WLC v The Queen [2007] NTCCA 06

PARTIES:	WLC
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 20 of 2006 (20423650)
DELIVERED:	4 May 2007
HEARING DATES:	16-17 April 2007
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & MILDREN JJ
APPEAL FROM:	Southwood J, Sentencing Remarks, 20 October 2006

CATCHWORDS:

CRIMINAL LAW – appeal against conviction – whether miscarriage of justice – whether misdirection to jury – whether evidence of guilty passion can be used as corroboration – whether appellate court should admit fresh evidence – appeal dismissed

Statutes:
Criminal Code (NT), s 128, s 129, s 131A, s 131A(1), s 131A(3), s 132, s 134, s 135, s 188(1), s 188(2)(k), s 192, s 192B

Citations:
Applied:
Director of Public Prosecutions v Hester [1973] AC 296

Gallagher v The Queen (1986) 160 CLR 392
Pollitt v The Queen (1992) 174 CLR 558
R v Baskerville [1916] 2 KB 658

Followed:
B v The Queen (1992) 175 CLR 599
K v R (1992) 59 A Crim R 113
McKeon v R (1987) 31 A Crim R 357
R v Beserick (1993) 30 NSWLR 510
R v Massey [1997] 1 Qd R 404
R v McCann (1972) Tas SR (NC3) 269
R v Taylor (2004) 8 VR 213
R v Witham [1962] Qd R 49

Referred to:
BRS v The Queen (1997) 191 CLR 275
Weiss v The Queen (2005) 224 CLR 300

References:
Cross on Evidence, 4th Aust ed, Butterworths, Sydney, 1991- (loose-leaf edition)

REPRESENTATION:

Counsel:

Appellant:	D Grace QC
Respondent:	R Wild QC

Solicitors:

Appellant:	Elliotts
Respondent:	Office of the Director of Public Prosecutions

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

WLC v The Queen [2007] NTCCA 06
No. CA 20 of 2006 (20423650)

BETWEEN:

WLC
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, ANGEL & MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 4 May 2007)

The Court:

[1] This is an appeal against conviction.

[2] On 13 October 2006, the appellant was convicted of two counts as follows:

> "**Count 1**
>
> That between 1 November 1993 and 30 June 1994 at an unknown location in the Northern Territory of Australia committed an act of gross indecency with S, a child under the age of 16 years.
>
> AND THAT the act of gross indecency involved the following circumstance of aggravation, namely,
>
> (i) that S was under the age of 14 years and WLC was an adult.

Section 129(1)(b) and (2) of the Criminal Code.

…

Count 3

Between 1 July 1994 and 1 May 1997 at various locations in the Northern Territory of Australia, being an adult, maintained an unlawful relationship of a sexual nature with S, a child under the age of 16 years.

AND THAT the unlawful relationship involved the following circumstance of aggravation, namely,

(i) that in the course of the relationship WLC had unlawful sexual intercourse with S a child under the age of 16.

Section 131A(2) & (4) of the Criminal Code."

[3] Section 131A of the Criminal Code commenced on 1 July 1994. Section 129 of the Criminal Code was substantially unaffected by amendments to the Criminal Code between 1994 and 1997. Count 2 on the indictment resulted in a directed verdict of acquittal. It is not necessary to deal with the reasons for the directed acquittal for the purposes of dealing with this appeal.

[4] Section 131A(3) provided:

"A person shall not be convicted of the crime defined by this section unless it is shown that the offender, as an adult, has, during the period in which it is alleged that he maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child on 3 or more occasions, and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions."

[5] Section 131A provided that, for the purposes of s 131A, "offence of a sexual nature" means an offence defined by s 128, s 129, s 132, s 134, s 135, s 188(1), s 188(2)(k), s 192 or s 192B.

