R v Ryan [2013] NTSC 54

PARTIES:	The Queen
	v
	RYAN, Kirk
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21225038
DELIVERED:	23 AUGUST 2013
HEARING DATE:	29 JULY 2013
JUDGMENT OF:	KELLY J

CATCHWORDS:

EVIDENCE—Admissibility—Statements of deceased witness identifying accused—Statements made four and five days following incident—Whether made in circumstances that make it highly probable that the representations are reliable—Statements admitted
EVIDENCE—Admissibility—Statements of deceased witness identifying accused—Statements made four and five days following incident—Whether statements made "shortly after" the incident—Held that the ordinary usage of the phrase "shortly after" not inconsistent with time elapsed—Held that identification of own cousin likely to be clear after five days—Statements admitted

Evidence (National Uniform Legislation Act) 2013 (NT) s 65(2)(b), s 65(2)(c), s 137

Williams v The Queen (2000) 119 A Crim R 490; *Harris v The Queen* (2000) 158 A Crim R 454; *Conway v The Queen* (2000) 98 FCR 204, applied

REPRESENTATION:

Counsel:

Plaintiff:	D Dalrymple
Defendant:	J Hunyor

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	North Australian Aboriginal Justice Association

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

R v Kirk [2013] NTSC 54
No. 21225038

BETWEEN:

THE QUEEN
Plaintiff

AND:

KIRK RYAN
Defendant

CORAM: KELLY J

REASONS FOR RULING

(Delivered 23 August 2013)

[1] The accused, Kirk Ryan has been charged with attempting to have sexual intercourse with SA without her consent, knowing about that lack of consent. He has been found not fit to stand trial and a special hearing is to be held before a jury. The evidence is that SA was sexually assaulted in a park in Katherine on the night of 1 July 2012. A major issue in the special hearing will be whether the man who assaulted her was in fact Kirk Ryan.

[2] SA identified Kirk Ryan to police as her attacker shortly after the assault occurred. He was previously unknown to her.

[3] Ms Sophia Weston, Mr Ryan's cousin made a statement to police on 6 July 2012, in which she said that she had witnessed the assault on SA and

recognised the attacker as her cousin Kirk Ryan. She had made an oral statement to the same effect to a police officer the day before. Ms Weston died in a car accident in May this year, and the crown is seeking to have her two statements admitted into evidence under s 65(2)(b) and/or (c) of the *Uniform Evidence Act*.

[4] The first statement was made by Ms Weston to a police officer, Ms Hollingsworth who came to the unit where she was staying, on 5 July 2012. Ms Hollingsworth's evidence was that she went to the unit to arrange to take a statement from Ms Rose Braun who she had been told had been a witness to the assault. Ms Weston, who was Ms Braun's sister in law, was staying at the unit. When she heard what Ms Hollingsworth had come about she said words to the effect of, "I was there with Rose last night. I saw what happened." Ms Hollingsworth took her aside and Ms Weston said words to the effect of, " … I know that man. He's Kirk Ryan. I know him from our community ties at Beswick."

[5] The second statement was made the next day at the police station to the same police officer. It was written down and signed by Ms Weston and contained the following paragraph.

> "I saw the street light from Railway Terrace, shining on the man and the woman. I saw that man had black skin on his face. Dark black skin. I recognise this man then. I know who that man is. His name is Kirk Ryan. I see him with my own eyes. I know that fella, we are from one community, Beswick Community. I am related to Kirk Ryan. His mother, Violet Ryan, is my mother's sister. My mother's name was Sandra Bennett. She passed away a couple of years back

> now. I have known Kirk Ryan since we were little kids together. He's short, curly, black hair."

It also contained other details of the actual assault.

[6] The Crown relies on these statements primarily for the identification of Mr Ryan by Ms Weston.

[7] On 30 July 2013 I made a ruling admitting into evidence the first statement and that part of the second statement in which Ms Weston identified the man in the park as the accused, Kirk Ryan pursuant to s 65(2)(c). I indicated that I would publish detailed reasons at a later date. These are those reasons.[1]

Section 65(2)(c)

[8] Evidence of the making of each of these statements is admissible under s 65(2)(c) if the statement in question was made in circumstances that make it highly probable that the representations in the statement are reliable.

