R v Janima [2012] NTSC 12

PARTIES:	**THE QUEEN**
	v
	JANIMA, Paul
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21019744
DELIVERED:	8 MARCH 2012
HEARING DATES:	29 FEBRUARY 2012
JUDGMENT OF:	KELLY J

REPRESENTATION:

Counsel:

Plaintiff:	S Robson
Defendant:	J McBride

Solicitors:

Plaintiff:	Office of Director of Public Prosecutions
Defendant:	John McBride

Judgment category classification:	C
Judgment ID Number:	KEL12004
Number of pages:	8

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

R v Janima [2012] NTSC 12
No. 21019744

BETWEEN:

THE QUEEN
Plaintiff

AND:

PAUL JANIMA
Defendant

CORAM: KELLY J

REASONS FOR DECISION

(Delivered *ex tempore* 8 March 2012)

[1] On 3 June and 15 July 2011 the evidence of the complainant in this matter was pre-recorded. During cross examination, she agreed that she had gone to CAALAS and spoken to a lawyer and an Aboriginal woman. She also agreed that she had told those people that she wanted to drop the charges. She was asked whether she had told them that she wanted to drop the charges because she had told a wrong story to police about the trouble. At first she did not agree,[1] and then she said she remembered making that statement.[2]

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1 Transcript of proceedings of pre-recorded evidence on 15 July 2011 at T46.

2 Ibid at T47.

[2] She also said that the accused's family was forcing her to drop the case,[3] that the accused's sister telephoned her about 20 times and threatened her, that the sister spoke to both her and her husband, had threatened to belt her and put her in the hospital, and that she was frightened.

[3] Defence counsel has given notice that he intends calling the sister who is alleged to have made the threatening phone calls to say that she did not do so. The Crown has objected to that evidence on the basis of the collateral evidence rule.

[4] In *Nicholls v R*[4] the collateral evidence rule was explained in these terms by Hayne and Heydon JJ (with whom Gleeson CJ agreed):

> "A debate between counsel and the trial judge then took place. It must be understood against the background of the traditional "collateral evidence" rule described by Phipson thus:
>
> > '*A party may not, in general, impeach the credit of his opponent's witness by calling witnesses to contradict him as to matters of credit or other collateral matters ...*'
>
> The general rule does not apply to evidence of prior inconsistent statements; previous convictions; evidence of reputation for untruthfulness; medical evidence affecting the reliability of a witness's evidence; evidence of bias, interest or corruption; and probably to evidence of some other matters. Some of these instances are on occasion treated as not being collateral, and hence as being outside the ban imposed by the general rule, but they are commonly analysed as exceptions to it.
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> A standard test for what is collateral is that of Pollock CB in *Attorney-General v Hitchcock*:

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3 Transcript of proceedings of pre-recorded evidence on 15 July 2011 at T47.

4 [2005] HCA 1; 219 CLR 196; 213 ALR 1; 79 ALJR 468.

> '*[T]he test, whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence - if it have such a connection with the issue, that you would be allowed to give it in evidence - then it is a matter on which you may contradict him.*'

The test is helpfully put by Wigmore:

> '*Could the fact, as to which the prior self-contradiction is predicated, have been shown in evidence for any purpose independently of the self-contradiction?*'"[5] [*references omitted*]

[5] The majority in *Nicholls* reaffirmed the existence of the rule in these terms:

> "The arguments of the appellants that Ross's evidence was admissible even if it did not fall within the bias exception must be rejected. When the matter was most recently considered by this Court, a majority reaffirmed the received law as to the finality of answers in cross-examination on collateral matters. There are real difficulties in defining the outer limits of the ban on evidence in rebuttal on "collateral" and "credit" questions. Opinions differ about how far it is legitimate to approach the problem emphasising the importance of flexibility against rigidity, convenience against principle, and case management rather than rigid rules, though the prosecution in this case was prepared to accept the legitimacy of such an approach up to a point.
>
> But whatever the difficulties of definition and approach, the law as it stands does not permit any relaxation of the traditional rules merely on the ground that the particular witness's credibility is inextricably linked with the principal issue in the case. If that is illustrated by nothing else, it is illustrated by the analysis in the cases involving evidence rebutting a challenged witness's denials of matters suggesting bias, interest or corruption. That analysis accepts that the key question is whether the witness's state of mind is such as to cause the witness to lie about the principal factual issues."[6] [*references omitted*]

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5 *Nicholls v R* per Hayne and Heydon JJ at pp 284-285 at [248] and [249].

