CITATION:	*The Queen v McMaster* [2019] NTSC 44
PARTIES:	THE QUEEN
	v
	McMASTER, Dean Stewart
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21812276
DELIVERED:	31 May 2019
HEARING DATE:	27 and 30 May 2019
JUDGMENT OF:	Kelly J

REPRESENTATION:

Counsel:

Crown:	D Dalrymple with L Hopkinson
Accused:	P Elliott

Solicitors:

Crown:	Director of Public Prosecutions
Accused:	

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

The Queen v McMaster [2019] NTSC 44
No. 21812276

BETWEEN:

THE QUEEN

AND:

DEAN STEWART McMASTER

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 31 May 2019)

Introduction

[1] The accused was charged with three offences arising from the same incident: one charge of indecent assault; one charge of performing an act of gross indecency without consent; and one charge of aggravated assault (the circumstance of aggravation being that the alleged victim was female). After the decisions embodied in these reasons were handed down, but before publication of the reasons, he pleaded guilty to one charge of aggravated assault and the Crown accepted that plea in full satisfaction of the indictment.

[2] The Crown case against the accused was that he kissed the complainant and groped her breast (the indecent assault) and subsequently put his hands down her underpants and rubbed the opening of her vagina (the gross indecency). The accused was alleged to have then threatened the complainant while holding her round the throat with one hand (the aggravated assault). (The agreed facts on which the accused pleaded guilty involved the accused entering the complainant's bedroom while she was asleep, lying beside her, and attempting to "cuddle" her – then desisting when she protested.)

[3] The charged conduct is alleged to have occurred after a farewell function at the Police Club in Katherine, seemingly held on the afternoon and evening of Friday 24 August 2001.

[4] On or around 28 October 2001 the complainant disclosed the incident to one of her supervising Sergeants, Dale Campbell ("Campbell"). Campbell emailed two of his superiors, Senior Sergeant Colin Smith ("Smith") and acting Officer in Charge of Katherine Police Station Debra Gabolinscy (nee Smith) ("Gabolinscy"). Gabolinscy spoke to the complainant on 29 October 2001. There is a dispute about what was said during that meeting. Thereafter, the complainant disclosed the allegations to a psychologist and to a number of other people in the course of making complaints about other matters concerning her treatment within the police force, but a formal

criminal investigation was not commenced until January 2018, as a result of which the present charges were laid.

[5] A number of evidentiary issues have arisen for consideration before the trial, some raised by the Crown and some by the defence.

Crown applications

Debra Gabolinscy

[6] After receiving the email from Campbell (referred to above), Gabolinscy spoke to the complainant on 29 October 2001. (Gabolinscy was at that stage OIC Smith). The complainant states that Gabolinscy told her to "take one for the team''. Gabolinscy took over a page of notes at or around the time of her conversation with the complainant and her account of the conversation as set out in the notes does not accord with the account of the complainant in some important respects. Gabolinscy also emailed Katherina Vanderlaan on 5 July 2002, summarising the conversation she had with the complainant on 29 October 2001, and this does not accord with the account of the complainant in those respects.

[7] If Gabolinscy is called to give evidence at the trial, the Crown has made application under UEA s 38 for leave to cross-examine her about her interaction with the complainant at the meeting between the two of them at the Katherine Police Station on 29 October 2001 (referred to above), including cross-examination which goes to her credit.

[8] UEA s 38 provides (inter alia):

> **Unfavourable witnesses**
>
> (1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:
>
> (a) evidence given by the witness that is unfavourable to the party; or
>
> (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or
>
> (c) whether the witness has, at any time, made a prior inconsistent statement.
>
> (2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).
>
> (3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

[9] UEA s 102 provides that credibility evidence about a witness is not admissible, subject to the exceptions in the following sections of the Act.

[10] The exception in s 103(1) provides that "the credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness". Section 103(2) provides that in making the assessment under s 103(1), the court must have regard to:

> (a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and
>
> (b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred,
>
> and may also have regard to any other relevant matter.

[11] Section 38(6) provides that in determining whether to give leave to cross-examine a witness under s 38(1), the Court must take into account:

> (a) whether the party gave notice at the earliest opportunity of the party's intention to seek leave; and
>
> (b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.
>
> The court may also consider any other relevant matter.

