CITATION: *Kennedy v Hopkins* [2006] NTMC 007

PARTIES:	GAVIN DEAN KENNEDY
	v
	MARK DEAN HOPKINS
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Justices Act, Criminal Code
FILE NO(s):	20521317; 20521319
DELIVERED ON:	24 January 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	17 November 2005; 10 January 2006
JUDGMENT OF:	Jenny Blokland SM

CATCHWORDS:

EVIDENCE – Relationship Evidence – Prior Inconsistent Statements with young witnesses

R v Nieterink (1999) 76 SASR 56;
BR S v R (1998) 191 CLR 275
Gipp v the Queen (1998) 194 CLR 104
Dr Carolyn Taylor, "Forced Errors" in *Court Licenced Abuse*, at 225, 2004, Peter Lang Publishing

REPRESENTATION:

Counsel:

Informant:	Ms Armitage
Defendant:	Mr Dooley

Solicitors:

Informant:	Office of the Director of Public Prosecutions
Defendant:	North Australian Aboriginal Legal Aid Service

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 007
Number of paragraphs:	24

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20521317; 20521319

BETWEEN:

GAVIN DEAN KENNEDY
Plaintiff

AND:

MARK DEAN HOPKINS
Defendant

REASONS FOR JUDGMENT

(Delivered 24 January 2005)

MS.JENNY BLOKLAND SM:

Introduction

1. The Defendant Mark Dean Hopkins has pleased *not guilty* to two counts of aggravated assault, each with *three* circumstances of aggravation, namely that the alleged victims were female; under the age of 16 years and that the assault was indecent: (s188(2) *Criminal Code*). With the consent of both parties the two matters were heard jointly in the Court of Summary Jurisdiction.

Evidence Called on Behalf of the Prosecution

AL and EJ

2. The prosecution called the two young women concerned, "AL" (also referred to as "Lowie" throughout these proceedings) and "EJ". AL's evidence was that she had stayed at the Defendant's house for some time in 2004 as she was a school friend of the Defendant's daughters and she had moved out of

home. I allowed both AL and EJ to give evidence about certain issues that appeared to place the incident in question in its proper context in terms of the way the Defendant related to them, (and they to him), and why the incident may have occurred without apparent alarm or remark from other persons who were present and without immediate complaint from the young women themselves.

3. AL gave evidence that on most days after school, the Defendant would like to receive massages from his step daughters and also from AL and EJ. AL said that on such occasions the Defendant would touch her "everywhere", specifically on her breasts, bottom and vagina on the outside of her clothing. She said this type of touching would happen *a lot of the time.*

4. Of the incident in question AL said that she was on the veranda of the Defendant's home with EJ, Trenton Faint, (the Defendant's cousin) and the Defendant; that EJ was sitting on the Defendant's lap and the Defendant was bouncing EJ up and down; that the Defendant was holding EJ's breasts in his hands and juggling them up and down; that everyone who was present was laughing; that the Defendant was saying to Mark Faint "Trenton, do you want to fuck her?" and that Trenton said "Stop being silly"; that the Defendant was "putting his hand underneath her bum and putting his hand up through her legs to her vagina on the outside of her pants; that he grabbed her (AL's) arm and pulled her down onto his lap and that he pushed her breasts up and down as he had done to EJ. She told the Court the Defendant said "Trenton, do you want to fuck this girl?" and Trenton said "Don't be silly, Uncle Mark".

5. In cross examination AL was challenged about some evidence she gave concerning the length of time she had stayed at the Defendant's house; that it was she, not the Defendant who wanted to call the Defendant "dad" and that she *wagged* school. She rejected those assertions save for *wagging school* and agreed the Defendant would try to make her go to school. She

agreed there was nothing in her statement to police about the Defendant placing her on his lap. She agreed with defence counsel that none of the information she had given in evidence in court concerning the actions of the Defendant towards her and the evening in question was in her statement to police.

6. EJ gave evidence of her visits, (usually after school), to the Defendant's home; that she used to call him "Mark" and that he had said she could call him "dad". In relation to the charge before the Court she said the Defendant, his wife HS, and Trenton were sitting on the veranda and the Defendant told her to sit on his lap which she did; she said the Defendant called AL out of the house and kept talking. She said the Defendant was grabbing her breasts, saying she had "big tits", that she felt uncomfortable and as she got off of his lap to walk away he touched her in the vagina area; that this was on the outside of her clothing for about three seconds. She said the Defendant had been saying things to Trenton such as "which one out of me and Lowie he liked more, and which one he would like to get in bed with more"; she said Trenton didn't answer and that's when he called AL out of the house and the Defendant started saying things like "you know you want to get them in the bed". She said she was not sure where AL was at that time; she said she did not witness anything happen between the Defendant and AL at that time. She told the Court the Defendant had not touched her on the vagina area on previous occasions but had previously touched her "on the breasts and on the arse".

