

The Queen v Brown [2010] NTSC 17

PARTIES: THE QUEEN

v

MATTHEW BROWN

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO: 20903843

DELIVERED: 29 April 2010

HEARING DATES: 27, 28 April 2010

RULING OF: OLSSON AJ

RULING ON *VOIR DIRE*:

CATCHWORDS:

EVIDENCE LAW – VOIR DIRE – ADMISSIBILITY OF EVIDENCE

Whether content of child forensic interviews admissible - prolonged interrogation by police of five-year-old female complainant amounting to virtual cross examination - pattern of questioning suggestive of misconduct by accused - whether responses of complainant contaminated - whether responses patently unreliable in circumstances - whether responses elicited by inappropriate inducements - whether, in any event, good reason not to admit responses pursuant to s21B(3) of *Evidence Act* - evidence of responses excluded.

REPRESENTATION:

Counsel:

Prosecution: R Noble

Accused: P Elliott

Solicitors:

Prosecution: Office of the Director of Public
Prosecutions

Accused: Northern Territory Legal Aid
Commission

Judgment category classification: B

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The Queen v Brown [2010] NTSC 17
No. 20903843

BETWEEN:

THE QUEEN

AND:

MATTHEW BROWN

CORAM: OLSSON AJ

REASONS FOR RULING

(Delivered 29 April 2010)

Introduction

- [1] In these proceedings the accused has pleaded not guilty to a charge of aggravated indecent dealing with a child under the age of 16 years. Specifically, the Crown asserts that, between 16 October 2008 and 29 December 2008 at Alice Springs, he indecently dealt with a young female child aged five years, by touching her vaginal area through her underpants. I will refer to that child as "the complainant".
- [2] At the time of the alleged incident the complainant was in care at a Child Care Centre in Alice Springs. The accused, a mature age man, was a member of the staff of that Centre. The Crown case is that the indecent

dealing took place in the kitchen of the Centre, in which, as portion of his duties, the accused frequently worked or in the so-called "over's" room of the Centre.

- [3] There are two specific factual aspects that should be borne in mind as portion of the relevant factual background matrix.
- [4] The first is that it emerged from the committal evidence¹ that the complainant had earlier been involved in an incident somewhat similar to that alleged against the accused. It appears that she had been improperly touched on the vagina by some person (other than the accused) when she was about three years of age. The possible impact of that event on the complainant's thinking and reactions, in light of the factual history that I am about to recite, cannot be overlooked.
- [5] The complainant's mother conceded that, since that incident, she had discussed the relevant circumstances of that incident with the complainant and, from time to time, reiterated statements to her that persons should not touch the complainant in that manner and that she should speak out if such a thing occurred.
- [6] The second is that it is not disputed that, in the course of a child forensic interview,² the complainant accepted that the children were not allowed in the kitchen of the Centre and that the accused sometimes did not let them go

¹ Transcript, pages 72, 73.

² Transcript of CFI conducted on 27 January 2009.

there. This has a potential significance in relation to the first assertion made by the complainant as to where the relevant incident took place.

- [7] When this matter was called on for trial Mr Elliott, counsel for the accused challenged the admissibility of the evidence of child forensic interviews conducted by police officers with the complainant on 19 and 27 January 2009 respectively. I will come to the substance of his submissions in that regard in due course.
- [8] He also submitted that, in all the relevant circumstances, the substance of what was effectively a third forensic interview (which followed the second interview on 27 January 2009) should be excluded from evidence on discretionary grounds.
- [9] A difficulty that immediately arose in addressing these matters was that, when it was sought to play the DVD discs of the interviews in question, although the video images were quite clear, the sound was substantially defective. Even with the court equipment at maximum volume, it was only possible to hear snatches of what was said by the police officers to the complainant and, in most instances, it was virtually impossible to hear the complainant's responses, save for a word here and there.
- [10] Notwithstanding that situation, the Crown produced what purported to be printed transcript of the exchanges that were said to have occurred during the child forensic interviews as tendered at the committal proceedings on

