MLB v The Queen [2010] NTCCA 11

PARTIES:	MLB 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:	CCA 3 of 2010 (20825784)
DELIVERED:	17 August 2010
HEARING DATES:	19 July 2010
JUDGMENT OF:	MARTIN (BR) CJ, RILEY AND BLOKLAND JJ
APPEAL FROM:	KELLY J

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST CONVICTION

Conviction for sexual intercourse without consent – whether trial Judge erred in admitting evidence pursuant to s 26E of the *Evidence Act* (NT) – directions regarding distress – failure to summarise evidence – whether conviction unreasonable – whether evidence supported finding of guilt – no miscarriage of justice – appeal dismissed.

Evidence Act 1939 (NT), s 26E(1), s 26F; *Evidence Act 1995* (NSW) s 55 and s 56

Libke v The Queen (2007) 230 CLR 559; *M v The Queen* (1994) 181 CLR 487; *MFA v The Queen* (2002) 213 CLR 606; *R v Manager* [2006] NTSC 85, *R v PW* [2009] NTSC 8, cited.

Alford v Magee (1952) 85 CLR 437; *Darkan v The Queen* (2006) 227 CLR 373; *Papakosmas v R* (1999) 196 CLR 297; *R v Joyce* (2005) 15 NTLR 134; *R v Wojtowicz* (2005) 148 NTR 24; *Ratten v The Queen* [1972] AC 378, followed.

REPRESENTATION:

Counsel:

Appellant:	J Tippett QC
Respondent:	E Armitage

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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

MLB v The Queen [2010] NTCCA 11
No. CCA 3 of 2010 (20825784)

BETWEEN:

MLB
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, RILEY AND BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 17 August 2010)

Martin (BR) CJ:

Introduction

[1] This is an appeal with leave against a conviction of the crime of Sexual Intercourse without Consent. The trial took place in September 2009 and it concerned events that occurred on 8 September 2005 when the female complainant was aged 12 years and the appellant 16 years.

[2] The grounds of appeal are as follows:

(1) The learned trial Judge erred in admitting the complainant's statements to MH on 24 and 25 April 2008 pursuant to s 26E of the *Evidence Act* (NT);

(2) The learned trial Judge erred in her directions to the jury concerning the complainant's distress [at the time of making the statements to MH approximately two years and seven months after the events in question];

(3) The learned trial Judge failed to summarise the evidence in the course of her charge to the jury; and

(4) The finding of guilt was unreasonable and not supported by the evidence.

[3] For the reasons that follow in my opinion the appeal should be dismissed.

Evidence - Critical issue

[4] When first arraigned in the absence of the jury, the appellant pleaded guilty to a second count on the indictment of indecently dealing with a child under the age of 16 years. That count was presented as an alternative to the first count of having sexual intercourse with the complainant without her consent and the Crown did not accept the plea in satisfaction of the indictment. Before the jury, the appellant was arraigned on the first count and pleaded not guilty.

[5] The complainant and the appellant are cousins. On the occasion in question they were both at the house of their mutual aunt, MH, for the purpose of looking after an 18 month old baby while adult members of the household went out for a social evening. The complainant was keen to look after the

baby, but as she was only 12 it was felt that she should have older company and arrangements were made for the appellant to be present.

[6] MH gave evidence that when the appellant arrived, although he was not intoxicated by reason of alcohol, he appeared to be "stoned". She said his eyes were red and he was very slow. He smelt of "dope". During cross-examination MH agreed that she had not previously mentioned that the appellant appeared to be affected by cannabis. In September 2008, three years after the events, the appellant told police he would have been drinking as he was always drinking and smoking cannabis.

[7] The complainant gave evidence that during the evening the appellant started to kiss her on the neck and then on the mouth. He asked her to move to the bed and she lay down on the mattress beside the baby. The appellant laid next to her and started rubbing her waist. In the words of the complainant:

> "And I just froze and I don't know what happened, but the next thing I knew he was on top of me."

[8] The complainant said that her shorts were around her ankles and she was not sure how they came to be in that position. The appellant was naked when he was lying on top of her and his penis penetrated her vagina. She said she was in a lot of pain and started to cry and scream a little. She asked him to stop and he ignored her. She started to hit him about his neck and shoulders, but he brushed her hair and told her everything would be okay.

Although she continued to yell at him to stop, the appellant persisted with the act of intercourse for another five minutes.

[9] The appellant did not give evidence. He told police that the complainant had been messing around in a sexually provocative manner. This included removing her top and putting her hands down the front of his shorts and playing with his penis. He said they both ended up naked and, while she was masturbating him, he attempted to put his hands between her legs, but she would not move her legs apart. According to the appellant, while this was occurring the complainant said "No, no, no" and he stopped immediately. He got dressed and left the room. He denied that any act of intercourse occurred.

[10] The learned trial Judge correctly directed the jury that the Crown was required to prove three essential elements in order to establish the guilt of the appellant; first, the act of intercourse; secondly, that the act of intercourse occurred without the consent of the complainant; thirdly, that the appellant intended to have intercourse with the complainant without her consent or was reckless as to the absence of consent.

[11] The critical question for the jury was whether the jury accepted the evidence of the complainant and rejected the version given by the appellant to the police. The trial Judge correctly directed the jury that even if the jury rejected the appellant's version to police, it was still necessary for the Crown to prove its case through positive evidence that the jury accepted

beyond reasonable doubt. Her Honour directed that it was not merely a question as to whether activity of a sexual nature occurred and that the "key issue" was whether the appellant had sexual intercourse with the complainant or whether, as the appellant had said to the police, he stopped when she said no. In identifying the "key issue", the trial Judge emphasised the burden of proof resting on the Crown to prove each element of the offence beyond reasonable doubt. There is no complaint about these directions.

