R v CMC [2016] NTSC 46

PARTIES:	THE QUEEN v CMC
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21602056
DELIVERED:	15 SEPTEMBER 2016
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JUDGMENT OF:	KELLY J

CATCHWORDS:

CRIMINAL LAW – Evidence of "Uncharged acts" – Relevance – Admissibility

EVIDENCE – Admissibility and relevance – *Evidence (National Uniform Legislation) Act (NT)* ("UEA") s 137 – Where accused charged with indecent dealing with child – Where relationship evidence given by complainant in police interview – Evidence of uncharged acts relevant to negative possible contention that charged acts unintended or misinterpreted by complainant – Possible prejudice due to propensity reasoning may be overcome by use of jury warnings – Potential prejudicial effect does not outweigh probative value of evidence – Evidence not excluded under UEA s 137

Evidence (National Uniform Legislation) Act 2011 (NT)

R v Shamouil (2006) 66 NSWLR 228; [2006] NSWCCA 112, referred to

HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, *IMM v The Queen* (2016) 90 ALJR 529; [2016] HCA 14, *R v Bond* [1906] 2 KB 389, *Wilson v The Queen* (1970) 123 CLR 334; [1970] HCA 17, relied on

R v Wickham (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, 17 December 1991), distinguished

REPRESENTATION:

Counsel:

Plaintiff:	T McNamee
Defendant:	T Berkley

Solicitors:

Plaintiff:	Director of Public Prosecutions
Defendant:	Robert Welfare & Associates

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

R v CMC [2016] NTSC 46
No. 21602056

BETWEEN:

THE QUEEN
Plaintiff

AND:

CMC
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 15 September 2016)

[1] The accused has been charged with two counts of indecent dealing with the complainant ("JLC"), attempting to procure an act of gross indecency by JLC and aggravated assault upon JLC.

[2] The accused is the great-uncle and godfather of JLC. JLC and her family have been in close contact with the accused since she was born and saw him on an almost weekly basis at his house in Palmerston. The only time the children (JLC and her two brothers) have been left in the accused's care for any substantial period of time, was for a few days from 14 December 2015 when the mother could not get time off work to look after the children.

[3] In an interview with police JLC described a time when she was 7 or 8 years old when the accused approached her in the kitchen, put his neck on her shoulder and then touched the right side of her vagina under her knickers. That is the subject of count 1 on the indictment.

[4] In relation to counts 2, 3 and 4, the allegation is that when JLC was 9 years old, the accused pulled down her t-shirt and bra and kissed her on the breast. On another occasion around the same time the accused was sitting on a couch; he had his hands on his groin area; he called JLC over and asked her to touch it and squeezed her bottom over her clothing. She ran to the bathroom to avoid contact with the accused. Later that night she complained to her sister and a complaint was made to police which led to the accused being charged.

[5] In her recorded statements to police JLC spoke of other times when the accused had touched her inappropriately. She was asked about the very first time the accused did anything to her. She said she was from 4 to 7 years old and her aunty, the accused's wife, told her to go into the bedroom to get a back scratcher for her. When she went in, the accused was naked lying on the bed and asked her to lie next to him, but she refused.

[6] She said the accused had been touching her in the wrong spots ("boob" and "vagina") when she was 5 years old and had told her if she didn't keep it a secret he would hurt her or do something to her. She said that was why she had not told her mother – because she was scared.

[7] In the first recorded statement on 17 December 2015 JLC said that the accused had held his "dick" in front of her on more than one occasion and described other generalised sexual behaviour. She said the accused had done similar things to her from the time she was 4 years old and that he had done "mostly the same thing every day". She also used the expressions "every time", "every week", "every year" and "every holiday".

[8] JLC also said that when she was in preschool she was nervous and not focused on her work properly because of what the accused had done.

[9] The Crown wishes to rely on JLC's recorded statements as her evidence in chief without editing out the portions described above (which I will refer to as evidence of uncharged acts) and contends that it is admissible as context or relationship evidence.