4 August 2009; and which were obviously the basis of pre-recorded evidence taken in this court on 28 September 2009.

- [11] It is not immediately apparent who prepared the transcript. Nor does the information before me reveal the technical means by which it was produced. Certainly, it is impossible to adequately check its accuracy by listening to the DVDs, utilising the court equipment. The Crown prosecutor volunteered that he had been in no better position in seeking to interpret the content of the DVDs, utilising a computer immediately available to him.
- [12] It must also be recorded that the transcript of the child forensic interviews also contains a series of entries in brackets that purport to indicate numerous physical gestures said to have been made by the complainant in response to questions put to her. Typical of such entries are "<Shaking head>", "<Nodding head>", "<Shaking head slightly>", "<Pointing to the wall>" and "<Shrugging shoulders>".
- [13] Whilst some of the annotations - particularly those related to certain instances of shrugging shoulders – are plainly accurate, I agree with Mr Elliott that, in important instances, other annotations made do not appear to be justified by what is seen in the video images. To that extent, they are, potentially, dangerously misleading.
- [14] After some debate, the Crown was afforded an opportunity of exploring the feasibility of enhancement of the DVD material in Darwin as to the sound recording.

[15] Whilst that process was in train, counsel agreed that a *voir dire* should proceed on the basis that certain materials placed before me represented the effect of the proposed Crown evidence as best it would be able to lead it, assuming that the technical problems with the DVDs could be overcome. Such material comprised:

- (1) the DVDs of the child forensic interviews to which I have referred;
- (2) the purported transcripts of those interviews;
- (3) the transcript of a pre-recording of evidence conducted on 28 September 2009 before a Judge of this Court;
- (4) the transcript of evidence taken at the committal proceedings on 4 and 5 August 2009;
- (5) the original declaration dated 5 January 2009 of LML, a child-care worker at the Centre; and
- (6) the declaration dated 29 January 2009 of KSR, the mother of the complainant and various annexures to it.

[16] This ruling and the reasons for it are based on a consideration of that material, leaving for later consideration, if necessary, certain other issues related to the potential use of any enhanced DVD material and the detailed transcripts to which I have made reference.

A general overview of the child forensic interviews

- [17] As appears from the indictment in these proceedings, the Crown was not able to specify the time of the alleged incident of indecent dealing more precisely than that it occurred between 16 October and 29 December 2008.
- [18] In her declaration, as amplified by her evidence at the committal, the complainant's mother testified that her daughter commenced part-time at the Centre in October 2008 and attended full-time from about 16 December of that year. She said that, on the evening of 29 December 2008, in circumstances that she related,³ the complainant made certain statements to her.
- [19] Those statements were to the effect that the accused had touched the complainant in her genital area with his hand, whilst she had her underpants on. On 15 January 2009 the mother took the complainant to the Alice Springs police station to speak with police.
- [20] On 19 January 2009 the complainant was again taken to the Alice Springs police station, this time for a formal child forensic interview by officers of the Child Abuse Task Force. The interviewing officers were Detective Acting Sergeant Carmen Butcher (to whom I will simply refer as "Butcher") and Constable Megan McKay.
- [21] That interview commenced at 11:19 am and concluded at 12:02 pm.

³ Paragraph 15, declaration.

[22] After preliminary questions designed to settle her down in an unfamiliar environment, establish the level of comprehension of the complainant and convey to her that it was important that she tell the truth, the police officers asked her a lengthy series of questions⁴. I assume that these were based on what had been said to them by the complainant's mother. The questions asked were obviously designed to establish the complainant's version of what relevant physical interaction may have occurred between her and the accused.