[9] In determining whether a statement is admissible under s 65(2)(c), the focus is on the circumstances under which the statement was made and whether those circumstances render it highly probable that the statement is reliable, not the actual reliability of the statement, judged (for example) by reference to its consistency with other reliable evidence.[2] In my view, the statements of Ms Weston to the effect that that she saw the attacker and recognised him

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1 A special hearing was held before a jury and on 1 August 2013, Mr Ryan was found not guilty.

2 *R v Ambrosoli* (2002) 55 NSWLR 603 at p 616 para [34]; *Williams v The Queen* (2000) 119 A Crim R 490 at [54]

as her cousin, Kirk Ryan, were made in circumstances that make it highly probable that the statements are reliable.

[10] First, the statements were made only four and five days respectively after the event, when the memory of recognizing the face of her own cousin revealed in the light of the street lamp apparently sexually assaulting a woman is likely to have been clear. In addition, the statements were in each case made to a police officer knowing they would be used in the prosecution of her own cousin, meaning the evidence is unlikely to have been concocted; might be said to be against her own family's interests; and (in the case of the second such statement) in circumstances where it was explained to her that making a false statement is an offence. The evidence is that the whole of the statement, including the usual paragraph about the consequences of making a false declaration, was read to her before she signed it.

[11] Defence counsel, Mr Hunyor, submitted that the fact that the statements were made about Ms Weston's cousin, apparently against the interests of her family, was a factor going to the intrinsic reliability of the statement, and not to circumstances which make it highly probable that the statements are reliable. I do not think that the relevant circumstances are limited to physical circumstances such as time and place. They must include things such as the relationship of the maker of the statement to the subject matter of the statement. (For example, if a statement inculpating another person was made by a person who was himself a suspect, that would be a circumstance which would tend to lessen the probability that the statement

was reliable,[3] and the fact that the statement is against the interest of the maker is recognised in s 65(2)(d) as a circumstance that lowers the requirement for admissibility so that it need only be made in circumstances that make it likely that the representation is reliable, rather than "highly probable".)

[12] Defence counsel, Mr Hunyor, submitted that there were circumstances which may have adversely affected the reliability of the statement. First, Ms Weston's primary language was Kriol and she did not have the benefit of an interpreter. He pointed, for example, to inconsistent use of tenses in the statement and submitted that it was not clear whether Ms Weston was saying that she recognised her cousin when she saw him or that she now knew (ie at the time of making the statement) that it had been him. I do not consider that circumstance makes it less probable that the statements are reliable. Ms Weston was asked if she wanted an interpreter and said she was OK to proceed in English. Further, erratic use of tenses notwithstanding, the substance of what Ms Weston was saying is clear: she saw the attacker "with her own eyes" and she knew him. It was Kirk Ryan, her mother's sister's son whom she grew up with.

[13] Mr Hunyor submitted further that Kirk Ryan had already been arrested for this offence at the time each of the statements was made and one cannot be certain that Ms Weston had not heard about that and only thought that he was the man she had seen. He pointed out that Ms Weston had been in the

[3] See *Williams v The Queen* at p 504-505

company of Rose Braun raising the possibility that her evidence had been contaminated. However, there is no evidence that Ms Weston was aware that Mr Ryan had been arrested, and even if she had been so aware, I do not think that bare possibility lowers the likelihood that the statement is reliable to any significant degree: it remains "highly probable". Further, Rose Braun did not say that the man she saw was Kirk Ryan. She said she did not know the man, which rules out contamination of Ms Weston's evidence by Ms Braun on the crucial issue of identification.

[14] Mr Hunyor also pointed out that the written statement was not a transcript of what was said by the witness but an edited statement which Ms Hollingsworth admitted had been constructed by the usual method of first asking the witness what happened and typing that up, then going back and asking for clarification of certain points and filling in the extra details so obtained in each relevant paragraph. I do not agree that that process is a circumstance which has the capacity to adversely affect the reliability of the statements so made.