6 Ibid at p 298 at [285] and [286].

[6] It seems to me that the evidence which is sought to be led by the defence is clearly collateral in the relevant sense and hence *prima facie* inadmissible unless it comes within one of the exceptions. It has no direct relevance to any matter in issue in the proceeding. Its only purpose is to contradict the complainant on a matter which goes to her credit only – and not to the material facts relevant to any element of the offence. The defence argued that "the evidence sought to be rebutted comes within the 'bias' exception to the collateral evidence rule" relying on the following statement of what might constitute bias in *Nicholls*:

> "Potential bias on the part of witnesses is frequently pointed to in litigation, whether it is said to derive from a relationship of family or blood or business or employment or friendship, or from self-interest (as where a witness is a party or likely to be affected by the success or failure of a party). Often the source of potential bias is obvious or is revealed by the party calling the witness. Often, even though it is not obvious, it is conceded at once in answer to a single question in cross-examination, partly because it is honest to do so and partly because it is foolish not to. The present problem arises only where it is not obvious, not revealed by the party calling the witness, and not conceded by the witness in cross-examination."[7]

[7] Counsel submitted that the complainant was "biased" in the sense outlined in *Nicholls* because she was likely to be affected by the success or failure of the Crown. Counsel pointed out that the complainant had denied having a previous intimate relationship with the accused, and denied that she had asked him for money or liquor except in the presence of her husband and submitted that "the natural desire to avoid the consequent opprobrium which might attach in the case of a married woman, if she were found to have had

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7 *Nicholls* at p 288 at [261].

consensual intimate relations with the accused, provides the complainant with an understandable interest in giving such evidence as would tend to support her claim that she was raped."

[8] The first thing to be said about that submission is that there is no question of the complainant being "found to have had consensual intimate relations with the accused". The only two possible outcomes in this case are that:

(a) the jury are satisfied beyond reasonable doubt that the intercourse which took place between the accused and the complainant was not consensual and that the accused either knew that or was reckless as to the existence of consent, in which case the accused will be found guilty; or

(b) the jury are not satisfied beyond reasonable doubt of one or more of those matters in which case, the accused will be found not guilty.

[9] Secondly, such an analysis would brand every complainant in every rape case as "biased". Indeed as every witness in every case could be said to have an interest in being believed (to avoid the natural opprobrium attaching to those found by the court to be lying), all would, on this analysis, be biased.

[10] Thirdly, and most importantly, even if it were shown that the complainant was "biased" in the relevant sense, that does not open the door to the defence to call evidence to rebut the complainant's evidence on all collateral

matters. It only allows in "evidence rebutting a challenged witness's denials of matters suggesting bias".[8] Put simply, the evidence which is sought to be led by the defence – ie evidence from the sister of the accused to the effect that she did not threaten the complainant - is not of that type. The complainant has not denied the existence of a fact or facts which, if established, would suggest that she was biased and so likely to lie about the principal factual issues, and the defence is not seeking to call evidence to rebut any such denial.

[11] It has been suggested that in sexual cases, at least where the only issue is consent, the collateral rule might be "relaxed". The cases relied upon: *R v Funderburk,*[9] *R v Lawrence*[10] and *R v Phillips,*[11] were all cases where the evidence sought to be led to contradict the complainant related to matters where "the difference between questions going to credit and questions going to the issue" was indeed "reduced to vanishing point".[12] In *Lawrence* the complainant had denied that he had previously threatened to wrongly report another fellow prisoner for sexual assault and it was held that evidence contradicting that denial should have been admitted. In *Funderburk* the appellant was charged with unlawful sexual intercourse with a 13 year old girl. She described the incident in terms of losing her virginity. The

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8 *Nicholls* at [286].

9 (1990) 1 WLR 587.

10 [2002] 2 Qd R 400.

11 (1936) 26 Cr App R 17.

12 See discussion in *Nicholls* at [286].

defence was that she had either fantasised or transposed her experience with other men. It was put to the complainant that she had told a witness that she had had sex with two other named men and had sought that witness's advice in relation to a pregnancy test. The complainant denied having that conversation with the witness and it was held that the evidence of the witness contradicting the complainant's denial should have been admitted. In *Phillips* the accused was charged with incest with his daughter. The case for the prosecution rested on the evidence of the complainant daughter and her sister. The accused had already been convicted of indecently assaulting the sister. The defence was that the story was a fabrication and the girls had been schooled by their mother. Each of the girls denied in cross examination that they had told a witness that they had lied at the earlier trial and were just saying what their mother told them to. It was held that the evidence of the witness contradicting those denials should have been admitted. It should be noted that the evidence in *Phillips* is not in any case an example of "relaxation" of the collateral rule as that evidence would have been admissible under the "corruption" exception, as, probably, would the evidence in *Lawrence,* and the evidence in question in *Funderburk* would seem to go to an issue in the case – namely whether the complainant "lost her virginity" to the accused as she said in evidence.

[12] The evidence sought to be led in this case is not of that kind. Indeed it seems to me to be the very sort of evidence which the rule is designed to exclude – that is to say evidence which would lead a jury to assessments of

credit between two witnesses the resolution of which would not resolve any material issue in the case and which, if there were no such rule, could lead to an endless enquiry with evidence being led to contradict the collateral witness on yet other collateral issues.[13]

[13] For these reasons, the evidence sought to be led from the accused's sister will not be admitted.

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13 The accused's sister, from whom the evidence is sought to be led, would definitely have a relevant "bias" by reason of her family relationship with the accused. If the exception meant that evidence could be led to contradict a "biased" witness on any collateral issue whatsoever, and not simply "evidence rebutting a challenged witness's denials of matters suggesting bias", then this would open the way to the calling of evidence to rebut anything the sister said in her evidence – no matter how unrelated to the issues – in order to attack her credit, and so on.