R v Adrian McNamara [2014] NTSC 53

PARTIES:	The Queen
	v
	McNamara, Adrian
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21352430
PUBLISHED:	18 NOVEMBER 2014
HEARING DATES:	27 – 31 OCTOBER 2014
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW – Evidence – Admissibility – Tendency evidence – Sexual interest in children – State of mind of accused – Evidence not of "significant probative value" – Evidence more prejudicial than probative – No connection between evidence and relevant state of mind under *Criminal Code* (NT) and *Criminal Code* (Cth) – Evidence not admitted.

CRIMINAL LAW – Evidence – Admissions – Formal ruling unnecessary.

CRIMINAL LAW – Evidence – Form of evidence – Evidence as written word – Jury to read text rather than have text read aloud.

Child Care and Protection Act (NT), s 34.
Criminal Code (Cth), s 473.1, 474.19(1)(a)(iii).
Criminal Code (NT), s 31, 125B(1).
Evidence (National Uniform Legislation) Act (NT), s 85(1)(a), 85(1)(b), 97(1)(a), s 97(1)(b), 99, 137.

Qualiteri v The Queen (2006) 171 A Crim R 463; *R v Johnston* [2012] 6 ACTLR 297, referred to.

REPRESENTATION:

Counsel:

Prosecution:	J. Johnston
Accused:	R. Goldflam

Solicitors:

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

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

R v McNamara [2014] NTSC 53
No. 21352430

BETWEEN:

THE QUEEN
Plaintiff

AND:

MCNAMARA, ADRIAN
Defendant

CORAM: BLOKLAND J

REASONS FOR RULINGS

(Published 18 November 2014)

Introduction

[1] These are reasons for rulings made at the commencement of this short trial.

[2] The indictment contained 6 counts: counts 1 and 2 charged that the accused produced "child abuse material", as defined by s 125B(1) of the *Criminal Code* (NT), and counts 3 to 6 charged that the accused used a carriage service to publish "child pornography material", contrary to s 474.19(1)(a)(iii) of the *Criminal Code* (Cth).

[3] Most of the evidence was not in dispute. The formal admissions of fact made by the accused included admissions that he produced the documents and stories, "Erotica.docx" and "Shelf Packer.docx"; that he uploaded a

series of documents entitled “Eleventeen” Parts 1 to 4 to the website “Loliwood Studios”; and that the documents entitled “Eleventeen” Parts 1 to 4 were written by him and formed part of the document “Erotica.docx”.

[4] The alleged “child abuse material” and “child pornography material” comprised text, apparently fiction, written by the accused.

Tendency Evidence

[5] The Crown filed a “Notice of Tendency Evidence” pursuant to ss 97(1)(a) and 99 of the *Evidence (National Uniform Legislation) Act* (NT), seeking to adduce certain evidence for the purpose of showing the accused possessed a particular state of mind, namely a sexual interest in children. I did not admit the evidence.

[6] It was argued the proposed tendency evidence, said to establish a sexual interest in children, was relevant to proof of the accused’s state of mind at the time of committing the offences, namely intent or foresight as to production of “child abuse material”, with respect to counts 1 and 2, and knowledge or recklessness as to “child pornography material”, with respect to counts 3 to 6. Counsel for the prosecution argued the evidence would strengthen the inference that the accused knew or was reckless about the quality of the material, the subject of the charges. More particularly, it was argued the proposed evidence was highly probative of the accused being aware of the substantial risk that the protagonist in the stories was a child.

[7] The tendency evidence proposed included internet search terms previously used by the accused, as well as admissions from which a sexual interest in young girls could be inferred.[1] I proceeded on the basis the proposed evidence had the capacity to prove the sexual interest as alleged.

[8] Although I readily accept a proven sexual interest in children will in many cases have significant probative value in the proof of a charge of offending against a child,[2] I was unable to find the clear path of reasoning implied by the expression "significant probative value", pursuant to s 97(1)(b) of the *Evidence (National Uniform Legislation) Act* (NT), between the evidence to be adduced and the state of mind to be proven in respect of these particular charges.

