R v IMM (No. 3) [2013] NTSC 45

PARTIES:	The Queen
	v
	IMM (No. 3)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21206228
DELIVERED:	7 AUGUST 2013
HEARING DATE:	9 JULY 2013
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

EVIDENCE – Admissibility – Uncharged Acts – Generalised statements – whether prejudicial – Whether evidence of sexual interest – Tendency – relationship evidence – Context evidence and consideration of discretionary exclusion
EVIDENCE – Admissibility – Special Uncharged Act – Whether prejudicial – Whether evidence of sexual interest – Consideration of discretionary exclusion

Evidence (National Uniform Legislation) Act 2011, ss 55, 56, 97,135 and 137

IMM v The Queen [2013] NTSC 9; *The Queen v IMM (No. 2)* [2013] NTSC 44; *Qualiteri v The Queen* (2006) 171 A Crim R 463; *GBF v The Queen* [2010] VSCA 135; *Nieterink* (1998) 76 SASR 56; *HML v The Queen* (2008) 235 CLR 334; *Ibrahim v Pham* [2007] NSWCCA 215, referred to

The Hon Justice Peter Johnson, ‘Admitting evidence of uncharged acts in sexual assault proceedings’ (2010) Judicial Officers Bulletin Vol 22, No. 10.

REPRESENTATION:

Counsel:

Plaintiff:	M Nathan
Defendant:	T Berkeley

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	Louise Bennett

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

R v IMM (No. 3) [2013] NTSC 45
No. 21206228

BETWEEN:

THE QUEEN
Plaintiff

AND:

IMM (NO. 3)
Defendant

CORAM: BLOKLAND J

Pre-Trial Ruling on Uncharged Acts/Context Evidence/Relationship Evidence/Evidence of Sexual Attraction

(Delivered 7 August 2013)

Introduction

[1] This ruling concerns broadly two further areas of evidence sought to be excluded prior to the commencement of trial.[1] The indictment charges four counts; three allege aggravated indecent dealings with a child and the fourth count alleges sexual intercourse with a child under 16 years.[2]

[2] The two broad areas of evidence involve uncharged acts. The first concerns generalised statements made by the complainant, alleging ongoing sexual misconduct by the accused. The second is an allegation that towards or at

[1] Previous rulings were made in *IMM v The Queen* [2013] NTSC 9; and *The Queen v IMM (No. 2)* [2013] NTSC44.
[2] Full particulars are set out in *IMM v The Queen* [2013] NTSC 9; see also *The Queen v IMM (No. 2)* [2013] NTSC 44.

the end of the offending period the accused touched the complainant inappropriately on the leg while she was giving the accused a massage. Neither the generalised statements alleging ongoing sexual misconduct, nor the alleged touching of the complainant's leg form the basis of any of the four counts. It may be observed this is a situation that is not unusual in cases of this kind. The broad competing considerations are that the accused must be given a fair trial without the jury being influenced by improperly prejudicial material; the Crown must also be given an opportunity to present its evidence through the complainant being able to give a full account that is not presented in an unfairly artificial way.

The generalised statements

[3] At various points in the Child Forensic Interview (CFI)[3] the complainant (SA) makes generalised comments, for example:

> SA: "... when I went to Wagaman, he'd pick me up from school every day and we'd been home alone for about three hours and it happened then, every day"[4] "it happened lots of times";[5] "... until he did it another time after that"; "then I realised probably when he did it another time"; "... it felt like every – all the other times he's done it".[6]

Further examples of this generalised evidence are as follows:

[3] 31 August 2011; 3 September 2011.
[4] 31 August 2011.
[5] 31 August 2011 at 26.
[6] 31 August 2011 at 52.

CHAMBERS: "You said this has happened a lot – okay?". "Is there any others – those – those – you've remembered those – two very clearly, is there any other times that you remember very clearly?"

SA: "I remember all of them ..."[7]. "Ah – he just did the same stuff over and over".[8]

CHAMBERS: "Has anything else happened at that place that you want to tell me?"[9]

SA: "There's too much."[10]

CHAMBERS: "How – why is it too much, tell me about that?"[11]

SA: "Cause it happened too many times."[12]

CHAMBERS: "How often did it happen?"[13]

SA: "Every day when he picked me up from school."[14]

CHAMBERS: "Yep. And what would happen at home."