[12] UEA s 192(2) sets out the factors the Court must consider in determining whether to grant leave or make a direction (inter alia):

> (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and
>
> (b) the extent to which to do so would be unfair to a party or to a witness; and
>
> (c) the importance of the evidence in relation to which the leave, permission or direction is sought; and
>
> (d) the nature of the proceeding; and
>
> (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

[13] Turning first to the criteria under s 38, the complainant submits that, assuming she gives evidence in accordance with her statement, the evidence to be given by Gabolinscy will be unfavourable to the Crown and this is conceded by the defence. I agree. The complainant says that at the meeting with Gabolinscy, when she spoke to Gabolinscy about the incident, Gabolinscy said to her, among other things that "it happens to all of us" and that she should "take one for the team". The complainant also gives this as one reason why she did not make a formal complaint of criminal sexual

assault at an earlier date. Gabolinscy denies saying this and gives a different account of the meeting from the complainant.

[14] As only one of the three criteria set out in s 38(1) needs to be satisfied before leave to cross-examine a witness may be given, the precondition for the grant of leave to cross-examine the witness has been fulfilled.

[15] The defence relies on s 38(6) and contends, first, that the Crown did not give notice at the earliest opportunity of its intention to seek leave to cross-examine Gabolinscy, pointing out that its submissions on the issue were served on 17 May 2019, a little over two weeks from the beginning of the trial and the statement of Gabolinscy was made in December 2017 and the preliminary examination brief was served before June 2018. I do not agree that adequate notice has not been given. It would have been preferable for notice to have been given earlier, but I do not think it is entirely unreasonable for the prosecutor to turn his mind to questions of this nature in the weeks leading up to the trial as preparation proceeds.

[16] Considering the matter in s 38(6)(b) (the matters on which, and the extent to which, the witness is likely to be questioned by another party) the defence concedes that it will not be attempting to discredit Gabolinscy, but contends that "this consideration is unimportant in the overall matrix of this particular case". I disagree. The complainant's evidence in relation to what occurred at the meeting will be tested in cross-examination by the defence. If the Crown is not given leave to cross-examine Gabolinscy, her alternative

version of events will not be tested at all. Gabolinscy's evidence may be important to an assessment by the jury of the complainant's credit, and also her stated reasons for not making a formal complaint which would have led to the laying of charges at an earlier time.

[17] Looking at the relevant matters in s 192(2), I agree with the contention by the Crown that giving leave to the Crown to cross-examine Gabolinscy will not add unduly to the length of the trial. Nor do I think it will be productive of any unfairness to the defence. (Rather, I think it would be unfair to the Crown to allow Gabolinscy's evidence about the meeting to go in untested.)

[18] Insofar as leave is sought to cross-examine Gabolinscy on matters related to credit, provided such cross-examination is related to the evidence being tested, I think leave should be given. I do not see how cross-examination on that topic could meaningfully proceed without delving in to issues of credit.

[19] Ruling: If Gabolinscy is called as a witness, the Crown has leave pursuant to UEA s 38 to question her as if cross-examining her about her interaction with the complainant on 29 October 2001, and for such questioning to include questioning about matters relevant only to the witness's credibility.

[20] There is doubt as to whether Gabolinscy will be called to give evidence as she is out of the country. If she is not called to give evidence, the Crown seeks leave to tender two documents: an internal memo dated 23 October 2001 written by her and a printout of an email dated 28 October 2001, endorsed with her handwritten notes dated 29 October 2001. Defence

counsel has indicated that this will be consented to. By consent, the Crown will also have Gabolinscy's statement dated 4 December 2017 read onto the record.

Natalie McMaster/Mauricio Perez-Ruiz

[21] The Crown seeks an order that defence counsel not be permitted to elicit from Natalie McMaster in cross-examination evidence regarding conversations she says she had with the complainant's then husband Mauricio Perez-Ruiz ("Perez-Ruiz") and in particular statements attributed to Perez-Ruiz to the effect that "he didn't know anything about it". Perez-Ruiz is now deceased.

[22] At the time of the alleged offences, Natalie McMaster was the accused's wife. They have since separated. At the time, she and the accused had a child who was an infant and Natalie McMaster was pregnant. An audio statement was taken from Natalie McMaster in relation to this matter on 18 January 2018 (approximately 17 years after the events). In that statement, Natalie McMaster says that the accused attended a social function at the Katherine Police Station, and the next morning the accused told her he had got a lift home from the club from the complainant. She also says that the accused spoke to her "possibly a couple of months later" about a complaint which had been made against him by the complainant. She says that when he told her of the complaint, he disclosed to her that he and the complainant had engaged in a consensual sexual interaction.

[23] In her statement, Natalie McMaster says that she had a phone conversation with Perez-Ruiz, followed by a face-to-face conversation. The relevant part of the recorded statement is as follows.

