UNSW CENTRE FOR CONTINUING LEGAL EDUCATION

CRIMINAL LAW PRACTICE & PROCEDURE SEMINAR

FRIDAY 5 NOVEMBER 2010

TRIAL OF SEXUAL ASSAULT CHARGES – AN UPDATER

Introduction

Anyone who practises in this area, the trial upon indictment of offences set out in Division 10 of Part 3 of the *Crimes Act 1900*, would have to agree that these are difficult trials in which to appear.

The law, particularly as to procedure, is constantly being revisited as society, through its elected representatives in Parliament, seeks to find the right balance between: the right and powers of the prosecution; the rights of accused persons facing these serious crimes which not only carry serious penalties, which are usually imposed, but also by their very nature seriously impugn the character of any person upon only being charged; the rights of complainants; and the rights of the media to report upon what are often matters that are very interesting the public.

As a result the relevant legislation changes regularly and has become more and more complex, and detailed, as it changes. Also the jurisprudence in the appellate courts, mainly the Court of Criminal Appeal, is constantly being developed.

There is of course a great deal of material readily available upon the conduct of sexual assault trials – not only the excellent Law Book (Thomson Reuters) and Butterworths (Lexis Nexis publications, but also for free on the Internet. See e.g. the various Bench Books published by the Judicial Commission of NSW, and particularly relevant to this topic the Sexual Assault Handbook.

The Bench Books are a fantastic resource, containing a regularly updated section entitled 'Recent Law', the approved directions for trial judges, and also learned articles on both legal

and non-legal topics authored by senior practitioners in the field, including current trial and appeal judges and academics.

This learned body of commentary contains in it somewhere some guidance to just about every legal issue that can arise in these trials.

However, I have been involved recently in two sexual assault matters outside the usual mould. One of those was conducted in what can be fairly described as a storm of publicity, and the other raised allegations going back to the 1970s with multiple complainants and issues of tendency and coincidence evidence.

These recent briefs forced me into a self-imposed updater course, and perhaps I can pass on some of that recently acquired, or refreshed, knowledge in this paper.

Criminal Procedure Act 1986

The current statutory delineation of how the balance is to be struck in NSW between the various competing interests referred to above is found mainly in Part 5 of Chapter 6 of the *Criminal Procedure Act* – which is entitled *'Part 5 Evidence in sexual offence proceedings'.*

Chapter 6 of that Act deals with *'Evidentiary Matters'* and Division 1 of Part 5 of Chapter 6 contains ss 290-294D under the heading *'Evidence in certain sexual offence proceedings'*, those proceedings being of course basically the prosecution of serious sexual assaults.

Division 2 of Part 5 of Chapter 6 contains ss 295-306 under the heading *'Sexual assault communications privilege'*.

Division 3 of Part 5 of Chapter 6, ss 306A-306G, operating from 12 May 2005, deals with retrials of sexual offence proceedings ordered in a successful appeal against conviction, and allows the evidence of the complainant to be tendered afresh in recorded form, subject to notice in advance and other detailed provisions, and deals with the re-calling or not of the complainant.

Division 4 of Part 5 of Chapter 6, ss 306H-306L, operating from 1 January 2007, deals with 'subsequent trial' of sexual offence proceedings when a trial of same has been discontinued for whatever reason (e.g. a hung jury, or aborted trial), and again allows the evidence of the

complainant to be tendered afresh in recorded form, subject to notice in advance and other detailed provisions, and again deals with the re-calling or not of the complainant.

I confine my brief remarks in this paper however to some of the provisions in Divisions 1 and 2 only.

