

R v MM [No 2] [2016] NTSC 55

PARTIES: THE QUEEN

v

MM

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 21552070

DELIVERED: 2 November 2016

HEARING DATES: 31 October 2016

JUDGMENT OF: HILEY J

CATCHWORDS:

CRIMINAL LAW — EVIDENCE — Sexual offences — Admissibility —
Leave to cross-examine or lead evidence of complainant’s sexual activities
with another person — “Substantial relevance to the facts in issue” —
consent of complainant — *Sexual Offences (Evidence and Procedure) Act
1984* (NT) s 4.

Criminal Code (NT) s 192

Sexual Offences (Evidence and Procedure) Act 1984 (NT) s 4 (1)-(4)

R v Burton [2013] NSWCCA 335, (2013) 237 A Crim R 238; *Bull v The
Queen* [2000] HCA 24, (2000) 201 CLR 443; *R v MM* [2016] NTSC 40,
referred to.

REPRESENTATION:

Counsel:

Crown: D Dalrymple
Defendant: J B Lawrence SC

Solicitors:

Crown: Director of Public Prosecutions
Defendant: Pipers Barristers and Solicitors

Judgment category classification: C
Judgment ID Number: Hil1610
Number of pages: 9

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

R v MM [No 2] [2016] NTSC 55
No. 21552070

BETWEEN:

THE QUEEN

AND:

MM

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 2 November 2016)

Introduction

[1] On 11 August 2016 I ruled that leave should not be granted for certain evidence to be used or elicited during the trial of this matter, mainly because it did not have “substantial relevance to the facts in issue” within the meaning of s 4(1) of the *Sexual Offences (Evidence and Procedure) Act 1984* (NT) (**the Act**).¹ Subsequent to me making that ruling, the Crown received and disclosed a number of reports in relation to the mental health of the complainant JH (**the fresh evidence**).

¹ *R v MM* [2016] NTSC 40 (*MM*).

[2] Counsel for the accused, Mr Lawrence SC, has renewed the application for such leave in light of those further reports and contended that the evidence now has substantial relevance to the fact of consent. My previous ruling primarily concerned a different fact in issue: the state of mind of the accused.

[3] In short, counsel contends that prior to and at the time when the complainant had sexual intercourse with the accused, she may have been experiencing a personality disorder as a result of which she was in fact consenting to sexual activity with anyone, including the accused.

[4] The evidence which counsel seeks leave to use or elicit is identified in [1] of my previous ruling.² In short the evidence comprises:

(a) two passages in the tape-recorded conversation between the complainant (JH) and Senior Constable Hoffman on 22 October 2015 (of which **Ex P1** is a transcript), namely:

(i) Passages on pp 10 – 13 that relate to two occurrences of sexual intercourse with an Indian man, M, on a particular day a few weeks before the alleged offending on 21 October 2015, immediately before and after she had consensual sex with the accused.

² For convenience I shall refer to this evidence as “**the evidence**”.

- (ii) Passages on pp 27 – 33 that relate to consensual sexual intercourse between the complainant and three other men on 20 and 21 October prior to the alleged offending.
- (b) DNA results relating to one of those three men, AAH (contained in **Ex P2**).
- (c) Photographs that include condom wrappers, condoms and dildos on the floor of the bedroom and lounge / dining / kitchen room (Photographs 3, 4, 5, 6, 9 and 10 in **Ex P3B**).
- (d) Some questions and answers contained in a tape-recorded interview between two police officers and the accused, an interpreter and a support person, on 22 October 2015 (at pp 21.8 and 27.7 of the transcript of the interview, **Ex P4**).

The fresh evidence

[5] The fresh evidence includes:

- (a) A letter dated 13 February 2015 to Dr Richardson, Cavanagh Medical Centre from Dr Ian Parkin, Consultant Psychiatrist, Top End Mental Health Service.
- (b) A letter dated 5 March 2015 to Dr Richardson, Cavanagh Medical Centre from Dr David Chapman, Senior Psychiatry Registrar, GP Liaison.

- (c) A statutory declaration by Dr Jeanine Richardson declared 2 September 2016 attaching a number of documents including Dr Chapman's letter of 5 March 2015 and other documents relating to events in March and April 2015 relating to the prescription of dexamphetamine, a restricted schedule 8 psychostimulant.
- (d) A report dated 8 September 2016 of A/Prof Robert Parker, containing his opinion of the complainant's mental state during her interview with Senior Constable Hoffman on 22 October 2015.

[6] Dr Richardson referred JH to Dr Parkin because she was having significant problems with anger outbursts. In his letter of 13 February, Dr Parkin recorded a history and previous diagnoses of ADHD and Asperger's spectrum disorder. He said, amongst other things:

One of the major issues is that she has four other personalities inside her head with: Dahlia being a sexual deviant who sleeps with anyone; Dawn, a male protector who is rather ineffectual; Kate, who worships God; Jakomi, a 4-year-old who doesn't do much; and Ellafloral, a character who eggs Dahlia all on but does not do much herself. All of this is added to by the character of [J] who does the everyday stuff.

[7] He also referred to other issues including panic attacks, hearing voices after smoking marijuana, her use of Ice, inappropriate Internet activity prior to March 2010, persecutory paranoid thinking and hallucinations. He said that "cognitively she appeared to be of reasonable level", "there is some mild self-referential thought but no evidence of disorder

or other positive or even negative signs of schizophrenia” and “some mild evidence of attention deficit”. He concluded by saying:

Some of her symptoms beg the diagnosis of dissociative identity disorder but this is generally fairly unhelpful as a diagnosis. There are certainly borderline traits in her personality and there is some evidence of Asperger’s spectrum disorder.

