

CURRENT ISSUES IN THE PROSECUTION OF SEXUAL ASSAULT

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Growing up in Australian society, I progressively became aware of the existence of sexual assault. Fortunately for me, awareness of child sexual assault came later, rather than earlier. When I was in private practice, occasionally I represented persons accused of sexual assault; occasionally I prosecuted them; the big picture was not apparent. But when I became Director of Public Prosecutions over ten years ago, I discovered the true extent of the continuing epidemic. Sexual assault prosecution files cross my desk every day and a huge proportion of prosecutions need not reach me at all. (I leave the statistics to others – they are quite alarming from a number of points of view.)

The sexual urge ensures the survival of the species and it is strong. The criminal law steps in when it is misdirected in certain ways – typically against the unwilling or the vulnerable: against those capable (at law) of consenting who do not consent and against those whom society has decreed must be protected from such abuse.

It is said that sexual assault is greatly under-reported. It can take many forms. It usually occurs in private, without witnesses. It usually occurs between people known to each other. It usually occurs between people in an unequal relationship – where intimidation and fear inhibit reporting. It usually occurs in ways that make it uncommon for there to be clear corroborative or supportive, objective physical evidence. When it is reported, it is most often a case of word against word.

Our adversarial criminal justice system requires the proof of allegations of crime beyond reasonable doubt. It provides for evidence to be given orally, to be tested by cross-examination. It provides for various warnings and directions to be given to the tribunal of fact before a conviction may be safely returned.

All these features make the prosecutors' tasks extremely difficult, as they deal in large numbers and on a depressingly regular basis with the individuals who have reported the crimes and who have (perfectly reasonable) expectations that their claims will be vindicated in court.

On the other side, precisely because of the features that I have described, it can be comparatively easy for a false allegation to be made for ulterior motives. Prosecutors must also be on guard against that event. The presumption of

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innocence is not just an empty collection of words. The fair achievement of justice according to law is the ultimate prosecutorial goal.

Some of the issues we presently face in prosecuting those sexual assault offences that are reported may be considered under the headings that follow.

I AGE

Time is the enemy of justice. The later an offence is reported and prosecuted, the less the chance of a spontaneous (and therefore more specific, detailed, consistent and credible) account, of scientific evidence in support, of convincing testimony in court – and the greater the chance of a warning or direction to the jury producing a reasonable doubt.

In New South Wales, there is no limitation period against the prosecution of serious offences and there is no legal requirement for corroboration (unlike in some other jurisdictions where one or both apply). It must be presumed, therefore, that a victim is to have her or his day in court regardless of the age of the allegation, unless the ordinary prosecution tests otherwise rule it out. The decision to prosecute in such cases can be a difficult one to make.

II VICTIMS

Not so long ago victims were just witnesses – called to give their account and sent home with expenses. In the last 15 years or so, worldwide, that has changed. It is now recognised that victims of crime must be treated more appropriately and that their special position and requirements must be addressed (even if in our system that does not extend to separate representation and the status of a party to the proceedings).

A heavy burden has been placed on the police and the prosecution to consult extensively with victims in the course of investigation and prosecution. They must be kept informed of developments in the case and their views about the proposed course of events and other aspects must be sought, obtained and recorded (but, importantly, that does not mean that they are clients of the prosecution or giving instructions on how it will proceed). Many measures have been put in place to try to prevent the re-victimisation of people by the criminal justice process itself.

The task is particularly onerous where children are concerned. There may also be an issue of the legal competency of the child to give evidence; the formality of the court process will be unfamiliar and daunting; adequate preparation for the task of giving evidence is vital – and it is difficult, psychologically taxing and time-consuming. Delays and adjournments are detrimental. The court system is not generally well-prepared to deal with the issues posed by child witnesses (although improvements are being made).

Child victims are interviewed on videotape with the recordings becoming the evidence in chief. Often the interviews are much longer and more diffuse than

would be ideal. They are then spared having to retell the story much later and may appear in the trial and be cross-examined by closed circuit television from a place remote from the courtroom. Alternatively, arrangements may be made to physically screen the child from the accused in the courtroom. Closed circuit television arrangements are being trialled for adult victims at Parramatta. These arrangements do not go as far as those in Western Australia and Queensland, where cross-examination is also conducted and recorded at a special hearing close to the time of complaint for later replay at trial – but there are significant practical problems about such a course.

Unrepresented accused persons are prevented from personally cross-examining victims and the courts have been enjoined to be proactive against the possibility of victims being unduly harassed in the witness box. Legislative moves are afoot to enable the recording of a victim's evidence in a trial to be admissible in any retrial.

Vulnerable witnesses are also offered the support of services such as the Office of the Director of Public Prosecutions Witness Assistance Service which try to reduce the trauma and unpleasantness of the experience of being a witness by providing knowledge and support to witnesses.

III WARNINGS

Even after all these measures have been taken, victims (and everyone else involved) must contemplate the trial judge giving a selection of warnings or directions to the jury (or to him- or herself in a judge alone trial) that may often operate to reduce further the chance of a conviction.