[9] The mental state to be proven with respect to counts 1 and 2 was, relevantly, an intention to describe or represent a child in a manner likely to cause offence to a reasonable adult. If not intended, the mental state regarded the foresight of causing such offence, as a possible consequence of the description or representation, unless an ordinary person similarly circumstanced would have appreciated the risk of causing offence to a reasonable person, and would not have proceeded with the production of the material.[3]

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[1] Notice of Tendency Evidence, [5]-[7].
[2] *R v Johnston* [2012] 6 ACTLR 297, [47]-[50] per Burns J; *Qualiteri v The Queen* (2006) 171 A Crim R 463.
[3] *Criminal Code* (NT), s 31 read with s 125B(1). The criminal responsibility for this offence is governed by Part II of the *Criminal Code* (NT).

[10] Counts 3 to 6 required proof of knowledge or recklessness with respect to material representing, describing or implying a person is under 18 years of age, in a way that reasonable persons would regard as being, in all of the circumstances, offensive.[4]

[11] Although there may be some logical connection between proof of a sexual interest in children and proof of an intention to describe or depict a person under 18 years of age, there is no logical connection with proof of intention, knowledge or foresight to cause offence to a reasonable person with such material. That is so whether considering the regime of criminal responsibility under Part II of the *Criminal Code* (NT) or under the *Criminal Code* (Cth). In this particular instance, the proposed evidence did not possess the quality of "significant probative value", as required by s 97 of the *Evidence (National Uniform Legislation) Act* (NT). It did not inform the question of whether the accused knew or was reckless about a reasonable person regarding the material as offensive, or that he intended or foresaw the same.

[12] In as much as it may have assisted proof of an intention to describe a person under 18 years of age, in my view the probative value of the proposed evidence was outweighed by the danger of unfair prejudice.[5] The proposed evidence was highly prejudicial, in circumstances where the inference could readily be drawn that the material described a person under the age of 18

[4] *Criminal Code* (Cth), s 473.1; 'Definitions'.
[5] *Evidence (National Uniform Legislation) Act* (NT), s 137.

years. There was direct evidence on this point. Even if admitted, use of the proposed evidence would be restricted to proving whether the accused intended, knew, or was reckless to describing a person in a story as under 18 years of age. This would have added an unnecessary complication to the jury's consideration of the evidence. The threshold for receiving tendency evidence is high. In the context of charges of this kind, as opposed to offending directly against children, the threshold is not met.

[13] In making this ruling, I disregarded the submission on behalf of the accused that persons charged with offences against children inherently suffer prejudice before juries and that sexual interest evidence effectively magnifies the prejudice. This is not a proposition I was prepared to entertain at face value. Current published research in comparable jurisdictions indicates propensity evidence is one of three variables that predict conviction; however, overall conviction rates are low.[6]

Exclusion of Admissions

[14] A *voir dire* was held but not completed with respect to proposed evidence from Ms Jacqui Daniels, an Advanced Practitioner, employed by the Northern Territory Department of Children and Families, attached to the Child Abuse Task Force. Her statement included summaries of certain conversations alleged to have taken place between herself and the accused.

[6] Suzanne Blackwell and Fred Seymour, 'Prediction of Jury Verdicts in Child Sexual Assault Trials' (2014) 21(4) *Psychiatry, Psychology* and *Law* 567, 573; noting New Zealand conviction rates stand at 37.5% after trial.

The conversations took place without caution and when the accused was in custody. The conversations were not recorded, nor confirmed in any subsequent recorded conversations. It was submitted the witness was exercising powers under s 34 of the *Child Care and Protection Act* (NT).[7] A compelling case for exclusion was made during the course of the *voir dire*; however, I requested evidence be produced that would assist in determining whether the witness was properly regarded as an "investigating official", or a person who the accused could have regarded as "capable of influencing the decision whether a prosecution… should be brought or continued".[8] Arrangements were made by the prosecutor for the witness' attendance but ultimately she was not called. A formal ruling became unnecessary.

Form of the Evidence

[15] Counsel for the prosecution indicated an intention to have the texts, the subject of the charges, read aloud by a detective who had investigated the matter. I ruled that members of the jury should read the text themselves, with sufficient time given to them during the course of the trial to complete that task. I was concerned that there may be a difference in how the material was perceived by the jury members between hearing it read aloud, as opposed to reading it themselves. As the charges involved text to be read, it was the impact on the reader of the stories, reading it for him or

[7] See, *Child Care and Protection Act* (NT), s 34(3) whereby a person answering 'inquiries' is compelled to give information.
[8] *Evidence (National Uniform Legislation) Act* (NT), ss 85(1)(a) and 85(1)(b).

herself that was relevant, not the impact on a listener, hearing the stories read to him or her.

[16] The trial proceeded accordingly.

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