NJB v The Queen [2010] NTCCA 05

PARTIES:	NJB
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CCA 16 of 2009 (20807446)
DELIVERED:	17 June 2010
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JUDGMENT OF:	MARTIN (BR) CJ, RILEY AND KELLY JJ
APPEAL FROM:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST CONVICTION

Convictions for sexual offences against a child under 16 years – directions as to assessment of evidence given by children – other discreditable conduct/uncharged acts – directions as to use – propensity reasoning – absence of warnings concerning disadvantage to appellant due to inability to cross-examine – appeal allowed – convictions set aside – retrial ordered.

REPRESENTATION:

Counsel:

Appellant:	S Odgers SC
Respondent:	P Usher

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

NJB v The Queen [2010] NTCCA 05
No. CCA 16 of 2009 (20807446)

BETWEEN:

NJB
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, RILEY AND KELLY JJ

REASONS FOR JUDGMENT

(Delivered 17 June 2010)

Martin (BR) CJ:

Introduction

[1] This is an appeal against convictions for a number of sexual offences against a child under the age of 16 years. The learned trial Judge directed an acquittal with respect to count 1, but the jury convicted the appellant of sexual offences charged in counts 2 to 9 and those sexual offences formed the basis of the conviction of the offence of maintaining an unlawful relationship of a sexual nature with a child under the age of 16 years (count 10).

[2] The grounds of appeal raise issues as to the directions given by the trial Judge concerning the assessment of the evidence of children and the absence of directions relating to evidence of discreditable conduct and the inability of the appellant to cross-examine the complainant and another child witness by reason of lack of detail and lack of memory.

[3] For the reasons that follow, in my opinion the appeal should be allowed and the convictions set aside. A retrial should be ordered.

Evidence

[4] The complainant was the stepdaughter of the appellant. It was the Crown case that the offences were committed between 1 June 2007 and 8 March 2008 when the complainant was aged 10 - 11 years. On 8 March 2008 the complainant told her mother that the appellant had been sexually abusing her and a number of interviews were subsequently conducted with the complainant by police ("child forensic interviews").

[5] At trial, the complainant was aged 11 years. The Crown tendered audio visual records of the child forensic interviews as the bulk of the complainant's evidence-in-chief and she gave brief oral evidence. Following the playing of the audio visual records of the child forensic interviews, the trial Judge directed the jury to acquit the appellant of the charge in count 1 on the basis that there was nothing in the interviews to support that charge. The complainant was then cross-examined by counsel for the appellant.

[6] In support of the evidence of the complainant, the Crown led evidence from the complainant's brother and sister of their observations of the appellant's conduct with the complainant. The conduct said to have been observed by the brother and sister was of a sexual nature and disclosed offences which were not the subject of charges before the jury. The Crown expressly disavowed any reliance upon the evidence as tending to prove that the appellant possessed a sexual interest in the complainant or a guilty passion for the complainant. The evidence was said by the Crown to be relevant because it provided "context" in which the offences occurred and helped the jury understand the nature of the "relationship" between the appellant and the complainant.

[7] The bulk of the evidence-in-chief of both the brother ("JC") and sister ("TC") was given by way of child forensic interviews conducted when they were aged 12 and 14 years respectively. Both gave additional oral evidence-in-chief and were cross-examined.

[8] An unusual situation arose with respect to the evidence of TC. After the playing of the child forensic interview in which TC spoke of seeing the appellant with his hands on the breasts of the complainant on a number of occasions, in oral evidence-in-chief TC said she remembered giving the interview with the police, but she now had no memory of the incidents about which she spoke in the interview. She said that the time the interview was conducted she had a memory of seeing the appellant touching the

complainant on her breasts, but in the witness box she did not have any memory of seeing such incidents occur.

Ground 1

[9] Ground 1 is a complaint that the trial Judge impermissibly interfered with the function of the jury in giving directions as to how the jury should approach the evidence of children. Directions concerning the evidence of children were particularly important because the critical evidence in the trial was given by children, namely, the complainant, TC and JC.

