The Queen v JRW [2014] NTSC 52

PARTIES:	THE QUEEN
	v
	JRW
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21358576
DELIVERED:	12 November 2014
HEARING DATES:	11 and 12 November 2014
JUDGMENT OF:	RILEY CJ

REPRESENTATION:

Counsel:

Plaintiff:	T McNamee
Defendant:	T Berkley

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	Halfpennys

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

The Queen v JRW [2014] NTSC 52
No 21358576

BETWEEN:

THE QUEEN

AND:

JRW

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 12 November 2014)

[1] JRW has been charged on the one indictment with four counts of indecent assault upon three different victims each of whom is his stepdaughter. The offences are alleged to have taken place in the 1970s and early 1980s. The trial is due to commence before a jury this week.

[2] A number of preliminary issues have been raised for determination before the trial commences. These issues are as follows:

(a) an application by the defendant to sever the indictment in relation to each complainant;

(b) the prosecution has delivered a notice that it intends to adduce "tendency evidence" pursuant to s 97(1) of the *Evidence (National*

Uniform Legislation) Act ("the Uniform Evidence Act") and the defendant opposes this course;

(c) the defendant seeks the exclusion of the evidence of four identified witnesses; and

(d) the defendant seeks exclusion of part of the evidence of two other witnesses.

Severance

[3] The *Criminal Code* provides a discretion to the court to order separate trials in appropriate circumstances. Section 341 of the *Code* is in the following terms:

> (1) Where before a trial or at any time during a trial the court is of opinion that the accused person may be prejudiced or embarrassed in his defence by reason of his being charged with more than one offence in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately for any offence or offences charged in an indictment the court may order a separate trial of any count or counts in the indictment.
>
> (1A) Subsection (1) applies subject to section 341A.

[4] Section 341A of the *Criminal Code* then provides that:

> (1) Despite any rule of law to the contrary, if an accused person is charged with more than one sexual offence in the same indictment, it is presumed that the charges are to be tried together.
>
> (2) The presumption is not rebutted merely because:
>
> (a) evidence on one charge is not admissible on another charge; or

(b) there is a possibility that evidence may be the result of collusion or suggestion.

[5] It was the submission of the defendant that, in the circumstances of this case, the presumption contained in s 341A is rebutted because the evidence of the different complainants was not cross-admissible and there was a real risk that the prejudice of trying unrelated matters together could not be avoided by directions from the trial judge. In support of the submission reference was made to the observations of Winneke P in *R v Papametrou* where his Honour said:[1]

> Nevertheless, it seems to me to remain a sound approach in cases such as the present for the trial judge, in exercising the discretion given by s 372(3),[2] to determine whether the evidence of the several complainants is cross-admissible because such a determination will – in most cases – be a powerful factor influencing the discretion. The capacity to ensure a fair trial of the accused must always be the dominant consideration governing the exercise of the discretion; and the more complainants there are whose evidence is not admissible in the trials affecting other complainants, the more difficult it will be for adequate directions to be given by the trial judge to avoid prejudice occurring to the accused.

[6] In the case of *R v TJB*[3], which was approved in the subsequent case of *GBF v The Queen*,[4] the Victorian Court of Appeal provided some guidance as to the circumstances in which the discretion to sever will be exercised. In *R v TJB* it was observed that:[5]

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[1] (2004) 7 VR 375 at [27].
[2] Section 372(3) was, at that time, the Victorian equivalent of s341 of the *Criminal Code* NT. The section has been replaced by sections 193 and 194 of the *Criminal Procedure Act* (Vic).
[3] [1998] 4 VR 621 at 630-633.
[4] [2010] VSCA 135 at [55].
[5] Ibid at 630.

1. A presentment should always be severed when it is both desirable and practicable in order to ensure a fair trial. It is for defence counsel to persuade the judge that that is so. In that respect sexual offences are no different from other offences.

2. One aspect of a fair trial is the taking of reasonable steps to prevent a jury from misusing evidence. That is not limited to propensity evidence and again is not peculiar to trials of sexual offences. (references omitted)

3. It is usually to be assumed that the jury will comply with any directions that are given by the judge. A fair minded lay observer takes that very factor into account in considering whether a trial is fair. (references omitted)

4. There are nevertheless cases where the risk of prejudice is unacceptable. It will often be found that that is so in the case of offences of an unnatural character or offences that arouse strong emotions or excite repulsion.