Ground 1

[12] Ground 1 is a complaint that the trial Judge erred in admitting into evidence, over objection, statements made by the complainant to her auntie, MH, on 24 and 25 April 2008. This ground raises the operation of s 26E of the *Evidence Act* ("the Act"):

> "26E **Exception to rule against hearsay evidence**
>
> (1) In a proceeding arising from a charge of a sexual offence or a serious violence offence, the Court may, despite the rule against hearsay evidence, admit evidence of a statement made by a child to another person as evidence of facts in issue if the Court considers the evidence of sufficient probative value to justify its admission.
>
> (2) …
>
> (3) An accused person cannot be convicted solely on the basis of hearsay evidence admitted under subsection (1)."

[13] The evidence in question was comprised of two conversations between the complainant and MH on 24 and 25 April 2008, approximately two years and seven months after the occasion in question. In the intervening period, the only mention by the complainant of the events was a brief conversation with her two cousins in which the complainant conveyed the substance of her complaint that the appellant had raped her. The complainant gave evidence that it was only a few days after the events that she made the complaint to her cousins, but the cousins placed the conversation at a significantly later time. One of the cousins gave evidence that the complainant did not seem particularly upset. When it was put to her that the complainant did not seem particularly upset, the cousin said:

> "No, I got the sort of reaction that she didn't care and didn't really want to talk about it, you know, so we didn't ask questions."

[14] In the absence of the jury the learned trial Judge heard evidence from the complainant and MH concerning the statements in issue and other matters relevant to the reliability of the statements to MH. The complainant's evidence was audio-visually recorded and the recording was played to the jury as part of the complainant's evidence. The complainant said she finally told MH in April 2008 about the appellant's conduct because she had heard her mother and MH talking about the appellant getting kicked out of his flat. She assumed that the appellant might be asked to move in with her mother and MH. As the complainant was deciding to go home and put everything behind her, she was scared the appellant would move back into the same

house and she would not be able to handle it. She was also upset because MH had kept going on about the subject of sex and she realised that maybe it would be better if she told MH what had happened.

[15] As to other occasions when she was with MH but did not tell her what had happened, the complainant said she was scared of the appellant, but also concerned for him because she knew what her family was like and how they would have reacted. She thought her family would either have killed the appellant or put him in hospital.

[16] MH gave evidence before the jury that she and the complainant were very close. There is a ten year age difference and they were more like sisters than aunt and niece. MH was concerned about the change in the behaviour and attitude of the complainant and chose an occasion when walking from a shopping centre to her home to discuss a number of matters with the complainant, including boys and sex.

[17] According to MH, the conversation began fairly casually, but the complainant became angry and annoyed with her. MH agreed that she kept at the complainant notwithstanding that the complainant told her to just let it go. Eventually the complainant became very distressed. The directions concerning the complainant's distress are the subject of ground 2. As the content and context of the statements are relevant both to the question of admissibility and to the relevance of the complainant's distress, it is appropriate to set out the appropriate passages of the evidence of MH in

order to provide the full context of the conversation and the occurrence of the distress:

> "Q. What were you talking about?
>
> A. A lot of different things: boys, sex, [the complainant] being a virgin, stuff like that.
>
> Q. When you went up to the shops, what was [the complainant] like in her demeanour, appearance?
>
> A. She was very quiet.
>
> Q. And did that change in any way on the return, when you were talking to her?
>
> A. Yes.
>
> Q. How did it change?
>
> A. She started to get angry and annoyed with me.
>
> Q. And when you noticed that she was getting angry and annoyed, did she say anything to you?
>
> A. She just asked me to just leave her alone. But yeah, I didn't.
>
> …
>
> Q. And when you noticed that change in her, did she say anything to you?
>
> A. She just told me she didn't want to talk about sex, she didn't want to talk about her virginity or anything like that.
>
> …

Q. Had [the complainant] changed over the years?

A. Yes.

Q. Was that one of the things that you were discussing?

A. Yes.

…

Q. What had you been saying to [the complainant]?

A. That she was always angry with her mother, which I didn't understand because her mother's only ever done things to help [the complainant] and her brother and her sister, and that [the complainant's] behaviour and her attitude towards her mother and everybody else had been becoming very out of control.

Q. And did she respond in any way?

A. Yes, she told me that 'People change, life gets hard, people get' – yeah, 'life gets' I think it's 'mean and nasty and you have to just learn to accept it and move on'.

Q. And after she told you that 'life gets mean and nasty', how did the conversation continue from that point?

A. We had stopped speaking for briefly and then I opted to change the subject and just started to talk to her about her late – like if she had any boyfriends or anything like that.

Q. And what were her responses to your questions on that topic?

A. She wouldn't answer me on whether or not she'd had a boyfriend, so I started to talk to her about sex and the fact that I wanted her to wait until she was at least 18.

Q. And what was her response to you, if any?

A. She got very upset with me and basically told me she didn't want to discuss sex or her virginity or anything like that with me at all.

Q. What was the next thing that was said?

A. As we were walking home, I asked her why she was so angry at me and that's – we were heading towards the alleyway across from my flat and that's when [the complainant] got very emotional and upset.

Q. When you say she got emotional and upset, what did you actually see that allowed you to say that she was emotional and upset?

A. She was crying, very heavily, and she could barely stand. She had to sit on the side of the alleyway.

Q. Did she say anything to you?

A. She had said something along the lines of that she – the reason why she didn't want to discuss sex or her virginity is because she's already had it and, yeah, she was no longer a virgin.

Q. And did she tell you anything about that experience?

A. No – all she said was that it was the most horriblest experience ever, or something along those lines, I don't know exactly word for word what she said.

