R v MM [2016] NTSC 40

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:	11 August 2016
HEARING DATES:	24 June 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" — state of mind of the accused — *Sexual Offences (Evidence and Procedure) Act 1984* (NT) s 4

Crimes Act 1900 (NSW) s 293
Criminal Law (Sexual Offences) Act 1978 (Qld) s 4
Evidence (National Uniform Legislation) Act 2011 (NT) s 135
Sexual Offences (Evidence and Procedure) Act 1984 (NT) s 4 (1)-(4)

AM v The Queen [2006] NTCCA 18, (2006) 18 NTLR 110; *R v Burton* [2013] NSWCCA 335, (2013) 237 A Crim R 238; *R v Lawrence* [2001] QCA 441, [2002] 2 Qd R 400, applied.

Bull v The Queen [2000] HCA 24, (2000) 201 CLR 443; *R v Fernando* [2009] ACTSC 137, (2009) 238 FLR 64; *R v MAG* [2004] QCA 397, 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:	B
Judgment ID Number:	Hil1605
Number of pages:	18

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

R v MM [2016] NTSC 40
No. 21552070

BETWEEN:

THE QUEEN

AND:

MM

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 11 August 2016)

Introduction

[1] The Crown submits that the following evidence should not be led, nor the subject of cross-examination, because of the restrictions imposed under s 4 of the *Sexual Offences (Evidence and Procedure) Act 1984* (NT) (**the Act**):

(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. At p 10.8 the complainant implied that she had consensual sex with M immediately before she had consensual sex with the accused.[1] At p 10.3 and from p 11.4 she said that M returned to her unit and sexually assaulted her soon after the accused had left. She complained to police about that sexual assault by M but did not "press charges".

(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**).

[1] The Crown says that this is implied from the last three words of the sentence: "He then left after we finished." The Crown seeks to exclude those last three words.

(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**). Those answers were to the effect that the complainant was willing to have sex with anyone, with four or five people per day.

(i) At p 21.8 the accused was asked when he had previously rejected the complainant's requests to have sex with him. He said that "… always poor peoples go to her room, every day, four to five peoples" and that "everyone know her".

(ii) At p 27.7 he said: "She is ready to sex with everyone, so I know every, every day five peoples come with beer … and to her room."

[2] Counsel for the accused contends that all this evidence falls within the exception in s 4(1) of the Act in that it "has substantial relevance to the facts in issue".

[3] Section 4 of the Act includes the following:

> (1) In an examination of witnesses or a trial, whether or not it relates also to a charge of an offence other than a sexual offence against the same or another defendant, except with the leave of the court, evidence shall not be elicited or led, whether by examination in chief, cross-examination or re-examination, relating to:
>
> (a) the complainant's general reputation as to chastity; or

(b) the complainant's sexual activities with any other person,

and the leave of the court shall not be granted unless the court is satisfied that the evidence sought to be elicited or led has substantial relevance to the facts in issue.

(2) For the purposes of subsection (1)(b), evidence that relates to or tends to establish the fact that the complainant was accustomed to engage in sexual activities with any other person, shall not be regarded:

(a) as having substantial relevance to the facts in issue by reason only of an inference it may raise as to general disposition; or

(b) as being proper matter for cross-examination as to credit, in the absence of special circumstances by reason of which it would be likely materially to impair the confidence in the reliability of the evidence of the complainant.

(3) For the purposes of subsection (1)(b), and without derogating from the relevance of other evidence in an examination of witnesses or a trial, evidence of an act or event that is substantially contemporaneous with an offence with which a defendant is charged, or that is part of a sequence of acts or events that explain the circumstances in which the alleged offence was committed, shall be regarded as having substantial relevance to the facts in issue.

(4) An application for leave of the court for the purposes of subsection (1)(b) shall be made in the absence of the jury, if any, and, if the defendant so requests, in the absence of the complainant, and shall be determined after the court has allowed such submissions or evidence, given on oath or otherwise, as it considers necessary for the determination of the application.