5. There is also a greater risk that a direction will be ineffectual if evidence in relation to one complainant is probative in relation to another but either the Crown does not rely on it for that purpose or the judge rules that it is inadmissible because of prejudice.

[7] Before dealing with the application for severance, it is necessary to consider the particular circumstances of the case in light of the requirements of the *Criminal Code* and the guidance provided by the relevant authorities.

The Crown Case

[8] The Crown has summarised its case against the defendant in the following terms.

Count 1 - Complainant JB

[9] Between 1975 and 1977 when complainant JB was 11 or 12 years of age she was in the dining room of a friend's house when the defendant approached

her from behind and massaged her shoulders and breasts. He said words to the effect of “does that feel good”? This conduct occurred whilst other members of her family were in close proximity.

Count 2 – Complainant DB

[10] Between 1976 and 1978 when complainant DB was 11 or 12 years of age she and her siblings stayed at the defendant’s house overnight. She was sleeping on the floor with her three siblings. The defendant put his hands down her pants and started rubbing her. He put his finger inside her vagina and said “do you like that, is that nice?” This occurred in close proximity to other family members.

Count 3 - Complainant KB

[11] Between 1977 and 1979 when complainant KB was nine or 10 years of age an incident occurred where her parents left the lounge room but were in close proximity when the defendant pulled her onto his lap and bounced her up and down and put his hand inside her pants. He tried to put/push his finger into her vagina. He stopped and rubbed her vagina saying “you like this don’t you … this is our secret don’t tell anyone.”

Count 4 - Complainant KB

[12] In 1984 when complainant KB was 15 years of age the defendant and her family were swimming in a creek on the property occupied by the defendant when he came up behind her and grabbed her breast and put his hand

between her legs on her vagina. This occurred in close proximity to other family members.

[13] The evidence presented on the *voir dire* revealed that the sisters did not know of the complaints of each other regarding the conduct of the defendant until many years after the events were said to have occurred. JB and DB did not get on from childhood through to the present. They rarely communicated.

[14] JB gave evidence that at a time in the 1990s she had a discussion with her sister KB regarding the defendant in the course of which she said “well I hate him” and KB responded that she did as well. JB then observed “I have got more reason to hate him than you do”. They each then revealed to the other that they had been “molested” by the defendant. JB said she did not at that or at any other time provide to her sister any detail beyond the broad description that she had been “molested”. However, KB informed her that the defendant had done something to her in Wagaman when he “got her on his knee or something” and at Virginia when “apparently he did something to her underwater”.

[15] JB gave evidence that they decided not to complain in order to protect their mother who had married the defendant and seemed happy in the relationship. JB learned later that KB had rung their sister, DB, and “found out that it happened to her too”. Again, no detail was provided by any of the sisters to the others.

[16] KB gave evidence consistent with JB as to the circumstances in which the allegations came to light. She recounted a similar conversation. She said she then called her sister DB and asked whether the defendant had “touched her or not” and DB responded that he had. She said that neither JB nor DB ever went into any detail regarding what the defendant did to them. She said the only shared information was that she told JB and, separately and on another occasion, DB, that the defendant put his hand down her pants at an address in Wagaman and that he “groped” her whilst swimming in a creek at Virginia.

[17] DB gave evidence confirming that she and JB had little to do with each other. She said in relation to her sisters that “I am not really close to either of them”. Her memory of how matters came to light differed markedly from that of her sisters. She recalled it happening in a conversation in 1989 in which she, JB and KB participated in Darwin regarding the prospect of their mother marrying the defendant. One of her sisters, possibly JB, said that the defendant had “done something to me” and the others each then said something had happened to them as well. No detail as to what had happened was revealed by any of the complainants.

