R v Manager [2006] NTSC 85

PARTIES:	THE QUEEN
	v
	MANAGER, Cameron Luke
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20606571
DELIVERED:	7 November 2006
HEARING DATES:	26 October 2006
JUDGMENT OF:	MILDREN J

CATCHWORDS:

EVIDENCE – Criminal Law – admissibility of complaints in sexual offence – whether admissible under s 26E of Evidence Act (NT) – mother's statement no probative value – evidence inadmissible

Legislation:
Evidence Act, s 26E, s 26E(1)
Justices Act
Evidence Reform (Children and Sexual Offences) Act 2004

Citations:
Followed:
R v Joyce (2005) 15 NTLR 134
R v Wojtowicz (2005) 148 NTR 24

REPRESENTATION:

Counsel:

Plaintiff:	E Armitage
Defendant:	P Maley

Solicitors:

Plaintiff:	Office of the Director Public Prosecutions
Defendant:	Maley's Barristers & Solicitors

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

R v Manager [2006] NTSC 85
No. 20606571

BETWEEN:

THE QUEEN
Plaintiff

AND:

CAMERON LUKE MANAGER
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 7 November 2006)

[1] The accused stands charged with one count of having sexual intercourse, namely digital penetration, with CW without her consent and with a further count of having an unlawfully indecently dealt with SW. CW and SW are sisters respectively aged six and five years.

[2] It is the Crown case that on the evening of 19 February 2006, after the children's parents had gone to sleep, the accused went into the girls' bedroom and committed the offences therein. Whilst this was happening, the accused's brother, Brendon, and sister, Karmani, were watching television in the lounge room. In his record of interview, the accused admitted leaving the lounge room where he had been watching television as well, in order to

go to the toilet. He claimed to have diarrhoea and that he left the lounge room to go to the toilet on three occasions that evening. The accused denied going into the bedroom and committing any offences on the two children.

[3] The Crown sought to tender as evidence in this case statements made by the elder child CW to the accused's sister Karmani and subsequently to the child's mother, TR. It is not disputed that the evidence is admissible as evidence of complaint. However, the Crown sought to have the evidence admitted pursuant to s 26E of the Evidence Act which is in the following terms:

> "**26E. Exception to rule against hearsay evidence**
>
> (1) In a proceeding in relation to a sexual offence, as an exception to the rule against hearsay evidence, the Court may admit evidence of a child's statement to another person as evidence of the facts in issue if the Court considers the evidence is of sufficient probative value as to justify its admission.
>
> (2) In a preliminary examination under Part V, Division 1 of the *Justices Act*, the child whose evidence is admitted under subsection (1) cannot be cross-examined in relation to the statement.
>
> (3) An accused person cannot be convicted solely on the basis of hearsay evidence admitted under subsection (1)."

[4] After hearing submissions I declined to admit the evidence as evidence of the facts in issue. I said I would provide reasons at a later date. I now do so.

[5] Section 26E(1) applies only where: (a) a child (i.e. a person under 18) makes a statement to another person; (b) the statement is relevant to the facts in issue; (c) the evidence is proposed to be led in a proceeding in relation to a sexual offence; and (d) the Court considers the evidence is of sufficient probative value as to justify its admission. It is not a requirement of s 26E(1) that (a) the child is a witness in the proceeding; (b) the child is the alleged victim of a sexual offence; (c) that the evidence is evidence of complaint of a sexual offence; and (d) that the child is still a child at the time of trial so that if a child subsequently becomes an adult and gives evidence as an adult the statement is still potentially admissible under s 26E(1).

[6] The section provides no guidance as to what is meant by the expression "sufficient probative value as to justify its admission", except that the section acknowledges that the evidence is hearsay and further, an accused cannot be convicted solely on the basis of that hearsay evidence. Consequently the "sufficient probative value" is apparently something rather less than would justify conviction solely on the basis of that evidence alone.

[7] It is not entirely clear what purpose s 26E was intended to serve. It was passed as part of a number of amendments to the Evidence Act and to the Justices Act by the Evidence Reform (Children and Sexual Offences) Act 2004. In the Minister's second reading speech, the Minister said that the purpose of the Bill was to reduce the trauma experienced by child witnesses and other vulnerable witnesses such as adults with intellectual disabilities in

criminal proceedings for sexual offences and improve the quality of evidence from those witnesses in criminal proceedings: see also *R v Wojtowicz* (2005) 148 NTR 24 at 28 para [24]. This provision does not appear to be relevant to the promotion of those purposes.