[10] The impugned directions were given at the outset of the summing up in the following terms:

> "YOUR HONOUR: Yes, members of the jury. I shall sum up this case for you.
>
> First, I am going to talk to you, in a general sense, about the weight which may be given to the evidence of children. Courts now recognise the following factors in relation to the evidence of children:
>
> 1. While children generally do not experience full cognitive development until about the age of 14 years, children, even children of tender years, can give reliable evidence if questions are tailored to their cognitive development.
>
> 2. From about the age of six onwards children do not have a less accurate memory than adults. However, recall is more likely to decline with time for children than for adults and children are likely to recount, when describing past events, in much less detail than adults.
>
> 3. Children do have the ability to distinguish fact and fantasy and the danger of children fabricating allegations without the

encouragement of older persons is no different to that of adults. However, children are suggestible and on occasion like everyone else they do tell lies.

4. With younger children recall is less likely to be organised because of the level of their cognitive development and because of underdevelopment of concepts such as time, space and distance. The spontaneous collating and organisation of recall is a learned skill which improves as language skills, vocabulary and cognitive development improve.

5. Children may experience difficulty in supplying information at a particular time, or in a particular place, or in an unusual or formal situation. Stress and anxiety may inhibit the capacity of a child to supply information at a particular point in time.

So far as courts are concerned, the days when children were considered to be incapable of giving reliable evidence are long gone."

[11] The critical question is how the jury would have understood these remarks. If it is possible that the jury would have understood that they were required to assess the evidence of the children in accordance with what the trial Judge had said, the trial Judge would have impinged impermissibly upon the function of the jury as the sole arbiters of the facts.

[12] The remarks in question were given at the outset of the summing up. They were expressed in firm and direct terms. Notwithstanding that his Honour told the jury that he was going to talk to the jury "in a general sense about the weight which may be given to the evidence of children", and notwithstanding later directions that the weight to be given to the evidence of the children was a matter for the jury and the jury alone, the remarks

presented the five numbered propositions as the incontrovertible view of the Court. The presentation of this view was not hedged with any qualification. Nor was it hedged with a direct or indirect statement or implication that it was a matter for the jury whether the jury agreed or disagreed with the five propositions. There was no hint given that it was within the province of the jury to reject any or all of the propositions as the jury saw fit.

[13] In my view, the jury would have understood the five propositions as directions which the jury was required to apply in approaching the evidence of the children. At the least, there is a real possibility that the jury would have understood the propositions in that way.

[14] In the context of the appellant's trial in which the evidence of the children was of critical importance, the remarks were particularly significant. The accused had denied on oath any improper conduct and the defence was faced with the task of persuading the jury that there was a doubt about the reliability of the evidence given by each of the children. While the trial Judge said that children are suggestible and, on occasion, "like everyone else they do tell lies", nevertheless the overall impression created by the five propositions was supportive of the children's evidence and tended to explain why their evidence might be reliable notwithstanding the absence of detail and, in the case of TC, her loss of memory.

[15] The third point of the direction was of particular importance. In substance, the trial Judge directed the jury that they were required to approach the

evidence of the children from the starting point that while children are suggestible, the danger of children telling lies is no greater than the danger of adults telling lies. This direction possessed a strong tendency to undermine the submission made by counsel for the appellant that the complainant might lie to avoid embarrassment or to avoid getting into trouble, and do so without a full appreciation of the devastating consequences of making false allegations against the appellant. In the argument of the appellant, awareness of possible consequences was an important distinction going to the likelihood of the complainant telling lies and counsel had invited the jury to use their experience of life in this regard. However, the effect of the direction by the trial Judge was to tell the jury that, regardless of their life experiences or views they might otherwise hold, they were obliged to approach the evidence of the children from the starting point that children are no more likely to tell lies than adults. In this way the trial Judge impermissibly directed the jury as to how they were to approach critical evidence in the trial.