SA: "He'd just do the same stuff."[15]

[7] 31 August 2011 at 68.
[8] 31 August 2011 at 68.
[9] 03 September 2011 at 24.
[10] 03 September 2011 at 24.
[11] 03 September 2011 at 25.
[12] 03 September 2011 at 25.
[13] 03 September 2011 at 24.
[14] 03 September 2011 at 24.
[15] 03 September 2011 at 25.

CHAMBERS: "What happened in Milikapiti?

SA: "It happened all the time"[16]

BLACKWELL: "Before the first thing you said when we asked you about the Milikapiti, was "it happened all the time", what do you mean by "It happened all the time"?"

SA: "It happened all the time."

BLACKWELL: "What do you mean by "It", when you say "It happened all the time", what are you talking about?"

SA: "He touched me all the time."

BLACKWELL: "And "he touched you all the time", describe what you mean by touching?"[17]

SA: "He touched my vagina."

[4] On behalf of the accused it is submitted this evidence is tendency evidence, highly prejudicial, unfair and inadmissible; that even if admissible it should be rejected in the exercise of the discretions under ss 135 or 137 of the *Evidence (National Uniform Legislation) Act 2011*. It is submitted the evidence is not only prejudicial, but is so general, it would be unfair to admit it.

[16] 03 September 2011 at 30.
[17] 03 September 2011 at 32.

[5] The Crown argues the evidence is admissible, essentially on three bases: as a persisting sexual interest in the complainant; as showing the true extent of the relationship between the accused and the complainant and as relevant context evidence so that the four charged accounts are seen in a broader context and are not seen necessarily as artificial or isolated.

[6] In my view the generalised statements amounting to uncharged acts of the type mentioned above, should not be admitted on the basis of 'sexual interest' or 'sexual attraction'. That would amount to tendency evidence particularly in the circumstances of alleged sexual offences against a child, but it would not satisfy the test 'significant probative value', pursuant to s 97(2)(b) of the *Evidence (National Uniform Legislation) Act 2011*. necessary for its admission. First, in relation to offences alleged against a child, with respect I agree with the observations of Howie J in *Qualiteri v The Queen*,[18] that evidence of the accused's sexual interest in the complainant will usually be found outside of the complainant's evidence, (such as in a letter written by the accused to the complainant or some other act of the accused that shows a sexual interest in the complainant or children generally). I emphasize "usually" as there may be distinct evidence given by a complainant tending to show interest, but I would not categorize this general evidence in this way. Second, particularly with respect to alleged offending against a child, it is not generally appropriate to regard such evidence as motive evidence; it is effectively tendency evidence and must

[18] (2006) 171 A Crim R 463 at [118].

therefore possess the "significant probative value" required before it is admitted. Counsel for the Crown did not appear to accept that sexual interest evidence amounted to tendency evidence, however, in the circumstances of this case, I do not agree. A third consideration is that to be admitted as sexual attraction evidence, (tendency evidence), the evidence must be specific – evidence that is vague or of a very general kind will not meet the strict criteria for admissibility under s 97.[19]

[7] Although I do not think the particular evidence is admissible as "tendency evidence", nor "relationship evidence", if that term is taken to mean proving a sexual relationship as part proof (tendency) of the counts charged, in my view the evidence is well capable of being admitted as context evidence. To be admitted as context evidence, the test is general relevance,[20] subject to the discretions. Context evidence becomes relevant because it is part of the narrative or history of events surrounding the particular charges. I agree that the evidence is relevant here in a similar way as that isolated by Howie J in *Qualiteri v The Queen*[21]: as relevant to the credibility of the complainant as to why the complainant acted as she did in circumstances where it would seem extraordinary that four counts would be complained of when they arose in isolation from all other surrounding circumstances or

[19] The Hon Justice Peter Johnson, 'Admitting evidence of uncharged acts in sexual assault proceedings' (2010); Judicial Officers Bulletin Vol 22, No. 10; *Ibrahim v Pham* [2007] NSWCCA 215 at [264]-[266]; *GBF v The Queen* [2010] VSCA 135.
[20] Sections 55 and 56 *Evidence (National Uniform Legislation) Act 2011*
[21] (2006) 171 A Crim R 463 at especially [119].

