CITATION:	*Ridolfi v Heenan* [2008] NTMC 034
PARTIES:	MATTHEW RIDOLFI v MICHAEL TIMOTHY HEENAN
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Justices Act
FILE NO(s):	20709865
DELIVERED ON:	6 June 2008
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JUDGMENT OF:	Mr V M Luppino SM

CATCHWORDS:

Evidence - Whether the provisions of Part IIA Evidence Act apply to summary hearings.

Evidence - Admissibility of recorded statement of child victim of a sexual offence - Whether leading questions are permitted - Whether there is "good reason" not to admit statement.

Evidence - Admissibility of record of interview – Whether record of interview contains admissions – Relevance of admissions to uncharged acts.

Evidence – Identification evidence – Warning to be given in relation to identification evidence – Matters making reliability of identification evidence suspect.

R v M (2006) NTCCA 21; R v Warren (1994) 72 A Crim R 74; R v FAR [1996] 2 Qd R 49; Re Aaron Shane Morris [1996] 78 A Crim R 465; R v Eldridge [2005] NTSC 59; Drago v R (1992) 8 WAR 488.

Criminal Code (NT) s 132
Evidence Act (NT) ss 21A, 21B, 21D
Sexual Offences (Evidence and Procedure) Act (NT) s3
Evidence Act (Qld) ss 93A, 98, 130.

Questioning of Child Witnesses, Thomas D Lyon & Martha Matthews, CLCLA, 2006

REPRESENTATION:

Counsel:

Informant:	Ms McMaster
Defendant:	Mr Noud

Solicitors:

Informant:	DPP
Defendant:	NAAJA

Judgment category classification:	B
Judgment ID number:	[2008] NTMC 034
Number of paragraphs:	70

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

No. 20709865

BETWEEN:

MATTHEW RIDOLFI
Informant

AND:

MICHAEL TIMOTHY HEENAN
Defendant

REASONS FOR DECISION

(Delivered 6 June 2008)

Mr V M LUPPINO SM:

1. The defendant was charged on information that between the 1st and 2nd April 2007 at Nguiu he indecently dealt with GO, a child under the age of 16 years contrary to s 132(2) of the *Criminal Code*. The parties consented to summary jurisdiction.

2. The hearing commenced in Nguiu on 19th September 2007. Deficiencies with technical equipment which could not accommodate the statutory requirements for vulnerable witness meant that only preliminary legal argument occurred on that occasion.

3. The legal argument concerned a defence submission that section 21B(2)(a) of the *Evidence Act* ("the Act") did not apply to summary hearings. After hearing argument, following the decision of the Northern Territory Court of Criminal Appeal in R v M (2006) NTCCA 21, I ruled that the term "proceedings" as described in section 21B(1) included a summary hearing.

4. The hearing then adjourned to Darwin on 30 November 2007 when the evidence commenced.

5. At the outset, the prosecution indicated that a recorded statement of the child victim was sought to be relied on pursuant to section 21B of the Act. Mr Noud for the defendant challenged the admissibility of that recorded statement as well as the record of interview conducted with the defendant. Evidence was taken on the voir dire and at the conclusion of the voir dire I reserved my decision. The hearing thereafter proceeded on the basis that any evidence given on the voir dire and relevant to the substantive issues would be taken as given on the substantive hearing.

6. In my view, for the reasons that follow, the recorded statement and the record of interview are both admissible.

7. The legislation relevant to the issue of pre recorded statement is found in Part IIA of the Act and the relevant sections are set out hereunder.