[16] As I have reached the view that the trial Judge gave a direction as to how to approach the evidence which the jury would have felt obliged to follow, and did not merely comment as to how the jury might see fit to approach the evidence of the children, it is unnecessary to determine whether the trial Judge was correct in saying that the five propositions are now recognised by courts. Perhaps most of the propositions are generally recognised, but in the absence of evidence I doubt that it is appropriate to say that courts now

recognise as incontrovertible that "from about the age of six onwards children do not have a less accurate memory than adults". Couched in terms such as "it is a matter for you, but based on your experience you might think …", in an appropriate case and clearly advanced as comments, the five propositions may be helpful to a jury. But if such comments are made, they must be accompanied by clear and unequivocal directions that the jury is free to accept or reject the comments. Further, in my view it would be unwise to present the comments in words that convey an impression that the five propositions are now recognised or adopted by the courts as general statements of truth.

[17] For these reasons, in my opinion ground 1 is made out and, in the particular circumstances, the convictions should be set aside. Notwithstanding the absence of any complaint by counsel for the appellant before the trial Judge, as the impermissible directions went to the heart of the case because they related to the critical evidence in the trial, in my view it is clear that a miscarriage of justice has occurred.

Ground 2

[18] Ground 2 is a complaint that the trial Judge erred in failing to give an adequate direction against the jury engaging in "propensity reasoning". This ground concerns the use that the jury were entitled to make of the evidence of JC and TC of other discreditable sexual acts which were not the subject of charges before the jury. It also concerns the use to be made by the jury

of evidence from the complainant of other discreditable sexual acts which were not the subject of charges, but counsel for the appellant conceded that the absence of directions about propensity reasoning is less significant when the evidence comes from the complainant herself. It is the fact that the evidence came from witnesses other than the complainant that makes the requirement for the direction particularly important.

[19] The difficulty with respect to the use of the evidence of JC and TC concerning other discreditable acts was created by the way in which the Crown advanced the relevance of that evidence. The Crown disavowed reliance on the evidence as tending to prove that the appellant possessed a sexual interest in the complainant. Rather, it was said that the evidence established the "context" in which the offending occurred and was relevant to the "relationship" between the appellant and the complainant.

[20] The trial Judge directed the jury that they were required to consider each of the counts separately and were not permitted to reason that if they found the accused guilty on one count, he was therefore guilty of the other counts. In this context his Honour said:

> "It is also impermissible for you to reason that because you find the accused is guilty of one count on the indictment, he is the sort of person who might commit such offences and, therefore, is guilty of the other counts on the indictment. You cannot and must not reason in these two ways. Both the community and the accused man are entitled to a separate consideration of each of the counts on the indictment."

[21] As to the evidence of JC and TC in particular, and the evidence of the complainant about other occasions that were not the subject of the counts before the jury, the trial Judge gave the following directions:

> "If I may then, next, go on to talk about the evidence of certain other offences or other discreditable act which has been led in this trial. They come from three sources:
>
> 1. There is the evidence from JC about him seeing the accused touch LC on her vagina through her shorts.
>
> 2. There is also the evidence of TC about the accused grabbing the breasts of LC.
>
> 3. There is then also the evidence of LC, herself, to the following effect that 'This always happened when you are away. They happened on numerous occasions. Similar things happen from time to time'.
>
> Now the Crown has not used any of that evidence to allege specific counts such as set out in counts 2 to 9 on the indictment. The two purposes for which you may use this evidence, that is, provided you accept the evidence to your satisfaction before you use it, but assuming you do accept the evidence for the purposes of explaining these principles to you, there are two ways in which this evidence may be used:
>
> 1. It may be used as evidence of relationship or context generally which you can use to evaluate the specific counts charged in counts 2 to 9. For example, if a witness was giving evidence and nothing was said about any previous activity and something occurred out of the blue, you might think, 'well, gee, that is a bit strange'. The purpose of this evidence, if you accept it, is to enable you to analyse the evidence about the other specific count in a realistic context, that is, provided you find the context proven. That is the first use which can be made of this evidence.
>
> 2. It may be used to directly establish the maintenance of the unlawful sexual relationship which forms the basis of count 10.

