conclude the complainant made the representation to SS at the time of her grandmother and the accused splitting up. Some of the evidence indicates that would appear to be November 2010. There is also evidence that the complainant thought she spoke to SS about the allegations before her birthday party (June 2011), rather than towards the end of that year.

[19] While there may be matters of credit or reliability to be considered, in my view, despite SS stating that at one point the representation was made after the complainant spoke to her mother (KW), that is by no means clear when all of the evidence relevant to the timing of the disclosures is considered. The lack of clarity on the timing is not, in my view a sufficient reason to reject the evidence of the complainant's previous representations.

Relevance

[20] On behalf of the accused it is submitted the complainant's previous representations are not relevant in the sense contemplated by s 55; evidence is relevant if it will "rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue". Here it is argued, the various representations lack that capacity; that the statements to SW, SC and KW would not be admitted at common law as complaint evidence given the leading nature of the questions by SW and the answers by the complainant to

⁵ CFI at 80, 30 September 2011

persons who, it was submitted are persons in authority. It is argued that the fact the complainant was to be spoken to in relation to her behaviour and dress is relevant to this assessment. It is argued the statements are not contemporaneous with the incidents complained of,⁶ and in some respects are ambiguous. SW interprets the statement by the complainant as the accused molesting the complainant and informs KW, the complainant's mother. All of these factors may reduce the reliability of the evidence, but on behalf of the accused it is argued, these factors also mean the evidence is not relevant. There is also the denial of penetration by the complainant to her mother to be considered. None of the representations, it is argued, go to proof of any charge on the indictment.

[21] In my view, although there is ample material available to challenge the weight to be attached to the complainant's previous representations, they are relevant in the sense of s 55. The expression that her grandfather "touched her" (as recalled by SS), in my view has the capacity, (in the context of the phone call to SS), of referring to sexual contact or being a complaint of a sexual nature about the accused, who she identifies in the conversation. It will be up to the jury to consider whether this was in fact the case.⁷ Failure to state the details of the contact do not render the details that she did give, irrelevant. The complainant's evidence was that she told SS her grandad was "molesting" her. Although there is a conflict in the evidence about the

⁶ cf *Papakosmos v The Queen* (1999) 196 CLR 297

⁷ *R v Robertson; Ex parte A-6* [1991] 1QLd R 262; 263 and 276).

words used, that will be a matter for the jury; both parties to the conversation understood the words used to be clearly referable to an allegation of sexual misconduct by the accused. That it does not refer to a specific count alleged in the indictment does not in these circumstances, dissuade me from that conclusion.

[22] Even though the representation made to KW (the mother) must be seen in the context of, and its weight assessed in the light of, the conversation between the complainant and SW, as well as SW's communication to KW, that does not, in my view mean the representation to KW is devoid of a logical connection with sexual misconduct alleged against the accused. Logically it is relevant to at least count one, but in my view it is also relevant to the remaining counts.

[23] In relation to the argument that the emotion shown by the complainant during the course of the disclosure to SW and SC could have been attributable to being disciplined is a matter going to weight for assessment by the jury, not to admissibility. These conversations unfolded in the context of family discussions. Although there is significant scope for testing the evidence and for any deficiencies to arguably reduce its weight, I would not refuse to admit it. As was said in *R v XY*,⁸ ambiguity or apparent inconsistency is not a sufficient reason to reject evidence in a criminal trial.

⁸ (2010) 79 NSWLR 629 at 646.

It is for the jury, not for the trial judge, to evaluate evidence and the weight to be given to evidence.

Hearsay or an Exception to Hearsay

[24] On behalf of the accused it is argued the evidence in any event is hearsay under s 60 and should not be received under the relatively new test for the exception provided under s 66(2A). Prior to the introduction of s 66(2A), it was held “fresh in the memory” meant “recent or immediate” in relation to the temporal connection between the asserted fact and the representation.⁹ Subsection (2A) was introduced to broaden the factors that could be taken into account in determining whether an asserted fact was ‘fresh in the memory’. As acknowledged by Justice Whealy in *R v XY*, when dealing with similar issues, given the nature of the offences and the age of the complainant, it is here as it was in *R v XY*, “highly likely” that the memory of such events would be fresh in the sense contemplated by the section. In my view all statements made by the complainant are fresh in the sense contemplated by s 66(2A); that is, bearing in mind the nature of the event concerned, the age and health of the complainant and the period of time between making the assertion and the occurrence of the event.