> **21A Evidence of vulnerable witnesses**
>
> (1) In this Part –
>
> ***audiovisual record*** includes a recorded statement.
>
> ***authorised person*** means:
>
> (a) a legal practitioner; or
>
> (b) a person of a class declared by regulation to be a class of authorised persons for the purposes of this definition;
>
> ***child*** means a person who is under 18 years of age.
>
> ***examination*** of a witness includes cross-examination and re-examination.
>
> ***recorded statement*** means an interview, recorded on video-tape or by other audiovisual means, in which an authorised person elicits from a vulnerable witness statements of fact which, if true, would be of relevance to legal proceedings.
>
> ***serious violence offence*** means an offence against any of the following provisions of the Criminal Code that is punishable by imprisonment for 5 or more years:

(a) Part V, Division 2;

(b) Part VI, Divisions 3 to 6A;

(c) section 211 or 212;

(d) another provision prescribed by the Regulations.

vulnerable witness means –

(a) a witness who is a child;

(b) a witness who suffers from an intellectual disability;

(c) a witness who is the alleged victim of a sexual offence to which the proceedings relate; or

(d) a witness who is, in the opinion of the Court, under a special disability because of the circumstances of the case or the circumstances of the witness.

(2) Subject to subsection (2A) and section 21B, a vulnerable witness is entitled to give evidence using one or more of the following arrangements as chosen by the witness:

(a) that the evidence of the vulnerable witness be given at a place outside the courtroom and transmitted to the courtroom by means of closed circuit television where that facility is available;

(b) that a screen, partition or one-way glass be placed to obscure the witness's view of a party to whom the evidence relates but not so as to obstruct the view of the witness by the Judge and the jury (if any);

(c) that the vulnerable witness be accompanied by –

(i) a relative;

(ii) a friend; or

(iii) any other person who the vulnerable witness requests to accompany him or her and who the Court considers is in the circumstances appropriate to accompany the vulnerable witness,

for the purpose of providing the vulnerable witness with emotional support;

(d) that the Court be closed while evidence is being given by the vulnerable witness in the proceeding (including evidence given under cross-examination) and that no persons remain in or enter a room or place in which the Court is being held, or remain within the hearing of the Court, without its permission.

(2A) The Court may make an order that the vulnerable witness is not to give evidence using an arrangement under subsection (2) if satisfied that –

(a) it is not in the interests of justice for the witness's evidence to be given using that arrangement; or

(b) the urgency of the proceeding makes the use of that arrangement inappropriate.

(2B) In determining whether or not it is in the interests of justice to use an arrangement under subsection (2), the Court must have regard to the following matters:

(a) the need to minimise the harm that could be caused to the vulnerable witness by giving evidence;

(b) the interest in the vulnerable witness being able to give evidence effectively.

(2C) The Court must state its reasons for making an order under subsection (2A).

(3) Where a vulnerable witness is to give evidence using an arrangement under subsection (2)(a) or (b), the Judge must issue a warning to the jury (if any) to the effect that –

(a) the procedure is a routine practice of the Court;

(b) no adverse inference is to be drawn against the accused as a result of the use of the arrangement; and

(c) the evidence of the witness is not to be given any greater or lesser weight because of the use of the arrangement.

(4) If an arrangement under subsection (2)(c) is used, the person who accompanies the vulnerable witness is to be placed so he or she is visible to the Judge and the jury (if any).

(5) If an arrangement under subsection (2)(d) is used in a proceeding in which the defendant is or is apparently a child, nothing in subsection (2)(d) is to be taken to require the exclusion from the Court or the place where the evidence is being given of a person who is required or permitted under the *Youth Justice Act* to be present.

(6) If the Court is requested to determine whether a witness is a vulnerable witness, the witness is to be taken to be a vulnerable witness until the Court makes the determination.

21B Evidence of vulnerable witnesses in cases of sexual or serious violence offences

(1) This section applies to proceedings for the trial of a sexual offence or a serious violence offence.

(2) If a vulnerable witness is to give evidence in proceedings to which this section applies, the Court may exercise one or both of the following powers:

(a) the Court may admit a recorded statement in evidence as the witness's evidence in chief or as part of the witness's evidence in chief;

(b) the Court may:

(i) hold a special sitting for the purpose of conducting the examination, or part of the examination, of the witness; and

(ii) have an audiovisual recording made of the examination of the witness at the special sitting and admit the recording in evidence; and

(iii) re-play the recording to the jury as the witness's evidence or as part of the witness's evidence (as the case requires).