> Before you can use it in that way, before you can use the evidence at all, you must be satisfied of it beyond reasonable doubt. But if you are satisfied of it beyond reasonable doubt, you can then take it into account in considering whether count 10 is made out or not. And you will recall this morning that I spoke about what maintenance of relationship meant, what the relevant conduct involved in the relationship is, and so on. As to whether when taken with all of the other evidence, that you accept that relationship, that unlawful sexual relationship is made out or not.
>
> So they are the two uses which can be made of that other evidence. Just to remind you of it again. It is the evidence of LC about other discreditable acts which do not form part of any of the counts charged in the counts 2 to 9. It is the evidence of TC and it is the evidence of JC."

[22] Although the trial Judge directed the jury that there were only two ways in which the evidence could be used, the direction that it was permissible to use the evidence "as evidence of relationship or context generally" did not further define how the evidence could be used as evidence of the "context" or of the "relationship" between the complainant and the appellant. The example that followed was not a restrictive example. Left to their own devices, having been told that the evidence of other discreditable acts could be used to determine the nature of the "relationship" between the complainant and the appellant, it is almost inevitable that the jury would have used the evidence as demonstrating that the appellant possessed a sexual interest in the complainant. This conclusion is particularly obvious in relation to the evidence of JC and TC concerning the appellant touching the complainant on her vagina and grabbing her breasts. How was the jury

to use the evidence in assessing the nature of the relationship other than by way of demonstration of a sexual interest?

[23] As the voluminous authorities in this area have repeatedly observed, when it is said that evidence of discreditable acts is relevant only to the "context" in which the alleged offences occurred or to the "nature of the relationship", it is necessary for the Crown to specify precisely how it is relevant. For example, evidence of other acts might explain why an accused would feel uninhibited in making sexual advances to a complainant. It might make the victim's lack of struggle or failure to complain more understandable. The evidence might be led to meet an attack upon the complainant advanced on the basis that the story of the sexual assaults charged is implausible because it is unlikely that the accused person would behave in the manner described by the complainant. But these uses must carefully be spelt out to the jury. Such directions must be accompanied by a direction that the jury is not permitted to use the evidence as proof that the accused had a sexual interest in the complainant and that the jury must not reason that because the accused committed the discreditable acts, the accused is the type of person who is likely to have committed the crimes charged.

[24] In my opinion, it is highly likely that the jury used the evidence as evidence of the "relationship" in the sense that it tended to establish that the appellant had a sexual interest in the child. The evidence of JC and TC was particularly important because it provided support for the evidence of the complainant that the appellant behaved in a sexually inappropriate manner

with the complainant. If the evidence was not to be used as tending to prove that the appellant possessed a sexual interest in the complainant, it was important that clear and precise directions be given as to how the evidence could and could not be used. In these circumstances, notwithstanding the absence of an objection, a miscarriage of justice has occurred.

Grounds 3 and 6

[25] Ground 3 is a complaint that the trial Judge erred in failing to give an appropriate warning concerning the disadvantage caused to the appellant by the lack of detail in the complainant's evidence. Ground 6 relates to the disadvantage to the appellant by reason of the inability to cross-examine the complainant's sister who professed to a lack of memory about the incidents she had described in her child forensic interview. As I have decided that the appeal should be allowed on other grounds, it is unnecessary to finally determine these questions. It will be a matter for the trial Judge on the retrial to determine whether warnings should be given and the terms of the warnings. It is sufficient to note that there is force in the contention of the appellant that warnings should have been given.

Conclusion

[26] A miscarriage of justice has occurred. To the extent that leave is required, I would grant leave, allow the appeal, set aside the convictions and order a retrial.

Riley J:

[27] I agree.

Kelly J:

[28] I agree.
