R v MLW [2016] NTSC 29

PARTIES:	THE QUEEN
	v
	MLW
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21521727
DELIVERED:	27 MAY 2016
HEARING DATES:	27 NOVEMBER 2015
JUDGMENT OF:	KELLY J

REPRESENTATION:

Counsel:

Plaintiff:	M Nathan SC
Defendant:	T Berkley

Solicitors:

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

Judgment category classification:	C
Judgment ID Number:	KEL16009
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v MLW [2016] NTSC 29
No. 21521727

BETWEEN:

THE QUEEN
Plaintiff

AND:

MLW
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 27 May 2016)

[1] The accused is charged with two counts of maintaining a sexual relationship with a child under the age of 16 (counts 1 and 12), and in the alternative with a number of individual counts of sexual intercourse and indecent dealing (counts 2 to 11 and counts 13 to 15). The complainants are his two granddaughters. Count 1 and the alternative counts 2 to 11 relate to the older granddaughter. Count 12 and the alternative counts 13 to 15 relate to the younger granddaughter. (The two granddaughters are sisters, the daughters of the accused's son.)

[2] The Crown has given notice under *Evidence (National Uniform Legislation) Act 2011* (NT) ("UEA") s 97(1) of its intention to adduce tendency evidence. The tendency evidence is said to relate to the following facts in issue:

(a) whether the accused maintained a sexual relationship with CMW (the older granddaughter) between 21 December 2006 and 31 December 2012 by engaging in sexual intercourse with the complainant including digital penetration, fellatio and cunnilingus as well as indecently dealing with the complainant and exposing her to indecent films (as particularised in counts 2 to 11 on the indictment); and

(b) whether the accused maintained a sexual relationship with CAW (the younger granddaughter) between 21 August 2006 and 31 January 2013 by engaging in sexual intercourse with the complainant including digital penetration, as well as indecently dealing with the complainant (as particularised in counts 13 to 15 on the indictment).

[3] The notice advised that the tendency sought to be proved was the tendency of the accused to act in a particular way (namely engage in sexual misconduct over a number of years with his pre-pubescent granddaughters) and to have a particular state of mind (namely a sexual interest in his pre-pubescent granddaughters upon which he is prepared to act).

[4] The notice is set out in a table of the evidence sought to be relied on to prove these tendencies. There were two categories of such evidence:

(a) the evidence of each complainant in relation to the counts on the indictment (to be used as tendency evidence in relation to the counts involving the other complainant); and

(b) evidence of "uncharged acts" of sexual misconduct said to have been committed by the accused against both granddaughters while the family was in Adelaide and not within the jurisdiction of the Northern Territory courts.

[5] The defence objected to the reception of this tendency evidence, but did not apply for the charges in relation to the two granddaughters to be tried separately.

[6] Following a *voir dire* on 27 November 2015, I allowed the evidence in and stated that I would publish my reasons in due course. These are those reasons.

[7] Under UEA s 97 evidence of the conduct of a person is not admissible to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind unless the appropriate notice has been given and the court thinks that the evidence will (either by itself or having regard to other evidence to be adduced) have significant probative value. Further, under UEA s 101(2), tendency evidence cannot be used against the defendant unless the probative value of the evidence substantially outweighs

any prejudicial effect it may have on the defendant. These requirements have replaced the common law rules relating to similar fact evidence.[1]

[8] The Crown submitted that the evidence sought to be adduced as tendency evidence – ie that the accused engaged in inappropriate sexual touching of pre-pubescent females who were his granddaughters when he was in a position of trust - is highly probative of the Crown case against the accused. In written submissions, Mr Nathan SC for the Crown pointed out that the primary charge in relation to each complainant is one of maintaining a sexual relationship (each child being under 16 during the relevant periods). Accordingly the evidence of each complainant is directly and significantly probative in relation to the relationship charge for that complainant. The real issue is whether that evidence is cross-admissible for both complainants.

[9] In support of the contention that the evidence was cross-admissible, Mr Nathan submitted that the evidence showed a similar *modus operandi* in that the accused used his position of trust within the family to gain access to the complainants while babysitting or exercising parental responsibility, and then abused that position of trust for his own sexual gratification. He also relied upon similarities in the evidence of the two complainants in relation to the nature of the abuse; in particular he pointed to the fact that both complainants said that the accused would lick his fingers before rubbing them inside the folds of their labia.