[6] The Crown provided particulars of each of the counts. The particulars changed during the course of the trial. At the time that the jury retired to consider its verdict, the particulars in relation to count 1 were as follows:

> "PLACE: unknown remote bush location in the Northern Territory.
>
> DATE: between 1 November 1993 and 30 June 1994 (some months after MA met WLC).
>
> DETAILS: WLC inserted his penis into S's mouth. MA was present. This is the first time WLC inserted his penis into S's mouth. This happened in WLC's work caravan on a bed. This happened sometime after WLC had physically assaulted S by throwing her around the caravan."

[7] In relation to count 3 the Crown alleged 12 separate occasions where an act defined by s 131A(1) was relied upon as evidence of the maintenance of the relationship. At the close of the Crown case, occasions 1 and 2 were by agreement reduced to only one occasion. Occasions 3, 5, 7, 10, 11, 13, 14 and 15 had been eliminated leaving only occasions 1 and 2; 4, 6, 8, 9, and 12.

[8] Occasions 1 and 2 involved the attempted insertion of the accused's penis into S's vagina and anus. For the purposes of this appeal it is not necessary to deal with the particulars of the other occasions which remained for the jury's consideration.

Background facts

[9] The complainant was born on 25 September 1988. The Crown case alleged that the appellant sexually assaulted the complainant starting when she was about five years of age in 1994. The appellant commenced a relationship with the complainant's mother, MA, shortly prior to 1 July 1994. MA testified as an eye witness to some of the sexual assaults (and contextual evidence of physical assaults upon the complainant), and conceded that she was also a party to some of the sexual assaults (testifying as to holding the complainant's hand while she was sexually abused and, on one occasion, travelling by car to pick up her daughter so that the appellant could play with her).

[10] The nature of the allegations made by the complainant was that the appellant had commenced a course of conduct involving repetitive sexual and violent offences against her from about the age of five years until she moved to Victoria at about the age of seven, at which time she disclosed the offending to the Victorian police. The appellant's behaviour commenced several months prior to the introduction of the offence of maintaining a relationship with a child created by s 131A.

[11] The offending mostly occurred in remote areas of the Northern Territory. The appellant was a bulldozer operator who lived out of a caravan as he moved around the bush. The complainant's mother joined the appellant initially as his camp cook and then as his de facto partner. The complainant

sometimes lived with her mother and the appellant and sometimes lived with her maternal grandparents and a couple known as “Lany and Glen”.

[12] The complainant gave evidence that her mother was present either watching or holding her hand during most of the offending. When the matter was first investigated in 1997, MA swore a statutory declaration that the complainant’s account was untrue and that no offending had occurred. In the light of this statement, a decision was made not to prosecute and the file was closed. Nevertheless, the complainant was never returned to her mother’s care.

[13] In 2004 the relationship between MA and the appellant broke down. MA approached the police and made a new statement retracting her former 1997 statement and detailing a course of conduct by the appellant much as the complainant had described. MA also complained that the appellant had subjected her to repeated sexual and physical abuse throughout the relevant period and threatened to kill her and her family if she attempted to leave the relationship or disclose the abuse.

[14] The investigation was reopened and proceeded to committal on numerous charges of sexual and physical violence by the appellant against the complainant and MA. The appellant was committed on the majority of the charges, however in order not the prejudice the appellant, a decision was made to run separate trials in relation to the offences against each complainant. Accordingly, the Crown did not lead any evidence of the

sexual offences concerning MA in the present trial. In pre-trial negotiations, it was agreed that evidence of the violent offending in relation to both mother and daughter would not be charged, but would be admitted into evidence without objection to show the relevant context of the offending and the nature of the relationship between the appellant, the complainant and her mother.

[15] At trial, both the complainant and her mother gave independent eye witness accounts that an unlawful relationship was maintained by the appellant with the complainant. Each also gave direct evidence of particularly unique "occasions" which they could identify within the course of the conduct. A number of the incidents described by one witness resembled incidents described by the other witness. However, due to the passage of time, and the repetitive nature of the offending, it was impossible to ascertain whether the occasions remembered by one witness were the same occasions remembered by the other witness.