[23] It is fair to say that the interview terminated without the complainant asserting any improper sexual activity on the part of the accused towards her. At best, she narrated an asserted incident in which the accused was said to have chased kids in the "over's" room whilst holding a knife from the kitchen and laughing.⁵ The complainant said that this made her feel bad.⁶ She stated that two other staff members at the Centre saw the accused do that.⁷

[24] The complainant was also questioned concerning whether adults took showers at the Centre. She said that they did sometimes. She, seemingly, denied ever having seen any adults have a shower at the Centre.⁸ The relevance of that will later appear.

⁴ The total transcript runs to some 24 pages.

⁵ Transcript, page 15.

⁶ Transcript, page 15.

⁷ Transcript, pages 16, 17.

⁸ Transcript, page 18.

- [25] Despite being pressed at some length on the topic of the accused not being a nice man or having made the complainant feel bad (propositions essentially put to her by Butcher), that police officer did not elicit any complaint that the accused had acted improperly towards the child. They therefore suspended the interview on that occasion.
- [26] Butcher conducted a further child forensic interview with the complainant, commencing at 10:14 am on 27 January 2009. Constable Martin was present as corroborating officer on that occasion.
- [27] After various preliminary exchanges, Butcher reminded the complainant about the previous interview and said that she wanted to talk further about what sort of things happened at Child Care. In doing so she first established with the complainant that the accused was a member of the Centre staff and reminded her that mention had been made of him at the first child forensic interview.
- [28] As appears from the transcript of that interview,⁹ the complainant was questioned at some length as to the role of the accused at the Centre. That was followed by some general questions about play and other activities within the Centre.
- [29] Eventually, Butcher told the complainant that they were talking to her because she had told her mother some things that had happened at Child Care. The complainant did not profess remembering that she told her

⁹ Pages 7-10.

mother about the accused and, according to the transcript of the interview, responded in the negative to a question as to whether there was anything that she wanted to tell the police concerning the accused.¹⁰

[30] The transcript of the interview suggests that the complainant acceded to propositions that she was worried and sad about telling anything concerning the accused, whereupon Butcher said to her:¹¹

".....T you don't have anything to be worried about as we said before you can say anything in here in this room okay no one else can hear us and you're not going to get into trouble for anything at all alright you have done nothing wrong so whatever you say stays in here and you don't get into any trouble for anything. You can use any words you can say anything at all you want so you've got no reason to be worried or no reason to be embarrassed or scared 'cause our job is to talk to kids and to stop them from worrying okay so is there something you want to tell us is there something that's making you feel a bit sad."

[31] The police officers then elicited from the complainant that she did not want to go back to Child Care and did not want to see the accused. She is reported as indicating that he had not done something to make her feel sad or funny in some way. She stated that she did not know why she did not want to see him anymore.

[32] As Mr Elliott stressed, Butcher then continued to press the complainant at some length to relate what might have happened to her.¹² There is no doubt that, in doing so, the thrust of her questions suggested that the accused had,

¹⁰ Transcript, page 13.

¹¹ Transcript, page 14.

¹² The printed transcript of the interview runs to just over 22 pages.

in fact, done something to the complainant and that the police would like the complainant to tell them so that they could help her.¹³

[33] Mr Elliott made the point that, on 35 occasions, the complainant was asked questions designed to get her to say that the accused touched her in her vaginal area and, on each occasion, she did not respond that this had occurred. He argued that such persistence was in the nature of a virtual cross examination that would be unthinkable in leading evidence-in-chief.

[34] There is force in his contention that the implicit thrust of the questions was to the effect that, as he put it, "Look, we know this has happened. You've just got to tell us about it."

[35] After being pressed in that way, the complainant commenced crying, whereupon, at 10:39 am, Butcher proposed having a break. However, for some reason, this does not appear to have happened and the interview immediately resumed.

[36] After a few irrelevant questions, obviously designed to settle the complainant down again, the detective returned to the topic of the accused and once more pressed the complainant to tell her why she did not want to see the accused, to which the complainant merely shrugged her shoulders.