Section 291C – Media access to proceedings held in camera

Sections 291, 291A or 291B set out powers of the court to order that all or parts of the proceedings in the trial be held in camera. Section 291C however allows the media access in certain circumstances to that evidence. It provides:

> **291C Media access to proceedings held in camera**
>
> (1) If a complainant gives evidence in proceedings in respect of a prescribed sexual offence from a place other than the courtroom by means of closed-circuit television facilities or other technology that enables communication between that place and the courtroom (whether under section 294B or Part 6), and the proceedings, or the part of the proceedings concerned, are held in camera under this Division, a media representative may, unless the court otherwise directs, enter or remain in the courtroom while the evidence is given from that other place. This subsection does not apply to proceedings in respect of an offence under section 78A or 78B of the *Crimes Act 1900*.
>
> (2) The fact that proceedings in respect of a prescribed sexual offence, or any part of such proceedings, are held in camera under this Division does not prevent the court from making such arrangements as the court considers reasonably practicable to allow media representatives to view or hear the evidence while it is given, or to view or hear a record of that evidence, as long as the media representatives are not present in the courtroom or other place where the evidence is given during the in camera proceedings.
>
> **Note.** For example, the court may permit media representatives to view the proceedings from a place other than the courtroom by means of closed-circuit television facilities.
>
> (3) In this section:
>
> ***media representative***, in relation to any proceedings, means a person engaged in preparing a report of the proceedings for dissemination through a public news medium.

The other sections of the *Criminal Procedure Act* referred to, ss 294B and Part 6 (which governs the giving of evidence by vulnerable persons, a whole new topic) are clearly set out and pretty self-explanatory and provide for the complainant or other witness, if vulnerable, to give evidence beamed into the courtroom by CCTV. Also, by s 294D of the *Criminal Procedure Act*, operational from 28 April 2010, a reference to a complainant in Division 1 includes a reference to another *'sexual offence witness'* against whom it is alleged that the

accused has committed a prescribed sexual offence although uncharged in respect of same in hat particular trial.

Sections 78A and 78B of the *Crimes Act* deal with incest offences – i.e. sexual intercourse with a close family member at or above the age of 16 years.

The application of s 291C is of course still subject to any non-publication orders made by the court under s 292 of the *Criminal Procedure Act*.

Obviously, in-camera evidence often contains material the subject of non-publication orders. The way s 291C works then is that professional media representatives (see the definition above, which although a bit fuzzy is obviously designed to cover working journalists) are assumed to be more trustworthy than other members of the public and able to listen to in-camera evidence, whilst still abiding by any non-publication orders.

Section 292 – Publication of evidence may be forbidden in certain circumstances

This section has been around for quite a long time, originally being s 578 of the *Crimes Act*, and is fairly self-explanatory. Subsection 292(3) specifically provides for it to be an offence to breach any non-publication order made by the court.

The media has standing to be heard in the making of any such order, and often in a trial of high interest, this right to be heard is exercised. Media organisations retain legal representatives who are quite able, from my recent experience and also from other matters in which I have appeared over the years, to gear up and appear within less than an hour of the making of an order that they wish to challenge.

The trial judge makes decisions upon media applications seeking the modifying or vacating of a non-publication order in the light of the practical realities of the trial at the time. The Crown, or the defence can of course be heard in that application as well. If the complainant is involved in the order, they can be also heard in their own interests, although if there is no separate representation for them or nearby on call, usually the Crown Prosecutor feels compelled to make submissions in their interest.

Any order of the trial judge is able to be reviewed by the Supreme Court, or Court of Appeal if the trial judge is sitting in the Supreme Court, in an application for prerogative or

declaratory relief – see *Nationwide News Ltd v District Court of NSW* (1996) 40 NSWLR 486.

Section 293 – Admissibility of evidence related to sexual experience

This section is fairly self-explanatory and has evolved from the original s 409B of the Crimes Act enacted in 1981.

In the intervening nearly 30 years there has been a wealth of jurisprudence and learned articles generated and I do not believe that I can really add much to what can be researched fairly quickly through the various resources available.

All I do comment however is that in a hard fought trial, almost invariably this section comes into play to some extent. Each case turns on its own facts, but practitioners do really need to study this section carefully in any trial of any complexity.

Division 2 of Part 5 of Chapter 6 - *'Sexual assault communications privilege'.*

Again, these provisions, ss 295-306 in the *Criminal Procedure Act*, have been around in one form or another for some time. They have evolved from provisions originally incorporated into the *Evidence Act*, in NSW only, in 1997 as Division 1B of Part 3.10.