> Q. Do you have any memory or recollection of speaking to Sam *(ie the Complainant)* about it at all?
>
> A. No. I didn't speak to Sam. I rang her husband.
>
> A. Cause um a little bit possibly cranky and vindictive at the time.
>
> Q. Okay.
>
> A. Um I'm not sure how I got in contact with him.
>
> Q. Mmmm.
>
> A. I'd never met him before so in the time that they'd been um in Katherine as a couple I'd never met him. I'd seen her and her child quite a bit um but he had never been to the club and never attended anything sort of social that um she'd been at.
>
> Q. Mmmm.
>
> A. So, I'm not exactly sure how I got his number but I gave him a phone call.
>
> Q. Mmmm.
>
> A. And um I guess that was when things were sort of getting a bit pear-shaped between Dean and I and I thought it was pretty unfair that she got to possibly get away with things so um I contacted him and asked him if Sam had said anything to him and he didn't know anything about it. So um he came around to the house and the two of us sat down and I had a chat to him about you know what apparently went on and um you know the fact that this could have possiba…. I don't know whether this was a one off thing or whether you know it was building up to some sort of relationship that didn't happen. Um but yeah he knew nothing about things and you know sort of left my place quite angry with Sam as well about you know the situation. So no. I haven't spoken to Sam.

[24] The complainant says that she had a telephone conversation with her husband the morning after the alleged offending and that she disclosed to him what had happened to her. She also says that at some time after she had met with Gabolinscy on 29 October 2001 her husband phoned her and told

her he had received a phone call from the wife of the accused in which Natalie McMaster asked if he knew what the complainant had done; that she was "asking for it"; that she was "that sort of a girl" and that she was "a slut". She says that her husband said to her that he told Natalie McMaster he knew what had happened and that he had defended her.

[25] The Crown does not intend to adduce through Natalie McMaster evidence of her conversation with the complainant's deceased husband and objects to such evidence being adduced through cross-examination of Natalie McMaster on the basis that the evidence is inadmissible hearsay.

[26] The Crown also submits that the evidence should not be admitted pursuant to UEA s 65.

[27] UEA s 65 provides that in a criminal proceeding, if a person who made a previous representation is not available to give evidence about an asserted fact the hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if (inter alia) the representation:

- was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication [s 65(2)(b)]; or
- was made in circumstances that make it highly probable that the representation is reliable [s 65(2)(c)].

[28] It is common ground that Perez-Ruiz is deceased and so not available to give evidence. The Crown submissions in relation to s 65 assert that the

statement of Natalie McMaster was not made when the events were fresh in her memory, rather but some 17 years after the fact, and also that it was not made in circumstances that make it highly probable that the representation is reliable. (Natalie McMaster was made aware at the commencement of the audio statement that the accused (the father of her children) was facing a criminal allegation made by the complainant and, the Crown submits, had a motive to provide NT Police with information that would undermine the credibility of the complainant.)

[29] However, the criteria in s 65 are addressed to the representation of the person who is not available to give evidence (in this case the deceased husband, Perez-Ruiz), not the person giving evidence that she heard the representation (Natalie McMaster).

[30] Defence counsel submitted that the representation was contemporaneous with the fact – ie that at the time of the conversation, Perez-Ruiz "knew nothing about things" (referring to any sexual impropriety between the complainant and the accused). It therefore qualifies as a "representation that was made when … the asserted fact (ie his lack of knowledge) occurred". I agree.

[31] Defence counsel also contended that the representation by Perez-Ruiz to Natalie McMaster was also "made in circumstances that make it unlikely that the representation is a fabrication". I do not agree with that contention. Assuming, as I must for the purpose of assessing admissibility, that the

evidence of Natalie McMaster about the conversation is accepted, there is nothing in the circumstances of the alleged conversation that make it unlikely that the representation was a fabrication – the onus being on the defence as the party who wishes to adduce the evidence to establish this. The representation is said to have been made in a phone call and a chat at Natalie McMaster's house in which Natalie McMaster asserted to Perez-Ruiz that there had been some sort of consensual sexual activity between his wife and her husband. There is nothing in these circumstances which makes it likely that the husband would be frank and honest in his responses to the woman's assertions – that is to say, would make it unlikely that the representation (that "he knew nothing about it") would be a fabrication. (The relevant circumstances also include the fact that Perez-Ruiz's wife (the complainant) had just made a complaint to her superiors of a non-consensual sexual assault and Natalie McMaster's conversation with Perez-Ruiz was directed to "whether this was a one off thing or whether you know it was building up to some sort of relationship that didn't happen".) As Mr Dalrymple for the Crown pointed out, the circumstances were complex and there may have been many reasons why a husband, in those circumstances, might say he knew nothing about the subject under discussion.