'out of the blue'.[22] It seems to me that the evidence can be properly regarded as part of the context; that if accepted it may explain the overall behaviour of the complainant which is clearly in issue. In my opinion the description of how context evidence is to be viewed in this case accords with how it is explained with great clarity by Howie J in *Qualtieri* at [117]:

> Context evidence in child sexual assault offences will normally come from the complainant because it is part of the narrative or the history of events surrounding the particular allegations in the counts set out in the indictment. Its relevance will only be found in the extent to which it does provide an understanding of the particular allegations before the jury. Where the complainant is alleging a history of assaults upon him or her by the accused, the evidence, or some of it, may need to be admitted because it would be impossible for the complainant to give an account of the particular allegations without referring to uncharged allegations that proceed or surround them. It would often be unrealistic for the complainant to be expected to give an account of the particular allegations as if they happened "in a vacuum".

[8] Here, although the allegations are expressed in general terms, (as set out above), that will often be the case, (which is why this phenomenon is spoken of as 'uncharged acts'), and in this particular case a series of the general allegations are "described" by reference to the similar conduct being spoken of to describe the particular counts. The complainant appears to raise the various allegations spontaneously. They seem to be genuinely part of the narrative. It is *not* her evidence that there were four distinct occurrences. Each reference to an uncharged act is spoken of in the context of one of the counts. This is potentially prejudicial evidence, however, the jury will need

[22] As suggested by Doyle CJ in *Nieterink* (1998) 76 SASR 56, a common law case, not governed by the *Evidence (National Uniform Legislation) Act 2011*. and although discussed in, not criticised in *HML v The Queen* (2008) 235 CLR 334.

to be instructed against tendency reasoning and the limited use that can be made of this evidence. The jury will be told it cannot substitute the context evidence for evidence of the charges or in proof of the charges. The probative value of this evidence comes from its capacity to contextualise the charged acts which are alleged to have occurred over the relevant time. In relation to count 1, my interpretation of what the complainant is saying is that the significance of what she says the accused did is not appreciated until later occurrences.

[9] In terms of the discretions, I have considered a weakness in this particular context evidence; that initially the complainant says it happened "lots of times before my fourth birthday ... but that was (inaudible) when I remember." She does however say it was when she went to Wagaman Primary School. Later, in response to a question "... the first one you remembered was your fourth birthday, is that right?", the complainant answers "Yeah". On one view this is contradictory and I have considered whether it should therefore be excluded in exercise of the discretion as 'misleading or confusing' (ss 135(b); 136(b)), or prejudicial. In my view while there may well be a weakness in this part of the evidence; or an apparent contradiction, such a conclusion would be open to interpretation and I am not persuaded it is a case where the evidence should be excluded. It may well be a point of criticism of the evidence. An error, on one interpretation, of a chronology of events, does not persuade me in this case that the evidence should be excluded.

Evidence of the accused's conduct during an alleged massage

[10] In my view the evidence from the complainant that the accused ran his hand up the complainant's leg during a massage does possess the quality "significant probative value" required by s 97. This is on the assumption that I am required to make that the jury accept the evidence. This evidence may be distinguished from the generalised statements. If accepted, it is capable of demonstrating an inappropriate sexual interest by the accused in the complainant. It may also show the accused is dis-inhibited, in terms of intimate or sexual conduct with the complainant due to a previous series of sexual encounters with her. There is a strong temporal nexus between the massage incident and the particularised charged acts, as the massage incident occurred shortly before the complainant's grandmother and the accused separated. The indication is that the Crown will not be in a position to call the complainant's cousin who was apparently present at the massage. On the complainant's version the cousin did not see the accused touching her leg. This may weaken the evidence but it does not mean it is inadmissible. In my opinion it is not improperly prejudicial, (unfairly) in the sense of the relevant discretions open under s 135 and s 137. Specifically in relation to s 137 given I have found the evidence, if accepted, is capable of establishing an improper sexual interest in my view its probative value outweighs the risk of unfair prejudice.

Conclusion

[11] In my opinion, the proposed evidence that has come to be known in this case as ‘the generalised statements of uncharged acts’ is admissible, not as sexual interest evidence, or tendency evidence nor relationship evidence effectively used as tendency evidence but it is relevant context evidence and should be before the jury. Evidence of the massage and touching the complainant’s leg may be lead as evidence of a sexual interest on the part of the accused in the complainant as described in paragraph [10].

[12] By arrangement with the representatives of the parties, these reasons will be forwarded to them.

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