In 1999 they were taken out of the *Evidence Act* and placed into this part of the *Criminal Procedure Act*, leaving Division 1B of Part 3.10 of the *Evidence Act* to merely ensure by s 126H that evidence found to be privileged in a criminal trial under Division 2 of Part 5 of Chapter 6 of the *Criminal Procedure Act* is also not able to be adduced in a civil trial in which substantially the same facts are in issue as were in issue the criminal trial.

Again, this legislation is fairly self-explanatory. The best way to understand it is to read the sections carefully, accompanied by a good commentary such as is in either of the standard loos-leaf services.

Also, again, since this legislation was enacted there has been a wealth of jurisprudence and learned articles generated and I do not believe that I can really add much to what can be researched fairly quickly through the various resources available.

However, I do want to bring to the attention of practitioners in this field the excellent pro–bono scheme initiated in April of last year by the Women's Legal Services (WLS) NSW. That

organisation is funded by the Commonwealth and State governments to provide a free community legal service for women in NSW in respect of sexual assault communication privilege.

In April 2009, in a pilot project initiated by WLS the legal firms of Blake Dawson, Clayton Utz and Freehills together with the Office of the DPP and the NSW Bar Association joined together to provide advice and representation at no charge to alleged sexual assault victims to assist them in maintaining sexual assault communications privileges over any material that may have been subpoenaed for use in trials, or otherwise sought to produced before the trial and adduced in the committal or trial.

Details of the scheme are at http://www.nationalprobono.org.au/page.asp?from=1&id=255.

Cases can be referred to the scheme at the time of committal hearing and before and during trial.

Briefly, under ss 295-306 of the *Criminal Procedure Act* a privilege is created seeking to protect alleged sexual assault victims from the harm that may be caused if their counselling records are revealed, as well as to safeguard the broader public interest in maintaining the integrity and confidentiality of counselling.

However, to work in practice, for the privilege to be maintained the holder of the records must be aware that the documents contain "protected confidences" and must object to production, so that the complainant can be notified by the court, or notify the complainant in advance themselves. Then someone must appear in the interests of the complainant to seek to maintain the privilege. Without objection there is a risk that the sexual assault victim's confidential records will be disclosed.

Obviously however there is a balance to be struck between these new statutory rights of a complainant to have his or her privacy respected in what is an extremely sensitive and embarrassing area of their life, and the right of an accused person to have every possible relevant line of cross examination able to be investigated.

Ethical issues can arise. Quite often for a prosecutor there is a difficult decision to be made when considering the disclosure of material that the prosecutor may well consider to be

completely irrelevant in itself but could perhaps be used forensically to test a complainant, perhaps in ways that the Crown cannot anticipate.

Given that the highest priority in these matters must be the right to a fair trial of an accused person, it seems to me that disclosure must err on the side of a generous definition of what may or may not assist the defence, despite possible embarrassment of complainants or other witnesses.

The new pro-bono scheme at least provides comfort that complainants can have the opportunity to themselves maintain their rights. It fills a very real gap.

In a recent case which I prosecuted the complainant had an illness of a psychiatric nature. Before the trial the defence sought details of that illness. Under the WLS pro-bono scheme the complainant was able to be very competently represented both at the committal and in the trial to maintain her privileges as to the confidential communications between her and her treating doctors that were produced as a result of the subpoenas that were issued.

The *Evidence Act 1995*

Of course, any practitioner involved in the conduct of sexual assault trials upon indictment needs to be familiar with detailed provisions of the *Evidence Act* as well, particularly those sections of the Act dealing with complaint evidence and tendency/coincidence evidence, which have particular application to sexual assault trials. See e.g. ss 66, 94-101, and 108.

See also Division 1A of Part 3.10 of the Act, ss 126A-126F, *Professional Confidential Relationship Privilege*. However, it does seem that at least in sexual assault trials, these provisions are not really applied, as the provisions of Division 2 of Part 5 of Chapter 6 of the *Criminal Procedure Act* apply more directly.

