The Queen v MLW (No. 2) [2017] NTSC 20

PARTIES:	THE QUEEN v MLW
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21521727
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RULING OF:	MILDREN AJ

CATCHWORDS:

EVIDENCE – hearsay rule – statement made by child to mother of what accused had said to the child – child has no memory of statement made – whether mother's evidence admissible – not led for hearsay purpose – first-hand hearsay - *Evidence (National Uniform Legislation) Act*, s59(1), s62, s65

EVIDENCE – hearsay rule – statement made by child to mother of what accused said to the child – child has no memory of statement made – mother's evidence admissible – whether evidence from witnesses who mother told what the child said admissible – second-hand hearsay – whether admissible to rebut attack on credit of mother's testimony - *Evidence (National Uniform Legislation) Act*, ss62, 108(3), 192(2)

Legislation

Evidence (National Uniform Legislation) Act, ss59(1), 62, 65, 67, 108(3), 192(2)

Cases

Rogers v The Queen (1994) 181 CLR 251
AZ v R; KM v R; Vaziri v R [2015] NSWCCA 244

REPRESENTATION:

Counsel:

Crown:	M. Nathan SC
Accused:	T. Berkley

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	-

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

The Queen v MLW (No 2) [2017] NTSC 20
No. 21521727

BETWEEN:

THE QUEEN

Plaintiff

AND:

MLW

Defendant

CORAM: MILDREN AJ

REASONS FOR RULING
(Delivered 15 March 2017)

[1] The accused is charged with two counts of maintaining a relationship of a sexual nature with a child under the age of 16 years contrary to s131A(2) and (5) of the Criminal Code (NT). The first of those counts relates to a particular child (the child). The second count relates to the child's sister.

[2] The Crown intends to lead evidence from the mother of the child that the child told her some 10 years ago when she was age 5, that the accused had said to her: "Nana likes to drink the white stuff that comes out of my penis". The circumstances leading up to that were that the child and her parents were then living with the accused and his wife in a unit in the Darwin area. The unit was a multi-story building with an underground carpark. A lift

provided access from the carpark to the unit. That day the accused had gone shopping for groceries and had taken the child with him. The accused and the child returned to the carpark afterwards. When the groceries and the child entered the lift, the accused left the building. The statement was made to the child's mother just after the child came out of the lift. The Crown intends to lead this evidence, not as tendency evidence, but to show that the accused had a sexual interest in that child, and was grooming the child for future sexual misconduct which will be borne out by the evidence from the child that, at a later time, the accused showed the child pornographic movies of adult females performing fellatio and swallowing the male sperm, and that he also got the child to do the same things to him.

[3] Counsel for the Crown anticipated that counsel for the accused would suggest to the mother that she was lying about this having been said by the child. The child does not remember this incident. In anticipation that this suggestion would be made, the Crown intended to call two witnesses, X and Y, who the mother had told what the child had said to her, as evidence to re-establish the mother's credit.

[4] Initially objection was taken to the calling of X and Y to give this evidence. My initial ruling was that it was premature for me to decide this question until such time as the Crown sought to lead the evidence of X and Y, because I had no way of knowing in advance whether or not counsel for the accused would suggest to the mother that her evidence was either a fabrication or a reconstruction.

[5] Following further discussion, counsel for the accused objected to the admissibility of the mother's evidence on the ground that it was second-hand hearsay. The trial before me was the third time the accused had been tried for these offences. The first trial before Kelly J resulted in a hung jury. The second trial before Grant CJ was abandoned because the mother fell gravely ill and was unable to give any evidence. Both Kelly J and Grant CJ had ruled that the mother's evidence was admissible. Only very brief, off-the-cuff reasons were given on those occasions.

[6] The fact that this issue has twice been resolved in favour of the Crown does not preclude the accused from raising it again[1], although as a matter of judicial comity, I would naturally give great weight to the judgments and rulings of each Judge who had already decided this question. I ruled that the evidence was admissible. I said that I would provide reasons at a later time. These are my reasons.

Is the evidence by the mother inadmissible hearsay?

[7] Counsel for the accused's primary submission was that if the child had been called to give this evidence, it was hearsay and prima facie inadmissible under s59(1) of the *Evidence (National Uniform Legislation) Act* (the Act). Even if the child's evidence would have been admissible under s65 of the Act, it was submitted that, as she had no memory of it, none of the exceptions to the hearsay rule applied to permit the mother to give evidence

[1] *Rogers v The Queen* (1994) 181 CLR 251; cf. s130A of the NSW Uniform Evidence Act. There is no similar provision in the NT Act, but in any event, a ruling on admissibility of evidence is not binding on the Judge who made the ruling: *AZ v R; KM v R; Vaziri v R* [2015] NSWCCA 244.

of what she was told by the child, which would be second-hand hearsay. As to the evidence of X and Y, he submitted that it was inadmissible third hand hearsay.

