R v Farrugia [2013] NTSC 47

PARTIES:	**THE QUEEN**
	v
	FARRUGIA, Paul
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21230633
DELIVERED:	14 August 2013
HEARING DATES:	7–9 August 2013
JUDGMENT OF:	MILDREN AJ

CATCHWORDS:

EVIDENCE – expert opinion evidence – forensic analysis of mobile phone – whether expert qualified to give opinion evidence on possibility that a film saved on the phone might have been accessed after the last access date recorded on the phone

EVIDENCE – alleged indecent assault - victim shown indecent movie – shown accused genitals and asked to show hers - whether subsequent kissing could amount to indecent assault

EVIDENCE – exception to hearsay rule – complaint by child victim – whether admissible as evidence of the facts under s 26E *Evidence Act* (NT)

DIRECTIONS – whether directions required under s 165A(2)(b) of the *Evidence (National Uniform Legislation) Act* (NT)

STATUTORY INTERPRETATION – exception to hearsay rule – complaint by child victim – whether admissible only under s 26E *Evidence Act* (NT) or whether s 66(2) *Evidence (National Uniform Legislation) Act* (NT) applied

Evidence Act, s 26E(1)

Evidence (National Uniform Legislation) Act, s 66(2), s 165A(2) & (3)

Evidence (National Uniform Legislation) (Consequential Amendments) Act 2012, s 68(1)

Sexual Offences (Evidence and Procedure) Act, s 4(5)(a)

R v Leeson (1968) 52 CrAppR 185; followed

The Queen v IMM (No.2) [2013] NTSC 44; referred to

Ratten v The Queen [1972] AC 378; referred to

REPRESENTATION:

Counsel:

Prosecution:	S Geary
Accused:	R Goldflam

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Accused:	Northern Territory Legal Aid Commission

Judgment category classification:	A
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

R v Farrugia [2013] NTSC 47
No 21230633

BETWEEN:

THE QUEEN

AND:

PAUL FARRUGIA

CORAM: MILDREN AJ

REASONS FOR RULINGS

(Delivered 14 August 2013)

Introduction

[1] The accused pleaded not guilty to five counts. Counts 1 and 2 charged that the accused, on 19 August 2012 at Tennant Creek, without legitimate reason, intentionally exposed a child under the age of 16 years to an indecent film. Count 1 related to a child BW, and count 2 related to a child AG. Counts 3 and 4 allege that the accused exposed the children to an indecent act by himself. Count 5 alleged an indecent assault on the child BW.

[2] The Crown case was that on 19 August 2012, the accused visited Bill Allen Lookout, known locally as One Tank Hill, just outside of Tennant Creek. He was driving a red Ford Falcon XR Sedan. There is a bituminised access road to the top of the hill, where there is a car park. Also at the top of the hill

there is a large water tank, and a small shed which contains pumping equipment. An employee of the Power and Water Corporation had been called out to do some maintenance work on the pump. He brought with him the two children who were amusing themselves by riding their scooters down the road to the bottom of the hill. It is alleged that the accused parked his car partly on the bitumen road, and partly on the dirt verge of the access road about half way up the hill, and got out of his vehicle carrying a mobile phone, when the two children came down the hill and stopped near the car. At this point the accused showed the children a pornographic movie, exposed himself to them, and invited the children to show him their genitals. The children refused to do so. It is alleged that the accused then invited the children to say "AH", which the older child understood him to mean that he was inviting them to fellate him. The children again refused. It is alleged that the accused then kissed the child BW on the cheek and departed. The children then went up the hill and the older child BW made an immediate complaint to the maintenance worker.

[3] The accused's version of the events, given to the police in his record of interview, and ultimately by giving sworn evidence at the trial, was that he was in urgent need of relieving himself, and stopped the vehicle to do so. He was just finishing off when the children came down the hill. He denied showing an indecent video to the children. He claimed that the child BW became hysterical, the child AG accused him of being gay, and that he attempted to explain to the children that he was looking for a mining expo,

took the wrong turn, and showed the phone to the children so that they could see that he had Google maps of the area on the screen, got into his car and left. He denied showing a pornographic movie to the children.

[4] The accused was ultimately found guilty of counts 1-4, but not guilty on count 5. What follows are my reasons for rulings I made regarding certain questions which arose during the course of the trial.

Admissibility of expert evidence

[5] The police seized a mobile phone owned by the accused at the time of his arrest which took place later that same day. It was an agreed fact that the accused had a 9-second film or video clip which had been saved on the phone, which displayed a naked man and a naked woman having sexual intercourse with two naked females watching. The film also showed a woman's breasts. The film was called "movie 2".