[16] Other witnesses were called to give circumstantial evidence as to the times, dates and places where the appellant and complainant lived during the relevant period.

[17] With respect to count 1, the Crown relied solely on the evidence of MA. As to count 3, the only evidence in support of occasions 1, 2, 4 and 8 was the evidence of MA and the only evidence in support of occasion 6, 9 and 12 came from the complainant. It appears that the Crown relied primarily on

the occasions described by MA because most of the occasions of sexual assault detailed by the complainant could not be proven to have occurred after s 131A commenced. There was no occasion used to support count 3 in respect of which both witnesses gave evidence.

[18] As mentioned, MA conceded she was party to some of the sexual assaults, including count 1. After reminding the jury of MA's evidence of that participation and of the false declaration sworn by MA in 1997, the learned trial Judge directed the jury that it would be dangerous to convict the accused on the evidence of MA alone unless there was independent evidence that corroborated or supported the evidence of MA. Further, a *Longman* direction was properly given in relation to the evidence of the complainant. There is no complaint about the terms of either direction.

[19] As to evidence independent of MA that could corroborate or support her evidence, the jury were directed that one specific incident of which the complainant spoke could be used in this way. The evidence concerned an incident of attempted anal and vaginal intercourse which could not be relied upon by the Crown as a particularised occasion for the purpose of count 3.

[20] The jury were directed that if they accepted the evidence of the complainant beyond reasonable doubt as to the specific occasion of attempted anal and vaginal intercourse, that evidence could be used as evidence that the appellant possessed a guilty passion or sexual desire for the complainant. The jury was told that if they were satisfied of that fact, the existence of

such guilty passion or sexual desire was circumstantial evidence tending to make the evidence of MA more likely to be true. The directions made it plain to the jury that this occasion of attempted anal and vaginal intercourse was not one of the occasions described by MA.

[21] The directions as to the danger of convicting and corroboration did not follow the classical format. For example, the word "accomplice" was not used and the reasons why the evidence of accomplices is regarded as suspect were not explained. The jury were not told that it was a matter for the jury whether they regarded the existence of guilty passion or sexual desire, if they found it existed, as corroborative of the evidence of MA. Nor was the jury instructed that corroboration must confirm both that the crime was committed and that the accused committed it. However, the existence of guilty passion tended to confirm both aspects and the directions conveyed the essential matters to be considered by the jury. Importantly, there is no complaint about the form or content of the directions. Senior counsel for the appellant on the appeal was well aware of these matters and, apart from seeking leave during argument to add ground 2 which is discussed later in these reasons, did not seek to complain about the form and content of the directions.

[22] The appellant submitted that the learned trial Judge erred in law in instructing the jury that the uncharged acts, amounting to "guilty passion", were capable of amounting to corroboration of the evidence of the complainant's mother in support of counts 1 and 3, thereby giving rise to a

substantial miscarriage of justice. It was submitted as a matter of law, that this evidence does not and could not amount to corroboration of the complainant's mother's evidence of individual occasions of sexual offending because the evidence does not connect or tend to connect the accused with a specific charge or occasion. So it was submitted it was evidence of mere propensity; and it could not be described as demonstrating striking similarities with the offending behaviour the subject of the counts.

[23] First it is to be observed that there is no rule that one witness who requires a corroboration warning cannot corroborate another witness who also requires a corroboration warning: see *Director of Public Prosecutions v Hester* [1973] AC 296 at 315; *Pollitt v The Queen* (1992) 174 CLR 558.