[32] I do not think that the evidence of Natalie McMaster about representations made to her by the complainant's deceased husband qualify for admission under s 65(2)(b).

[33] Turning to s 65(2)(c), I do not think it can be said that the representation was made in circumstances that make it highly probable that the representation is reliable for the same reason as I do not accept that the circumstances make it unlikely that the representation is a fabrication.

[34] Ruling: Defence counsel will not be permitted to adduce evidence through Natalie McMaster of representations made to her by the complainant's deceased husband.

Megan Duncan

[35] The Crown wishes to adduce evidence from Megan Duncan ("Duncan") that because she was an injured female probationary constable when she was sent to Katherine in 1999, she struggled to obtain sufficient operational experience to progress through her probation, and that female officers were more likely to be allocated Front Counter, Communications and Watch House shifts at that time. The Crown also wishes to adduce evidence from Duncan that, in her assessment, the complainant was in the same situation after she started at Katherine Police Station in 2001, and that she seemed to get a hard time from members in the station from the time she started.

[36] Defence objects to this evidence being adduced on the ground that the evidence "simply reflects the experience of this witness, and goes to no fact in issue, and is capable of being used against the accused, who was not the officer-in-charge of the Katherine Police Station, nor, on the evidence,

responsible for any of the culture of the Katherine Police Station at the relevant times".

[37] I do not agree that the evidence is capable of being used against the accused in the manner suggested. I intend to assess its admissibility on the ground of relevance: could this evidence rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding (noting that evidence is not taken to be irrelevant only because it relates only to the credibility of a witness)?

[38] The Crown submits that this evidence is relevant to the jury's understanding of the complainant's challenges as an injured junior probationary constable commencing service at the Katherine Police Station in 2001, information which is relevant to their assessment of her vulnerability and why she might not make a formal complaint after experiencing the alleged offending. I accept that the evidence is relevant for this purpose and therefore admissible.

[39] Ruling: The objection to the evidence of Duncan is disallowed, except that the witness will not be permitted to give opinion evidence. Her evidence should be restricted to her own circumstances, and what she observed of the complainant's circumstances and factual evidence about the duties assigned to women in general.

Jan Isherwood-Hicks

[40] The Crown seeks to adduce evidence from a psychologist, Jan Isherwood-Hicks, that:

(a) the complainant came to see her for an appointment on 3/11/04 in accordance with an arrangement with Police whereby Police members could self-refer, with Police being billed for the consultation;

(b) during that appointment the complainant disclosed that she had been sexually assaulted by a sergeant who had been her boss at the time, and identified the accused;

(c) the complainant told her that during the assault the accused had grabbed her around the neck and had threatened to kill her if she spoke up about the incident; and

(d) the complainant said that she was about to transfer to the Mounted Police in Darwin in 6 weeks, and would be pleased to be away from "the network of Katherine" and the friends of the accused.

[41] At the hearing of the voir dire, counsel for the Crown confirmed that the Crown does not intend to adduce evidence of later, ongoing treatment of the complainant relating to other issues she had with the police force, just the first appointment in 2004 in which the complainant made the above disclosures.

[42] The defence objects to the admission of any of this evidence. The defence submissions in relation to this objection are as follows:

> The complainant has made complaint over many issues regarding her time in the police force, from being bullied during her time as a trainee at the police college, the work that she was made to undertake while at Katherine, the probationary report done by the accused, among others. It is submitted that it is dangerous to allow the treatment by a psychologist evidence to be led by the Crown, because unless it is intended to support her allegation of sexual assault by the accused it

> has no relevance, but if it is admitted, all of the other matters complained of by the complainant from the time of the alleged assault will need to be canvassed, and the trial will be unnecessarily prolonged. Furthermore, the complainant did not have her first visit to Dr. Isherwood-Hicks until November 2004, some three and a half years after the alleged assault.

[43] Assuming it to be relevant, the evidence would be admissible under UEA s 66 which provides that, in a criminal proceeding, where a person who made a previous representation is available to give evidence about an asserted fact (and does give evidence) [s 66(1) and (2)], the hearsay rule does not apply to evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation [s 66(2)].[1]

[44] The conversation took place about three years after the alleged assault occurred. However, given the traumatic nature of the assault, I think it can be concluded that it would still have been "fresh in the mind" of the complainant.