7. EJ accepted a proposition put to her by defence counsel that this incident sticks out in her mind as it was the worst thing the Defendant had done to her because previously he had touched her breasts or backside whereas this time he touched her vaginal area. She agreed that she had nothing in her statement about AL being on the Defendant's lap and she could not recall her being on his lap. She agreed that as well as visiting the Defendant's home, she would spend Friday and Saturday nights there; she agreed the

Defendant would sometimes slap her on the backside and make a silly comment; she agreed she began to dislike that behaviour; she agreed with a proposition that when police took her statement she was feeling that she would like to get him "into some trouble".

8. In terms of the incident, she agreed HS and Trenton were there but she did not agree Jacky Treeves or Lynette were present. She disagreed that she was trying to make something that was a bit of "slap fun" into something worse. She said, "yeah, but it felt real bad because it was in the vagina area."

9. In re-examination she was asked about her evidence that she wanted to get the Defendant into trouble and she said "Because he – it had to stop because if it didn't stop it would have gone further."

Evidence Called on Behalf of the Defendant

MH

10. The Defendant, MH told the Court he had been with his de-facto partner HS for 12 or 13 years; that she had six children and that he was in a step-parent relationship with them. Of the incident in question he said he did not remember anything; he said "I don't – I don't remember anything they're saying, not at all, it just didn't happen." He said his other daughters did not like AL and EJ calling him "dad"; he said he might have hit AL or EJ "on the bum or something like that, but not in a, like a sexual way or anything like that, you know"; he explained this would only ever take place "mucking around" and "joking around"; he said he had never touched the girls on the vagina and he would never have made them sit on his knee and touch their breasts; he told the Court that his wife would not have let him do that to young girls.

11. In cross-examination he agreed that massages took place on him after school and he said that was because he had a sore back; he said he would ask his

daughters to “walk on my back” and give him a massage and if the other girls gave him a massage they “did it on their own accord, they joined in and, you know, maybe massaged my leg or my feet while my daughter’s doing my back or something like that. But I’ve never forced ‘em to give me a massage or anything like that.” He said his wife was there the whole time – he said she used to walk into the bedroom and she was always around; he said he did not object to the friends of his daughters giving massages. It was put to him that he would also grab and touch the girls; he said “No, not really. Like in what way? Like in a sexual way or in a friendly way, or?” On being asked about a “friendly way” he said “You know, maybe, you know.” He said he would only tickle his daughters; not the other girls and denied touching them in a sexual way. He reiterated that AL and EJ chose to call him “dad” but that he did not like it; he agreed he did not have a high regard for either girls; he said AL was a good “liar”. It was suggested he made comments to his daughters about fucking other boys; he said he never said anything to AL or EJ about that. It was suggested to him that it would not be unusual for him to be making rude sexual comments to Trenton about AL or EJ; he replied he would never have done that, then he said, “Maybe I’ve said, ‘Trenton, you know, do you find this girl attractive or what? Or something like that, but, you know he is my cousin….” And “I might have said ‘Yeah, look Trenton, yeah, look here’s a girlfriend for you” He reiterated that he never grabbed the girls in the private parts; when the specific allegations were put to him that he bounced EJ’s breasts around and asked Trenton to have a look at them he said “I don’t remember that” and when it was suggested that he told Trenton he should take his pick between EJ and AL he said “Don’t remember that either, you know.” He qualified those statements saying “I probably said it – like said to Trenton, ‘Yeah, you want a girlfriend, look one of those girls’, but, like – it probably wasn’t on that, like, night you’re saying, it was probably another day I said it, you know. But, you know, I just can’t remember doing anything like that, you know.”

HS

12. The Defendant's wife HS gave evidence about an evening on the veranda when she said Sharon and Defendant, their daughters Lynette, Raelenea, Michelle, Trenton, and Trenton's sister Sarah were sitting around and AL and EJ came out and MH said to Trenton "Cuz, do you have a girlfriend?" "Well, there's two young girls, two pretty girls there, do you want a girlfriend? HS said that Trenton said he did not need a girlfriend. HS said that was the only conversation that took place. She said there was no other time that that group were all sitting around on the veranda.