[4] This provision was discussed by the Court of Criminal Appeal in *AM v The Queen.*[2] At [46] and [47]:

[2] *AM v The Queen* [2006] NTCCA 18, (2006) 18 NTLR 110 (***AM***).

> [46] The proposed evidence would necessarily amount to evidence relating to the complainant's sexual activities with a person other than the appellant. Section 4 of the *Sexual Offences (Evidence and Procedure) Act* prohibits the admission of such evidence without the leave of the court. In common with legislation throughout Australia, s 4 is intended to prevent cross examination of complainants as to their chastity or sexual activities with persons other than the accused unless conditions of relevance are satisfied. …
>
> [47] Before leave can be granted pursuant to s 4, the court must be "satisfied" that the evidence has "substantial relevance to the facts in issue". This requirement placed a responsibility on counsel for the appellant to clearly identify for the trial Judge the nature of the evidence and how it possessed substantial relevance. If counsel was to adequately discharge this responsibility, it was necessary for counsel to clearly state how the video, in itself, possessed substantial relevance. Alternatively, if the relevance was found in events or conversations that occurred between the appellant and the complainant in relation to or in connection with the video, it was incumbent upon counsel to identify his instructions as to the events and to clearly identify how those events bore upon the issues at trial.

[5] In written submissions provided at the commencement of the hearing Mr Lawrence SC, counsel for the accused, stated that this evidence should be admitted because it relates to "the fact in issue: the essence of the accused's guilt or otherwise is his state of mind on the night as to the alleged victim's consent or non-consent". Counsel contended that the evidence is substantially relevant to consent and more specifically the accused's belief as to that, whether it be a belief, or whether he was being reckless as to her consent:

> This involves relevant and admissible evidence concerning the accused, the prosecutrix, their relationship and its history and the circumstances on the night. Unusually, because it impacts

> on the accused's state of mind on the night, it also includes evidence concerning aspects of her previous sexual relationships with other men **which the accused knew about** and also her previous sexual encounter with the accused himself, in the same room, which happens to include proximate to the same, further sexual relations with another man which the prosecutrix said were non-consensual and which, although at first reporting to the police, she did not take any further. That aspect is relevant to her credit as allowed by s 4(2) and it is also relevant to the accused's state of mind.[3] (Counsel's emphasis in bold)

[6] The main focus of the submissions was the exception in s 4(1), the Court being "satisfied that the evidence sought to be elicited or led has substantial relevance to the facts in issue".

[7] During oral submissions counsel's primary focus remained on the "fact in issue" referred to in the written submissions, namely the state of mind of the accused as to the complainant's consent. Counsel contended that the evidence, or at least some of it, for example the answers given by the accused in his record of interview, are substantially relevant to that mental element.

[8] Counsel also relied upon the exception in s 4(2)(b) contending that he could 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."

[3] Written Submissions on behalf of the Accused.

[9] Mr Lawrence SC conceded that if the evidence was admitted his ability to cross-examine the complainant on the material could be limited at the trial, and the trial judge would need to give appropriate directions as to how the jury should treat the evidence.

[10] Counsel for the Crown, Mr Dalrymple, informed the Court that there is no evidence discernible from the Crown brief, apart from what is contained in the record of interview, that the accused had knowledge to the effect that the complainant had a reputation for being promiscuous, and that there is no evidence of which the Crown is aware that the accused was aware of the sexual encounters referred to in [1](a)(ii) above.

[11] Ms Lawrence SC conceded that the accused did not know about the three men referred to in [1](a)(ii) above. However he informed the Court that he has instructions from the accused which "confirm and amplify" what he said to the police recorded at pages 21 and 27 of Ex P4. He also said that "there is a potential for the defence to call other evidence from other people, which would support … or corroborate or confirm pages 21 and 27 and what he directly amplifies." Counsel did not indicate what he meant by saying that the accused would be "amplifying" what he said to police except to say that "clarifying" would be a better way of putting it. Nor did counsel elaborate about what such other people would say.

[12] I consider I must proceed on the assumption that the accused would not be saying anything additional in substance to what appears in the relevant passages of his interview; for example that he also had knowledge about the complainant having sex with the other four men referred to at pages 10 and 27 to 33 of Ex P1, or knowledge of the condom wrappers and dildos shown in the photographs (Ex P3).