[15] I am therefore of the opinion that the assertions by Ms Weston in each statement to the effect that she recognised the man as her cousin Kirk Ryan are admissible under s 65(2)(c).

[16] However, I do not think that assertions in the written statement other than the identification of Mr Ryan as the attacker – that is to say those recounting the details of what happened – should be admitted under s 65(2)(c).

Although many if not most of the other circumstances are present, crucially, it seems to me that her recollection of peripheral detail is more likely to have faded over four or five days than the memory of recognising her cousin's face in such extraordinary circumstances. In relation to the other aspects of the statement of 6 July, taking into account the whole of the circumstances, I do not think they are such as to render it highly probable that those other aspects of the statement are reliable.

Section 65(2)(b)

[17] Strictly speaking, it is not therefore necessary for me to consider whether the statements are also admissible under s 65(2)(b). If it had been necessary, I would have been inclined to hold that those aspects of the statements in which Ms Weston identified Mr Ryan were admissible under that provision, although it seems to me that the applicability of that provision is not so clear cut.

[18] Evidence of the statements is admissible under s 65(2)(b) if the statements were made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication.

[19] I have no hesitation in holding that each of the two statements was made in circumstances that make it unlikely that the statement (in each case to the effect that Ms Weston saw the person who committed the assault and that it was Kirk Ryan) was a fabrication. Those circumstances include (in both cases) the fact that Mr Ryan is Ms Weston's cousin, and that they grew up

together; that the victim of the assault was unknown to her (making it unlikely that she would have any motive to lie to falsely inculpate him); and that the statement was made to a police officer. In the case of the second statement, there was the added factor that it was made in a formal setting in a police station; she would have understood that it was to be used in the prosecution of her cousin; and it was made on oath in the form of a statutory declaration the final parts of which warn of the consequences of making a false declaration, including criminal prosecution.

[20] The question is whether the other pre-condition for the admission of the evidence is met. In the case of each statement, was it made "shortly after" the asserted fact occurred? The incident she was describing occurred on the night of 1 July 2012. Ms Weston made the first (oral) statement on 5 July 2012, four days later; she made the fuller, more formal statement the next day, 6 July, five days after the incident.

[21] Counsel for the defence, Mr Hunyor, in very ably argued submissions, contended that both statements were simply too late to qualify as having been made "shortly after" the event.

[22] In *Harris v The Queen,*[4] the trial judge had admitted into evidence a statement made to police at a police station about 24 hours after the event. (The statement was made by the victim who had been assaulted and who later died from a brain haemorrhage caused by the assault.) Studdert J,

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4 (2005) 158 A Crim R 454

delivering the judgment of the NSWCCA, reviewed the authorities on this provision of the *Uniform Evidence Act* at paragraphs [33] to [37] of the judgment.

[23] In *Conway v The Queen* (2000) 98 FCR 204, Miles, von Doussa and Weinberg JJ said (at [123] and [133]):

> [123] The word "when" in s 65(2)(b) of the Act encompasses this notion of strict contemporaneity. The introduction of the expression "shortly after" is, however, a significant departure from traditional doctrine ...
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> [133] The primary objective which underlies the requirement in s 65(2)(b) of the Act that the representation be made "when" or "shortly after" the asserted fact occurred seems to be to ensure that the matters conveyed are either strictly contemporaneous or, if a narrative of a past event, still fresh in the mind of the person recounting that narrative. The expression "shortly after" makes it clear that there need not be anything like the strict contemporaneity required at common law to render the evidence admissible as res gestae.

[24] In *R v Mankotia* (unreported, Supreme Court, NSW, Sperling J, No 70049 of 1997, 27 July 1998) Sperling J considered the meaning of the phrase "shortly after" in the following terms.