[18] The complainants each gave evidence that they did not take the matter further at that time because to do so would hurt their mother. Quite some time later, the matter came to light when JB wrote to her mother informing her that the defendant had “molested me”. She did not provide any detail as to what had taken place. She did not reveal, or discuss, the contents of the

letter with either of her sisters. Neither sister has seen the letter. JB told KB that she had sent the letter and KB informed DB. Thereafter, both KB and DB separately informed their mother that they had also been molested by the defendant.

[19] The evidence made it plain that, whilst each sister was aware that the others had been "molested" and, in the case of KB also of the sparse additional information referred to above, there was no discussion of any detail of what each complainant said the defendant had done to her.

Tendency Evidence

[20] The Crown has delivered a notice pursuant to s 97(1) of the *Uniform Evidence Act* that it intends to adduce tendency evidence to prove that the defendant has or had a tendency to act in a particular way or to have a particular state of mind. The tendency sought to be established in relation to the defendant is that he acted in a particular way, namely engaged in inappropriate sexual touching of young females from the same family, and that he had a particular state of mind, namely that of a sexual interest in young females in the same family upon which he was prepared to act. The evidence sought to be adduced in relation to those issues is that of each of the complainants as to his conduct towards them in the circumstances summarised above.

[21] Although the notice was expressed in those terms, the thrust of the Crown submissions rested upon the contention that there is a similar underlying unity in the offending alleged by each complainant in that:

(a) they were all from the same family;

(b) he had access to them through his relationship with their mother;

(c) they were all young females – in relation to counts 1 to 3 they were between the ages of 9 and 12 years and, in relation to count 4, 15 years;

(d) the alleged offending occurred sequentially over a number of years;

(e) there was a degree of risk taking involved in each incident in that family members or other persons were in close proximity;

(f) in at least three of the incidents a question was asked or comment was made directed to the proposition that the victim "would like it";

(g) the conduct involved inappropriate touching and rubbing of the vagina and breasts; and

(h) the complainants were inappropriately touched without warning and without ability on the part of the complainants to avoid what occurred.

[22] The ultimate submission on behalf of the Crown was that the evidence revealed similar features demonstrating a pattern that increased the likelihood that the conduct complained of occurred. The Crown would also

seek to use the evidence to rebut any suggestion of accidental or unintentional touching on the part of the defendant. It was submitted that the evidence has significant probative value[6] and, further, the probative value of the evidence substantially outweighs any prejudicial effect it may have for the defendant.[7]

[23] Section 97(1) of the *Uniform Evidence Act* provides:

> (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:
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> > (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
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> > (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

[24] In this case there is dispute regarding the appropriateness of the notice provided. It was submitted that the notice was vague and lacking in specificity. Whilst the notice may have been more clearly expressed and could be the subject of criticism for referring to matters relevant only to propensity,[8] in my opinion, the notice did comply with the requirements of the legislation. The parties had no difficulty in identifying the evidence of

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[6] Section 97 (1)(b) of the *Uniform Evidence Act*.
[7] Section 101(2) of the *Uniform Evidence Act*.
[8] *Velkoski v The Queen* [2014] VSCA 121 at [22] and [173f].

tendency relied upon by the Crown and the basis of the claim of significant probative value.

[25] It follows from s 97(1) of the Act that the proposed tendency evidence will not be admissible to prove that the defendant had the identified tendency unless the court thinks that the evidence will, either by itself or in combination with other evidence, have "significant probative value".

[26] There has been a difference in approach to the provision between the courts of New South Wales and Victoria leaving the law "in a state of uncertainty as to the degree of similarity in the commission of the offences or the circumstances which surround the commission of the offences that is necessary to support tendency reasoning".[9]

[27] In *Velkoski v The Queen*[10] the Victorian Court of Appeal conducted a comprehensive review of intermediate appellate court decisions in both Victoria and New South Wales following which it held that, in determining whether tendency evidence is admissible, the principle consistently applied in the Victorian courts was that "the evidence must possess sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct".

[9] *Velkoski v The Queen*[2014] VSCA 121 at [162].
[10] [2014] VSCA 121.

[28] The position in New South Wales was summarised by the court as being that tendency reasoning is not based upon similarities and evidence of similarities need not be present.[11] In *R v Ford* [12]Campbell JA said that "all that is necessary is that the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged". In *R v PWD*[13] Beasley JA (with whom Buddin J and Barr AJ agreed) stated that:

> The authorities are clear that for evidence to be admissible under s 97 there does not have to be striking similarities, or even closely similar behaviour.