13. In cross examination HS said she was the person in the family who looks after discipline; that she "rules the house"; she agreed that she supports MH the same way he supports her; she agreed they were a united force; she agreed she was anxious for his support and that her loyalties were with MH "and the kids"; she spoke of a difficult life before she was with MH where she was subject to significant violence and she had raised "battered wife's syndrome" as a defence to a manslaughter charge; when asked about comparing the current level of violence in the home to what she had been exposed to in the past, she said of what occurred now: "I call disciplinary – disciplinary flogging different to being bashed. I've seen kids get bashed where they've run to my house for safety. I've seen women that run to my house from domestic violence…my kids never get discipline in the way that they've been neglected and abused." When asked whether MH regularly grabs and touches the young girls, she said "No, I don't think so". She told prosecuting counsel the allegations were "very incorrect"; she explained AL was a liar and she had kicked her out; on whether MH ruled the house with violence HS said: "No, he doesn't. And the thing is the 11 years that he's been a part of the family there's never been violence. We have had dispute; there's nothing about violence in our household." And later when asked about MH belting the children she said: "Probably slap with them with his hand, he's never punched the kids. And if you would like to know when

MH goes off with the kids, I attack him. I've broken bamboo over him, I've smashed him with chairs and then he stops. I'm the person that attacks him."

Jaqueline Treaves

14. Ms Treaves gave evidence that MH is her brother-in-law and HS is her sister; that she was a regular visitor to their house; that she saw AL at the house from time to time and she knew EJ; that she was on the veranda on the night in question and they were all sitting around; they were sitting on chairs. She said that as well as herself, HS, MH, Trenton, AL, EJ and "the girls" were all present; she said MH asked Trenton if he had a girlfriend and Trenton said "no"; she said she thought that was the only time and she was there for a while and must have gone back into the house. In cross-examination she said she couldn't remember what the time was; she said she knows HS asked her to make some tea; she said it was during 2004, late in the dry; she said she did not know if the evening she was describing was before or after her birthday which was September; she said she spoke to MH's lawyers when he came to court late last year; she said she didn't make a statement about the matter; she said she didn't know what the topic of conversation on the evening was apart from what she told the Court; she agreed she was on MH's "side."

Trenton Faint

15. Mr Faint told the Court he lived at House 10 Kulaluk; prior to that he lived in Palmerston; he knows MH as he is a cousin through his mother; he said he visited House 3 in 2004 and that "everybody" was there, meaning HS, MH, the "twinnies"; and the other daughters; Anthony and Chris, his parents and Laurence (aunty Jack's son) as well; he said he knew AL and EJ, although not all that well; he said on the veranda they were all having dinner; he said MH *might have* asked if he liked them; that he said "do you want to go with that chick", or "which chick did you want to go out with";

he said he thought they were standing; he said he couldn't remember what he said in reply. In cross-examination he said the dinner was not for any celebration but was a bit like a welcome dinner; he said he moved to Kulaluk in the dry but couldn't say if it was the late or early dry; he agreed he had a close relationship to MH and HS and he was in a relationship with their daughter Lynette; he was unable to say whether the dinner occurred before or after he went out with Lynette; he said he went out with Lynette for all of 2005; he said during 2004 he would occasionally visit MH's house; he said he did not know what MH was charged with and hadn't talked to anybody about it; he said he didn't know if anyone was going to call him as a witness; he said he didn't know of any conversation about the girl's breasts, nor any bouncing, nor MH touching their breasts.

Discussion of the Evidence

16. Over objection from Mr Dooley I allowed both AL and EJ to give evidence about the massages and touching that occurred, that on their evidence, was a regular feature of their time at MH's home. It is true that there are significant dangers in admitting this type of testimony as if used incorrectly, it breaches or tends to breach the rules excluding evidence of prior wrong doing or evidence tending to show disposition or bad character. In my view the evidence was not tendered for those purposes and I have not used it in that way. I do see that evidence as being relevant in explaining the nature of the relationship and the level of contact between the alleged victims and the Defendant. If that evidence were not before the Court, the bizarre nature of the allegations and the fact that the alleged assaults occurred in front of other persons from the household or visiting the household would be difficult to place in context. In my view the evidence used is admissible on similar grounds as the relationship evidence was in *R v Nieterink* (1999) 76 SASR 56 where Doyle CJ after citing *BR S v R* (1998) 191 CLR 275 and *Gipp v the Queen* (1998) 194 CLR 104, states that this type of evidence is outside the exclusionary rule where it is not tendered for propensity

purposes. Doyle CJ (at 76) concluded that the evidence under question in that case showed a continuing sexual relationship including uncharged acts and was admissible to explain "lead up to the first charged incident", "the lack of surprise on the part of [the victim]", "the confidence that the [accused] might have in repeating his conduct", "the failure of [the victim] to complain to her mother" and to "establish a sexual attraction by the accused towards the victim". I concluded the evidence lead by the prosecution was admissible for similar reasons, namely the lack of surprise or other strong reaction expressed by either alleged victims at the time, or the lack of surprise or intervention expressed by either of the other persons present and the lack of any spontaneous complaint.

