The Queen v SG [2011] NTSC 44

PARTIES:	THE QUEEN
	v
	SG
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20941912
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JUDGMENT OF:	BARR J

CATCHWORDS:

Evidence Act NT s 21A(1)(a) to (d), s 21B, s 21C(2)(b), s 21D, s 21E, s 26L

R v Manager [2006] NTCCA 21; (2006) NTLR 206
Whitehorn v R (1983) 152 CLR 657

REPRESENTATION:

Counsel:

Crown:	M Stoddart
Defendant:	S Corish

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Defendant:	North Australian Aboriginal Justice Agency

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

The Queen v SG [2011] NTSC 44
No 20941912

BETWEEN:

THE QUEEN
Crown

AND:

SG
Defendant

CORAM: BARR J

REASONS FOR DECISION ON PRELIMINARY QUESTION

(Delivered 23 June 2011)

Introduction

[1] The Crown alleged in the indictment dated 26 April 2010 that on 9 November 2009 at a remote coastal Aboriginal community, the accused had sexual intercourse with a female child, then 9 years old.

[2] A special hearing was held under s 21B *Evidence Act* in July 2010 before Kelly J to pre-record the evidence of the complainant and a number of other child witnesses, including a witness, BB.

[3] The matter then came on for trial before Kelly J and a jury in October 2010, at which time the pre-recorded evidence of BB was played to the jury.

[4] Subsequently the jury was discharged by her Honour, for a reason which is not presently relevant.

[5] The matter was subsequently re-listed for trial before me to commence on 12 April 2011. However, some weeks prior to the intended commencement date, the Crown notified the Defence that it no longer proposed to rely on and would not be leading the evidence of the witness BB.

[6] The Crown asserted that BB had "a history of unreliable and dishonest evidence". The Crown's written submissions would subsequently assert:-

> "Opinion as to her reliability is not drawn solely from evidence given in a formal manner but also from opinion formed when the young girl was proofed before the special sitting before Kelly J. This fresh assessment concludes that the witness is so unreliable, the Crown has no duty to have her give evidence nor make her available for cross-examination."

[7] The course proposed by the Crown was opposed by the Defence. The Defence sought a stay of proceedings against the accused, such stay to continue until such time as the evidence of BB "tendered and recorded" at the special hearing before Kelly J was played in the prosecution case at the re-trial.

[8] Before the jury was empanelled for the re-trial, I heard the stay application pursuant to s 26L *Evidence Act,* which permits the Court to hear and determine preliminary questions relating to both admissibility of evidence and questions of law.

[9] The question I had to consider was whether, on the retrial, the Court was required to replay to the jury the evidence of the child witness BB in addition to the evidence of those other witnesses upon whom the Crown still wished to rely.

[10] On 31 March 2011 I gave an *ex tempore* decision in relation to the stay application. I held that the prosecution had lost control over whether or not to call the witness BB at trial once the Court had held a special sitting for the purpose of conducting the examination of that witness. That applied not only to the trial but also to any retrial. My conclusion was that the audiovisual recording of the examination of the witness BB had to be replayed to the jury at the re-trial.

[11] I did not make findings as to the basis for the Crown's adverse assessment of BB, since I did not consider it necessary to do so.

[12] At the request of the parties, and because s 21B *Evidence Act* (NT) has not to my knowledge been considered since being amended in 2007, subsequent to the decision of the Court of Criminal Appeal in *R v Manager*,[1] I now publish my reasons for decision on the preliminary question.

[13] I set out below s 21B *Evidence Act* (NT):-

[1] [2006] NTCCA 21; (2006) 18 NTLR 206. The amending Act was 16 of 2007, which inserted a re-drafted s 21B and s 21C; and which amended s 21A and s 21D. The amending Act also inserted a new s 21E and s 21F.

“21B Evidence of vulnerable witnesses in cases of sexual or serious violence offences

(1) This section applies to proceedings for the trial of a sexual offence or a serious violence offence.

(2) If a vulnerable witness is to give evidence in proceedings to which this section applies, the Court may exercise one or both of the following powers:

(a) the Court may admit a recorded statement in evidence as the witness's evidence in chief or as part of the witness's evidence in chief;

(b) the Court may:

(i) hold a special sitting for the purpose of conducting the examination, or part of the examination, of the witness; and

(ii) have an audiovisual recording made of the examination of the witness at the special sitting and admit the recording in evidence; and

(iii) re-play the recording to the jury as the witness's evidence or as part of the witness's evidence (as the case requires).

(3) If the prosecutor asks the Court to admit a recorded statement in evidence or to hold a special sitting under subsection (2), the Court must accede to the request unless there is good reason for not doing so.