Q. And when she indicated that it was a horrible experience, did you say anything to her?

A. I was worried, so I asked her if she had been forced.

Q. Did she respond?

A. She just nodded her head and wouldn't stop crying.

Q. And when you say, ‘nodded her head,’ can you demonstrate for us what you saw her do?

A. She just went like that.

Q. So, nodded her head in an up and down way?

A. Yes.

Q. With her eyes down?

A. Yes.

Q. After you asked that question and received that answer in the form of a nod, was anything else said?

A. I tried to get her to talk to me, and she just said that when she tells me what happened everybody is going to be angry and there’s going to be a lot of violence. And I tried to still encourage her to talk, but she was just unable to do it.

Q. Why was she unable to do it? What could you see about her that --- ?

A. She couldn’t stop crying and she was getting to the point where she was sobbing constantly, and I just couldn’t understand a word she was saying.

Q. What was it that you then decided to do?

A. I told her that I would give her a couple of hours to come [sic] down, and I wasn’t going to annoy her, but I did need to know what was going on, and yeah, she had to tell me. So, I told her, we’ll go home, you go upstairs, and yeah, take some time, but I need to know.

Q. When you went into the unit, where did [the complainant] go?

A. She went straight upstairs.

Q. Where did you go?

A. I stayed in the loungeroom with [the complainant's mother] and [the complainant's] sister.

Q. Did you see [the complainant] again?

A. Not until the next morning.

Q. What time the next morning?

A. It would have been about 6 o'clock, 6.30.

Q. Where did you see her?

A. She was coming out of the bedroom as I was heading up the stairs.

Q. What had you been doing overnight?

A. I was awake downstairs, tidying up. I usually am awake all night. I don't sleep during the night.

Q. So you'd been up all night?

A. Yes.

Q. And you were, I think, heading off to actually go to bed, were you?

A. Yes.

Q. And [the complainant] came out?

A. Yes.

Q. Did you have a further conversation with [the complainant] at that time?

A. Yes, she had ---

Q. Where did you have the conversation?

A. She – on the steps, she asked me if I still wanted to know what was wrong, and I told her, ‘Yes.’ So we walked downstairs into my loungeroom.

Q. Was anyone else there at that time in the lounge area?

A. No. Just me and her.

Q. And what was [the complainant’s] state when you first saw her on the steps?

A. She was, I guess, anxious, would be the way I’d describe it. She was nervous, really nervous.

Q. And when you went in to the lounge room, can you tell us to the best of your ability what was said, either by you or [the complainant] in order, to the best of your ability?

A. She sat down on the couch and she kept repeating, ‘I don’t know how to tell you this, I don’t know how to tell you this,’ and moving her hands constantly, and then I told her to ---

Q. Moving her hands?

A. She was fidgeting, like that.

Q. Is that a movement that [the complainant], sorry, was it clasping of the hands?

A. Yeah, opening and closing.

Q. Opening and closing, one hand in the other and actually changing each hand top to bottom, is that what you saw?

A. Yes.

Q. And is that a movement that you've seen [the complainant] make on any other occasion?

A. Only when she is scared, and nervous, and I then told her to just say it, just be honest, blunt, and that's when she had just said that [the appellant] had raped her.

Q. What was – you've told us about the hand movements, was she showing any other emotions at that time?

A. After she had told me that [the appellant] had raped her she started crying.

Q. Did she tell you anything else?

A. At that stage she, I asked if she could tell me more, and that's when she said that it happened the night she had babysat [the baby], and that he had raped her in my loungeroom.

Q. Were you asking any questions at this stage, or was she just telling you things?

A. She was just telling me, I didn't ask.

Q. So, after she told you it was the night that she babysat [the baby], and it was in your loungeroom, did she give you any further information about what had happened to her?

A. She said that once it was over she just ran upstairs and barricaded herself in my bedroom.

Q. Did she tell you anything about what happened while she was in your bedroom?

A. No, not at that stage, no.

Q. So what was the next things she told you or that you asked?

A. I had basically asked her whether she wanted to talk to her mother and her father and she was scared, and she asked me to be the one to tell them, but I wouldn't. I told her that that was something that she had to do.

Q. Did she tell you what she was scared of, or did she just say, 'I'm scared'?

A. She was worried that her mother and her father would try and harm [the appellant] and end up going to gaol for it.

Q. Did she tell you anything else about the events of the night she babysat [the baby]?

A. No, not at that stage.

[18] During cross-examination MH agreed that it was in the context of also talking about the complainant's mother that the complainant spoke of how it was not her fault that things happened and that life was mean and nasty. MH also agreed that when the complainant hinted she was not a virgin, the reaction by MH was shock and it was not a happy reaction. She kept at the complainant and suggested to the complainant that she had a secret, which the complainant denied.

[19] The question to be determined by the trial Judge was whether evidence of the statements by the complainant to MH was of "sufficient probative value

to justify its admission".[1] The trial Judge correctly directed herself to this question and, from the Crown submissions, identified the following circumstances advanced as establishing such probative value as to justify the admission of the evidence:

> "The statement contains detail about what occurred (rape), when it occurred (the night of babysitting) and where it occurred (in the lounge room of MH's unit). The complainant's disclosure was accompanied by significant distress in circumstances where there are no reasons to suggest fabrication. It was the first disclosure to an adult. MH has a detailed recollection of the conversation. It was the catalyst for the complainant to the police and the subsequent investigation and charge."

[20] The trial Judge referred to the opposing propositions by counsel for the appellant which centred on discrepancies between the accounts given by the complainant and MH, inconsistencies in the accounts given by MH on different occasions and the delay in making the statement to MH. Her Honour correctly observed that "assessment of the reliability of the evidence is part and parcel of assessing its probative value" and found that, "despite some discrepancies in detail", the complainant and MH have been consistent in their accounts. In her Honour's view, the evidence was "reliable".