[10] The defence objects to admission of the evidence of uncharged acts. The first contention of the defence is that the evidence of uncharged acts is "inherently incredible or fanciful or preposterous".[1] Defence counsel pointed out that the frequency with which JLC said the conduct had occurred was given variously as "every day", "every time", "every week", "every holiday" and submitted that this was unhelpful; and that a suggestion that the accused behaved in the manner alleged on every occasion when the

[1] In approving the approach of Spigelman CJ in *R v Shamouil* (2006) 66 NSWLR 228; [2006] NSWCCA 112 to the assessment of the probative value of evidence for the purpose of the UEA s 97, the High Court in *IMM v The Queen* (2016) 90 ALJR 529; [2016] HCA 14 said at [58], "[E]vidence which is inherently incredible or fanciful or preposterous would not appear to meet the threshold requirement of relevance. If it were necessary, the court could also resort to the general discretion under which evidence which would cause or result in an undue waste of time may be rejected."

accused and JLC were together was fanciful or preposterous and therefore incapable of rationally affecting the assessment of a fact in issue.

[11] I disagree. Having read the transcript of the child forensic interviews the impression I gained was of a young, not very articulate child with a not particularly well developed sense of time, struggling to answer questions. I did not get the impression of wild, fanciful or preposterous allegations. In my view this is a matter for the jury to assess.

[12] If the evidence of uncharged acts is relevant – that is to say if it is capable of rationally affecting the assessment of a fact in issue in the proceeding[2] then, subject to UEA s 137, it is admissible.[3] Evidence of the nature of the relationship between an accused and a complainant can be relevant for various purposes.

[13] As Gleeson CJ said in *HML v The Queen*:[4]

> Information may be relevant, and therefore potentially admissible as evidence, where it bears upon assessment of the probability of the existence of a fact in issue by assisting in the evaluation of other evidence. It may explain a statement or an event that would otherwise appear curious or unlikely. It may cut down, or reinforce, the plausibility of something that a witness has said. It may provide a context helpful, or even necessary, for an understanding of a narrative. An example is some evidence given in *R v Wickham*. A female complainant in a child sex abuse case gave an account, directly relevant to a charge, of a sexual encounter she had with her father when she was 14 years old. She said that her father entered

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2 UEA s 55

3 UEA s 56

4 (2008) 235 CLR 334; [2008] HCA 16 at [6]

her bed, and had sexual intercourse with her. After some brief conversation, they both went to sleep. The father denied that any such event occurred. There was other evidence to show a history of similar sexual activity before the occasion in question. In the absence of that evidence, the complainant's account of what otherwise would have been presented as a single, and apparently isolated, act might have been regarded by the jury as difficult to believe. The complainant expressed no surprise when her father came to her bed. She made no protest. She behaved as though this was a common occurrence. She said that, in fact, it was a common occurrence. If she had not been permitted to say that, her evidence could have appeared hard to believe. To have put her evidence forward as though she were describing an isolated incident would have been misleading, and, it might be added, unfair. *(citations omitted)*

[14] In *R v Bond*[5] Kennedy J said:

> The relations of the murdered or injured man to his assailant, so far as they may be reasonably be treated as explanatory of the conduct of the accused as charged in the indictment, are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial.

[15] In a similar vein, in *Wilson v The Queen*[6] Menzies J said:

> Any jury called upon to decide whether they were convinced beyond reasonable doubt that the applicant killed his wife would require to know what was the relationship between the deceased and the accused. Were they an ordinary married couple with a good relationship despite differences and disagreements, or was their relationship one of enmity and distrust? … To shut the jury off from any event throwing light upon the relationship between this husband and wife would be to require them to decide the issue as if it happened in a vacuum rather than in the setting of a tense and bitter relationship between a man and a woman who were husband and wife. Accordingly, in my opinion the evidence was properly admitted because it was pertinent to the issues which the jury had to decide.