(3) If the prosecutor asks the Court to admit a recorded statement in evidence or to hold a special sitting under subsection (2), the

Court must accede to the request unless there is good reason for not doing so.

(4) Before the Court admits a recorded statement, or the recording of an examination conducted at a special sitting, in evidence under this section, the Court may have it edited to remove irrelevant or otherwise inadmissible material.

(5) A vulnerable witness may (but need not) be present in the courtroom when a recorded statement of evidence of the witness, or an audiovisual recording of the examination (or part of the examination) of the witness, is re-played to the jury.

(6) The vulnerable witness's demeanour, and words spoken or sounds made by the vulnerable witness, during the re-play of a recorded statement of evidence or an audiovisual recording of the examination (or part of the examination) of the witness, are not to be observed or overheard in the courtroom unless the vulnerable witness elects to be present in the courtroom for that part of the proceedings.

21C Omitted

21D Principles in relation to child witnesses

(1) It is the intention of the Legislative Assembly that, as children tend to be vulnerable in dealings with persons in authority (including courts and lawyers), child witnesses be given the benefit of special measures.

(2) If a witness is a child, the Court must have regard to the following principles:

(a) the Court must take measures to limit, to the greatest extent practicable, the distress or trauma suffered (or likely to be suffered) by the child when giving evidence;

(b) the child must be treated with dignity, respect and compassion;

(c) the child must not be intimidated when giving evidence;

(d) proceedings in which a child is a witness should be resolved as quickly as possible.

(3) However, if the Court is satisfied that a child witness is able, and wants, to give evidence in the presence of the defendant, special measures are not to be taken, contrary to the wishes of the child, to protect the child from the apprehended distress or trauma of giving evidence in the presence of the defendant.

21E Omitted

8. Also relevant is the definition of a "sexual offence". This is defined in section 4 of the Act, where it is assigned the same meaning as the meaning of that term in the *Sexual Offences (Evidence and Procedure) Act*. In section 3 of that Act, it is defined in the following terms:-

> "sexual offence" means an indictable offence involving:
>
> (a) sexual intercourse or sexual penetration; or
>
> (b) a sexual relationship; or
>
> (c) sexual abuse; or
>
> (d) indecent touching or an indecent assault; or
>
> (e) any other indecent act directed against a person or committed in the presence of a child; or
>
> (f) the making, collection, exhibition or display of an indecent object or indecent material; or
>
> (g) sexual servitude or any other form of sexual exploitation; or
>
> (h) an attempt to commit, an act of procuring, or any other act preparatory to the commission of, any of the above;

9. It is of note that section 21D of the Act contains a statement of the intention of the Legislature in relation to child witnesses. Specifically, that acknowledges that children are considered vulnerable and require special measures when giving evidence. That applies specifically to a child victim of a sexual offence as in this case. There are also relevant provisions which apply to all vulnerable witnesses, including children, which enable other special arrangements to facilitate the giving of evidence by a vulnerable

witness. These also contain a statement of the Legislature's intention. These facilities are provided for in section 21A(2) of the Act. The matters that a Court is to have regard to in decisions concerning vulnerable witnesses generally are set out in section 21(2B). It is clear from all these provisions that these measures are designed to ensure that children are not intimidated by Court proceedings and to alleviate possible distress or trauma which may be suffered by a child in the course of giving evidence.

10. Central to the legislative scheme are the significant concessions made in the evidence taking process for the benefit of vulnerable witnesses generally and specifically for child victims of a sexual offence. In the case of the latter, this is primarily the use of a recorded statement made without Court involvement. Fairness to the accused is achieved as the right to cross examination is maintained and secondly, by the broad discretion given to the Court to reject the recorded statement. Section 21B(3) states that a recorded statement is to be admitted at the request of the prosecution "*…unless there is good reason for not doing so*". That proviso gives the Court a wide general discretion to exclude the recorded statement. Mr Noud argued that the recorded statement in this case should not be admitted in the exercise of that discretion due to the extent of the leading questions in the recorded statement.