[21] As to delay, the trial Judge correctly approached the question on the basis that contemporaneity or lack of it "is one of the factors to be considered when determining whether or not the evidence has relevant probative value". In the context of this question, s 26F of the Act is a provision of general application and directs that, in "estimating" the weight to be attached to a

[1] *Evidence Act 1939* (NT), s 26E(1).

statement "rendered admissible" through the operation of the Act, the Court shall have regard to all the circumstances that might bear upon the accuracy or otherwise of the statement. This legislative direction requires that, "in particular", the Court have regard "to the question whether or not the statement [was] made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts".

[22] The trial Judge considered all relevant matters, including the explanation for the delay and the circumstances in which the statement was made under the pressure that was applied by MH. Her Honour also referred to the complainant's distress and recognised that there "may be many causes of such distress". As required by s 26F, her Honour addressed whether the evidence disclosed any incentive to conceal or misrepresent the facts and noted that there was no suggestion of any such incentive.

[23] I am unable to discern any error in the approach of the trial Judge. Her Honour had regard to all relevant matters and made an appropriate assessment of the evidence as it had emerged during the voir dire examination. A reading of the transcript left me with the clear impression that the complainant was reluctant to speak about the events for good reason, that is, good reason in her mind. The way the two conversations developed conveyed a strong impression of reliability as to the essential allegation.

Section 26E

[24] The operation of s 26E has been discussed in a number of authorities.[2] Section 26E was introduced in 2004 as part of a package of evidentiary reforms enacted by the *Evidence Reform (Children and Sexual Offences) Act.* These reforms contained provisions intended to reduce the trauma experienced by children and other vulnerable witnesses when giving evidence and to provide increased protection for such witnesses, particularly when giving evidence in respect of sexual offences. It is unnecessary to canvass the various provisions as they were discussed in *Joyce*[3] and *Wojtowicz*.[4]

[25] In the context of a reform package intended to reduce trauma and provide increased protection for children and other vulnerable witnesses, the purpose of s 26E is not obvious. Section 26E is not concerned with reducing trauma or protecting witnesses. It creates a statutory exception to the common law rule prohibiting the admission of hearsay evidence. Section 26E is a provision which permits a statement made by a child to "another person" concerning a sexual offence or a serious violence offence to be admitted as evidence of the facts in issue, that is, as evidence of the truth of the facts asserted in the statement.[5] At common law, such a statement tendered for the purpose of proving the truth of the facts asserted in the statement

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[2] *R v Joyce* (2005) 15 NTLR 134; *R v Wojtowicz* (2005) 148 NTR 24; *R v Manager* [2006] NTSC 85; *R v PW* [2009] NTSC 8.
[3] *R v Joyce* (2005) 15 NTLR 134 at 137 and 138 [4] – [12].
[4] *R v Wojtowicz* (2005) 148 NTR 24 at 27 – 28 [20] – [24].
[5] In its original form, s 26E related only to sexual offences, but was subsequently amended to include a "serious violence offence".

amounts to hearsay evidence and would not have been admitted unless it came within one of the recognised exceptions to the rule against hearsay evidence.

[26] In his Second Reading Speech, the Attorney-General spoke of the primary purpose of the Bill as reducing the trauma experienced by children and other vulnerable witnesses and improving the quality of evidence from those witnesses. After discussing various provisions plainly aimed at those purposes, including the use of pre-recorded statements as evidence-in-chief and the taking of evidence of children at a special pre-trial hearing in the absence of the jury, the Attorney-General made the following observations with respect to s 26E:

> "The bill also proposes to use out-of-court or hearsay evidence in sexual offence prosecutions that involve a child. In these cases, the court will have the discretion to admit evidence of a child's statement to another person if the court considers the evidence is of sufficient probative value. For example, this will permit the court to admit evidence of a child's initial disclosure of sexual abuse and for that to be part of the evidence of the offence. Under the current laws of evidence such statements cannot be admitted as evidence of the offence. The rights of an accused person are protected by the provision that an accused person cannot be convicted solely on the basis of hearsay evidence admitted under the provision."

[27] During submissions on the appeal, counsel for the appellant emphasised the importance of contemporaneity, or the lack of it, between the events in issue and the making of the statements. At times, the submission bordered on reliance on an assumption that a delay in complaining is necessarily an indicator of unreliability. As a general proposition, if it ever had any

validity, such an assumption has been recognised for a significant number of years as lacking validity, particularly in the case of children.[6] The invalidity of the assumption is reflected in s 4(5)(b) of the *Sexual Offences (Evidence and Procedure) Act* which requires that if a suggestion is made that there was a delay in making a complaint, a trial Judge "shall":

> "(iv) warn the jury that delay in complaining does not necessarily indicate that the allegation is false; and
>
> (v) inform the jury that there may be good reasons why a victim of a sexual offence may hesitate in complaining about it."

[28] The courts and the community now have a more enlightened understanding of why genuine victims of sexual assaults might delay in complaining. In any event, contemporaneity is not a condition of admissibility under s 26E. It is a factor relevant to reliability and to be taken into account in estimating the weight, if any, to be attached to a statement rendered admissible as evidence by the Act.[7]

[29] It is appropriate to bear in mind the background against which s 26E was enacted. It was a background that included a general prohibition in the common law against the use of hearsay evidence, but a permitted use of a statement by a complainant alleging sexual assault, commonly referred to as a "complaint", provided the statement met certain conditions. As was pointed out in the joint judgment of Gleeson CJ and Hayne J in *Papakosmas*

[6] For example see the remarks of Gaudron J in *M v The Queen* (1994) 181 CLR 487 at 514 and 515.
[7] *Evidence Act 1939* (NT), s 26F.

v The Queen,[8] if evidence of a complaint is irrelevant, it would not be admissible and no question of its proper use would arise.