Relevant cases

[13] Counsel referred to *Bull v The Queen*[4] which concerned evidence of what was said during a telephone conversation between the complainant and Mr Bull shortly before the complainant went to Mr Bull's home, where she was subsequently sexually assaulted by Mr Bull and two other men. The conversation included her using particular words which the parties understood to indicate that she was willing to engage in sexual intercourse with the men. The High Court held that the telephone conversation was admissible on the ground that it tended to prove the complainant's state of mind, that is, her reason or purpose for going to the house, and therefore was relevant to a fact in issue, namely the issue of consent.[5] It was also relevant to and admissible in relation to Mr Bull's belief as to her consent. However it was not evidence of, and could not be used to draw inferences about, the complainant's disposition in sexual matters or her propensity to

[4] *Bull v The Queen* [2000] HCA 24, (2000) 201 CLR 443 (***Bull***).
[5] *Bull* at [118] – [121] and [126].

consent to any of the acts charged.[6] Nor was it suggested that the evidence could be used in relation to any belief held by the other accused as to her consent.

[14] I was also referred to *R v Fernando*[7] where the Court gave leave for the accused to lead evidence of sexual activities with another person C some hours before he attempted to have sex with the complainant. The accused alleged that while she and C were engaging in consensual sexual activities the complainant invited him to engage in some kind of sexual activity with her. Although the accused's evidence about the invitation did not require leave, the evidence about the complainant having sex with C could not be led without leave, which could only be given if the court was satisfied that the evidence had substantial relevance to the facts in issue. The Court held that evidence of the context during which the complainant had issued the invitation to the accused did have substantial relevance because it would assist the credibility of his evidence about the invitation, and thus his ability to give convincing evidence about his beliefs about consent.

[15] Counsel for the Crown also referred me to the decision of the New South Wales Court of Criminal Appeal in *R v Burton*.[8] Some hours before the complainant awoke to find the accused engaging in sexual activity with her the complainant had encouraged the accused

[6] *Bull* at [126] – [127].
[7] *R v Fernando* [2009] ACTSC 137, (2009) 238 FLR 64.
[8] *R v Burton* [2013] NSWCCA 335, (2013) 237 A Crim R 238.

and another friend PM to attend strip clubs at Kings Cross where she exhibited sexual interest in a man she met there. On previous occasions she had indulged in consensual sexual activities with PM after which she would later express regret. After attending the strip clubs and an adult shop the three of them returned to the accused's boat where the alleged offending occurred after PM had left. The accused sought to lead evidence about her expression of sexual interest in the man at the strip club, and also about her expressions of regret following previous sexual activities with PM. The Court of Criminal Appeal held that the evidence was irrelevant and had no probative value.

[16] Per Simpson JA, RA Hulme J and Barr AJ concurring:

> [67] … the evidence was not, and was not capable of being, relevant. The issue in the trial, as declared by counsel for the respondent, was whether, in the early hours of 18 May 2012, the complainant had in fact consented to sexual connection (by cunnilingus) with the respondent. It is proper to broaden that inquiry to include questions concerning the respondent's knowledge (or lack thereof) that the complainant was not consenting (in the event that it would be proved that she was not), or his belief that she was consenting (again, in the event that it would be proved that she was not).
>
> [68] That the complainant had exhibited sexual interest in another man (whether or not at or near the time the offence is alleged to have been committed) is irrelevant to any question concerning her consent to sexual engagement with the respondent.
>
> [69] … The issue is a simple one: it is now clearly understood that the willingness of a person (whether male or female) to