[24] It is well established that independent evidence of guilty passion is as a matter of law capable of amounting to evidence corroborating the complainant's account where the charge involved is of a sexual nature: see *B v The Queen* (1992) 175 CLR 599; *R v Witham* [1962] Qd R 49; *R v McCann* (1972) Tas SR (NC3) 269; *McKeon v R* (1987) 31 A Crim R 357; *K v R* (1992) 59 A Crim R 113; *R v Massey* [1997] 1 Qd R 404; *R v Taylor* (2004) 8 VR 213; and *R v Beserick* (1993) 30 NSWLR 510. Once it is accepted that as a matter of law evidence of guilty passion given by a witness is capable of corroborating the evidence of a complainant that the alleged offence occurred, the question then arises as to whether there is any reason why evidence of guilty passion given by the complainant could not amount to corroboration of the evidence of MA, who was the only witness who gave

evidence in relation to count 1 and the only witness who gave evidence in relation to occasions 1, 2, 4 and 8 in relation to count 3.

[25] As counsel for the appellant pointed out, in all the authorities to which we have been referred, the evidence of guilty passion was used to corroborate the evidence of a complainant and came from a witness independent of the complainant. However, in principle, where the witness to be corroborated is not the complainant but an accomplice who gives evidence of an offence committed against the complainant about which the complainant gives no evidence, we are unable to see why the evidence of the complainant proving the corroborating fact of guilty passion cannot be used to corroborate the accomplice. For these purposes, the complainant is a witness independent of the accomplice. The relevant fact to be proved which is capable of corroborating the accomplice is the existence of guilty passion. If accepted, the evidence of the complainant proved that corroborating fact. The jury was plainly told that it was only if they accepted the evidence of the complainant as to the occurrence of the occasion in question that it could be used to prove the existence of guilty passion.

[26] It was submitted by counsel for the appellant that there was a distinction to be made between the nature of the evidence which can amount to corroboration of the evidence of an accomplice and the nature of the evidence which can amount to corroboration in other circumstances. We were referred by counsel to the observations of Brennan CJ and Gaudron J in *BRS v The Queen* (1997) 191 CLR 275 at pp 283-284 and at p 297.

[27] However, in our opinion, there is no distinction between what is evidence capable of amounting to corroboration of an accomplice and what is evidence amounting to corroboration in other circumstances. In each case as was said by Viscount Reading CJ in *R v Baskerville* [1916] 2 KB 658 at 665 and 667:

> "Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it."

[28] As the learned author of *Cross on Evidence* observes in footnote 7 to paragraph [15165] in the loose-leaf edition:

> "This oft quoted statement was made in the context of corroboration of accomplice evidence, but has been applied to sexual cases and there is no reason to doubt its general applicability wherever corroboration is required."

[29] Evidence of guilty passion is evidence which fits the description of being evidence which shows not only that it is more likely than not that an offence occurred but also that it was the accused who perpetrated the offence and its seems to us to make no difference in the circumstances of this case that the evidence corroborated the evidence of the accomplice rather than the evidence of the complainant.

[30] It was submitted that the evidence was circular in that the complainant was in effect corroborating her own evidence but that is not the basis upon which the jury were instructed. It was not suggested to the jury that the

complainant's evidence of the uncharged act or acts could corroborate her own evidence; rather the jury was instructed that the evidence, if accepted beyond reasonable doubt, could corroborate her mother's evidence on matters about which the complainant had not given evidence.

[31] It was not suggested that the learned trial Judge erred in his discretion in allowing this evidence to go to the jury as guilty passion because it tended to show a propensity on the part of the accused to commit crimes of the nature charged or crimes of a similar nature and that it should have been rejected on the grounds that its probative value outweighed its prejudicial effect. Indeed the learned trial Judge gave a propensity direction to the jury; but the point is that no ground of appeal was argued on the basis that the learned trial Judge's discretion miscarried.

[32] We would therefore dismiss ground 1.

[33] Leave was sought to add a further ground during the course of the hearing as follows: Ground 2 – "the learned trial Judge erred in his directions to the jury in failing to direct the jury that before it could rely upon the evidence of guilty passion as corroborative of the evidence of MA it would first have to satisfied beyond reasonable doubt that the complainant gave evidence of a separate incident to that particularised pursuant to occasions 1 and 2 relating to count 3, thereby giving rise to a substantial miscarriage of justice".