11. Under what circumstances should I reject the statement due to the use of leading questions in the interview? As a starting point, I think it is important to note that the Legislature, in making such a significant change to the process of court proceedings, saw fit not to specifically proscribe the manner of the taking of the recorded statement. By providing for a recorded statement to occur outside of the Court process and without Court supervision or involvement, by not requiring the interview to be conducted by only a legally qualified person, the Legislature must have known and accepted that the law relating to Court process would not apply in the context of those recorded statements. The only limitation on the personnel

who can be involved is that the questioning be performed by an *"authorised person"*. Although a legal practitioner is also an *"authorised person"* as defined, the Legislature clearly envisaged that persons other than those with legal qualifications would be involved in the process of making a recorded statement.

12. The special measures and facilities contemplated by the Act appear designed to establish an environment conducive to the vulnerable witness to enable the witness to freely relate his or her version of events. The format of the questioning process is apparently intended to be less of a priority. The accommodation of a vulnerable witness takes precedence to legal formality. Why this should be can be ascertained by considering the nature of the special measures and facilities and the provisions of sections 21D(1) and 21A(2B) of the Act. In my view the reason is that as young children may not easily understand or follow general questions which follow the formal requirements of questions in evidence in chief, some scope in relation to the form of questioning was seen to be necessary. In my view, the Legislature has deliberately opted not to proscribe the form of questions as it is nearly impossible to define precisely the extent to which the rules are to be relaxed as the extent of that will vary from case to case. Support for this contention also exists in section 21B(4) which allows for editing to remove irrelevant or inadmissible material.

13. As the Legislature clearly contemplates that all this occurs outside of the Court process and without any involvement of the Court, I conclude therefore that the Legislature must have intended that there would be no restrictions as to the format of the interview process. This, along with the matters raised in the defence argument on this issue is relevant to the exercise of the discretion.

14. I now consider the specifics of the defence objections in light of that. The parts of the recorded statement which the defence take issue with is

predicated on the basis that the identity of the defendant is in issue and that the defendant denies the conduct alleged. The first part of the recorded statement that the defence takes issue with is at transcript page 14.5 which provides:

BAYLISS:	Ok. Well can you tell me about what happened just tell me a little bit to start with and um we can work with that then. Can you tell me what happened? Maybe from Sunday night tell me what happened Sunday night.
GO:	I was asleep
BAYLISS:	You were asleep yep.
GO:	I heard a noise and then I wake up.
BAYLISS:	Yep.
GO:	And I waked my big sister.
BAYLISS:	Yep.
GO:	And my littlest sister.
BAYLISS:	Yep.
GO:	And then nanna.
BAYLISS:	Ok. Alright so this was on Sunday night so you were sleeping and then you said he was pulling your shorts and then you woke up and then you woke up your big sister and your little sister and then your grammar. Is that right? Ok. Well just so that I know that this was on Sunday night so it wasn't, it was …… We'll just find out. Sunday night this was when you were in Bathurst Island?

15. It is clear from the recorded statement that GO had said nothing at all about the substance of the allegations to that point. Constable Bayliss then introduces, for the first time in the interview, the topic of someone pulling her shorts. This was an allegation which GO made and which had been reported to Senior Constable Russell, albeit third hand, and which he noted in the briefing note provided to the interviewing officers.

16. The defence also complains that by use of the words "…*he* *was pulling your shorts…"* Constable Bayliss identified the assailant as a male. However, in the circumstances of the case, I do not think that much turns on that. Likewise in relation to the complaint of the defence that following the introduction of the allegation of the pulling at the shorts, the next question asked is as to which house the victim was in at the time. It is a matter of record that in response she identified that she was at the defendant's house. The defence submits that this has operated unfairly as it had the effect of placing the name of the defendant in the mind of the victim as the person who pulled her shorts down by reason of the juxtaposition of the questions.