[8] Dr Parkin prescribed low dose aripiprazole and suggested her condition be reviewed on 11 March.

[9] Dr Chapman was asked to assess JH for Adult ADHD treatment. He referred to her comprehensive history consistent with the diagnosis of ADHD in childhood with symptoms continuing into adulthood. He also referred to her “heightened association with Asperger’s syndrome and ADHD” and “an established increased vulnerability to psychotic like symptoms, all 3 related to elevated androgens in utero.” These and other things “will have made [JH] vulnerable to Borderline Personality traits and to dissociative experiences, as well as exacerbating her already heightened vulnerability to psychotic like experiences.” He said:

The conjunction of ADHD and Asperger’s is likely to underlie her anger towards others that has an element of impulsivity. This may contribute to the persecutory paranoid thinking noted by Dr Parkin, rather than an underlying schizophrenia.

[10] He recommended a “trial of stimulant medication”. He said nothing about “personalities” of the kind noted by Dr Parkin.

[11] The documents attached to the statutory declaration of Dr Richardson included “copies of notes relating to any mental health related attendances” of JH during the period 5 March 2015 to 21 October 2015. It seems that there were only two consultations during the period, both in April 2015. The notes relating to her attendance on 14 April 2015 indicate that she was progressing well since taking dexamphetamine, and note, inter alia, “no change in tremor, different personalities, still has risky behaviour with men, not sure if that has changed.” The notes relating to her consultation on 28 April 2015 show further improvement including improved motivation, “lot better mood than before, happier not as depressed and things to do now and hope for the future.”

[12] A/Prof Parker considered that “[JH’s] mental state during her interview with Senior Constable Hoffman did display some mild features of Asperger’s syndrome” but that this did not have “any impact on [her] ability to understand questions posed to her by Senior Constable Hoffman or to respond appropriately or intelligently to such questions.” He said that:

There did not appear to be any indication that [JH] was experiencing clinical symptoms of Dissociative Identity Disorder or Adult Attention Deficit Hyperactivity Disorder during her interview that may have impacted on the quality of information that she provided to Senior Constable Hoffman.

Consideration

- [13] There is nothing in this material that suggests that JH was suffering from any relevant mental condition at the time when she was interviewed by Senior Constable Hoffman on 22 October 2015, or five or so hours before that when she says that she was sexually assaulted by the accused and made it plain to him that she was not consenting.
- [14] Her earlier disclosures to doctors, in particular of “risky behaviour with men” in April 2015 and of her “four other personalities inside her head” in February 2005, cannot have any substantial relevance to what might have been her mental state on 21 October, some six months later. If anything, the absence of any evidence of medical consultations since April 2015 after she had been taking dexamphetamine, might more readily lead to the conclusion that the earlier problems had abated if not resolved.
- [15] The principles and authorities to which I referred in my original ruling, particularly the High Court’s decision in *Bull v The Queen*³ and that of the New South Wales Court of Criminal Appeal in *R v Burton*,⁴ are equally apposite here.⁵
- [16] The introduction of the evidence, for example, evidence relating to her sexual activity with three other people earlier that day, absent expert

³ *Bull v The Queen* [2000] HCA 24, (2000) 201 CLR 443.

⁴ *R v Burton* [2013] NSWCCA 335, (2013) 237 A Crim R 238.

⁵ See *MM* [3] – [4] and [13] – [17].

opinion that shows the possibility of her in fact having a relevant mental illness at the time of her sexual activity with the accused, can only result in the strong risk of a jury reasoning that she is the kind of person who would willingly have engaged in sexual conduct with the accused.⁶ As I said in my previous ruling, this is the very sort of reasoning which s 4 of the Act is designed to prohibit.⁷

[17] Further, with or without such expert opinion, I do not consider that the evidence can be substantially relevant to the issue of JH's consent to having sexual intercourse with the accused. Even if there was evidence that she was in some kind of mental state when she engaged in consensual sex with others, followed by sexual intercourse with the accused, her evidence is to the effect that she was not consenting to the latter and that she was resisting the assaults by the accused.

[18] The present matter might be contrasted with a situation where a complainant does not protest or physically resist and or is "unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing".⁸ If that were the case here, and the complainant was in fact in a relevant mental state at the time of

⁶ During argument, counsel for the accused said that he did not press this application in relation to what the accused had said in the record of interview. That can only have related to the accused's belief, not to the issue of consent.

⁷ *MM* [26] – [27].

⁸ s 192 *Criminal Code* (NT).

engaging in the sexual activity, interesting questions may arise as to whether she was capable of “free and voluntary agreement”.⁹

[19] Mr Lawrence SC also relied upon the exception in s 4(2)(b) of the Act, contending that in light of the fresh evidence he should be able to cross-examine the complainant as to credit because there were “special circumstances by reason of which [such cross-examination] would be likely materially to impair the confidence in the reliability of the evidence of the complainant.”

[20] I disagree. I do not consider the fact of her mental state such as has been revealed in the fresh evidence makes it any more likely materially that the evidence, if leave were given to adduce it, would impair the confidence in the reliability of the complainant’s evidence. In addition to the temporal gap between JH’s consultations with the various doctors in and before April 2015 and her activities on 21 October, there is nothing in the fresh evidence, coupled with the evidence sought to be adduced, that suggests that she has a tendency to lie or that her evidence may not otherwise be reliable.

[21] Accordingly, I reject the further application.

⁹ s 192(1) *Criminal Code* (NT).