[8] The provision has been the subject of consideration on two previous occasions by this Court. In *R v Joyce* (2005) 15 NTLR 134, Riley J said at p 140-141:

> "No guidance is provided within the section or the Act as to matters to be considered in determining whether evidence is of sufficient probative value to justify admission. The use of the adjective "sufficient" indicates that the conclusion that the evidence has probative value is, by itself, not enough. The requirement is that it have sufficient probative value to justify its admission as evidence of the facts in issue. In applying the provision the court is called upon to make a value judgment in circumstances where some, and possibly all, of the evidence in the particular matter is yet to be adduced.
>
> [20] It would not be helpful or wise to endeavour to further define the legislative requirement nor to exhaustively identify the matters which may be of assistance in addressing this issue. Much will depend upon the circumstances of the particular case and the nature of the statement sought to be admitted in the context of those circumstances as they are understood at the time. What is of assistance in one case may not be in another. It is necessary for the court to consider all of the known surrounding circumstances of the particular case in order to determine whether the evidence is of sufficient probative value as to justify its admission in the circumstances of that case."

[9] Those comments were approved by BR Martin CJ in *R v Wojtowicz* (supra) at p 29 para [30].

[10] Further, in *R v Wojtowicz* (supra), BR Martin CJ said at p 30 para [32]:

> "In my opinion the Court is required to assess the probative value and, having regard to the dangers associated with this type of hearsay evidence, to determine whether the admission of the evidence is justified having regard to that 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, such evidence would ordinarily possess "sufficient" probative value to "justify" its admission."

[11] It is apparent that whether or not to admit the evidence is a two stage process. The first question is whether the evidence is admissible at all. To be so admitted it must fall within the parameters of s 26E(1). The second question is whether the evidence should nevertheless be excluded in the exercise of the Court's discretion. It is difficult to see how evidence can have sufficient probative value to justify its admission if it is to be rejected on the discretionary ground that its probative value it outweighed by its prejudicial effect. In that event, in my view, the evidence does not even get past the first stage, i.e. it is simply not admissible at all. If the evidence is to be excluded on discretionary grounds there must be some other basis for it.

Circumstances of First Complaint

[12] The evidence is that CW and her sister, SW, and their three half siblings live with their single mother at Palmerston. The mother's current partner, FC, was due to come out of prison on 19 February. FC was met by his brother, Brendon, and another person and driven to the house of TR. The offences are alleged to have occurred in the circumstances which I previously briefly described. The accused, his brother Brendon and his sister Karmani stayed

overnight. The following day CW and her sister SW both were taken to school. No complaint was made by either child at that stage. Later in the day, the children were returned home in a car driven by the accused. In the car there was as well, FC and Brendon. The car belonged to TR. As the accused drove the car into the driveway, he hit the front gate, the car stopped and TR came from out of the house and had some words to say to the accused and to FC who had got out of the car and was vomiting on the ground. The children were taken inside by TR who placed them in the bathroom. A significant domestic argument then followed between FC, TR and TR's mother. At one stage FC had chased TR with some knives. Karmani was looking after the children and they were taken from the bathroom into another bedroom. According to TR the children were hysterical and screaming. The police were called. FC, Brendon and the accused left the premises. Shortly thereafter the police arrived. TR went to the front gate where she was speaking to the police officers about the domestic violence matter.

[13] When the police arrived the children were in the yard playing and climbing into a tree. Whilst TR was speaking to the police CW approached her mother and was overheard to say that the accused had come into her room and was being dirty. TR did not hear what the child had said and told the child to go away as she was busy speaking to the police. However, Karmani overheard what the child said and she brought the child inside and asked her to tell her what had happened. CW said that the accused was being dirty by putting his

fingers in her “private”. Karmani was unsure whether the child said that this occurred ‘last night’.

[14] Subsequently, Karmani spoke to SW who made a similar complaint to her. Following that Karmani told TR about the complaints. TR spoke with both of the children together a little later on in the lounge room.

[15] The evidence concerning this conversation was that the mother sat on a recliner and spoke to the two children who were standing on each side of her. TR said to the girls that they were not in any trouble and that all she needed to know was what had happened and what they had told Karmani. TR said, “The girls both turned and said to me that [the accused] had been in their room and he had put the finger inside their minka.” (“Minka” is a word used in this family to mean “vagina”.) The examination in chief followed:

> “Q: Were both girls talking or did one girl talk and then the other, or how did that happen? – CW started to talk and as she started to talk, SW was quiet, slowly starting to repeat it. Then she put her head down and went really quiet. When CW had actually said it, she put her head down and went quiet and walked off. The way she reacted was the same way she does when she has done something wrong and she’s in trouble; she’ll walk away with her head down.
>
> Q: So who said that [the accused] had …? – The actual wording came out clearer from CW.
>
> Q: Sorry I know that you’ve said it and I know that it’s upsetting for you to say it, but because I think you are little bit upset I missed the exact words that you said she said. – That [the accused] had put his fingers in her vagina, in her minka.