(4) Before the Court admits a recorded statement, or the recording of an examination conducted at a special sitting, in evidence under this section, the Court may have it edited to remove irrelevant or otherwise inadmissible material.

(5) A vulnerable witness may (but need not) be present in the courtroom when a recorded statement of evidence of the witness, or an audiovisual recording of the examination (or part of the examination) of the witness, is re-played to the jury.

(6) The vulnerable witness's demeanour, and words spoken or sounds de made by the vulnerable witness, during the re-play of a recorded statement of evidence or an audiovisual recording of the examination (or part of the examination) of the witness, are not to be observed or overheard in the courtroom unless the vulnerable witness elects to be present in the courtroom for that part of the proceedings."

[14] A "vulnerable witness" is defined to mean a witness who is a child; a witness who suffers from an intellectual disability; a witness who is the alleged victim of a sexual offence to which the proceedings relate; or a witness who is, in the opinion of the Court, under a special disability because of the circumstances of the case or the circumstances of the witness.[2]

[15] The reference to "recorded statement" in s 21B(2)(a) is to "an interview, recorded on video-tape or by other audiovisual means, in which an authorised person elicits from a vulnerable witness statements of fact which, if true, would be of relevance to legal proceedings".[3] In relation to child witnesses the "recorded statement" is often referred to as a 'child forensic interview'.

[16] In the case of the child witness, BB, there was a "recorded statement" or video recording of the child's forensic interview(s), plus the audiovisual recording of evidence at the child's examination at the special sitting held under s 21B(2)(b) before Kelly J.

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[2] *Evidence Act* (NT) s 21A(1), definition of *vulnerable witness*, paragraphs (a) to (d).
[3] *Evidence Act* (NT) s 21A(1), definition of *recorded statement*.

Analysis of s 21B *Evidence Act* (NT)

[17] The section most frequently (although not exclusively) comes into play in the trials of accused persons charged with sexual offences. As such, the most frequently seen categories of vulnerable witnesses are child witnesses, who may also be the alleged victims of the sexual offence(s) to which the proceedings relate.

[18] The section operates in respect of an individual vulnerable witness, who "is to give evidence" in proceedings for the trial of a sexual offence (or a serious violence offence). In relation to such witness, the court, under par (a) of s 21B(2), may admit in evidence "the recorded statement", that is, the audiovisual recording of the out-of-court child forensic interview, as the witness's evidence-in-chief or part thereof.

[19] It would then follow, although par (a) does not expressly provide, that the vulnerable witness at the trial may be further examined in chief, then cross-examined and re-examined.

[20] Par (b) of s 21B(2) enables something further to be done by the Court: it may hold a "special sitting"; that is, a sitting without the jury present,[4] for the purpose of conducting the examination or part of the examination of the child witness. The "examination" of the witness is defined to include both cross-examination and re-examination.

[4] The jury may not even have been empanelled at that stage – see *Evidence Act* (NT) s 21C(2)(b).

[21] There may be circumstances in which a special sitting is held in circumstances where the Court does not admit the recorded statement in evidence as the vulnerable witness's evidence-in-chief, but that was not the situation in the present case and I did not need to speculate on the possible circumstances where it may happen.

[22] Generally I would expect that at a special sitting the recorded statement would be tendered and admitted as the evidence-in-chief of the witness, possibly supplemented by some additional evidence-in-chief led in court, whereupon cross-examination and re-examination of the witness would take place.

[23] In my view, s 21B(2) gives the court two separate powers, respectively contained in par (a) and par (b). The Court has a discretion as to whether to exercise one or both, or neither. The discretion is constrained by the need for the Court to have good reason not to exercise one or both if the prosecutor makes a request under s 21B(3) that the Court do so.

[24] I construe the power contained in par (b) of s 21B(2) as a composite power requiring, if it is exercised, the doing of all three things in sub-pars (i), (ii) and (iii). This construction arises from the use of the words "one or both of the following powers" in s 21B(2), and the fact that the individual sub-pars (i), (ii) and (iii) in par (b) are linked by the word "and" twice appearing.

[25] That means that if the Court embarks on an exercise of the power in par (b), which includes the power to hold a special sitting for the purpose of conducting the examination of the witness, the Court must have an audiovisual recording made of the examination *and* must admit the recording in evidence *and* then replay that recording to the jury at trial as the witness's evidence, subject to editing under s 21B(4) for removal of irrelevant or inadmissible material.