> participate in sexual activity with one person does not, and cannot be taken to, connote willingness to participate in sexual activity with another. For the same reason, the evidence is not relevant either to the respondent's knowledge (or lack thereof) of the absence of consent by the complainant, or any belief in her consent that he might assert.
>
> [70] The [primary] judge's conclusions that the evidence indicated "a general sexual willingness on the part of the complainant", and that it "might act as some sort of antidote to the evidence that the complainant had, in the past expressly disavowed any interest in intimacy with the [respondent]" betrays an impermissible approach to the question of consent in the prosecution of allegations of sexual offences. The reasoning contains an unstated premise. The unstated premise is that a person who engages sexually with another person will, or is likely to, engage sexually with any other person. It is a patently false premise. Section 293 was introduced into the legislation (originally as s 409B of the *Crimes Act* 1900) for the specific purpose of putting an end to offensive and demeaning cross-examination that proceeded on the basis that evidence of consent by a person (then invariably female) to sexual engagement with one person (person A) provided the foundation for an inference that that person also consented to sexual engagement with another person (person B). That process of reasoning has been banned from the criminal courts, first by s 409B of the *Crimes Act*, and subsequently by s 293 of the *Criminal Procedure Act*. Yet that is precisely the process of reasoning disclosed in the passages of the judgment set out above, and the inference that was explicitly drawn. That inference was the basis for the decision to admit the evidence of the complainant's sexual interest in the stranger at Kings Cross.

[17] Although s 293 of the *Crimes Act 1900* (NSW) is worded quite differently to s 4 of the Act, the overall purposes of both sets of provisions are the same.

Consideration

[18] A fundamental difference between the factual circumstances in those cases and the present case is that MM’s knowledge or belief, such as it

is, did not result from something that the complainant had said or indicated to him or done in his presence, shortly before the alleged offending. Moreover, his knowledge or belief that the complainant was promiscuous was based upon unsourced hearsay, and therefore prima facie inadmissible, even before one gets to consider s 4 of the Act.[9]

Substantial relevance to the accused's state of mind – s 4(1)

[19] The only evidence which relates to counsel's primary contention, namely evidence that suggests some knowledge by the accused of other sexual conduct on the part of the complainant, is that contained in his record of interview (Ex P4). Applying what was said in the passages in *Burton* quoted above such evidence is irrelevant and therefore inadmissible.

[20] Even if, contrary to what I have just said, the evidence was relevant, for example to the accused's state of mind concerning the complainant's consent or absence of consent, I do not consider that the evidence has "substantial relevance".

[21] It is common ground that the accused was very intoxicated at the time of the alleged assault. In his record of interview he initially denied having sex with the complainant. Later, after some of the complainant's allegations were put to him, he said that he was so drunk that he did not remember any of that. He said that if he did have sex

[9] See discussion in *Bull*.

with her it would not have been against her will because she has previously wanted to have sex with him. According to the complainant she and the accused had previously engaged in a consensual sex. It appears that the accused was so drunk that any belief that he did have as to the complainant's consent was based upon the fact that she had previously consented to sexual intercourse with him. Any understanding that he might have had when being interviewed by police concerning her general promiscuity, even if relevant, would not have substantial relevance to a fact in issue.

[22] Defence counsel also contended that the presence of the condom wrappers and dildos would also have led the accused to think that the complainant would be, and was, consenting to sexual intercourse with him. However, although the complainant talks about telling the accused where to get some condoms, there is no suggestion, from either the complainant or the accused, that the accused was aware of those other items.

[23] Counsel stressed that the photographs which included pictures of the condom wrappers and dildos were photographs of the alleged crime scene and should therefore be made available to the jury. However the fact that evidence, for example of a crime scene, is relevant and prima facie admissible does not preclude its exclusion or editing in some circumstances, for example under s 135 of the *Evidence (National Uniform Legislation) Act 2011* (NT).

[24] All of the evidence which the Crown seeks to exclude is evidence of the kind which s 4, and similar provisions elsewhere, is designed to render such evidence inadmissible unless leave is granted. It is all evidence of, or evidence from which inferences could be drawn about the complainant's disposition in sexual matters or her propensity to consent to sexual intercourse.[10]

The "special circumstances" exception in s 4(2)(b)

[25] Otherwise, the question is whether there are "special circumstances" of the kind referred to in s 4(2)(b). This kind of evidence goes to the other main fact in issue, namely whether or not the complainant consented to the sexual intercourse.