It is notable that in *KRM v The Queen*¹ McHugh J observed that 'the more directions and warnings juries are given the more likely it is that they will forget or misinterpret some directions or warnings'.²

In *R v RTB*³ the Court said:

Jurors are not required to think like lawyers when they determine issues of credibility. It is regrettable that many directions which the courts have determined must be given to juries, as well as many issues to which juries are required by statute to attend, notably by the Evidence Act, are framed in terms that could only be devised by lawyers and which, in our opinion, are liable to distort a lay fact-finding process. Nevertheless, it remains desirable, particularly in a context where criminal proceedings turn entirely on the credibility of a single witness, that a trial judge does not constrain or direct the jury's thought processes, unless manifestly required to do so. In particular, a trial judge should refrain from giving the jury directions which suggest that they should think like lawyers.⁴

For all that, the following warnings (paraphrased) are among those that may need to be given.

1 (2001) 206 CLR 221.

2 Ibid 234 (McHugh J).

3 [2002] NSWCCA 104 (Unreported, Spigelman CJ, Wood CJ at CL and Kirby J, 5 April 2002).

4 Ibid [54].

- *Murray v The Queen*:⁵ the need to scrutinise the evidence of the single witness with great care and convict only if they are satisfied beyond reasonable doubt of its truth.
- *Longman v The Queen*:⁶ concerning delay in complaint (even if the complainant is corroborated) and the danger of convicting.
- *Crofts v The Queen*:⁷ requiring balance between failure to complain at the earliest reasonable opportunity not necessarily meaning that the complaint was untrue, and taking that delay into account as reducing the complainant's credibility.
- *Gipp v The Queen*:⁸ concerning coincidence, relationship and 'guilty passion' evidence – evidence of uncharged sexual assault involving the same complainant or sexual assaults involving another.
- *R v Mitchell*⁹ and *R v Mayberry*:¹⁰ not using the evidence of one complainant in the determination of charges involving another.
- *KRM v The Queen*:¹¹ dealing with tendency, coincidence and relationship evidence.

IV CONTRIBUTION BY JUSTICE WOOD

There are many more requirements imposed by various sections of the *Evidence Act 1995* (NSW) and other evidentiary requirements. These and much more are collected in an excellent paper by Justice Wood, 'Sexual Assault and the Admission of Evidence'.¹²

Justice Wood also flagged as issues for further consideration:

- the use of colposcopy in the initial sexual examination, providing a precise visual record of any signs of sexual trauma;
- greater use of pre-trial video recording of the testimony of the victim, at least to become the evidence-in-chief;
- pre-trial disclosure by the defence, at least as to the nature of the defence;
- greater use of evidence by audio or audiovisual link from a place remote from the courtroom;

5 (1987) 11 NSWLR 12.

6 (1989) 168 CLR 79.

7 (1996) 186 CLR 427.

8 (1998) 194 CLR 106.

9 (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Gleeson CJ, Cole JA and Sperling J, 5 April 1995).

10 [2000] NSWCCA 531 (Unreported, Beazley JA, Greg James and Kirby JJ, 14 December 2000).

11 (2001) 206 CLR 221.

12 Justice Wood, 'Sexual Assault and the Admission of Evidence' (Paper presented at the Practice and Prevention: Contemporary Issues in Adult Sexual Assault in NSW Conference, Sydney, 12–14 February 2003), <http://www.lawlink.nsw.gov.au/sc/%5Csc.nsf/pages/wood_200203> at 31 July 2005.

- protection of vulnerable witnesses by separate facilities at court, closed courts, protection of anonymity by various means, close contact between police and prosecutors and victims;
- restrictions on cross-examination of the complainant;
- ‘rape shield laws’ restricting cross-examination on the past conduct of a complainant, sexual reputation and history; and
- innovations from the inquisitorial system – examination of witnesses by the judge, separate legal representation for the complainant, specialist courts and judges.

V A FAIR CHANCE

In New South Wales (and more generally throughout the country) there are many groups at work to address the issues raised in the prosecution of sexual assault and to attempt to provide recommendations to government for beneficial reform. At intrastate, interstate and national levels meetings are held, conferences convened, papers prepared – there is really a great deal of work going on and it is to be hoped that at some time, somehow, it will be coordinated, distilled, evaluated and acted upon. The New South Wales Parliament, Legislative Council Standing Committee on Law and Justice published Report 22 in 2002;¹³ the Department for Women published the report *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault*¹⁴ in 1996; the Victorian Law Reform Commission published reports in 2003 and 2004,¹⁵ and the New South Wales Attorney-General has convened a Sexual Assault Taskforce that is due to report by November 2005. There is no shortage of recommendations and guidelines on how the job should be done.

One, only, of those initiatives has been taken by the New South Wales Adult Sexual Assault Interagency Committee which in November 2004 published a paper ‘A Fair Chance: Proposals for Sexual Assault Law Reform in NSW’.¹⁶ There are 28 specific recommendations for reform by legislation, court practice directions, education campaigns and so on. I commend it to you.

VI CONCLUSION

Perhaps the major current issue in the prosecution of sexual assault (adult and child) is when will it next change and in what way; for change is certainly afoot,

13 New South Wales, *Report on Child Sexual Assault Prosecutions: Standing Committee on Law and Justice*, Parl Paper No 208 (2002).

14 NSW Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996).

15 Victorian Law Reform Commission, *Sexual Offences*, Interim Report (2003); Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004).

16 NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004).

sometimes provoked by nothing more than the media publicity given to a particular case. It is to be hoped that this will ultimately produce changes that are beneficial for all caught up in the process, and that these changes will be consistent, practical and in accordance with accepted international practice.

In the meantime, prosecutors (and others) face the epidemic of sexual abuse in the community on a regular basis, armed with the tools provided by the legislature, the courts and the prosecution agencies and their own professionalism, humanity and common sense. It is a continuing challenge to all.