[6] Forensic examination of the accused's phone showed that the film had been saved on 15 July 2012 at 3.21 hours and had been last accessed on that date. If this information was accurate, this film could not have been shown to the children. There was no other film or trace of another film of a similar nature found on the phone. The Crown called a police officer, Marcus Becker, as an expert to give evidence that the time recorded on the phone as to when Video 2 was last accessed was unreliable, and that it was possible that the film had been accessed afterwards without that being recorded on the phone.

[7] Objection having been taken to Officer Becker's qualifications, evidence was taken on the voir dire in the absence of the jury.

[8] The accused's evidence at the trial was that the film was sent to him as a text from a friend in the early hours of the morning, when he had been out late at the Casino. He opened the text, saw the film, and had not looked at it since.

[9] Initially, when reporting his findings after he had examined the film, Officer Becker had not reported that the last retrieval date shown on the phone was inconclusive. At the request of the prosecutor, Mr. Geary, he examined the phone further, to see if he could ascertain whether there was any uncertainty about the date. Using an identical phone, he conducted an experiment by placing movies on it, and found that the access times had not changed when he had played the movies, apparently more than once.

[10] It is common ground that the movie clip was found in a folder called "inbox" within an app called "Viddy". Viddy is a freely available iPhone application which can be used by people to send short videos to each other.

[11] Officer Becker's qualifications and experience as an expert were as follows. He has been a member of the computer crime unit of the NT Police force since 2010. Since that time he has conducted analyses of hundreds of phones. The accused's phone was an Apple iPhone 4. In 2011 he underwent a one or two day course in the use of forensic software for the analysis of phones conducted by employees of Aceso Phone Analysis. He has also

completed a Certificate 3 course in Information Technology at Charles Darwin University, and a level 1, 3 day examinable Forensic Course for the use of software called “Spnease.”

[12] Officer Becker’s evidence was that iPhones are essentially computers. User file systems are wide and varied. In the case of Windows, the last access time on that file system has been disabled to save space and time on the operating system and the resources of the computer. It is possible to activate the last access time by going to the computer registry. The Apple operating system is an IOS, or integrated operating system, and has similar features to Windows with respect to modification and access times. The forums for the forensic analysis system called End Case, which is used world-wide, indicate that the last access times do not always provide a true account of the time and date when the file was last viewed on the device. End Case was the phone software he used for the analysis of the iPhone’s operating system.

[13] So far as the experiment which he conducted, Officer Becker agreed that when he conducted it, he was not aware that the Viddy application had been used on the accused’s phone, and he agreed that he had not conducted an experiment on an Apple iPhone 4 using the Viddy application to see if the last access dates were reliable. He was not asked whether this altered his opinion in any way. However, he said that he subsequently did become aware that Viddy had been utilized, and I inferred from the fact that he continued to assert that he was unable to say that the last access times on the

accused's phone were not definitive that this made no difference to his opinion.

[14] I was satisfied that without the assistance of an expert opinion, an ordinary juror would not be able to form a sound judgment on the question in issue. I was also satisfied that the subject is a matter which forms part of a body of knowledge or experience which is sufficiently organised or recognised to be acceptable as a reliable body of knowledge. Further, I was satisfied that the courses which Officer Becker has undertaken have acquainted him with that knowledge, and have been reinforced by the experiment which he conducted. For those reasons I found that Officer Becker had been qualified as an expert to provide the opinion which he did.

[15] I should mention for completeness that Officer Becker, when he gave evidence before the jury, told the jury without objection that the Apple iPhone 4 has a function which enables it to access the internet. He said that it was possible to stream videos from the internet without the phone recording that this had been done. He described what is called "buffering". There is a limited space available for a video to be downloaded for access, so only enough memory is used to view the video. The movie is then put into what he called "unallocated space" which is able to be written over with new information. He agreed that it was possible, when a phone is forensically analysed, that not all movies that had been downloaded would be found. Although nothing was made of this at the trial, it left open the possibility that even if the movie seen by the children was not Video 2 but

some other video being downloaded from the internet, and that no evidence of this movie would have been found by forensic examination.

[16] The end result of admitting this evidence was that whether or not the jury was satisfied beyond reasonable doubt that the accused had played a pornographic video to the children depended on whether the jury accepted the evidence of BW as to what she claimed to have seen on the accused's phone.

Was there evidence fit to go to the jury of an indecent assault?

[17] The circumstances of the alleged indecent assault was the allegation that immediately after showing the film and his penis to the children, asking BW to show him her vagina, and then asking the children to say "Ah", the accused had said to BW that she was a beautiful girl. She started to cry, and he then kissed her on the cheek.