> The phrase "shortly after" is not defined. The legislature has chosen not to specify a time. That implies that a normative judgment is to be made dependent on the circumstances of the case. For a judgment to be made, considerations of some kind or other have to be taken into account but – as in the, case of normative judgments generally – it may be difficult or impossible to articulate in a precise way what they are. I think the predominant factor in the phrase "shortly after" must be the actual time that has elapsed and whether that fits the ordinary usage of the expression "shortly after" in the circumstances of the case. The judgment should, however, be influenced by the policy behind the provision. That is to put a brake on evidence being given of a recollection which may have faded in its accuracy with the

passage of time. The judgment may therefore be influenced by the subject matter of the event and by how long the memory of such an event is likely to have remained clear in the mind.[5]

[25] In *Williams v The Queen* (2000) 119 A Crim R 490 Whitlam, Madgwick and Weinberg JJ reviewed the authorities and said (at [47]-[48]):

> [47] Thus, it is principally a concern to exclude concocted evidence that informs the meaning of the phrase "shortly after". As noted by Sperling J in Mankotia, at [10], s 65(2)(b) ought not be regarded as simply importing a test of:
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> > *... reliability at large. It is a narrower test ... [I]t is the unlikelihood of concoction to which the paragraph is directed. Whether the representor might have been honestly mistaken is immaterial.*
>
> [48] For these reasons, it would be a mistake, in determining whether a statement has been made "shortly after", to over-emphasise such matters as whether the events in question were "fresh" in the memory of the person making the statement. The rationale for the exception to the hearsay rule contained in s 65(2)(b) is not based only upon the necessity to ensure that the events in question may be easily recalled. Rather that provision is, as a whole, intended to allow evidence that is unlikely to be a fabrication. One condition of this is that the statements be made spontaneously during (when) or under the proximate pressure of (shortly after) the occurrence of the asserted fact.

[26] In *Williams v R* the Full Court of the Federal Court held that the trial judge had wrongly admitted into evidence under s 65(2)(b) a statement that had

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5 As Studdert J pointed out in *R v Harris* at para [35] in *R v Polkinghorne* (1999) 108 A Crim R 189 Levine J cited the discussion of "shortly after" in *R v Mankotia*, and in *Conway v The Queen* (at [135]) Miles, von Doussa and Weinberg JJ considered this approach to be correct.

been made five days after the event. The statement there was by a (subsequently) deceased uncle of the accused to the effect that the accused telephoned him and (effectively) confessed to the crime - an armed robbery.[6] The Court held:

> 49 In this case, the statements were not made during the events in question, and, we think, could not be said to have been made "shortly after". Despite being made within a time in which Mr Stewart may be considered to have retained a good recollection of events generally, the lapse of five days takes the representations outside the likely temporal realm of statements that may be considered to be reliable because made spontaneously during, or under the proximate pressure of, events. This time lapse, therefore, takes the representations outside the exception contained within s 65(2)(b). Indeed, it would seem to be an unusual case in which a representation made five days after the occurrence of the asserted fact might be regarded as having been made "soon after" it.

[27] The reasoning in both *Conway* and *Harris* is not easy to reconcile with *Williams*. The principles I think that can be distilled out of these cases are these:

(1) The section is not just a restatement of the *res gestae* principles. It was intended to significantly expand upon the range of statements that were admissible at common law as part of the *res gestae*. (*Conway* at [123] and [133]; *Harris* at [33]).

(2) A narrative of past events may be admissible under s 65(2)(b). (*Conway* at [133]).

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[6] A shotgun had been found buried in the uncle's backyard and he had been suspected of aiding and abetting the robbery. The trial judge was also found not to have taken that properly into account in assessing whether the statement had been made in circumstances that make it unlikely that the statement was a fabrication.

(3) The emphasis in s 65(2)(b) is not on reliability as such, but on admitting evidence that is unlikely to have been fabricated. For that reason the section requires that the statements be made "when" the asserted fact occurred (rephrased in *Williams* as "during the occurrence of the asserted fact") or "shortly after" the asserted fact occurred (rephrased in *Williams* as "under the proximate pressure of the asserted fact"). (*Williams* at [48])