[30] A complaint is not admitted as an exception to the rule against hearsay evidence. Such a statement is admitted only as evidence of consistency of conduct relevant to the credit of the complainant. It is not admitted as evidence of the truth of the facts asserted in the statement and is not, therefore, hearsay evidence.

[31] It is a condition of admissibility of a complaint that it be made at the first reasonable opportunity. In this way reasonable contemporaneity with the events in question is assured. It was contemporaneity with the events in issue that was regarded as a significant factor pointing in the direction of reliability. The requirement of contemporaneity has been relaxed in recent years, but it is unnecessary to discuss where the line is now drawn as to whether a complaint was made at the first reasonable opportunity.

[32] The same element of contemporaneity as an indicator of reliability underpins the admission as an exception to the rule against hearsay of statements made as part of the *res gestae*. This point is made in the joint judgment of Gaudron and Kirby JJ in *Papakosmas*.[9] Their Honours cited the following passage from the judgment of Lord Wilberforce in *Ratten* as identifying the general statement of principle:[10]

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[8] (1999) 196 CLR 297 at 306 [21].
[9] *Papakosmas v The Queen* (1999) 196 CLR 297 at 314 [53] – [55].
[10] *Ratten v The Queen* [1972] AC 378 at 391.

> "[H]earsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused."

[33] In *Papakosmas*, the High Court was considering the provisions of the *Evidence Act* 1995 (NSW) which created an exception to the rule against hearsay evidence in the context of fundamental requirements that to be admissible evidence must be relevant and relevant evidence is evidence that, if accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings.[11] In this context s 59 excluded hearsay evidence, but the exclusion was subject to an exception. Section 66 provided that if a person who made the previous statement was available to give evidence, and had been or was to be called to give evidence, the hearsay rule did not apply to a previous statement made by such person if, when the statement was made, the occurrence of the asserted fact in the statement was fresh in the memory of the maker of the statement.

[34] The requirement that the fact asserted in the statement be fresh in the memory of the maker ensured that contemporaneity was a feature of the conditions of admissibility of first hand hearsay pursuant to the provisions of the New South Wales *Evidence Act* which were being considered by the High Court in *Papakosmas*. It was in this context that Gaudron and Kirby JJ discussed the principle in *Ratten* and the circumstances in which a statement

[11] *Evidence Act 1995* (NSW), ss 55-56.

that is not "closely contemporaneous" with the events in issue might be capable of possessing probative value in the sense that the statement could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings:[12]

> "[55] The principle expressed in *Ratten* is crucially dependent on the virtual certainty of the statement in question being true and, to that extent, it reflects the common law's bias against the reception of hearsay evidence. That is because it is not logically necessary for the possibility of concoction to be excluded before a statement is probative of the fact asserted in it. Rather, all that is necessary is that the statement be consistent with the fact to be proved and its making so connected to that fact that, when taken in conjunction with other evidence in the case, it bears on the probability of that fact having occurred.
>
> [56] The nature and degree of the connection necessary before a statement is probative of the fact asserted in it will, of course, depend on the nature of that fact and, if it be different, the fact ultimately to be proved. Even so, the connection will ordinarily be found in the close contemporaneity of the statement with the fact in issue and the consideration that the statement is a statement of the kind that might ordinarily be expected from the maker if the fact were true. Similarly, a statement that is closely contemporaneous with the fact in issue and is contrary to what would ordinarily be expected if that fact were true rationally bears on the improbability of it having occurred.
>
> [57] *The question whether, in the particular circumstances, a statement that is not closely contemporaneous (for example, a subsequent statement to police) is probative of the facts asserted in it can logically only be answered in a case in which those circumstances arise. However, there must be some connecting circumstances because, otherwise, evidence that a particular statement was made is probative only of its making and it contents and such inferences as, in the circumstances, may be properly drawn.*
>
> [58] As a matter of logic, the statement is not, as such, proof of the facts asserted. People do make false statements of fact and false

[12] *Papakosmas v The Queen* (1999) 196 CLR 297 at 314 – 315 [55] – [58].

> accusations. Nothing in the Act requires the admission of a statement unless, in the terms of s 55, it could rationally affect, directly or indirectly, the assessment of the probability of the facts asserted. There has to be more than the fact that the statement is made to produce the conclusion required by s 55 as the price of admissibility. Rationality connotes logical reasoning." (my emphasis)

[35] In the passage emphasised, their Honours recognised that a statement not "closely contemporaneous" with the events in issue might, nevertheless, be capable of rationally affecting the assessment of the probability of the existence of a fact in issue. In their Honour's view, such culpability depended upon the existence of appropriate "connecting circumstances" that, through "logical reasoning", endow the making of the statement with such probative value.

[36] In its terms, s 26E does not require that a statement be contemporaneous with the events in issue in order for it to possess probative value. The factor of contemporaneity is specifically treated as a factor relevant to an estimation of the weight, if any, to be attached to the statement.[13] Having regard to the dangers associated with evidence of this nature, particularly when there is a lack of contemporaneity, s 26E requires the court to determine whether the statement possesses "sufficient probative value" to "justify" its admission. As Gaudron and Kirby JJ pointed out in *Papakosmas*, there must be a "sufficient connection" such that in all the circumstances the making of the statement "bears on the probability" of the facts asserted in the statement having occurred.

[13] *Evidence Act 1939* (NT), s 26F.

[37] As to the meaning of "sufficient probative value", I adhere to the view expressed in *Wojtowicz*[14] that it is not a requirement that the evidence possess "significant" or "substantial" probative value. As Riley J pointed out in *Joyce*,[15] the court is required to make a "value judgment in circumstances where some, and possibly all, of the evidence in the particular matter is yet to be adduced". Having determined that the evidence possesses probative value, the next step is to form a view as to the likely degree of probative value and to consider whether, in the circumstances of the particular case, including the critical matters in issue and the content of the statement, that probative value is "sufficient" to "justify" admission of evidence of the making of the statement.