[29] For the purposes of the present case, it is not necessary to choose between these lines of authority. The evidence will constitute tendency evidence whichever path be chosen. There are similarities and there is similar behaviour on the part of the defendant reflected in the complaints of each of the complainants.

[30] The evidence of each complainant revealed a course of conduct consistent with and similar to the complaints of the other complainants. Each was a young girl in the care of her mother. They were all from the same family and the defendant had access to them through his relationship with their mother. On three of the occasions the complainant was between 10 and 12 years of age and on one occasion 15 years of age. Each complainant referred to the defendant inappropriately touching her by rubbing her breasts or vagina and

[11] *Velkoski v The Queen*[2014] VSCA 121 at [162].
[12] *R v Ford* (2009) 201 A Crim R 451.
[13] (2010) 205 A Crim R 75 at [79].

asking whether the complainant liked what was happening. On each occasion the conduct took place whilst other adults were either present or nearby and the danger of discovery was present. The touching occurred without warning and without the complainant being able to resist.

[31] The observations of the Victorian Court of Appeal in *DR v The Queen*[14] have force in the circumstances of this case. Their Honours said:

> It does not seem to us that the sexual abuse of a child, stepchild or grandchild by their parent, stepparent or grandparent is such a common occurrence that it should be regarded as having limited probative value in relation to an allegation that the applicant has abused another child, stepchild or grandchild. As Hodgson JA said in *BP v R*, "it is unusual for a parent or grandparent to do acts of the kind described by each witness". We would therefore be inclined to hold that evidence that a person had committed sexual offences against a child, stepchild or grandchild has significant probative value as evidence of a tendency to offend against other children in the family. (references omitted)

[32] In my opinion, the evidence of each complainant had significant probative value.[15] It was capable of rationally affecting the assessment of the probability of facts in issue in the proceeding. It also served to negate any suggestion of accidental or unintentional touching on the part of the defendant.

The possibility of concoction

[33] Section 101(2) of the *Uniform Evidence Act* provides that tendency evidence adduced by the prosecution cannot be used against the defendant unless the

[14] [2011] VSCA 440 at [88].
[15] See the definition of "probative value" in the Dictionary attached to the *Uniform Evidence Act*.

probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

[34] In order to determine the admissibility of the tendency evidence it is necessary to consider the possibility of joint concoction in relation to the evidence of each of the complainants. If joint concoction cannot be excluded, the evidence will not possess the same probative value as would otherwise be the case.[16] It is the possibility of concoction, not the probability or a real chance of concoction, which will lead to the evidence being excluded.

[35] In *Murdoch v The Queen*[17] it was observed:

> As to the express evidence of collusion, it was not for the trial judge to make her own assessment of the credibility of that evidence. The trial judge was not to determine the actual weight that she considered should be assigned to the evidence or make any prediction about the weight that the jury would assign to the evidence. Her Honour's task was to determine only whether there was a reasonable possibility that a rational jury might regard that evidence as providing a credible explanation for the similar features in their accounts. If the hypothesis of collusion and concoction could not be excluded, the accounts would not have that quality of independence necessary to achieve the probative value required by s 101.

[36] In the later case of *SLS v The Queen*[18] the Victorian Court of Appeal followed *Murdoch* noting:

> Her Honour fell into plain error as the question was not whether a jury could accept the complainants' exculpatory accounts and reject a reasonable possibility of concoction or contamination but whether a

[16] *AE v R* [2008] NSWCCA 52 at [44].
[17] [2013] VSCA 272 at [7] per Redlich and Coghlan JJ.
[18] [2014] VSCA 31 at [178].

> jury acting reasonably could find there was a reasonable possibility of collusion or collaboration between complainants, or that their accounts were contaminated.