17. The next objection to leading questions is more significant. In the lead up to the relevant question GO had been asked questions about dancing next door to the defendant's house. She then said that she then went back to the defendant's house to sleep and that she went to sleep in the defendant's room. The following is taken from the transcript of the recorded statement (at p 19.2).

BAYLISS:	So you went dancing and then you were tired and you went to sleep? Ok so when you went to sleep do you remember whereabouts you went to sleep? Whose house was that?
GO:	Heenan's
BAYLISS:	Michael Junior Heenan's place ok. His house. Do you remember which room you went to sleep in?
GO:	His room
BAYLISS:	In his room ok. Who else was sleeping in that room?
GO:	His girlfriend.
BAYLISS:	His girlfriend. Ok what was her name again?
GO:	Rowena.
BAYLISS:	Rowena ok. Who else was there?

GO: My sisters.

BAYLISS: Your sisters. That's V and R ok. Anybody else in that room?

GO: That was it.

BAYLISS: That was it ok. So how were you when you went to sleep, what were you sleeping on in that room? What was in that room to sleep on?

GO: Television.

BAYLISS: Was it ….were you sleeping on a television or where you sleeping? Sleeping on the floor?

GO: On a mattress.

BAYLISS: On a mattress ok. And who else was on the mattress?

GO: My two sisters.

BAYLISS: Ok so you went to sleep with your two sister's ok and also in the room was Michael Junior and Rowena. Where were they sleeping in the room? Were they sleeping on the floor were they sleeping on a mattress?

18. It is evident from the foregoing that the leading question about the presence of the defendant came shortly after the victim had specified who was in the room but had not made any mention of the presence of the defendant. The interviewing police officer thereby directed GO's attention to the involvement of the defendant. This also occurred in another part of the interview, namely at transcript pages 21.1 – 22.6. That proceeds as follows:

BAYLISS: You went to sleep and what do you remember next that happened?

GO: I saw him

BAYLISS: You saw him ok. Tell me what you saw?

GO: Him

BAYLISS: Yep what was he doing?

GO: He was pulling my shorts.

BAYLISS: He was pulling your shorts?

GO: And he got them. *(I think this is an error in the transcript and when the recorded statement was played the answer I heard the victim give was "then he got up").*

BAYLISS: Did he say anything?

GO: No

BAYLISS: Did you say anything?

GO: (Inaudible)

BAYLISS: Nothing?

GO: Yeah.

BAYLISS: Yeah what did you say?

GO: V, R, let's go, let's go home.

BAYLISS: Let's go home yep.

GO: And then ran

BAYLISS: And then you ran. Were they awake or were they asleep?

GO: Awake

BAYLISS: Awake. So when you said V, R let's go home did you say that in a quiet voice or did you say it in a loud voice?

GO: Loud.

BAYLISS: Loud voice. Can you show me how you did that? Use that voice that you used when you said that.

GO: V, V I said

BAYLISS: Say in the voice that you used. What voice did you use?

GO: V, V wake up. R wake up.

BAYLISS: Did Michael did he say anything?

GO:	No
BAYLISS:	Nothing ok. I just want to make sure I've got this right? So you were asleep and then you woke up cause you saw him. He was trying to pull your shorts down ok so you got up.
GO:	Yeah.