[8] Counsel for the Crown, Mr Nathan SC, submitted that s59(1) did not apply because the Crown was not leading the evidence to prove "an asserted fact", namely, that "Nana likes to drink the milk out of the accused's penis". Section 59(1) and (2) of the Act provide:

> (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assent by representation.
>
> (2) Such a fact is in this Part referred to as an **asserted fact**.

[9] Mr Nathan submitted that the purpose of the evidence was not to prove the truth of the fact asserted, but to prove that is what the accused said, as evidence that the accused was intending to groom the child by normalising fellatio. I accept Mr Nathan's submission. The evidence, if given by the child, is not caught by s59(1) because it is not being led to prove an asserted fact, but to prove conduct on the part of the accused.

[10] Mr Nathan submitted that the mother's evidence is caught by s59(1). The asserted fact in this instance is the assertion by the child of what the accused said to her. It is the fact that it was said, in other words, that is the asserted fact. I accept that submission. However, he submitted that it was admissible as "first hand" hearsay because it fell within s62(1) of the Act. Section 62 provides:

62 Restriction to "first-hand" hearsay

(1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.

(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

(3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

[11] Mr Nathan submitted that the child did have personal knowledge of the asserted fact because it was something that she heard herself. It therefore falls within s62(1) and (2). I accept that submission. It follows that what the child said to her mother is “a previous representation”.

[12] Mr Nathan submitted that the evidence of the mother was admissible under s65(2)(b) and (c) of the Act. Those provisions are subject to notice being given pursuant to s67 of the Act. No point was taken that notice had not been given. Presumably counsel for the accused was well aware of the Crown’s position, given that the matter had been twice argued before other Justices of this court, and if necessary, I would have directed that no notice was required, in accordance with s67(4). Returning to s65(2)(b), the evidence is that the previous representation was made by the child shortly after the “asserted fact” occurred. In my opinion it is unlikely that the representation is a fabrication. Further, having regard to the nature of the

representation, in my opinion it is highly probable that the representation is reliable. It is not the kind of statement a child of those years would make up. I find therefore that the hearsay rule does not apply to the mother's evidence of what the child told her the accused had said to her.

[13] As to whether the Crown can lead the evidence of X and Y as to what the mother told them, I accept Mr Berkley's submission that this is not first-hand hearsay, and therefore it is inadmissible on its face.

[14] However, if it is put or suggested to the mother that her evidence in respect of that which she asserts the child told her is a fabrication or a reconstruction by the mother, my ruling was that the Crown may be able to lead that evidence under the exception to the credibility rule contained in s108(3) of the Act, which applies to evidence of a prior consistent statement of a witness in those circumstances and is admissible as evidence going to the credit of the mother's account subject to my granting leave. "Prior consistent statement" is defined in the dictionary to mean "a previous representation that is consistent with the evidence given by the witness". There is nothing to suggest that the previous representation so referred to cannot be given by X and/or Y in the form of a conversation which either X or Y (or both) had with the mother, as long as it was a "previous representation" as defined in the dictionary.[2]

[2] 'Previous representation' is defined to mean "a representation made otherwise in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced".

[15] Finally it was submitted by Mr Berkley that I should reject the mother's evidence because it would be unfair to admit the evidence. By this I took Mr Berkley to be referring to the discretion to refuse to admit evidence if its probative value is outweighed by the danger that it might be unfairly prejudicial to the accused, vide s135 of the Act. Mr Berkley's main complaint was that it would be unfair because it was inadmissible hearsay, an argument that I had already rejected. It is difficult to see how the probative value of the evidence is outweighed by any prejudice to the accused. The accused could choose to give evidence that he either never said it to the child or he could offer any other explanation that he had to the jury. The fact is that the evidence is highly probative. There is no prejudice to the accused in admitting it.

[16] Similarly, in relation to my discretion to admit the evidence of X and Y if it came to that, the relevant criteria to be considered include the matters set out in s192(2) of the Act. Bearing in mind the purpose of X and Y's evidence would be to re-establish the credit of the mother, it is difficult to see why leave should not be given if suggestions of the kind referred to in s108(3) of the Act were made during the cross examination of the mother, and I so indicated. However, as things transpired, no such suggestions were made to the mother when she was cross examined (despite a submission by Mr Nathan to the contrary) and as a result the evidence of X and Y was not admitted into evidence.