[26] The requirement that the court admit the audiovisual recording "in evidence" suggests that it is to be admitted in evidence immediately; that is, at the special sitting. This is an unusual provision, in my view, because the audiovisual recording is not then admitted into evidence in the sense that it is placed before the members of the jury, who are the judges of fact at the trial. Indeed, the jury may or may not have been empanelled at that stage. Nor does the audiovisual recording become "part of the records of the court" under s 21E(3) of the Act, as does a court-ordered audiovisual record of the evidence of a vulnerable witness giving evidence in criminal proceedings.

[27] Nonetheless, as I interpret the provision, the requirement in s 21B(2)(b)(ii) that the Court "admit the recording in evidence" is a requirement that the recording be formally admitted into evidence for the trial, whether it is admitted at the special sitting itself or at some later time after the Court has had the recording edited to remove irrelevant or otherwise inadmissible material, if any. Then, at trial, the recording must be re-played to the jury

"as the witness's evidence or as part of the witness's evidence". Upon such replay, it becomes evidence before the jury.

[28] In my view, if the Court exercises the power in s 21B(2)(b) to hold a special sitting for the purpose of conducting the examination of a vulnerable witness, the Court has committed to a course whereby the audiovisual recording of the examination of that witness must be replayed to the jury at trial as that witness's evidence. The prosecutor loses control over whether or not to call the witness at trial once the Court holds a special sitting for the purpose of conducting the examination of that witness.

[29] The statute does not specifically deal with the status of the evidence recorded at the special sitting in the event that there is a re-trial. On one view, the Court's exercise of one or both of the powers in s 21B(2) is for the purpose of one trial, "the trial" referred to in s 21B(1). The evidence of the child witnesses pre-recorded at a special sitting would simply 'fall away' after the one trial, in the way that evidence given viva voce in court at a mistrial would have no evidentiary status requiring or even permitting its admission at a later re-trial. On that view, and in the facts of the present case, the Court would have fully discharged the obligation under par (iii) arising from the exercise of its power to hold a special sitting by, at the (first) trial, re-playing the audiovisual recording of the examination of BB made at the special sitting.

[30] If the law were as postulated in the previous paragraph, and the Court's exercise of the power in s 21B(2)(b) were for the purpose of one trial only, then, at a re-trial, there would be no lawful basis for the Court to replay the 'pre-recorded evidence', that is, the audiovisual recording of the examination of any of the vulnerable witnesses examined at the earlier special sitting. The Court could still exercise the power in s 21B(2)(a) and admit the recorded statement (or child forensic interview) for each vulnerable witness; but with respect to s 21B(2)(b), each witness would have to be examined at a further special sitting to enable an audiovisual recording of that witness's evidence to be made, admitted and then played to the jury at the re-trial. Alternatively, if the Court were not to exercise the power in s 21B(2)(b), the vulnerable witness could give evidence at the re-trial either in court or by contemporaneous transmission from outside the courtroom.

[31] If the law were as set out in par [29] and par [30], the audiovisual recording of the examination of all of the vulnerable witnesses examined at the earlier special sitting would be wasted. Vulnerable witnesses would have to give evidence again and be cross-examined again. This process might take place some considerable time after the earlier special sitting. In the respective memories of the witnesses, the relevant events may well have receded into the distant past. Cross-examination could be directed to inconsistencies between the statements in the witnesses' "recorded statement" or child forensic interview, the evidence given at the earlier

special sitting and the evidence given at the re-trial, possibly causing considerable confusion.

[32] In considering the proper construction of s 21B, in particular s 21B(1) and s 21B(2)(b)(iii), in order to determine whether the special sitting and the audiovisual record of the evidence of any vulnerable witness obtained thereat were for the purposes of one trial only, I considered the intention of the legislature as expressed in s 21D(2)(d) of the *Evidence Act* and stated by the Minister in the second reading speech for the Evidence of Children Amendment Bill.[5]

[33] Reference to s 21D(2)(a) of the *Evidence Act* demonstrates a legislative intention to protect children and to limit "to the greatest extent practicable" the distress or trauma suffered or likely to be suffered by children when giving evidence, and s 21D(2)(d) expressly provides that proceedings in which a child is a witness should be resolved as quickly as possible.

[34] The Second Reading Speech contained an express statement of purpose on the part of the legislature to "ensure that the number of times the child is required to give evidence is minimised by allowing for recording of trial evidence and its use at any subsequent hearing in relation to the offences in the event of a mistrial or appeal." This may well be a reference to s 21E of the Act, but it is expressed sufficiently widely to be seen as the legislative purpose for the new s 21B as well.

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[5] Evidence of Children Amendment Bill, (Serial 91), Second Reading Speech made by the Honourable S Stirling, Minister for Justice and Attorney-General, Hansard, 18 April 2007.