As Stephen Odgers writes in his text on the Evidence Act, at [1.3.12500], Division 1B of Part 3.10 of the *Evidence Act,* which became in effect Division 2 of Part 5 of Chapter 6 of the *Criminal Procedure Act*, see above, was first enacted in 1997 apparently because of *a perception within the NSW Attorney-General's Department that the general privilege contained in Div 1A would not provide sufficient protection for confidential sexual assault counselling communications".*

Subsection 66(2A)

Subsection 66(2A) is an important new provision which, as the Act itself notes, was inserted by Parliament as a response to the decision of the High Court of Australia in *Graham v The Queen* (1998) 195 CLR 606.

Section 66 provide, relevantly:

> **66 Exception: criminal proceedings if maker available**
>
> (1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
>
> (2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
> (a) that person, or
>
> (b) 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.
>
> (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.
>
> **Note.** Subsection (2A) was inserted as a response to the decision of the High Court of Australia in *Graham v The Queen* (1998) 195 CLR 606.

The recent judgment of the Court of Criminal Appeal in *R v XY*, [2010] NSWCCA 181, 6 September 2010 is the first upon this new subsection 66(2A).

In that judgment the Court gave a pre-trial ruling to the Crown allowing it to adduce evidence of complaint made some years after the alleged offences.

In the leading judgment of Whealey J, his Honour refers to some of the material relied upon by the Australian Law Reform Commission in its recent review of the *Evidence Act*, as set out in e.g. Mr Odger's textbook in his commentary on this new subsection. See in particular the article by Dr Cossins published in the medico-legal journal *Psychiatry, Psychology and Law*, Volume 9 No 2 2002, entitled "The Hearsay Rule and Delayed Complaints of Child Sexual Abuse – The Law and the Evidence". That article is extremely interesting and can be accessed on the Bench Book sites, see above.

As his Honour noted at [78]:

> … s 66(2A) is an interpretative section. It tells the reader how the section is to be interpreted. It makes clear that, in determining whether the occurrence of the asserted fact was "fresh in the memory" of the person, the court may take into account "all matters that it considers are relevant to the question". Thus it will be seen that the three matters mentioned in (a), (b) and (c), although clearly very important, are not the only matters that may be considered.

Then at [90]:

> 90 Ambiguity or apparent inconsistency is not a sufficient reason to reject evidence in a criminal trial. It is for the jury, not the trial judge, to evaluate evidence and the weight to be given to evidence **R v EM** [2003] NSWCCA 374; **R v Sing-Bal** (1997) 92 A Crim R 397; **R v Louizos** (2009) 194 A Crim R 223; **R v SJRC** [2007] NSWCCA at 142; 14 Crim LN 664 (2214). In the present matter, it was plainly the task of the jury to evaluate the complainant's evidence, including any matter of alleged inconsistency between his statement to the police and the terms of the representation made to CD. It was certainly not a matter for the trial judge in determining the question of admissibility under s 66(2) of the **Evidence Act**. It was extraneous to a proper determination as to whether the representation to CD was fresh in the memory of the complainant at the time it was made.

And finally at [98]-[99]:

> 98 The approach I have advocated appears to me to reflect the points of view discussed in ALRC Report 102. They were the considerations which led to the amendment to s 66 of the **Evidence Act**. In particular, the Commission had stressed that recent research showed that emotionally arousing or stressful incidents were remembered very well, even though peripheral details surrounding them might not be…
> 99 … the expression, "fresh in the memory", is now to be interpreted having regard to the considerations specified in s 66(2A) and such other matters as the court considers relevant to the question to be dealt with in the section. In particular, "the nature of the event" looms large in the matters now to be considered. That represents a very significant change to the interpretation given to the phrase "fresh in the memory" determined by the High Court in **Graham's** case.

In my opinion, there is a lot of litigation to come in respect of subs 66(2A).

Tendency and co-incidence evidence

This is always a difficult area and in sexual assault trials it is inextricably linked to the further difficult considerations of whether or not separate trials should be ordered, see e.g. *Hoch v R*, (1988) 165 CLR 292, and, I suspect, from now on in the application of subs 66(2A).