19. The defence has raised two concerns here. Firstly that the interviewing police officer referred to the defendant's first name when she asked "…*did Michael did he say anything*?" In the lead up to that the victim only referred to the assailant as "*him*". I do not think that was overly significant at that point given that the interviewing police officer had effectively already placed the defendant in the room and all the other persons identified to by GO were all females. I note that the police officers did not make up the allegation of the involvement of the defendant. This derived from information they had been given about GO's complaint. Bearing in mind the acknowledged difficulties in extracting evidence from young children in circumstances such as those that exist here, I do not consider this to be that objectionable as a result. It is not a leading question which generates the notion for the witness. It is in the nature of a prompt. Although I accept that in a normal case not involving a vulnerable child witness such an approach would be routinely objected to and disallowed, in the circumstances of this case and relying on the statutory provisions, I think it is acceptable as it does no more than prompt a vulnerable child witness as to a matter previously and proximately stated by that witness. It does not go as far as creating a version which the witness has not previously given.

20. The second concern is that despite GO saying that the assailant "…*was pulling my shorts*", when the police officer summarised at the end of the last passage referred to, she used the words "*He was trying to pull your shorts <u>down</u>*…" (emphasis added). That is clearly leading, albeit that it is difficult to imagine that the assailant would be pulling the shorts in nay other way

than down. To the extent that it leads, it does so only in respect of what is an obvious matter. This renders it even more in the nature of a prompt. Acknowledging that the process is intended to be relaxed to accommodate the giving of evidence by a child witness, I am of the view that this is within acceptable bounds.

21. The next part of the recorded statement that the defence takes issue with appears at transcript page 24.3 as follows:

BAYLISS:	Ok so you moved around. When you say he was pulling your shorts how far did he pull your shorts?
GO:	Little bit.
BAYLISS:	Just a little bit. How far's a little bit? Did he pull them down to your knees, pull them down to your legs or just pulled them just down? Ok. So he was lying on your tummy or lying on his tummy?
GO:	On my tummy.
BAYLISS:	He was lying on your tummy. Ok and he's pulling your shorts down. He just pulled them down a little bit.
GO:	A little bit.

22. The defence says that this is another example of the interviewing officer leading GO on an important feature. The defence points out, and it is correct to say, that up until that point, GO had only said that the assailant was on her tummy not <u>lying</u> on her tummy. I do not consider that to be a strong point of complaint either. As GO was asleep on a mattress at the time, the only way that the assailant could be on her tummy would be if he was indeed lying on her tummy. This then again only leads in respect of an obvious matter. For the same reasons as I give in respect of the objection raised in paragraph 20 above, I do not consider that this goes too far.

23. Likewise with the defendant's complaint in relation to the question (at transcript page 26.8) where the interviewing officer asks "...*so when you*

woke and Michael was on your tummy were you still like this on the mattress?" The defence submission is that this is a grave example of a leading question as it is the first time in the interview that the interviewing officer led GO on the identity of the defendant as the assailant whereas up to that point only pronouns had been used to refer to the assailant. However, this is not the first time that the police identify or refer to the defendant as the assailant and I consider that also to be in the nature of permissible prompting in relation to an account which the witness has already separately and proximately given.

24. Similarly in relation to the issue the defence took to the question appearing at transcript page 27.9 i.e., "*So you've drawn Michael over here next to Rowena but you said that Michael, you said that he was laying on your tummy so could you see Michael's face*?". The defence submission is that that is a leading question suggesting the identity of the assailant to GO namely, that the assailant was "*Michael*" which, given earlier parts of the recorded statement, could only refer to the defendant.

25. The defence cited a number of other instances of leading questions which they claim only serves to reinforce earlier examples of leading questions concerning the identity of the assailant. However, these other instances were less significant than the specific instances discussed above.

26. In the context of the foregoing I turn to consider the authorities that I was referred to. *R v Warren* (1994) 72 A Crim R 74 is a New South Wales Court of Criminal Appeal case. A reading of the case indicates that this case preceded the enactment of vulnerable witness type provisions analogous to those under the Act. It is therefore of limited value in the context of principles specifically applicable to legislation of that sort. Nonetheless the case is authority for the application of the general principle concerning rejection of evidence due to the prejudicial value exceeding its probative value. In that case the concerns were not just leading questions by a police

officer at interview which had the likely effect of contaminating the evidence of the child victim. The Court was more concerned by what it described as intense and sustained attempts made by the child's mother to have him specifically identify the accused as the assailant in the face of a clear reluctance by him to do so. That is a considerable factual difference with the current case. Clearly the Court's concerns in that case accentuated the prejudice in a way not apparent in the current case.