[38] I agree with the following observations of Riley J in *Joyce*:[16]

> "[20] It would not be helpful or wise to endeavour to further define the legislative requirement nor to exhaustively identify the matters which may be of assistance in addressing this issue. Much will depend upon the circumstances of the particular case and the nature of the statement sought to be admitted in the context of those circumstances as they are understood at the time. What is of assistance in one case may not be in another. It is necessary for the court to consider all of the known surrounding circumstances of the particular case in order to determine whether the evidence is of sufficient probative value as to justify its admission in the circumstances of that case."

[14] *R v Wojtowicz* (2005) 148 NTR 24 at 30 [31].
[15] (2005) 15 NTLR 134 at 140 [19].
[16] *R v Joyce* (2005) 15 NTLR 134 at 141 [20].

Section 26E - Circumstances

[39] The essential circumstances relevant to determining whether the statements to MH should be admitted pursuant to s 26E were as follows:

- At the time of the events, the complainant was aged 12 years and the appellant 16.

- The events occurred in the home of the complainant's aunt, MH, at a time when the complainant and the appellant were babysitting an 18 month old child.

- The appellant admitted to police that sexual activity occurred, but denied the occurrence of an act of intercourse.

- Between the events and the statements to MH, the complainant had told her cousins that the appellant had raped her.

- The statements to MH were made approximately two years and seven months after the events.

- The complainant gave evidence that she did not tell MH earlier because she was scared of the appellant and also concerned for him because she thought her family would either have killed the appellant or put him in hospital.

- The complainant gave an explanation as to why she finally told MH about the events. She heard her mother and MH talking about the appellant

getting kicked out of his flat and she assumed that he might be asked to move in with her mother and MH thereby bringing him into close contact with her. She was scared the appellant would move back into the house and she would not be able to handle it. In addition, she was upset because MH kept going on about the subject of sex and realised that maybe it would be better if she told MH what had happened.

- The circumstances in which the statements to MH were made began with MH suggesting that the complainant was always angry with her mother and the complainant's behaviour and attitude had changed. Initially the complainant became angry. After the conversation ceased for a short time, MH changed the subject and started to talk to the complainant about boyfriends and sex and told the complainant that she wanted her to wait until she was at least 18. The complainant became upset and said she did not want to discuss her virginity or anything like that. MH kept at the complainant and the complainant became extremely distressed, crying very heavily and barely able to stand. It was during this part of the conversation that the complainant said, or hinted, that she was no longer a virgin and that the sex had been the most horrible experience ever. It was then that MH asked if the complainant had been forced and, crying, the complainant responded by nodding her head.

- The complainant went to MH in the house and, hesitantly in a scared and nervous manner, told MH that the appellant had raped her. She then started crying.

- The complainant gave details of the events. She told MH that it had occurred on the night she had babysat and that the rape occurred in the lounge room. She said that once it was over she ran upstairs and barricaded herself in her bedroom. She said she was worried that her mother and father would try and harm the appellant and end up going to gaol for it.

Section 26E - Conclusion

[40] As I have said, the essential issue in the trial was whether an act of intercourse occurred. In this context the critical statement was the statement to MH in the morning that the appellant had raped the complainant. However, in substance that conversation was a continuation of the conversation the previous evening and it is necessary to assess the critical statement in light of the events in their entirety.

[41] In my view, bearing in mind the essential issue as to whether intercourse occurred, a combination of circumstances established a relevant connection between the facts in issue and the making of the statements to MH. The complainant was a child. She had previously made a complaint of rape by the appellant and gave a credible explanation for the delay in speaking to MH. The events occurred in the home of MH and the statements were made

to MH. Importantly, the statements were made in the context of the complainant's fear that she would be brought into close contact again with the appellant in the home of MH. Against this background, the complainant was questioned by MH about sex and boys and spoke of sex as the most horrible experience ever. Without identifying any male person, the complainant acknowledged that she had been forced. The next morning the complainant reluctantly and hesitantly named the appellant. Details were given.

[42] While it might be said that fear of the appellant living in the same house gave the complainant a motive to falsely implicate the appellant, bearing in mind the age of the complainant, her previous complaint to her cousins, her explanation for the delay and the way in which the conversations developed, in my view the complainant behaved in the way a child might be expected to behave if the events occurred as she described them.

[43] It is the totality of these circumstances which established the relevant connection between the making of the statements and the facts in issue. The trial Judge found the evidence to be reliable. As I have said, in my view the development of the conversations conveys a strong impression of reliability.

[44] The trial Judge had the advantage of seeing and hearing both the complainant and MH. Her Honour found the evidence to be reliable and there is no basis upon which this Court could interfere with that finding. Her Honour found that the evidence possessed probative value and my

assessment of the evidence has led me to the view that a relevant connection existed and the evidence possessed probative value. The trial Judge considered that the probative value was sufficient to justify admission and I am unable to discern any basis upon which this Court could properly interfere with the exercise of that discretion. Further, in my view her Honour reached the correct conclusion.

[45] For these reasons ground 1 is not made out.