In *XY*, above, Whealey J made the following comment at [105]:

> … the marked similarity between the sexual incidents … would have been a reinforcing factor on the complainant's retention of the incidents in his memory.

> Consequently, the time lag between the first and last incidents would not have been particularly memory dissipating, if at all."

Three recent judgments in this area of note are:

- *R v Ford*, [2009] NSWCCA 306, 17 December 2009;
- *R v Ceissman*, [2010] NSWCCA 50, 22 March 2010; and
- *R v PWD*, [2010] NSWCCA 209, 17 September 2010

In each of these judgments, the Court of Criminal Appeal has looked carefully at the application of the rules as to the adducing of tendency and/or coincidence evidence.

Each case turns on its facts, but the principles are clear from the judgments, and, it seems to me, if they reveal a trend it is to rely more and more upon the common sense of juries to be able to fairly assess such evidence. As Beazley JA stated in *PWD*, above, at [89]-[90]:

> 89 … Of its nature, tendency evidence will have a prejudicial effect. However, I am of the opinion that her Honour erred in finding that whatever significant probative value there may be in the evidence, that did not substantially outweighed its prejudicial effect. Her Honour's reason for this conclusion was that there was more than a real risk that the jury would focus on the allegations of serious criminal conduct and be unable to properly consider the basis upon which the evidence would be admitted.
>
> 90 This reasoning fails to recognise the intelligence and focus with which juries go about their deliberations. In this regard, the Court is also entitled to take into account that juries are to be properly directed as to the use to which such evidence is to be put.

Dealing with the effect of the media in a high profile case

In any high profile trial in which the media has an interest there is the real prospect that the various organisations will be represented to put submissions in relation rulings on publication or not.

There is no obligation on persons in the courtroom to give any notification at all to the media of such application but in any event, in my experience, the media is more than capable of looking after itself in this regard. In my experience whenever there is a need for separate representation with some urgency, it occurs with some urgency.

Finally, some purely personal comments of a practical nature under this head, not based on legal matters:

We all know the warnings that juries are given at the start of a trial as to avoiding consideration of media reports and to judge the trial purely on the evidence adduced in the court room (or perhaps on a view). In other words, to consider only those matters coming through the proper filters of the rules of evidence and procedure.

Some judges warn juries not to even read, look at or listen to the media, but in my opinion this is somewhat naive. In the modern world, with jurors going back to their lives and domestic situations every night and over the weekend, it would be impossible for all 12 of them to not pick something up about a high profile case as published in the media.

Again, it would be naive to suppose that media coverage does not have some effect. Every juror has friends and colleagues who have opinions but even if the jurors scrupulously avoid listening to those comments and opinions during the conduct of the trial, it seems to me that there must always be lurking the knowledge that at some time in the future, after the verdict, they will, at everything from birthday parties to Christmas gatherings, be asked to expand upon why or why not they did not deliver a particular verdict - and this must have some effect.

Media coverage must have some impact, if only contextually. But this is a fact of the modern world, it is part of our system and it seems to me that really there is no point in complaining too much about it. If a person is to be judged by his peers, those peers are persons in the same society with the same media coverage as everyone else – and in my experience, from what I can glean from anecdotal conversations with people who have been jurors and from the attention that jurors give to trials as evinced by the questions asked and the like, jurors do take very seriously warnings not to consider as evidence anything other than what is adduced in the trial.

All that one can seek in a high profile case with great media interest is that the reporting is as fair as possible, and of course compliance with any rulings on publication made by the judge as the matter progresses.

In my experience the professional media in this state are indeed professional and do comply with the various rulings made in the administration of justice.

For the Crown, there really are no issues about managing the media other than perhaps ensuring that there is fair reporting, and being careful not to make comment upon current

matters or other comment that could in any way infringe the rule of law and the administration of justice.

For the defence, perhaps one can be more creative – but if recent cases prove one thing, to attempt to manipulate media coverage is to take a tiger by the tail.

Peter Skinner

5 Wentworth Chambers

31 October 2010