[18] In *R v Leeson*[1] the accused was convicted of indecent assault for kissing a girl of 13 against her will, accompanied by a suggestion that she should engage in sexual activity with the offender. The girl had been employed as a baby sitter at the appellant's home. When his wife was out, he returned to the house and asked the girl if she would let him have sex with her, to which she replied "no." When asked why not, she replied that she was not old enough. She started to cry and the appellant went out of the front door for a moment, then came back, and after talking to her, sat beside her and put his

[1] (1968) 52 CrAppR 185.

arm around her and his hand on her knee, and then kissed her on the neck and about the face. The Chairman of the Quarter Sessions admitted the evidence, and the accused was found guilty. On appeal it was argued that what had occurred did not amount to an indecent assault. It was submitted that unless the act itself was indecent, the circumstance that it was accompanied by indecent suggestions or words could not convert what would be an ordinary assault into an indecent assault. The judgment of the Court of Criminal Appeal was delivered by Diplock LJ, who said that the court had no doubt that where an assault of this kind involving the kissing of a girl against her will is accompanied by suggestions that sexual intercourse should take place, or that sex play should take place between them, the assault is an indecent one. Mr. Goldflam attempted to distinguish this case on the facts, but in my view the observations of the Court of Appeal were compelling, particularly as there had been a gap between the asking for sex, and the kissing, even to the extent that the appellant in that case had left the room. For that reason, I left the question of whether the assault was an indecent one to the jury. In the result, the accused was acquitted of any assault, not just an indecent assault.

Direction under s 26E(1) of the *Evidence Act* (NT)

[19] At the conclusion of the evidence, Mr. Geary for the prosecution asked me to give the jury a direction in accordance with s 26E(1) of the *Evidence Act* (NT), which permits the court, despite the rule against hearsay evidence, to admit evidence of a statement made by a child to another person as evidence

of facts in issue if the court considers the evidence of sufficient probative value to justify its admission. I raised with counsel whether that provision was still in force having regard to the fact that the *Evidence (National Uniform Legislation) Act 2011* (NT) (the NUL Act) is now in force,[2] and there is a similar provision, and one easier to apply, in s 66(2).

[20] I was referred by counsel to the decision of Blokland J in *The Queen v IMM (No.2)*.[3] In that case, complaint evidence in a sexual case was admitted under s 66(2) and her Honour said that she had not separately discussed admission under s 26E of the Evidence Act, but that the result would be substantially the same.

[21] I accepted that both of these provisions are in force, s 26E of the Evidence Act being a special provision relating to the evidence of children in sexual cases, and s 66(2) being a general provision referring to previous representations made generally, whether by children or not, and whether in sexual cases or not. That being so, I did not think that s 26E has been impliedly repealed by s 66(2) which is a later provision: *generalia specialibus non derogant.*

[22] However, I was not referred to the *Evidence (National Uniform Legislation) (Consequential Amendments) Act 2012* (NT) (the Consequential Act). Part 3 of the Consequential Act deals with amendments to the Evidence Act. Of some significance is that s 15 of the Consequential Act repeals ss 22, 23 25

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[2] See NT Government Gazette No G51 (19 December 2012) p 4.

[3] [2013] NTSC 44.

to 26D and 26F to 26L, but not s 26E. Section 68(1) of the Consequential Act provides as follows:

> If the Evidence (NUL) Act[4] applies in relation to a proceeding, this Act,[5] as amended by the Consequentials Act,[6] applies in relation to the proceeding. (citations added)

[23] This provision reinforces my opinion that s 26E continues to apply to this proceeding, and that the intention of the legislature is that it applies exclusively of s 66(2) of the NUL Act in cases involving sexual offences against children.

[24] Mr Goldflam's objection to the evidence being admitted under s 26E was that the evidence had no probative value, given that the child had made a Child Forensic Interview with the police only hours later which was admitted into evidence.

[25] In my opinion, s 26E is the provision which governs the admissibility of the evidence in this case. There is, in any event, discretion to exclude the evidence or to limit the use to which the evidence can be put under the NUL Act[7] if the evidence has little probative value and it would be unfairly prejudicial to the accused.

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4 Defined by s 4 of the *Evidence Act* as amended to mean the *Evidence (National Uniform Legislation) Act*.

5 Ie the *Evidence Act* as amended.

6 Defined by s 67 of the *Evidence (National Uniform Legislation) (Consequential Amendments) Act 2012* (NT) to mean the *Evidence National Uniform Legislation (Consequential Amendments) Act 2012*.