[34] As we understand this submission it was that the learned trial Judge wrongly decided that the evidence of the complainant related to an uncharged act when in fact the evidence of the complainant may have been the same incident which is referred to in occasions 1 and 2 relating to count 3. We think that there is substance in the submission that it was for the jury to decide and not for the learned trial Judge, whether or not the two occasions were separate occasions or really only the same occasion, even though the complainant said that the acts in question occurred in the caravan whilst MA said that it occurred at a later time in a demountable at Adelaide River. If the jury had formed the view that the two incidents were the same occasion, the evidence of the complainant did not lose its character as evidence of guilty passion capable of corroborating MA's evidence in relation to count 1 and the occasions relevant to count 3. We therefore think that although his Honour erred in this respect, there was no miscarriage of justice. We note that by directing the jury that MA and the complainant were describing different occasions, the Crown was deprived of a view that the evidence of the complainant as to the occasion of attempted anal and vaginal intercourse was supported by the evidence of MA. In other words, the effect of the directions was to weaken rather than strengthen the Crown case. In those circumstances and as no specific objection was taken at trial on the basis which is now sought to be argued, we think that leave to argue proposed ground 2 of the Notice of Appeal should be refused.

[35] The third ground which also requires leave is that the convictions on counts 1 and 3 of the indictment are unsafe and unsatisfactory because of new or fresh evidence which has become available to the appellant, namely evidence which impacts upon the credibility of the complainant and which allegedly produces a substantial possibility that the jury were mistaken or mislead upon some material matter.

[36] After the jury returned its verdicts on 13 October 2006, the complainant's victim impact statement was signed and provided to counsel for the appellant. In the description of the physical effects of offending, the complainant stated that she had suffered long-term and short-term memory loss and she also used the term "hearing little voices". It was put that this information which was not available to the accused at trial would have been important to the defence case, which was that the complainant had concocted the accounts. It was suggested that the disclosures would have been the subject of cross-examination and could have impacted significantly upon the credibility of the complainant.

[37] We were directed by Mr Wild QC to a number of occasions when the complainant said in the course of her evidence that she was unable to remember a number of the things that had happened to her. On one occasion she said that maybe she had memory loss "short-term memory loss from, you know, the abuse. Things, you know, I've blocked out for many years now because out of my choice I've better things to do in my life. I've gotten

over this, I don't need to sit there, you know, think about it, it doesn't get to me anymore".

[38] It is clear that the complainant had on a number of occasions given evidence to the effect that she had both long-term as well as short-term memory loss relating to the relevant events, so to that extent, it could not be said that the evidence was fresh evidence.

[39] It is conceded that the expression "hearing little voices" does not appear to have emerged at trial. Mr Wild QC submitted that in context it could hardly be said to be significant evidence that would justify the Court embarking on an examination of all of the other evidence given at trial in terms of an investigation pursuant to *Weiss v The Queen* (2005) 224 CLR 300.

[40] There is simply no evidence before this Court as to what significance might be attached to what was said in the victim impact statement about "hearing little voices". No evidence was sought to be placed before the Court that, for instance, this might be symptomatic of some psychiatric illness and, if so, what might flow from that. In substance the appellant is asking this Court to speculate as to the significance of the complainant "hearing little voices".

[41] The power of the Court to admit fresh evidence will be exercised only in exceptional circumstances and, in order to be admitted, must be such that there is a significant possibility that the tribunal of fact acting reasonably would have acquitted the accused had the evidence been admitted at trial: see *Gallagher v The Queen* (1986) 160 CLR 392 at 395-396 per Gibbs CJ; at

402 per Mason and Deane JJ; *c.f.* per Dawson J at 421 who held that the Court must reach the conclusion that a jury might entertain a reasonable doubt about the guilt of the appellant. In our opinion, the proposed evidence does not meet this test and indeed it falls very far short of it.

[42] In those circumstances the application for leave to admit fresh evidence must also be rejected.

[43] In conclusion the appeal should be dismissed.