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1 *R v Ellis* (2003) 58 NSWLR 700

[10] Mr Nathan said that the Crown would ultimately ask the jury to find that the accused did have a sexual interest in his pre-pubescent granddaughters and a tendency to act in a sexualised manner towards them notwithstanding the relationship of trust and confidence. The Crown would be asking the jury to use the evidence that he had that tendency to support the inference that he engaged in the conduct with which he has been charged. The Crown would be seeking a direction to the jury that if they are satisfied beyond reasonable doubt that the accused did the things (or some of the things) described by the older granddaughter, then they are entitled to reason this way: that is evidence that the accused had a sexual interest in his pre-pubescent granddaughter and that he was prepared to act on it and they can add that into the balance when assessing whether they are satisfied beyond reasonable doubt that he did the things described by the other pre-pubescent granddaughter (and vice versa in relation to the evidence of the younger granddaughter). Further, the Crown would seek to use the tendency evidence to rebut any suggestion of accidental touching on the part of the accused.

[11] Mr Berkley for the defence submitted that there is no rational view of the tendency evidence detailed in the notice that makes the doing of any of the charged acts by the accused more likely because the evidence is nothing more than further examples of uncorroborated complaints made by each complainant. He submitted that they are no more probative of whether the

acts charged in the counts on the indictment occurred than of whether they themselves occurred.

[12] I disagree. As counsel for the Crown pointed out, the real issue is whether the evidence of the two complainants is cross-admissible. (The evidence of each complainant is admissible as directly relevant to the charge of maintaining a sexual relationship with that complainant without the need for it to be admissible as tendency evidence.) In my view the evidence is cross-admissible and, what is more, has significant probative value for the reasons contended by the Crown. The evidence of each granddaughter supports the inference that the accused had a sexual interest in at least one of his pre-pubescent granddaughters and was prepared to act on it. That has significant probative value in considering the question of whether he had, and acted upon, a sexual interest in another of his pre-pubescent granddaughters.

[13] Absent any evidence of opportunities for collusion, the probative value of the evidence is increased when account is taken of the similarities in the evidence relating to *modus operandi* and technique.

[14] Mr Nathan for the Crown conceded that the evidence would not be admissible if there was a reasonable possibility of collusion[2] but contended that there was no evidence before the Court that suggests either complainant has spoken to the other about the details of the offending. The evidence is

[2] *Murdoch v The Queen* (2013) VR 451; VSCA 272

that the complaints came out separately. The older child disclosed the conduct to her mother first and then a separate discussion occurred between the mother and the younger child. Neither conversation occurred in the presence of the other child. [3]

[15] Further, the Crown contended that when assessing the probative value of the evidence the court must accept the evidence as honest and reliable. Absent rare circumstances which fundamentally undermine the credit of a witness, it is for the jury to make an assessment of credibility and the weight to be attached to the evidence.[4]

[16] I conclude that the evidence of each child about sexual misconduct by the accused against her (both those the subject of the charges and those said to have occurred in South Australia) has significant probative value as tendency evidence in relation to the charges concerning the other child.

[17] The next question (for the application of UEA s 101) is whether that probative value substantially outweighs any prejudicial effect it may have on the defendant. In my view, it does. The probative value of the evidence

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[3] At the trial (in which the jury was unable to reach a verdict), Mr Berkley for the defence pointed to the fact that the South Australian police officer who initially took the complaint had the mother and both girls together in the same room. He submitted that the case was bad from then on. He also submitted that the younger child's allegations became more serious and more like the older child's as time progressed and she made a number of statements. These submissions were not made on the *voir dire*.

Mr Nathan SC for the Crown pointed out that the police officer's notes taken at that first meeting show that only the bare bones of the allegations were taken not full details and (importantly) that there was no mention of saliva on fingers. He pointed to the fact that this initial interview with police came after each child had independently complained to the mother. He contended that the younger child's later statements were not inconsistent with her earlier ones; they simply added more detail. He also relied on the evidence of both girls that they had not told each other the details of what occurred to them.

[4] *IMM v The Queen* [2014] NTCCA 20 This approach has since been upheld by the majority of the High Court in *IMM v The Queen* [2016] HCA 14 at [50] – [59].

is high and the only prejudice identified by defence counsel is the risk of impermissible propensity reasoning. In my view, the risk of impermissible propensity reasoning is slight. If the evidence is admissible as tendency evidence (as I think it is) then a limited sort of "propensity" reasoning is permissible – that is to say, the fact that the accused has been shown to have a tendency to engage in inappropriate sexual touching of one pre-pubescent granddaughter makes it more likely that he had and acted on a sexual interest in another pre-pubescent granddaughter: that is the point of leading the evidence. Further, the jury will be warned against impermissible, generalised propensity reasoning.

[18] In my view the tendency evidence sought to be led by the Crown has significant probative value (s 97) and that probative value substantially outweighs any prejudicial effect it may have on the defendant (s 101).