7 See ss 135, 136 and 137.

[26] I ruled that the evidence should be admitted under s 26E. In my opinion the evidence had sufficient probative value to warrant its admission because the complaint made by BW was made within what must have been at the most only a matter of minutes after the alleged events had taken place. Moreover, the nature of the complaints made to the maintenance worker went beyond mere allegations of the kind which could mean almost anything, but were specific enough to be of real value. Indeed, even at common law, the evidence would probably have been admitted into evidence as part of the res gestae.[8] From the accused's point of view, admission under s 26E has the advantage that the jury must be told that the accused cannot be convicted solely on the basis of hearsay evidence admitted under s 26E(1).

Direction under s 165A(2)(b) of the *Evidence (National Uniform Legislation) Act 2011* (NT)

[27] This provision prevents a trial judge from giving a corroboration warning to a jury where the evidence of a child is relied upon in criminal proceedings. The provision is not limited to cases of sexual offences, and goes further than s 4(5)(a) of the *Sexual Offences (Evidence and Procedure) Act 1983* (NT), which deals only with warnings on the uncorroborated evidence of a complainant because the law regards complainants as an unreliable class of witness. The common law requirement to warn in the case of the uncorroborated evidence of children was not specifically covered by the s 4(5)(a) provision or elsewhere in the last-mentioned Act. This being so, I

[8] See *Ratten v The Queen* [1972] AC 378 at 391.

accept that the provisions of s 165A of the NUL Act apply to these proceedings.

[28] Sub-sections 165A (2)–(3) provides:

> (2) Subsection (1) does not prevent the judge, at the request of a party, from:
>
> (a) Informing the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable; and
>
> (b) Warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it;
>
> if the party has satisfied the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrants the giving of a warning or the information.
>
> (3) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

[29] Counsel for the accused, Mr. Goldflam, submitted that there were factors in this case which warranted the giving of a warning that it was dangerous to convict on the uncorroborated evidence of BW unless the jury scrutinized the evidence with great care and with great caution and were satisfied of its truth and accuracy and were satisfied to reject the accused's denials. Mr. Goldflam submitted that there were three reasons why I should give such a direction. These reasons were (a) the shock which BW experienced in seeing the accused's penis; (b) the silence of AG and (c) the lack of any independent corroborative evidence with any probative value which would

support the complainant's account. After hearing submissions, I rejected these reasons as being sufficient to warrant the giving of a warning, although in my summing up I did draw to the jury's attention matters in BW's evidence which may be thought to be unreliable and why this was so. I said that I would provide reasons for this at a later time. These are those reasons.

[30] There was evidence that BW was shocked by her experience, although not necessarily immediately. On her own account. she became tearful only at the end of the episode when the accused said words to the effect that you are a beautiful girl. There is no doubt that by the time she reached the top of the hill and spoke to the maintenance worker, she was very distressed. The maintenance worker's evidence was that she was crying so much she was struggling to talk. The defence case was that she became tearful and hysterical almost immediately. She and AG had come down the hill on their scooters, stopped by the side of the parked car, saw the accused urinating, and BW almost immediately became hysterical. Which version of this was the true account was a question for the jury, but in general terms there is not much doubt that BW was shocked and distressed by whatever it was she saw or heard. I did not think that this is a matter of such significance that a warning was required. Indeed BW's distress was more consistent with her own account, than with the accused's account. I did not consider that it affected the reliability of BW's account.

[31] As to the silence of AG, who was only 8 years of age at the time, AG clearly had a good memory of what happened up to and immediately before the incidents, and immediately thereafter. He claimed to have forgotten what took place in between. His evidence was intractably neutral. No inference could be drawn as to why he said that he had forgotten what had happened. One possibility is that he was too embarrassed and shy to tell the police about it. Another possibility is that when he heard BW's complaint to the maintenance worker, he decided not to say anything to contradict BW who was older than him and his friend. There may be other possibilities and it is impermissible to speculate in the absence of evidence. The highest that Mr. Goldflam could have put this submission was that AG's evidence does not support the Crown case. I do not see how this affects the reliability of BW's account.

[32] As to the lack of any corroborative evidence of any probative value which supports BW's account, by itself that is not a sufficient reason to draw the conclusion that BW's account may be unreliable. Whilst I accept that there was no evidence which strictly speaking amounted to corroboration at common law, there were some pieces of evidence which lent some support to BW's account apart from the distress. First, there was the evidence that a pornographic movie was found on the accused's phone. It was open to the jury to conclude that this was the movie which BW saw, although her account of what she saw was not entirely consistent with the agreed facts. Secondly, there was the evidence that AG had accused the accused of being

gay, which the jury might think was more consistent with BW's account than with the accused's account.

[33] For these reasons, I did not consider that any of the factors relied upon by Mr. Goldflam either individually or in combination warranted a warning under s 165A(2)(b) of the NUL Act.

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