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5 [1906] 2 KB 389 at p 401

6 (1970) 123 CLR 334; [1970] HCA 17 at p 344

[16] However, the fact that the evidence is relevant does not mean it will necessarily be admitted. In *HML*, Gleeson CJ said:

> Where evidence of uncharged acts is introduced for the common, and acceptable, purpose of explaining that a complainant, in giving an account of conduct the subject of a charge, is not purporting to describe an isolated event, so that the account of the event may properly be evaluated by the jury, the test to be applied in determining admissibility is whether the probative value of the evidence outweighs its prejudicial effect. Evidence may have probative value in the assistance it gives in assessing other evidence. What is sometimes called "relationship evidence" may have value in this way.[7] *[emphasis added]*

[17] That position at common law has not been affected by the UEA. UEA s 137 provides that the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant. This involves a balancing exercise – weighing the probative value of the evidence against its potential prejudicial effect.

[18] Defence counsel contends that the evidence of uncharged acts in this case has little or no probative value, characterising it as "further unsupported accounts of the alleged sexual interest shown by the accused in the complainant". The defence relies on the statements of the majority in *IMM v The Queen* to the effect that in cases where the evidence of uncharged acts is led to show that the accused had a sexual interest in the complainant, "the

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7 at [24]

probative value of this evidence lies in its capacity to support the credibility of a complainant's account."[8] The majority continued:[9]

> Evidence from a complainant adduced to show an accused's sexual interest can generally have limited, if any, capacity to rationally affect the probability that the complainant's account of the charged offences is true. It is difficult to see that one might reason rationally to conclude that X's account of charged acts of sexual misconduct is truthful because X gives an account that on another occasion the accused exhibited sexual interest in him or her.

[19] However, as I understand the Crown's contention, the purpose for which the evidence of uncharged acts intended to be adduced in this case is not to show that the accused had a sexual interest in JLC – or for any tendency purpose. No tendency notice under UEA s 97 has been served.

[20] Nor is this a case like *R v Wickham*,[10] referred to in *HML*[11] in which the complainant's acquiescence or lack of reaction requires an explanation. Far from acquiescing, JLC says that on the first time the accused did anything inappropriate she refused his request and the last time she left the room and went to the toilet to avoid complying.

[21] Before one can make an assessment of the probative value of any piece of evidence, one has to know the purpose for which the evidence is to be relied

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8 per French CJ, Kiefel, Bell and Keane JJ at [62]

9 at [63]

10 Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, 17 December 1991

11 in the judgment of Gleeson CJ quoted at [13] above

upon – ie what fact in issue the probability of the existence of which it is said the evidence could rationally affect.

[22] The Crown submits that the facts at issue in this case are whether the acts occurred at all and whether they were intended. The Crown contends that the evidence of uncharged acts in this case is relevant to negative what might otherwise be contended by the accused to be innocent, unintended gestures of affection misinterpreted by a self-conscious prepubescent girl. I agree.

[23] In his record of interview with police, the accused appeared to be putting that forward as an explanation. He provided a number of details which were consistent with what JLC said happened on the occasion which is the subject of counts 2 to 4. As well as consequential details, he admitted, for example, kissing all three children (JLC and her two brothers) on the mouth and neck from time to time, giving them hugs and cuddles and giving JLC a "squeeze on the bum" or a pat of affection over the years while denying any inappropriate sexual contact. He characterised the relationship between himself and all three children as close and loving and the visit in question as no different from any other visits. If JLC is not permitted to explain the conduct of the accused towards her as she experienced it over the years, the jury may well be invited to conclude that the conduct the subject of the charges did indeed consist of isolated and unintended acts which JLC misinterpreted. In other words, if the Crown is not permitted to adduce evidence of the context in which the offending behaviour is said to have

occurred, the jury would be in danger of being misled. The evidence of uncharged acts has probative value – in my view significant probative value - to that potential issue in the proceeding. I say "potential issue" advisedly. As Gleeson CJ said in *HML*:[12]