Ground 2

[46] Ground 2 is a complaint concerning the directions given by the trial Judge as to the complainant's distress at the time she made the statements to MH. The directions were as follows:

> "Now, [MH]. You heard evidence from [MH] about what she saw and heard on the night of 8 September and the next morning and you also heard evidence from both [MH] and [the complainant] of what occurred on the evening of 24 April 2008 and early in the morning on 25 April 2008 when [the complainant] told [MH] that she had been raped by the accused, [the appellant].
>
> Now, both counsel have addressed you about this evidence and I am not going to repeat the evidence or summarise it, but if you do need to be reminded of any of the evidence of any of the witnesses you only need to send a note and I can read the evidence that you need from the transcript.
>
> *But I do need to tell you a couple of things about the evidence of [the complainant] and [MH]. The first thing is about the evidence that she was greatly distressed. You heard that [the complainant] was in a great deal of distress when she had the conversation with [MH] on the night of 24 April 2008. The evidence of her distress is only relevant to your assessment of whether you accept the truth of what*

[the complainant] was saying to [MH] in that conversation and what weight you give to those statements." (my emphasis)

[47] The trial Judge then explained to the jury that the jury was entitled to use the statements as evidence of the facts and that it was a matter for the jury what weight was given to the evidence. Her Honour directed the jury to have regard to the circumstances in which the statements were made and to any other circumstances which the jury considered might make it more or less likely that the statements were accurate, including the delay and the question of incentive to conceal or misrepresent the facts.

[48] Counsel for the appellant contended that the trial Judge should have directed the jury that the complainant's distress was "equivocal" because it occurred in the context of a "heart to heart discussion with MH about the deteriorating relationship with her mother". In these circumstances the distress could have been unrelated to the conversation concerning the appellant's conduct and considerable caution was required. The jury should have been told that the evidence of distress could only be used as evidence of consistency of conduct if the jury was satisfied that other explanations for the distress were excluded.

[49] In addition, counsel criticised the failure of the trial Judge to remind the jury that when the complainant spoke to her cousins, she did not exhibit any signs of distress. At the least, the jury should have been warned about the dangers of using evidence of distress in these particular circumstances.

[50] There is force in the submissions of the appellant. As the trial Judge recognised in her reasons for admitting evidence of the statements to MH, in the particular circumstances in which the statements were made many months after the events, there may be a number of factors which caused or contributed to the complainant's distress. It would have been preferable for these types of directions to have been given.

[51] Although it would have been preferable for the directions to have been given, it does not follow that the failure to give the directions led to a miscarriage of justice. First, the complainant gave evidence that initially she was angry and it was when the questioning turned to boys and sex that she became emotionally upset. She said:

> "And in the end I just broke down and I told her that I wasn't a virgin any more and that I was raped."

[52] During cross-examination, it was not suggested to the complainant that her distress, as opposed to her initial anger, was related to matters other than recalling the events involving the appellant.

[53] Secondly, the complainant's evidence as to the timing of her distress was supported by MH. According to MH it was not until the conversation turned to sex and virginity that the complainant became emotionally distressed. MH said that the complainant became angry and annoyed with MH during the first part of the conversation, but it was not until she changed the subject

to sex and wanting the complainant to wait until she was at least 18 that the complainant became distressed. This evidence was not challenged.

[54] Thirdly, the Crown having put to the jury in the closing address that it was when the complainant came to speak about sex that she became "overwhelmed by emotion" and distressed, counsel for the appellant put to the jury that the complainant broke down because of her aunt's reaction to the disclosure that she was not a virgin any more. Counsel did not suggest that other factors such as problems within the family were also in play. The proposition that the complainant broke down because of her aunt's reaction was not put to the complainant.

[55] Finally, and significantly, in advance of the summing up counsel for the appellant at trial agreed to the contents of the direction ultimately given. At the time of agreeing, counsel did not suggest that additional directions should be given and, following the direction, no request was made for additional directions.

[56] In all the circumstances, I am not persuaded that the failure of the trial Judge to give qualifying directions concerning distress has led to the possibility of a miscarriage of justice. In my view this ground of appeal is not made out.

Ground 3

[57] Ground 3 is a complaint that the trial Judge failed to summarise the evidence for the jury. In the context of this ground, counsel urged that the failure to

summarise the evidence resulted in a failure to put the defence case adequately.

[58] The trial Judge did not summarise the evidence or relate the evidence to particular issues. Her Honour reminded the jury that the jury were the sole judges of the facts and specifically directed that the interview between the police and the appellant was "just like any other piece of evidence" in the trial. After referring to the exculpatory statement in the interview that the appellant stopped when the complainant objected, the trial Judge said:

> "Now, once it has been tendered, as it has been, the record of interview can become evidence both against the accused and for the accused. Everything said in the record is part of the evidence, including the self-exculpatory statements to the effect that essentially when she said no he got up, put on his clothes and walked away.
>
> …
>
> If you think that what the accused has said in the record of interview about what happened – in other words that he got up, got dressed and walked away – is, in light of the other evidence in the case, reasonably possible, then you must approach this case on the basis that that reasonable possibility has not been excluded by the Crown. If that is the case, the accused is entitled to a verdict of not guilty."

[59] The trial Judge then gave directions that if the jury rejected the exculpatory account given in the interview, it did not necessarily mean that the verdict had to be a verdict of guilty. Her Honour emphasised that it was still necessary for the Crown to prove guilt through evidence accepted by the jury. These directions were followed by directions concerning the "key

issue" and repeated reminders that the Crown was required to prove each and every element of the offence beyond reasonable doubt.

[60] The adequacy of the directions must be assessed in the context of the particular trial and the issues for determination by the jury. Reference was made to the oft-cited passage in the judgment of the High Court in *Alford v Magee*[17] in which the Court said:

> "And it may be recalled that the late Sir Leo Cussen insisted always most strongly that it was of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before them. He held that the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. He held that the only law which it was necessary for them to know was so much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are."

[61] The judgment then continued with an example of a criminal matter which is helpful in the circumstances under consideration:

> "If the case were a criminal case, and the charge were of larceny, and the only real issue were as to the *asportavit*, probably no judge would dream of instructing the jury on the general law of larceny. He would simply tell them that if the accused did a particular act, he was guilty of larceny, and that, if he did not do that particular act, he was not guilty of larceny."