[35] My conclusion was that s 21(2)(b) is such that the obligation to replay the audiovisual recording of the examination of the vulnerable witness made at a special sitting will continue notwithstanding any mistrial. The result is that, having admitted the recording in evidence under s 21B(2)(b)(ii), the Court must replay the recording to the jury at any retrial for the same offence. It would be contrary to the intention of the legislature, both as expressed in s 21D(2)(d) of the *Evidence Act* and made clear in the second reading speech, that the special sitting should be wasted in the event of a mistrial and that the Court might have to hold a further special sitting for the examination of each vulnerable witness, particularly if any such vulnerable witness were a child witness.

[36] As a result, I decided that the audiovisual recording of the examination of all the vulnerable witnesses, including the witness BB, had to be replayed to the jury at the retrial.

Alternative consideration

[37] If my ruling were incorrect, for the reason suggested in par [29], then there would have been no lawful basis at the re-trial for the Court to re-play to the jury the audiovisual recordings of the examination of those vulnerable witnesses upon whom the Crown still wished to rely.

[38] As explained in par [30], it would have been necessary for each vulnerable witness still relied on to have been examined at a further special sitting; alternatively, if the Court were not to exercise the power in s 21B(2)(b),

the vulnerable witnesses could have given evidence at the re-trial either in court or by transmission from outside the courtroom.

[39] Therefore, although the prosecutor could have conducted the Crown case at the re-trial without calling the witness BB, the prosecutor could not have required the audiovisual recordings of the examination of the other vulnerable witnesses at the earlier special sitting to be re-played to the jury.

[40] Moreover, it would have been necessary for me to have raised a question as to the prosecutor's decision not to call BB, a material witness, and *possibly* to have suggested that the prosecutor should reconsider that decision. As Dawson J. explained in *Whitehorn v R* (1983) 152 CLR 657 at 674 – 675:-

> "All available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. In general, these witnesses will include the eye-witnesses of any events which go to prove the elements of the crime charged and will include witnesses notwithstanding that they give accounts inconsistent with the Crown case. However, a prosecutor is not bound to call a witness, even an eye-witness, whose evidence he judges to be unreliable, untrustworthy or otherwise incapable of belief. ……
>
> The means by which a trial judge may ensure the propriety and fairness of the trial do not, however, extend to the assumption of responsibilities which are properly those of the parties. The decision whether to call or not to call witnesses in a criminal trial is a decision for the parties. If the Crown fails to call a witness whom the trial judge considers ought to be called, no doubt he may invite the Crown to reconsider whether the witness ought to be called and if the invitation is declined, and the judge remains of the same view, he may comment upon the failure of the Crown to call the witness. But if the trial judge were to do more, he would place himself in danger of usurping the function of the prosecutor."

[41] At the time of my ruling, I had not carried out a careful assessment of all the evidence in the case; nor did I have at the pre-trial stage a full appreciation of the basis for the Crown's contention that the evidence of BB was unreliable and dishonest. Therefore, given my decision set out in par [10] above, it would have been (and still is) inappropriate to speculate as to what else if anything I would have done, apart from raising the question referred to in the previous paragraph.

[42] I make some final observations. In settling the draft of these Reasons, it occurred to me that, if the law were as set out in par [29] and [30], the Court has the means to ensure in advance that the examination of a vulnerable witness at a special hearing and the audiovisual recording made at the special hearing are not 'wasted' in the sense I used that word above.

[43] Under s 21E(1) of the Act, the Court has the power to direct that an audiovisual record be made of the evidence of a "vulnerable witness (who) is to give evidence in criminal proceedings". An audiovisual record of a witness's evidence made under s 21E(1) then "forms part of the records of the Court". In later criminal (as well as civil) proceedings, the Court under s 21E(4) may admit the audiovisual record in evidence, if it is relevant. Under s 21E(6), the Court may then relieve the vulnerable witness wholly or in part from an obligation to give evidence in the later proceedings.

[44] If a vulnerable witness gives evidence in criminal proceedings at a special sitting under s 21B(2)(b), there is no apparent reason why the Court could

not direct that an audiovisual recording be made under s 21E(1) as well. There may need to be two recordings, or possibly two copies of the one recording, one to be utilised for the purpose of s 21B(2)(b)(iii) and the other to form part of the records of the Court for the purposes of s 21E(3).

[45] Because the audiovisual recording of BB and the other vulnerable witnesses in the present case had not been court-ordered audiovisual records under s 21E of the Act, the matters referred to from par [42] to par [44] above were not argued before me, or raised by me with the parties, and my comments do not form part of my Reasons as such. Nonetheless, my comments may be of some assistance if these sections are the subject of legal argument in future.
