R v PJMS (No 2) [2011] NTSC 49

PARTIES:	THE QUEEN
	v
	PJMS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21013634
DELIVERED:	24 JUNE 2011
HEARING DATE:	20 JUNE 2011
JUDGMENT OF:	MILDREN J

CATCHWORDS:

EVIDENCE – complaints made by a child of sexual misconduct – child has no memory of the incidents – admissibility to prove motive by accused to commit sexual acts alleged to have occurred years later – whether admissible – whether should be excluded on discretionary grounds – *Evidence Act*, s 26E

Evidence Act, s 26B, s 26E(1), s 26E(3)

R v PW (2009) 229 FLR 287; followed

HML v The Queen(2008) 235 CLR 334; referred to

REPRESENTATION:

Counsel:

Crown:	T McNamee
Defendant:	P Maley

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Defendant:	Maleys

Judgment category classification:	B
Judgment ID number:	Mil11496
Number of pages:	8

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

R v PJMS (No 2) [2011] NTSC 49
No 21013634

BETWEEN:

THE QUEEN
Crown

AND:

PJMS
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 24 June 2011)

[1] The accused is charged with two counts of indecent dealing with a child under the age of 16 years.

[2] The facts upon which the Crown was relying upon in relation to Count 1 were that in about November 2008 the child was visiting the accused pursuant to an arrangement under which the accused had access to the child over a weekend. The accused lived with his parents in a separate flat on the same land. The house in which the accused's parents lived had three bedrooms, one of which was a bedroom to be used by the child. In the bedroom was a queen size bed at the end of which was a television set which could be used only for the purpose of watching DVDs. It was the accused's

practice to lie on the bed with the child and watch DVDs on Saturday nights. It was alleged that on the occasion relating to Count 1 on the indictment the accused and the child were lying on the bed watching a DVD when the accused placed his leg over the child's leg and began rubbing up and down. It is alleged that as he was doing this his penis came into contact with the child's leg or thigh. It was further alleged that this conduct continued on virtually every occasion when the accused had access to the child on Saturday nights for over a period of twelve months.

[3] Count 2 related to an incident which occurred in November 2009 in very similar circumstances. The accused and the child were lying on the bed watching a DVD in the same bedroom. On this occasion, it is alleged the accused put his hand under the child's t-shirt and onto her panties in the area of her vagina and that he squeezed it.

[4] A Special Sitting was conducted to audio visually record the child's evidence in chief and cross examination two weeks prior to trial in accordance with the provisions of s 21B of the *Evidence Act*.

[5] At the commencement of the trial itself, I was asked to rule on the admissibility of certain evidence which the Crown intended to lead at the trial.

[6] The complainant is the biological daughter of the accused. Her parents separated in August 2000 when she was seven months old. There was a mutual agreement between them that the complainant would visit her father

regularly. Difficulties arose from the shared access and on 18 June 2002 court orders were imposed granting the accused unconditional access to the complainant from Friday through to Saturday.

[7] The Crown sought to lead evidence of disclosures and corresponding acts which the complainant made to various persons in January 2003 when she was three years of age. The disclosures were sexual in nature and nominated the accused as the person who did those acts. The allegations were that the accused had on an occasion unspecified placed his finger into the child's vagina. Complaints were made by the child to the child's mother, to the child's grandmother, to a neighbour, to a family day care carer and to the child's stepfather on various dates in January of 2003. There was also a complaint which the child made in February 2003 to the effect that the accused had permitted the child to lick his penis. Some contemporaneous notes were made of the complaints by the child's mother. The complaints were investigated. No charges were laid. However, some orders were made by the Family Court restricting the accused's access to the child for a period of time until 2005 when the restrictions were removed upon certain conditions.

[8] The child has no memory of any of these events and did not give evidence concerning them at the Special Sitting.

[9] The Crown intended to lead this evidence to show that the accused had a sexual interest or desire in the complainant pre-dating the offending in

respective of which he has been charged on Counts 1 and 2. The offences to which those charges relate are alleged to have occurred in late 2008 and late 2009.

[10] After hearing submissions, I ruled that the evidence was admissible but rejected it in the exercise of my discretion. I gave brief reasons for my ruling at the time but said that I would prepare fuller reasons at a later stage. These are those reasons.

[11] Ordinarily evidence of complaint led by the Crown is admissible only to show consistency between the evidence of the complainant and the nature of the complaint which was made. An amendment was made to the *Evidence Act* in 2007 permitting the reception of evidence of a complaint made by a child to another person as evidence of the facts in issue, as a further exception to the rule against hearsay evidence.

[12] Section 26E(1) provides in a proceeding arising from a charge of a sexual offence or a serious violent offence, a Court may, despite the rule against hearsay evidence, admit evidence of the statement made by a child to another person as evidence of the facts in issue if the Court considers the evidence to be of sufficient probative value to justify its admission.

[13] Section 26E(3) provides that an accused person cannot be convicted solely on the basis of hearsay evidence admitted under subsection (1).