[17] (1952) 85 CLR 437 at 466.

[62] The importance of tailoring the terms of a summing up to the particular circumstances of the case was emphasised in the joint judgment of Gleeson CJ, Gummow, Heydon and Crennan JJ in *Darkan v The Queen*:[18]

> "The function of a summing up is to furnish information which will help a particular jury to carry out its task in the concrete circumstances of the individual case before it and in the light of the trial judge's assessment of how well that jury is handling its task."

[63] Evidence before the jury commenced on Wednesday 16 September 2009 with the playing to the jury of the audio-visual recordings of evidence given by the complainant at a special hearing on 11 May 2009 and before the trial Judge on 15 September 2009. The Crown called four other witnesses and played the audio-visual record of the interview between the appellant and police conducted on 19 September 2008. The four additional witnesses were the two cousins to whom the complainant had complained, MH and the complainant's mother who gave evidence about various matters of background. The complainant's mother also gave evidence about a statement she overheard made by the appellant to an unidentified boy which the Crown relied on as an admission of intercourse. The particular statement is set out in para [72] of these reasons.

[64] The Crown closed its case at about 4.15pm on the second day of evidence before the jury, Thursday 17 September 2009. No evidence was called on behalf of the appellant. Counsel addressed the jury before lunch on Friday

[18] (2006) 227 CLR 373 at 394 [67].

18 September 2009, after which the summing up was delivered and the jury retired to consider its verdict at about 3.10pm that day.

[65] The evidence was not complicated. The critical issues were straightforward and easily understood. There was nothing complicated about the law or the application of the law to the facts. The learned trial Judge gave clear and accurate directions concerning matters such as the complaint to the cousins, prior inconsistent statements, delay in complaining, the impact of delay upon the appellant and the need to subject the evidence of the complainant to close and careful scrutiny.

[66] Importantly, her Honour concisely and accurately identified the critical issues and, in particular, the "key issue" as to whether the jury accepted the evidence of the complainant that sexual intercourse occurred and rejected the version given by the appellant to police. This was the critical issue and no suggestion was advanced that the jury could accept the evidence of the complainant as to intercourse having occurred but, nevertheless, entertain a doubt as to her lack of consent or the appellant's awareness of the complainant's lack of consent. Counsel for the appellant fought the trial solely on the basis that the jury should have a doubt as to whether intercourse occurred.

[67] The audio-visual recording of the interview with the appellant was an exhibit. The jury was instructed that it was for the jury to listen to the recording and decide what was said by the appellant. The trial Judge told

the jury that if the version given by the appellant to police was a reasonable possibility, the Crown would have failed to prove its case. The jury cannot have been in any doubt as to the essence of the defence.

[68] Counsel for the appellant contended that independently of the essence of the defence, the trial Judge was obliged to refer to evidence which the appellant submitted supported the case for the appellant. For example, the complainant said that the appellant offered her jewellery as a bribe and there was evidence which the appellant argued supported the view that the complainant had lied about that matter.

[69] The issue of the jewellery and whether the complainant lied about how she came into possession of jewellery was the subject of submissions by counsel to the jury. There was nothing complicated about that issue. Nor were other matters upon which counsel relied in the category of complicated or intricate. None of the issues were of such a nature as to require the assistance of the trial Judge in order to explain the significance of the particular matters to the cases for the prosecution and the defence.

[70] In all the circumstances, given the short duration of the evidence, the lack of complication with respect to legal or factual issues and the terms of the summing up, in my opinion the directions were appropriate and adequate for the circumstances of the particular trial. In my view this ground of appeal is not made out.

Ground 4

[71] In support of the complaint that the verdict of the jury was unreasonable, counsel for the appellant identified a number of features of the evidence of the complainant which counsel suggested lacked credibility. In addition, counsel drew attention to the delay before the complainant spoke to MH and to inconsistencies between the evidence of the complainant and MH concerning the complainant's opportunity to come into possession of jewellery by means other than a bribe by the appellant. All these matters were valid points to make to a jury, but neither individually nor in combination do these matters give rise to the possibility that a miscarriage of justice has occurred.

[72] Having read the evidence of the complainant and other witnesses, I am not left uneasy about the reliability of her evidence. In the context of this ground of appeal, the evidence of the complainant's mother is significant. She said that about two weeks after the April weekend during which the complainant spoke to MH, she heard the appellant telling another young boy about sex with a girl who was trying to charge him with rape. The statement overheard was as follows:

> "A couple of years ago I had sex with a girl … Now, she's trying to charge me with rape, I don't know why, since she was a lousy root anyway".

[73] The trial Judge carefully directed the jury that before they could use the mother's evidence the jury had to be satisfied not only that the appellant

spoke the words, but also that he was referring to the complainant. Further, her Honour directed that the jury had to be satisfied that the statement was a true statement. If the jury accepted the evidence and found that it was a true statement by the appellant referring to the complainant, the evidence provided strong support for the evidence of the complainant that sexual intercourse occurred. It was evidence capable of amounting to corroboration in law and the trial Judge gave appropriate directions to that effect.

[74] Having regard to the evidence in its entirety, I am not left in any doubt about the guilt of the appellant. It was open to the jury to convict the appellant.[19] In my opinion, this ground of appeal is not made out.

[75] For these reasons, the appeal should be dismissed.

Riley J:

[76] I agree that the appeal should be dismissed for the reasons given by the Chief Justice.

Blokland J:

[77] I also agree that the appeal should be dismissed for the reasons given by the Chief Justice.

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[19] *M v The Queen* (1994) 181 CLR 487; *MFA v The Queen* (2002) 213 CLR 606; *Libke v The Queen* (2007) 230 CLR 559 at 596 [113].