17. In my view both young women gave clear oral evidence; aside from the fact that they did not like what had happened to them they did not appear to be otherwise ill-motivated towards MH; I could not detect any evidence of collusion between them, indeed, EJ's evidence did not support AL's testimony concerning the alleged assault against AL. AL's evidence did however suffer from certain weaknesses.

18. AL's description of the event in her oral evidence was virtually omitted from the statement she had made to Police closer to the time. Although I don't at all think that the revelation of new information in the witness box in a case such as this is fatal to a witness's credibility, in this case the statement and the testimony are at such odds that I cannot be satisfied to the criminal standard that the law requires. There is no doubt that the probative force of AL's testimony has diminished significantly as a result of the inconsistency acknowledged before the Court. I note also that the evidence of EJ, while not contrary to AL's testimony, does not support it either. In my view the revelation of the inconsistency was not obtained unfairly by Defence Counsel in this case and although I am aware of the "forced errors" problems in cross-examination of young people concerning sexual assault, (a term coined by Dr Carolyn Taylor in "Court Licenced Abuse", chapter 7), in

my view this was not an unfair cross-examination in the circumstances. It was not one that focussed on minor matters and exaggerated the inconsistencies. The issue was more fundamental.

19. In my view EJ's evidence did not suffer from the same problems and her reason for complaint in this circumstance rather than on other occasions was that on this occasion she was touched in the vaginal area; she was asked in cross-examination "when you gave your statement to the Police, you were certainly feeling like you wanted to get Mark in some trouble?...I was – yeah, trying to / yeah". She explained this answer in re-examination and I think it is an explanation that is completely reasonable, namely, that she wanted to get him into trouble "because he / it had to stop because if it didn't stop it would have gone further"; it was suggested to her that this whole incident was just a bit of mucking around and joking around and just giving her a bit of a slap but she answered, once again in my view in a fairly understated way but a way that is completely understandable "yeah, but it felt real bad because it was in the vagina area".

20. I do not see any reason to not believe EJ, her evidence was clear, it was internally consistent, and was comprehensible in the circumstances in the context of the relationship she had with MH.

21. Overall I found MH to be an unimpressive witness. True enough that he made certain partial admissions to aspects of his behaviour concerning the girls giving him massages, stopping well short of doing anything he would regard as improper and although he basically said he did not remember anything that the girls were saying of the events in question, he did acknowledge that he "might have" made certain remarks to Trenton that had some resonance with AL and EJ's evidence. In a general sense he does deny ever touching in a "sexual way". I know I will be dismissing the charge concerning AL, but even giving due allowance for it to be perfectly reasonable for MH to say he remembers nothing of what AL has said, there

is nothing in the Defendant's evidence that makes me sway from my interim conclusion on the strength of EJ's evidence. His partial admissions coupled with his lack of memory tend to support EJ's evidence.

22. I am loathe to categorise witnesses as being in a particular "camp". People are allowed to have allegiances and it does not necessarily detract from their evidence. However, the defence witnesses in this case have such strong loyalties to MH, each for slightly different reasons, that I have come to the conclusion that I must strongly discount their evidence. HS began her evidence by impressing the court on the lack of violence exhibited by MH in the house but ended her evidence with much more qualified descriptions of what occurs. It was evident she was a "united force" with MH and was not well disposed towards AL and EJ. The bond between MH and HS is so strong that it weakens significantly the assertion that HS would not have tolerated such behaviour on the part of MH. Ms Treaves also considered herself to be on the defendant's "side" but she was quite vague with her evidence on when the night in question was; what the topic of conversation was that night and she thought in any event that she may have left the veranda for a while to make HS a cup of tea. Trenton Faint also has very strong bonds with MH as he is currently going out with MH's daughter as well as being MH's cousin; it is very hard to accept that he came to court not knowing whether he would be called as a witness; not having spoken to anybody about the incident and not knowing what MH was charged with.

23. As has been evident from these reasons I will dismiss the charge concerning AL (file 20521317) but I do find proven beyond reasonable doubt the charge concerning EJ (20314913). I note on behalf of the defendant there has been an express disavowing of any reliance on lack of recent complaint. I have not given myself any directions in that regard.

24. This decision was made in open court on 24 January 2006, however I showed counsel at that mention my draft reasons which could not be read

due to a computer or printing malfunction. I note I am forwarding my reasons to Ms Armitage and Mr Dooley on 6 February 2006.

Dated this 6 day of February 2006.

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Jenny Blokland
STIPENDIARY MAGISTRATE