> HH: Well, I think you said actually that the girl said the accused had been in their room? – He'd come in their room and put his finger in their minka.
>
> Q: Now you said it came out more clearly from CW? – Yep.
>
> Q: Did SW say anything? – SW was mumbling, but it wasn't clear enough to understand her.

[16] Subsequently in cross-examination, TR admitted that at the committal proceedings she had said that CW was saying that the accused was "in our room last night and SW turned round – like interrupted and said, 'And he put his fingers in my minka mummy.' And I just grabbed both girls and I said 'Don't worry about it bubba', I said, 'it was not your fault'. I said, 'Mum will deal with it". It was also put that at the committal that she was asked by the prosecutor, "'Did CW say anything to you about that?' And you said, 'No I just got up'?". TR responded to that, "But I'd also stated I wasn't really sure of that at the time as I was still doing counselling, and I still am".

[17] Further it was put that at the committal, TR had been asked and had given answers to the following:

> "Prosecutor: Okay, did CW say anything to you on that day? – Well it was both, as I was saying it was both girls talking – SW interrupted CW as she was talking. – With everything else going on I'm pretty sure – I know as a fact it was SW."

TR acknowledged that she said that at the committal.

[18] In re-examination, TR said that at the committal she also said that although the words came from SW's mouth, CW had said "It was both of us".

[19] In this case, SW is not being called to give evidence. She was interviewed by the police, but was not able to tell the police anything about the allegations at all.

[20] I turn now to consider whether the evidence is admissible. In relation to the evidence of complaint to Karmani Gounder, it was submitted that the evidence was a very early complaint made within the first 24 hours; it was unsolicited; and there is no suggestion that it was other than spontaneous. It was submitted that the nomination of the accused as the perpetrator was not solicited in any leading way and is consistent with the later complaint made to the police. Similar submissions were made in relation to the complaint to TR.

[21] Counsel for the accused, Mr Maley, submitted that the evidence of Karmani was unreliable as she had no independent recollection of what the children had said and was reliant solely upon her recollection of what was in her police statement. He also pointed out that the complaint was made in both cases against a background of significant domestic disharmony when the children had only a short time previously been in a state of hysteria. So far as the complaint to the mother is concerned, it was submitted that it was inherently unreliable because of the different versions that had been given as

to which of the two children had said anything about the accused placing his finger into one of the child's "minkas" or both of the children's "minkas".

[22] In my opinion, the evidence of complaint made to Karmani is not sufficiently probative to be admitted into evidence under s 26E. The evidence of the complaint is lacking in sufficient specificity as to time and place, lacks detail and amounts merely to an assertion that at some stage the accused digitally penetrated the child. The complaint is not spontaneous but has taken place approximately some 24 hours later against a background of very significant domestic disharmony. It is made at the time when the police are present speaking to the complainant's mother concerning the domestic dispute which involved the child's step-father, who had only just been released from gaol. The child, although only six, knows full well that FC has been in gaol although she may not know quite what this means. Further, no evidence was led about this complaint from CW by the prosecutor. The child had not given evidence on that subject at the committal. Counsel for the accused was therefore placed in the difficult situation of not knowing what the child might say in cross-examination and it comes as no surprise, therefore, that CW was not cross-examined on that subject either. In the difficult circumstances in which this complaint is made, and bearing in mind its lack of specificity, I do not consider that the statement has sufficient probative value to be admitted into evidence as evidence of the truth of the facts in issue.

[23] In relation to the complaint made to TR, the difficulty here is that there are in fact two complaints which are made by the children to the mother at the same time. The mother's evidence is quite confused as to which of the two children in fact made a complaint at all. On one view of the evidence, it was the child SW who complained about the accused putting his finger into her "minka". On another view of the evidence, it was both children. The reliability of the evidence is significantly affected (a) by the fact that the mother's evidence is confused and therefore unreliable; and (b) by the fact that the mother interviewed both of the children at the same time with the result that it is not clear which child said what. Further, the evidence of the child SW is not able to be tested in cross-examination as she is not to be called as a witness, so that even if the complaint of SW was strictly speaking admissible, it would be excluded in the exercise of discretion on grounds of lack of fairness. The complaint of SW is so mixed up with the complaint of CW it would, likewise, be unfair to admit the complaint of CW as evidence of the facts in issue. However, in my opinion, neither complaint to the mother is admissible as it does not have sufficient probative value to justify its admission as being evidence of the truth of the facts contained therein.