[37] The complainant was then asked whether the accused had hurt her somewhere on her body or whether anyone at Child Care had ever hurt her

¹³ Transcript, pages 15, 16.

somewhere on her body that she could remember.¹⁴ It was put to the complainant that if she could not say it, she could show the police officers.¹⁵

[38] The transcript of the interview suggests that the complainant then pointed to her crutch on two occasions, although it must be said that this does not clearly emerge from a viewing of the video images. The complainant told the police officers that her name for her vaginal area was her lily petal or lilies and petals.¹⁶

[39] She was then asked whether anyone at Child Care had ever touched or hurt her in that area - to which she responded that she did not know. She said that she did not know what happened to her lilies and petal and made some inconclusive statements as to whether it hurt at some point.¹⁷ The declaration of the potential witness L, to which I shortly refer, is of some potential relevance in this regard.

[40] Butcher continued to press the complainant in these terms:

"okay T just remember that you don't have any thing to be worried about okay you can say whatever you need to say in here you're not going to get into trouble or anything like that okay alright did someone at child-care touch your lilies and petal."

[41] I here pause to record that, in her declaration, the Centre employee LL related that, on one occasion, the accused told her that he was concerned about T because she was always scratching her vagina. Ms L then herself

¹⁴ Transcript, page 17.

¹⁵ Transcript, page 18.

¹⁶ The police subsequently kept referring to her vagina as her lilies and petals.

¹⁷ Transcript, page 19.

noticed that T was scratching her vagina a lot on the outside of her clothes. This potential witness thought that the complainant might have had thrush. She was clear in her memory that she reported that situation to the person in charge of the Centre.

[42] In response to the question put to her by Butcher, the complainant ultimately said that she did not want to say. She was then pressed as to why she did not want to do so, in the manner indicated in the transcript.¹⁸ In the course of the relevant exchanges she was asked the suggestive question as to whether she was scared of the person that had hurt her or touched her or whatever happened. She said that she did not know. She then appears to have denied that anyone had ever touched her lilies and petal or hurt them or, for that matter had touched her or hurt her anywhere else.¹⁹

[43] Butcher then proceeded, at some length, to press the complainant about the accused and why she did not want to see the accused or talk about him. She received no definitive responses to her questions. Having made repeated references to the accused, Butcher said to the complainant:

"T when you stood up and showed and pointed to your lilies and petal can you tell me why you did that." The response was "I don't know".

[44] A series of further questions was put to the complainant, in the course of which she said that she did not want to say anything else. Those exchanges included a question "What about Uncle M is there anything else you want to

¹⁸ Transcript, page 19.

¹⁹ Transcript, page 20.

say about him." (Uncle M was the name by which the complainant referred to the accused.)

[45] It seems fair to say that, at that point, the police were obviously somewhat frustrated. At 10:53 am Butcher said that "this interview is concluded".

[46] The potential evidence as to what then occurred is somewhat unsatisfactory and contradictory.

[47] The pre-recorded evidence given by the complainant in cross examination²⁰ was to the effect that, having left the interview room, she told her mother that she wanted to go home. She agreed that her mother told her to just tell the police ladies about UM and she could then go home.

[48] Butcher testified at the committal proceedings that, at the time at which the interview was said to have been concluded, the complainant was quite upset and crying. She claimed that, as they left the interview room, the complainant disclosed to her that it was the accused who had touched her lilies and petals and that she agreed to go back and talk about that on the tape. Contrary to the evidence of the complainant, Butcher asserts that, at that time, the complainant's mother gave the complainant a hug and merely asked her if she was okay, but otherwise did not speak to her.

[49] At 11:21 am (ie almost half an hour after the purported termination of the interview) a further interview was conducted in the interview room. Even

²⁰ Pre-recording transcript, page 24.

allowing for any need to reactivate the recording equipment, there is no satisfactory explanation as to why there was such a time lapse, if no conversation of substance took place between the complainant and her mother and the complainant had immediately made the alleged statement to Butcher.