[25] Both counsel have drawn my attention to *LMD v The Queen*,¹⁰ where a complaint to a friend of the complainant that she had been “molested” by the accused six or seven years after the assault and her reaction to sexual

⁹ *Graham v The Queen* (1988) 195 (LR 606)

¹⁰ [2012] VSCA 164 at [24] – [26]

advances (“freezing”) some ten years later were held to satisfy s 66 UEA. This matter readily calls for a ruling in favour of admissibility in similar terms.

[26] In my view the complaints made to SS and KW and the distressed demeanour described by these witnesses qualify for admission under the Act. Any delay is not of the significance discussed in comparable cases¹¹ that permitted admission on this basis. The asserted facts were likely to be clear in the complainant’s memory. In relation to the complaint to SS, at the most it would have been 12 months after the last incident; further, the complainant’s demeanour while referring to being “touched by” the accused is highly likely to refer to sexual misconduct. The relationship between the complainant and accused is also relevant. Similar considerations apply to the evidence of KW which must also be seen in the context of the disclosure to SW and SC the night before.

Discretionary Exclusion

[27] On behalf of the accused it is argued the evidence should in any event be excluded under s 137 on the grounds that its “probative value” is outweighed by the danger of unfair prejudice to the accused. It is submitted this is evidence that would be inadmissible at common law, at least in relation to the facts in issue and could only be relevant to credit if admitted. It is submitted the jury may unfairly use the representation made by the

¹¹ For example in *R v XY and LMD v The Queen*

complainant to bolster her later more detailed accounts of the allegations.

In my view, although there are reasons the jury will need to consider the weight to be given to the disclosures made, the UEA and s 66 in particular, permit the admission of evidence of this kind

[28] To reject the evidence under s 137, there must be a real risk that the evidence will be misused by the jury in some way and that risk will exist notwithstanding direction.¹² Evidence is not prejudicial merely because it strengthens the prosecution case. It is prejudicial only when the jury is likely to give the evidence more weight than it deserves or that it may divert the jurors from their task.¹³

[29] Further, the enactment of s 137, as with the common law *Christie* discretion, does not involve considerations of the reliability of the evidence when considering its “probative value”.¹⁴ The evidence is to be “taken at its highest” in order to determine its probative value. Even prior to the UEA, the term “probative value” included an assumption that the evidence would be accepted on the basis that the “evidence can rationally affect the assessment of the probability of a fact in issue only if it is accepted”.¹⁵

¹² *R v BD* (1997) 94 A Crim R 131 at 151; *R v Shamouil* 206 NSWCCA 112 at [72]

¹³ *Festa v The Queen* (2001) 208 CLR 593 at [51]

¹⁴ *R v Shamouil* [2006] NSWCCA 112; affirmed in *R v MK* [2012] NSWCCA 110

¹⁵ *Adam v The Queen* (2001) 207 CLR 96 at [60], Gaudron J

[30] Although contrary views have been expressed as noted in *Shamouil*, the preponderance of authority favours a restrictive approach to the assessment of “probative value” in the context of s137 UEA. In my view the evidence has probative value and does not create the prejudice s 137 is directed to.

[31] For similar reasons I would not exclude the evidence under s 135. The added criteria of “misleading or confusing” do not advance the accused’s argument. This level of conflict around disclosures is not uncommon in cases of this kind.

Written Representations (Poems)

[32] In the CFI conducted on 27 January 2012 the complainant stated she did not talk about the allegations earlier as she was “too scared”. She wrote poems as clues to prompt disclosure. The Crown proposes to place the complainant’s evidence about writing the poems, (not the documents themselves), before the jury. In my view this is inadmissible. It would clearly breach the prohibition against bolstering one’s own evidence.¹⁶ The precise dimensions of the “bolster” rule must, of course be considered in the light of the UEA; however, regardless of that consideration there will be a natural tendency for the jury to want to consider what is in the poems or other notations made by the complainant. In my view this would potentially distract the jury, even with appropriate directions. I am not persuaded this evidence is admissible and even if admissible to inform about a course of

¹⁶ *Stuart v The Queen* [2010] NTCCA 16

conduct, in my view it should be excluded in exercise of the s 137 discretion.

Orders

- [33] The evidence of the complainant's representations to SS and KW will be admitted as evidence of previous representations relevant to the facts in issue. The evidence of her representations to SW and SC will be admitted given they place the conversation with KW in context. If the jury accept that the representation made to SS was the first in time, that evidence may in any event amount to recent complaint and I anticipate an appropriate direction will be given. I have not separately discussed admission under s 26E *Evidence Act* (NT), however, in my view the result would be substantially the same.
- [34] The evidence of the complainant writing poems is to be excluded.
- [35] I note the trial is to commence on 9 July 2013.
- [36] By arrangement with the representatives of the parties these reasons will be forwarded to them.