[14] Section 26E has been considered previously by this Court, most recently in the case of *R v PW* where I said:[1]

> [9] The relevant authorities were reviewed by me in *R v Manager* in which I endorsed the observations of Martin (BR) CJ in *R v Wojtowicz* where it was said that the Court is required to assess the probative value of the evidence and having regard to the dangers associated with this type of hearsay evidence, determine whether the admission of the evidence is justified having regarding to its probative value and all the circumstances of the case. It is not a requirement that the evidence have significant or substantial probative value, but if the evidence is significant in the sense that it is important or of consequence to the facts in issue, subject to questions of reliability and discretionary exclusion, the evidence would ordinarily possess sufficient probative value to justify its admission.
>
> [10] I note also that under s 26F if the evidence is to be admitted the weight to be attached to the evidence depends upon all of the circumstances in which an inference can reasonably be drawn as to the accuracy or otherwise of the statement and in particular to the question of whether or not the statement was made contemporaneously with the occurrence of the existence of the facts stated and also to the question of whether or not the maker of the statement had any incentive to conceal or misrepresent facts.
>
> [11] The statement made does not necessarily need to be contemporaneous in order to be admissible under s 26E. Contemporaneousness goes to weight not admissibility. Similarly, questions relating to whether or not the complainant had an incentive to conceal or misrepresent facts also go to weight.
>
> [12] Nevertheless having said that, contemporaneousness is in my view one of the factors which needs to be considered as to whether or not the Court is satisfied that the evidence has relevant probative value. In this particular case, I consider the evidence does not have sufficient probative value to admit it in this case as it was lacking in any detail as what in fact occurred, when it occurred and where it occurred. It amounted to no more than a mere allegation and nothing more. In those circumstances it is difficult to see how it could be probative of anything.

[1] (2009) 229 FLR 287 at 289-290; [9]-[12].

[15] It was submitted by counsel for the Crown that the evidence was admissible as to the facts in issue under s 26E. Ms McNamee submitted that the nature of the allegations was clear, the complaints were made to a number of different people without any prompting and that the evidence was reliable because contemporaneous notes were made of the complaints by the complainant's mother.

[16] Mr Maley for the accused submitted that s 26E could not be used in this way and should be restricted to circumstances where a complaint is made in relation to the charges actually being dealt with by the Court. There is nothing in s 26E in my opinion which restricts the use of the complaint material in that fashion.

[17] Mr Maley made no submission that the evidence should not be admitted because it lacked sufficient probative value to admit it, in the sense in which I discussed that issue in *R v PW*.[2] At the time, I thought that the evidence probably did have sufficient probative value, but on reconsidering the matter, now I think that it ought not to have been admitted under the section because the complaints were mere allegations and nothing more, with the exception of one of the complaints in which it may be inferred that the child asserts that the accused inserted his finger into her vagina while she was having a bath. Apart from this, there is simply no evidence as to the circumstances under which what is alleged in fact occurred, when it

[2] (2009) 229 FLR 287.

occurred and where it occurred and, in those circumstances, it is difficult to see how it could be probative of anything.

[18] The purpose of leading the evidence was to show that the accused had a sexual interest or desire in the complainant pre-dating the offending for which he is presently charged. It was relevant in establishing intent to commit the indecent dealing. Counsel for the Crown relied upon the observations of Gleeson CJ in *HML v The Queen*,[3] where his Honour said:

> Evidence of uncharged acts in child sexual abuse cases may also be relevant because of the matter mentioned above, that is, motive. As both Deane J and McHugh J have said, evidence which tends to show that a father has treated a daughter as an object of sexual gratification may tend to show a motive for committing the offence charged. If it appears that a parent has a sexual desire for a child, then that may make more credible the child's allegation that a particular alleged sexual incident occurred.

[19] Mr Maley's principal submission was that I should reject the evidence in the exercise of my discretion because the accused could not have a fair trial in relation to these allegations. It is not in issue that if evidence of this kind is admitted, the trial Judge is required to direct the jury that before they can act upon the evidence it must be proved beyond reasonable doubt.[4]

[20] The difficulty in this case is that the child has no memory of the incidents and, therefore, is unable to give evidence about them and, of course, cannot be cross-examined about them. To allow the Crown to lead this material would, it seems to be, to be unfair in the sense that the accused would not be

---

[3] (2008) 235 CLR 334 at 352-353 [7].
[4] *HML v The Queen* at [41], [63], [132], [247] and [506].

able to have a fair trial about those issues. Moreover, admission of the evidence in order to prove motive in the present circumstances would seem to be inconsistent with the requirement of s 26E(3) that an accused person cannot be convicted solely on the basis of hearsay evidence admitted under subsection (1).

[21] Furthermore, in my opinion the evidence should be rejected on the basis that the probative value of the evidence outweighs its prejudicial effect. Nothing is more likely to excite the passion of a jury than allegations of this kind which are inherently vague as to time, place and circumstance and which are, moreover, completely untestable.