[45] Therefore, unless it is excluded on discretionary grounds, the evidence of the making of the representation is admissible for a hearsay purpose – ie to prove the existence of a fact (that the assault occurred and the details of that

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1 (2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:

(a) the nature of the event concerned; and

(b) the age and health of the person; and

(c) the period of time between the occurrence of the asserted fact and the making of the representation.

assault) that it can reasonably be supposed that the person intended to assert by the representation [s 59(1)].

[46] That being the case, the evidence (ie the representation) is relevant. It is direct evidence from the complainant that the assault occurred and could therefore rationally affect the assessment of the probability of the existence of a fact in issue (namely whether the assault occurred) [s 56].

[47] It would also be relevant to the complainant's credit – that is to say whether the details she provided to the psychologist are consistent with what she told other witnesses closer to the event and with her evidence in court.

[48] The relevance of the representation for a hearsay purpose needs to be distinguished from the relevance of the fact that she made the representation.

[49] The question which then arises is whether the evidence should be excluded under UEA s 135 which provides:

> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
> (a) be unfairly prejudicial to a party; or
> (b) be misleading or confusing; or
> (c) cause or result in undue waste of time.

[50] The representation itself (used for the hearsay purpose as evidence of the truth of what was asserted) is high in one sense. However, it is low in

another because that evidence will be given again, in any event, at the trial and the hearsay statement adds little or nothing to that evidence.

[51] The probative value of the fact that the complainant made the representation to the psychologist in 2004 is, in my view, slight to moderate, as it may assist the jury to assess the credibility of the complainant by whether or not her allegations have been consistent over time.

[52] Looking at the factors in s 135, there is no suggestion that the evidence might be misleading or confusing [s 135(b)]. Nor has the defence pointed to any potential prejudice that might arise as a result of the evidence being given. The basis on which the defence seeks to exclude the evidence is that it may result in undue waste of time. The defence contends that the complainant has made complaint over many issues regarding her time in the police force, and that if this evidence is admitted, all of the other matters complained of by the complainant from the time of the alleged assault will need to be canvassed, and the trial will be unnecessarily prolonged.

[53] I do not see that it follows that letting in evidence of what the complainant told the psychologist about the alleged assault would necessitate evidence being adduced about all of the other matters complained of by the complainant about her treatment in the police force. When pressed, defence counsel could not indicate to what extent the admission of this evidence would affect the extent to which he intended to raise the other complaints made by the complainant in his cross-examination of her.

[54] Ruling: The evidence proposed to be led from Jan Isherwood-Hicks will be admitted.

Re: cross-examination of the complainant about her previous employment

[55] The defence has indicated that it will seek to elicit evidence of the complainant's work as a lingerie and topless waiter as a teenager prior to joining the police force. The Crown seeks an order that no cross-examination of the complainant in relation to her past casual employment as a lingerie waiter be permitted.

[56] In written submissions, counsel said that the Crown anticipates that Smith will give evidence that the accused told him that sometime during the evening of the alleged assault, the complainant had indicated that she had previously been an exotic dancer and that there was some sexual innuendo to their conversation.

[57] The Crown therefore anticipates that defence counsel will cross-examine the complainant on whether she told the accused she was an exotic dancer on the evening of the alleged offending, and whether there was any sexual innuendo to her conversation with the accused. The Crown further anticipates that the complainant will deny that she said any such thing and that defence counsel will then cross-examine her about whether she had in fact worked as a lingerie and topless waiter.

[58] The Crown objects to this line of cross-examination as irrelevant. The Crown relies on the NSW decision in *White*[2] in which the Court of Criminal Appeal held that evidence that the complainant in a rape case had had sexual intercourse with a body builder. (The complainant had given evidence at the committal that she had told the accused in a humorous manner that her boyfriend had found her having sex with another man.) The court held:[3]

> The only basis on which the cross-examination might have been permissible at common law would have been that what was relevant was not the fact of the complainant's intercourse with the body builder, rather, the fact that she was discussing the matter with the appellant on the beach and over coffee shortly before the intercourse took place. If it were relevant, the relevance would have been to the issue of consent.

[59] This case is of little relevance to the present case. It concerned a New South Wales provision which prohibited a complainant in sexual offence proceedings from being questioned about prior sexual activity except in circumstances not relevant to that proceeding.