[50] Having introduced what was effectively the third forensic interview by a statement to the complainant that they had come back into the interview room again because there was some more that the complainant wished to tell the police, Butcher asked why the complainant had showed them her lilies and petal. The complainant's response was that the accused had touched her lilies and petal in the "over's" room at the Child Care Centre. He had placed his "point finger" on her clothes in the area of her lilies and petals. She told him to stop and he then went away.²¹

[51] In response to further questioning, the complainant said that the touching had only ever occurred on one occasion.²² She asserted that she had first told her Auntie M about what had occurred and then, later, told her mother. It is common ground that Auntie M would or could not corroborate that suggestion.

²¹ Transcript, pages 23, 24.

²² Transcript, page 25.

Issues arising on the *voir dire*

- [52] In essence, Mr Elliott submitted that, such were the unsatisfactory features of the child forensic interviews and the technical improprieties apparent, the substance of the evidence sought to be derived from them was inadmissible.
- [53] In the alternative he contended that there was "good reason", within the meaning of that phrase in s 21B(3) of the *Evidence Act* (NT), for excluding the relevant material as an exercise of discretion and/or that it should be excluded as an exercise of the Court's general discretion by reason of the unfairness of the manner in which it was obtained.
- [54] He drew attention to s 21B(4) of the *Evidence Act* (NT) which, he submitted, specifically contemplated a need to excise irrelevant or otherwise inadmissible material.
- [55] In pursuing his primary argument as to admissibility, Mr Elliott stressed that, whilst he did not assert *mala fides* against the police officers concerned, nevertheless the prolonged and suggestive questioning of the complainant in the course of what were, in reality, three successive child forensic interviews, producing a total of 56 pages of transcript, so far exceeded the bounds of what could be regarded as proper, permissible examination-in-chief of a witness as to render the substance of the statements made inadmissible.
- [56] As to this, he pointed to these features:

- (1) On the first two occasions, the questioning was both prolonged and persistent to the degree that, at times, it really amounted to an oppressive cross-examination of a five-year-old child who was twice reduced to tears;
- (2) The questioning, both in the manner and context in which it was developed, as well as in the framing of certain specific questions, was both leading and suggestive in important respects. It had the practical effect of persistent innuendo that the accused must have been guilty of inappropriate sexual or other behaviour towards the complainant. Moreover, at one point, the police suggested to the complainant that she had actually asked her mother to call the police about the accused, whereas there is no evidence that she did so.²³
- (3) In reality, what was said to the complainant to induce her to implicate the accused amounted to inappropriate inducements designed to persuade her to allege that he had been guilty of sexual misconduct. These ranged over a number of facets, including the false representation that anything that was said would, in fact, not go beyond the interview room. She was told that the police would ensure her safety and that of other children. The third interview was preceded by the inducement of the mother, in response to the complainant's expressed desire to go home, that, if she told the police what she had said to her, she would then be allowed to go home.

²³ Transcript of first CFI, page 12.

- [57] In my opinion, these contentions are well-founded. Mr Noble, the Crown prosecutor, fairly conceded that, even given the latitude obviously contemplated by the *Evidence Act* and the legislative policy underlying its provisions, the mode of conduct of the interviews clearly exceeded the bounds of what would have been proper examination-in-chief of a complainant by a prosecutor.
- [58] I consider that, when it is borne in mind that the scheme erected by the *Evidence Act* (NT) is such that the content of a proper child forensic interview may be tendered as the evidence-in-chief of a young complainant, then the fact that basic principles of evidence and procedure are grossly breached in the mode of conduct of the interview is an important consideration as to admissibility.
- [59] In this regard the reasoning of the Court of Criminal Appeal in the case of *Warren*²⁴ is of relevance, given that it focussed on a different factual matrix.
- [60] As in that case, the danger of contamination of the evidence of a very young child by the mode and context of the interrogation process was very real. To apply the concept expounded by Hunt CJ at CL in *Warren*, the relevant interrogation was so sustained and suggestive and the inducements made or implied were such that, at the end of the day, the probability of contamination was so great as to render the statements sought to be relied on

²⁴ (1994) 72 A Crim R 74.

as highly unreliable -- to the point that little weight could safely be placed on them.