[26] If that evidence were led, there is a strong risk that the jury would reason that because the complainant was promiscuous and had engaged in sexual conduct a few weeks earlier with M immediately before and after having sex with the accused, and with three different men shortly before this occasion (which conduct may also be inferred from the existence of the condom wrappers and the DNA evidence relating to AAH) and had dildos in her bedroom and lounge area, she is the sort of person who would willingly have engaged in sexual conduct with the accused.

[10] Cf *Bull* at [127].

[27] This is the very sort of reasoning which s 4 is designed to prohibit. Like the evidence in *AM*, this evidence does not have "substantial relevance to the facts in issue for some reason other than inferences the evidence might raise as to general disposition".[11] There are no other reasons why this evidence would be likely to materially impair the confidence in the reliability of the complainant's evidence. The exception in s 4(2)(b) does not apply. Consequently, the evidence is not a proper matter for cross-examination as to credit.

Alleged false complaint re M

[28] Counsel for the accused contended that the making and not proceeding with the complaint regarding the alleged sexual assault by M, a few weeks before the conduct the subject of this matter, is a matter that "… would be likely materially to impair the confidence in the reliability of the evidence of the complainant".

[29] This contention has some similarities to that considered by the Queensland Court of Appeal in *R v MAG*[12] at [19] – [33]. Section 4 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) prohibited cross-examination of the complainant or leading of evidence as to the sexual activities of the complainant without leave of the court, which could only be granted if the court "is satisfied that the evidence sought to be

[11] *AM* at [55].
[12] *R v MAG* [2004] QCA 397 (***MAG***).

elicited or need as substantial relevance to the facts in issue or is proper matter for cross-examination as to credit."

[30] In *MAG* the accused sought to adduce evidence that the complainant had made unfounded allegations of sexual abuse against her mother's boyfriend some eight years earlier, and that she had threatened to make sexual allegations against her grandfather. A prosecution against the boyfriend was withdrawn because the complainant could not sufficiently particularise her allegations. The fact that the prosecution did not proceed was not due to any suggestion that the allegations were untrue.

[31] The Court considered it significant that there was nothing to suggest that the complaint about the mother's boyfriend was false and given the lapse of time since those earlier events the leading of such evidence was not likely to materially impair confidence in the credibility of the complainant.[13]

[32] At [25] of *MAG* the Court quoted the following passage from the judgment of Thomas JA in *R v Lawrence*[14]:

> The making of false sexual complaints on other occasions may properly be the subject of an exception to the finality rule, provided that it has a clear tendency to support the view that the subject of complaint is false. Such evidence is not limited to complaints or conduct directed against the accused. Of course matters such as remoteness in time and significant factual

[13] *MAG* [24].
[14] *R v Lawrence* [2001] QCA 441, [2002] 2 Qd R 400.

> dissimilarity might well justify a decision in the trial court to exclude such evidence as not probative.

[33] At [26] the Court said:

> Here it has not been demonstrated that cross-examination on the proposed matters would have a "clear tendency" to impact upon the complainant's credibility with respect to the charges in question.

[34] The same applies in the present matter. The complainant says that she did not proceed because she felt that there was not enough evidence to convict M as she had had a shower. As was the case in *MAG* there was nothing to suggest that her complaint about M was false. There can be any number of reasons why a complainant might decide not to press charges. I do not consider that evidence or cross-examination in relation to the complainant's earlier complaint about being assaulted by M would have a clear tendency to impact upon her credibility in relation to the current charges.

Other "special circumstances" asserted

[35] In both his written submissions and his oral submissions Mr Lawrence SC repeated what the complainant told the police about the alleged offending, and stressed that this is consistent with the complainant having consented to have sex with the accused on the occasions that are the subject of the charges. But the Crown is not seeking to exclude that evidence. The fact that there is likely to be admissible evidence consistent with consent having been given does not, in my opinion,

support the contention that cross-examination of the complainant about those other matters would be likely to materially impair the confidence in the reliability of the complainant's evidence.

Conclusions

[36] I am not satisfied that the material which the Crown proposes to exclude has "substantial relevance to the facts in issue." Accordingly leave is not granted for such evidence to be used or elicited. The relevant documents should be edited accordingly.