[60] A similar provision can be found in s 4 of the *Sexual Offences (Evidence and Procedure) Act* which provides:

> (1) In an examination of witnesses or a trial, whether or not it relates also to a charge of an offence other than a sexual offence against the same or another defendant, except with the leave of the court, evidence shall not be elicited or led, whether by examination in chief, cross-examination or re-examination, relating to:
>
> (a) the complainant's general reputation as to chastity; or
>
> (b) the complainant's sexual activities with any other person,

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2 (1989) 46 A Crim R 251 at 257 to 259

3 at p258

and the leave of the court shall not be granted unless the court is satisfied that the evidence sought to be elicited or led has substantial relevance to the facts in issue.

[61] Defence counsel submits that the evidence is relevant in this way:

(a) The evidence of Smith will be that the accused told him the complainant said to him at the function that she used to work as an exotic dancer: the complainant denies this.

(b) It is possible that the accused was mistaken about what the complainant said to him: perhaps she said she worked in a similar field and he was mistaken or forgot what she said.

(c) Being a lingerie or topless waiter is a similar occupation to an exotic dancer as both involve exposing intimate parts of the body as part of the job.

(d) Defence counsel should be entitled to cross-examine the complainant as to whether she said "something similar" at the function – for example that she used to work as a lingerie or topless waiter.

(e) If she denies that, he should be permitted to ask if she had in fact worked in such an occupation. That, he submits would be relevant to the jury's assessment of whether the accused simply made up the story of what the complainant said at the function: they are more likely to believe that the complainant said something about her prior-employment if what she is alleged to have told him is true.

[62] The Crown contends that the evidence is not relevant in this way. In the alternative, if it is found to be relevant to credit, the Crown relies on UEA s 102 which provides that credibility evidence about a witness is not admissible, and s 103 which provides the following limited exception to that rule:

> The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.

[63] The Crown submits that this evidence would not be admissible under s 103 because it could not substantially affect the assessment of the complainant's credit.

[64] I do not agree that the evidence is relevant in the way contended by the defence because the essential step in the reasoning at point (b) involves hypothetical speculation. The defence has pointed to no evidence that the complainant may have said anything to the accused other than the evidence of Smith that the accused told him the complainant had said she used to work as an exotic dancer. Evidence that she used to work as a lingerie or topless waiter is irrelevant to the jury's determination of whether or not to accept that she said this.

[65] If I am wrong, and the evidence has some relevance to credit, I agree with the Crown's contention that the evidence would be excluded by the operation of UEA s 102, and does not come within the exception in s 103. It could not substantially affect the assessment of the complainant's credit.

(a) The fact that she once worked as a lingerie/topless waiter does not invite an inference that she told this to the accused on the night of the farewell party – let alone that she told him she had been an exotic dancer.

(b) Defence counsel submitted that it was just fanciful to suppose that the accused made up that the complainant said she had been an exotic dancer, when in fact, she had been a topless or lingerie waiter – that it was just fanciful that there could be such a coincidence. That being the case, he submitted it was "beyond belief" that the existence or nonexistence of such a coincidence doesn't substantially affect the credit of the person who denies saying that she was an exotic dancer. I reject that reasoning. First, it does not seem to me to follow as a matter of logic. Second, if the issue were to be raised before the jury, the complainant would give evidence that she had told other police officers in Katherine that she had once worked as a lingerie waiter before the accused had the conversation in question.

[66] The Crown submits that, if the evidence were to be found to be relevant in the way described by the defence, the evidence ought in any event be excluded under s 135 as its potential prejudice to the Crown case substantially outweighs its probative value. In my view it has no probative value. However, if it had (for example if the complainant actually had worked as an exotic dancer and the defence wished to cross-examine her about that) then, although even then its probative value would be slight, in

my view so would its potential prejudice and that prejudice could not be said to substantially outweigh its slight probative value.

[67] Ruling: Defence will not be permitted to cross-examine the complainant about her former employment as a lingerie and topless waiter.

Defence objections

[68] I do not intend publishing written reasons for each of the rulings made in relation to the defence objections to various paragraphs of the statements of the various witnesses. These can be found in the transcript of the voir dire held on Thursday 30 May. I do, however, make the following general observations.

[69] Many, if not most, of the objections concerned expressions in the statements in which witnesses commented on the demeanour of either the accused (eg "sheepish and apologetic") or the complainant (eg "she was a very guarded person when … working in the property office in Katherine"). In relation to all of these objections, I ruled that the witnesses could give evidence of their observations of what the person said and did and his or her interactions with other people, but not the witnesses' conclusions, opinions or beliefs.