[37] It is not the risk of any contamination whatsoever which necessarily requires the exclusion of tendency evidence but, rather, there must be a risk of contamination going to the substance of the evidence and not merely to the incidental details. The Crown must exclude "a real chance of contamination going to the substance of the evidence" to enable the tendency evidence to be admitted.[19]

[38] In this case, the complainants were sisters who regularly kept in touch over the years. The alleged offending came to light in discussions between them many years after the events. They complained to their mother within days of each other. As the Crown has acknowledged there was a relationship between the complainants (albeit strained as between DB and her sisters) and there was the opportunity for the witnesses to collude. However, it was submitted, that the evidence revealed there had been no relevant discussion. There was no evidence of any motive for them to concoct such a story. They each expressed a dislike of the defendant but the reason for the dislike was, in each case, the conduct of which they complained. It was suggested in submissions on behalf of the defendant that the complainants' motive may have been grounded in the loss of their natural father of whom they were fond and his substitution in their life and in their mother's affections by the defendant. The evidence did not support this submission.

[19] *BP v R* [2010] NSWCCA 303 at [123].

[39] There was no real challenge to the evidence of the complainants as recorded in their statements. There must be an identified basis found in the evidence for a conclusion that it is reasonably possible that there may have been concoction, collusion, collaboration or contamination. It is not enough that the opportunity existed; a mere speculative suggestion of concoction, collusion, collaboration or contamination is not sufficient.[20]

[40] In my opinion, the material placed before the court does not suggest that collusion or contamination occurred. Each of the complainants had made a complaint against the defendant to others at an earlier time. The complaint made to her sisters was not the first time the issue had been raised by any of the complainants. Each complainant reluctantly revealed to her sisters that she had been "molested" by the defendant but the evidence demonstrated a conscious effort on the part of two of the complainants to keep to themselves the detail of the alleged assaults. The third only revealed sparse information as to what happened in her case. In my opinion, based upon the evidence presented to the court, a jury acting reasonably could not find there was a reasonable possibility of collusion or collaboration between complainants, or that their accounts were contaminated.

[41] Based upon the information available at this time, it is my opinion that the evidence in relation to each count is cross-admissible with the other counts.

[20] *Velkoski v The Queen* [2014] VSCA 121 at [173(c)].

Severance – Conclusion

[42] As noted above there is a statutory presumption that sexual offences joined in the same indictment will be tried together. The capacity to ensure a fair trial for the defendant must be the dominant consideration governing the exercise of the discretion.[21] In the present case the evidence of the complainants is cross-admissible. There are three complainants and the evidence of each complainant would be admissible in the trials affecting the other complainants. It seems to me that the probative value of the evidence is greater than the prejudicial effect of the evidence and it satisfies the requirements of s 101 of the *Uniform Evidence Act*.

[43] Even if the evidence discussed above was not cross-admissible there is a strong argument against severance. The presumption is that sexual offences joined in the same indictment will be heard together. Section 341A of the *Criminal Code* provides that this presumption is not rebutted merely because (a) evidence on one charge is not admissible on another charge, or (b) there is a possibility that evidence may be the result of collusion or suggestion.

[44] As the evidence presently stands it is my opinion that the identified evidence is cross-admissible in relation to the respective charges. To the extent that this position may change in the course of the trial, the defendant can be protected from any resulting unfairness by appropriate directions provided to the jury.

[21] *R v Papamitrou* (2004) 7 VR 375.

[45] Further, based upon the material available at this time, it is my opinion that there is no reasonable possibility that the evidence to be given by each of the complainants has resulted from collusion or suggestion.

[46] In addition in this case, and leaving aside the tendency evidence, there is a body of evidence, common to each of the counts included in the indictment. It is both practical and convenient to receive the evidence in the one trial. This evidence includes:

(a) the evidence of the police officers;

(b) information which is relevant to all matters contained in a pretext telephone call made to the defendant;[22]

(c) words said by the defendant to his wife which may be regarded as admissions against interest in relation to each of the complainants;[23] and

(d) the record of interview conducted with the defendant by Detective Acting Sergeant Kren on 27 December 2013.

[47] The counts should be heard together. The application for severance is dismissed.

[48] The remaining issues have been dealt with separately.

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[22] Transcript of telephone conversation between KB and the defendant on 1 October 2013.
[23] Statement of MHW dated 20 August 2013 at [59].