[61] I am of the view that the content of the forensic interviews sought to be relied upon by the Crown in proof of the guilt of the accused is inadmissible on the basis asserted by Mr Elliott and I would exclude it on that footing.

[62] However, even if I am in error as to that assessment, I unhesitatingly conclude that, in the circumstances of this case, good reason exists for declining to admit the relevant material, in the sense in which that phrase is employed in s 21B(3) of the *Evidence Act* (NT).

[63] Quite apart from the unsatisfactory features attendant on the conduct of the interviews to which I have referred and in addition to those features, there are other factors that strongly suggest the unreliability of the evidence sought to be adduced. Without attempting to be fully definitive, some principal aspects arising for consideration are:

- (1) There are inherent inconsistencies in the statements made by the complainant as to where the alleged touching incident occurred. The initial complaint to the mother was that it took place in the kitchen of the Child Care Centre when several other girls were present and that the accused touched them as well.²⁵ In the course of the ultimate forensic interview it was said that the touching actually occurred in the "over's"

²⁵ Declaration of mother, paragraph 21.

room of the Centre.²⁶ In cross-examination during the pre-recording of evidence, the complainant said that the touching was in the bathroom at the Centre,²⁷ a place in which the complainant elsewhere conceded that the accused did not go. Each of those locations was only identified by the complainant once.

- (2) Not only are there those important inconsistencies, but also the detail of what was said (in the final forensic interview) to have actually happened and how the incident came about is very sparse. I agree with Mr Elliott that the impression to be gained from the final forensic interview is that, once the complainant had implicated the accused, the police officers were not intent on pushing their luck too far by seeking to elicit full details of the asserted relevant circumstances;
- (3) The reliability and veracity of what was said by the complainant on several important topics is highly suspect. By way of example, her assertion that she first complained of the touching to her Aunt Melissa is not supported by the latter;
- (4) Additionally, her narrative concerning the alleged exposure of the accused's "willy" in the shower at the Centre is not only patently improbable on the evidence, but is also not lent support by others likely to have witnessed the incident;

²⁶ Transcript of CFI on 27 January 2009, page 23.

²⁷ Pre-record transcript, page 23.

- (5) Further, the complainant's version of the alleged brandishing by the accused of a knife and of his asserted scratching of the penis of a male child are, once again, not supported by any other person said to have been involved or present;
- (6) Due regard must be had to the fact that the complainant was seen to be constantly touching her vaginal area -- a situation that the accused himself reported, as earlier recited; and
- (7) Finally, although this is not of great moment in itself, it is of interest to observe that, in the diary notes made by the complainant's mother (as exhibited to her declaration), she plainly had grave doubts at the time concerning the reliability of what was said to be the complaint first made to her. As Mr Elliott pointed out, this is scarcely surprising when one reviews the somewhat curious context in which the initial allegations were said to have been made.²⁸

[64] I am driven to the conclusion that such are the unsatisfactory features of the conduct and content of the child forensic interviews as to the matters relied upon to establish the guilt of the accused that it would be grossly unfair and unjust to permit them to be adduced in evidence. I therefore hold that there is, in any event, good reason not to admit them.

²⁸ Paragraph 15, mother's declaration.

Conclusion

[65] It follows that, quite apart from the technical problems associated with the DVDs, their content must be excluded, in so far as it bears on the alleged conduct of the accused towards the complainant which is said to found the offence charged against him.