(4) For that reason, the court should not over-emphasise such matters as whether the events in question were fresh in the memory of the person making the statement in determining whether a statement was made "shortly after" the event. (*Williams* at [48]) However it is proper to take into account whether the events are likely to have been fresh in the mind of the person when the statement was made, as the policy behind the provision is to exclude evidence of a recollection which may have faded in accuracy over time. (*Conway* at [123] – [135]; *Harris* [33] to 40; *R v Mankotia* (unreported, Supreme Court, NSW, Sperling J, No 70049 of 1997, 27 July 1998) quoted in *Harris* at [34])

(5) "The predominant factor in the phrase 'shortly after' must be the actual time elapsed and whether that fits the ordinary usage of the term "shortly after" in the circumstances of the case." (*R v Mankotia* quoted in *Harris* at [34])

(6) The assessment of whether a statement was made "shortly after" the event in question may be influenced by the subject matter of the statement and by how long the memory of such an event is likely to be clear in the mind. (*R v Mankotia; Harris* at [34])

[28] I found this case difficult. I do not think that it would be inconsistent with the ordinary usage of the phrase "shortly after" to say that the statement made by Ms Weston on 5 July (or even the longer statement of 6 July) was made "shortly after" the sexual assault on 1 July. Taking into account the subject matter of the event about which the various statements were made, and how long the memory of the event is likely to be clear in the mind, I think that the statements are not all of a piece. If one categorises "the event" as Ms Weston recognizing the face of her own cousin revealed in the light of the street lamp apparently sexually assaulting a strange older woman, then the memory is likely to be very clear indeed four or five days later and it would not be stretching language to say that at least her first statement on 5 July (and possibly even the statement the next day) to the effect that she recognized her cousin as the attacker were made shortly after the event. I am not so sure the same could be said to the details contained in the statement of 6 July, taking into account the nature of these observations and how long they are likely to have remained clearly in the mind of Ms Weston.

[29] Mr Hunyor for the defence submitted that as the purpose of s 65(2)(b) was to ensure that only evidence which was unlikely to be fabricated was

admitted and for that reason, a statement could only be made "shortly after" the event if insufficient time had elapsed to give an opportunity to the maker of the statement to reflect sufficiently to make something up. I think that is too restrictive an interpretation. Moreover it is inconsistent with the approach adopted by the court in *Harris* where the court admitted a statement made by the victim who had gone to the police station 24 hours after the event for the purpose of making a statement (and who, it might be thought, had an interest in minimising his own contribution to the incident).

[30] In all of the circumstances, had it been necessary for me to determine, I would have held that both statements in which Ms Weston identified the attacker as her cousin, Mr Ryan, were admissible under s 65(2)(b).

Section 137

[31] Under s 137, in a criminal proceeding such as this, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

[32] I do not think it would be appropriate to refuse to admit either of the statements about the identity of the attacker under s 137. Each of the statements has significant probative value. Ms Weston says that she saw the attack taking place and recognised the attacker as her own cousin (her mother's sister's son) whom she grew up with. It is highly likely to be reliable for the reasons I have already outlined plus the fact that her

statement is corroborated by the evidence of the victim who pointed Mr Ryan out to police shortly after the attack.

[33] The possible prejudicial effect is said to be the risk that the jury will place too much weight on the evidence. I do not agree that that is a real likelihood. Defence counsel can make submissions about all of the reasons why he says they should not do so, and there can be suitable warnings in summing up.

[34] I recognise that there is significant prejudice to the defence in being unable to cross examine. That cannot be determinative (although in some cases it may be sufficient) as that will always be the case when statements are let in under s 65. It is open to the defence to make submissions to the jury about the risks inherent in acting on evidence which has not been tested in cross examination and, of course, appropriate warnings will be given to the jury in summing up. In this case, in my view, the probative force of this identification evidence does outweigh its prejudicial effect.

[35] Had I determined that the assertions about the details of the event were admissible under either s 65(2)(b) or (c), I would have excluded them under s 137. It seems to me that, given that Ms Weston had been drinking that night, and the period of time which elapsed between the event and the making of the statement, the probative value of these assertions is considerably less than the probative value of the assertions in which Ms Weston identified her cousin as the attacker (a matter about which she was

most unlikely to have been mistaken) and the prejudice from being unable to cross examine Ms Weston is correspondingly greater.