> As to the potential use of uncharged acts to evaluate a complainant's evidence by furnishing an explanation for apparent lack of surprise, or protest, Gaudron J said, in *Gipp v The Queen*, that evidence of general sexual abuse is relevant and admissible on that basis, but only if the conduct of the defence case raises such considerations. I regret that I am unable to agree. Questions of admissibility of a complainant's evidence of uncharged acts usually arise for decision either before the trial or during the evidence-in-chief of the complainant. There may be no relevant conduct of the defence case by reference to which a decision can be made. Furthermore, the conduct of the defence case may not be a fixed point of reference. It is important not to overlook the legitimate opportunism that may be involved in the conduct of a defence under an accusatorial system of trial. It is one thing to require a prosecutor to give particulars. It is another thing to bind defence counsel to a certain line of argument. It should also be remembered that jurors, in assessing probabilities, are not bound by the conduct of defence counsel. When jurors evaluate the evidence of a complainant they are not limited to considering arguments advanced by the lawyers. If the complainant's evidence concerning a charge were given as though it were an account of an isolated event, then regardless of the line taken by the defence it might create a false impression, and that impression could colour the jury's assessment of the evidence. *[citations omitted]*

[24] The next question then is whether that probative value is outweighed by the danger of unfair prejudice to the defendant. If so, the evidence must be excluded.

[25] The major potential prejudice pointed to by the defence is the danger of propensity reasoning. Defence counsel also pointed to the possibility that

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[12] at [9]

the jury might give more weight to the evidence than it deserves, particularly in light of the fact that the case, involving as it does allegations of the sexual abuse of a child, is likely to arouse emotional responses in the jury.

[26] Counsel relied on these selected passages from the judgment of Hayne J in *HML*:

> …The rule takes as its premise that evidence of other discreditable acts of the accused is ordinarily inadmissible. The foundation for the rule excluding evidence of other discreditable acts of an accused is that, despite judicial instruction to the contrary, there is a risk that the evidence will be used by the jury in ways that give undue weight to the other acts …[13]
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> …The very risk to which the general rule of exclusion is directed is the risk that the evidence will be *misused*. Judicial directions about use of such evidence have not hitherto been seen, and should not now be seen, as solving that problem.[14]

[27] These passages have been extracted from a discussion about the reasons for the general common law exclusion of evidence of discreditable conduct by an accused and "why the solution that has been adopted for so long by the common law, reflected in [the High] Court's decision in *Pfennig,*[15] is to limit the circumstances in which evidence of other discreditable acts of an accused will be received in evidence."[16] *[emphasis added]* The selected

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13 at [113]

14 at [116]

15 (1995) 182 CLR 461; [1995] HCA 7

16 *HML* at [116]

passages are not authority for the proposition that the balance must always come down in favour of exclusion of evidence whenever there is any risk of propensity reasoning. Warnings are commonly given to juries to avoid propensity reasoning and may be presumed to have real effect. The question to be considered is the one set out in UEA s 137. Once the conditions for the admissibility of the evidence have been established, the court asks: is the probative value of the evidence outweighed by the risk of unfair prejudice to the accused?

[28] I am of the opinion that the risk of unfair prejudice to the accused does not outweigh the probative value of this evidence. As I have said already, when one analyses the purpose for which the evidence is to be adduced, I do not agree with the defence submission that its probative value is at best slight. I consider it to be significant. I also consider that, as is commonly done, the risk of unfair prejudice to the defence due to propensity reasoning on the part of the jury can be largely overcome by the use of suitable warnings.

[29] As to the defence contention that there is a danger that the jury will give too much weight to the evidence because this case involves allegations of sexual abuse of a child and is therefore likely to arouse emotions in the jury, I do not think that hearing evidence of additional uncharged acts of sexual abuse is likely to arouse a markedly greater emotional response in the jury than the evidence they will hear about the acts which are the subject of the charges. The uncharged acts are not of a different kind likely to arouse greater horror than the charged acts. Having read the transcripts of the child forensic

interviews, the impression I gained of the substance of the child's evidence was that there was more of the same on other occasions that she had difficulty being specific about – hence (presumably) the absence of further charges.

[30] Evidence of the uncharged acts will be admitted with one exception. That part of the interview in which JLC said that when she was in preschool she was nervous and not focused on her work properly because of what the accused had done falls into a different category. It seems to me that that evidence has little, if any, relevance to the issue outlined above. If admissible at all, it should be excluded under UEA s 137.