27. The case of *R v F.A.R.* [1996] 2 Qd R 49 is a Queensland Court of Appeal decision where the Court considered the impact of legislation analogous to that contained in Part IIA of the Act. The relevant section of the Queensland Evidence Act at the time, namely s 93A, was not as detailed as the provisions in Part IIA of the Act. Nonetheless the Queensland Act had specific provisions providing statutory protections to accused persons. These are ss 98 and 130 which were reproduced in the case. The report indicates that those sections respectively provided:-

> 98
>
> (1) The Court may in its discretion reject any statement notwithstanding the requirements of this Part are satisfied with respect thereto, if for any reason it appears to be inexpedient in the interest of justice that the statement should be admitted.
>
> (2) This action does not affect the admissibility otherwise than by virtue of this Part.
>
> 130. Nothing in this Act derogates from the power of the Court in a criminal proceeding to exclude evidence if the Court is satisfied that it would be unfair to the person charged to admit that offence.

28. For the purposes of argument, the terminology is sufficiently similar to the Northern Territory legislation. It was interesting to note in that case the comment, at page 54 that "*…the Court's discretion to reject evidence tendered under s 93A is regularly exercised against the accused*".

29. The principles which can be derived from that case are:-

1. Rejection of the evidence can be on the basis that it has a prejudicial effect disproportionate to its probative value;

2. In deciding whether it would be unfair to an accused to receive such evidence, regard should be had to whether and to the extent that it is possible for the defence to test that evidence by cross-examination;

3. Evidence generally should not be excluded for the sole reason that the evidence is considered unreliable.

30. *In Re: Aaron Shane Morris* (1996) 78 A Crim R 465 is another Queensland Court of Appeal case dealing with sections 93A and 98 of the Queensland Evidence Act. At first instance the trial Judge excluded the relevant evidence on two bases. Firstly, that it amounted to yet another inconsistent version by the child of the relevant events. Secondly any conviction based on that would ultimately be unsafe and unsatisfactory and liable to being overturned by an appeal Court. Dowsett J noted that section 93A was designed to avoid difficulties inherent in extracting cogent evidence from young witnesses in Court. He also noted that discrepancies between the versions offered at different times are reasonably to be expected in the case of a child witness. He acknowledged that the recollection was expected to be different from a contemporaneous statement to a version given by a child at trial, in that case many months later. He noted that what the trial Judge therefore relied upon to exclude the statement was an example of the very problem which the provision was designed to remedy.

31. In relation to the second reason given by the trial Judge namely that a conviction based on that evidence would ultimately be found to be unsafe and unsatisfactory, Dowsett J said at p 471:-

> "It cannot be correct to test admissibility by reference to the likely outcome of the case. I do not imply that inherent unreliability may not be a basis for the exercise of the discretion under s 98.
>
> Circumstances may arise in which the statement itself appears to be so unreliable, either because of its contents or because of the way in which it was obtained, that it ought not to be received in evidence for reasons directly related to the interest of justice. However, that is not the present case."

32. Turning now to consider the issue in the current case, the defence submitted that overall it would be unsafe and contrary to the interest of justice for the recorded statement to be admitted in evidence due to concerns of possible contamination of the child's account. Mr Noud submitted that the Legislature was careful in not relaxing the rules about the method of questioning police may use in an interview. He submitted that this is an important distinction and that if the Legislature had wanted to allow latitude in terms of the nature of the questions, specific provisions would have been made in the legislation. However, I disagree for the reasons previously given. I have concluded the opposite, namely, the absence of any limitation in the legislation in relation to the mode of questioning evidences an intention by the Legislature not to proscribe the method of questioning.

33. The prosecution's contention is that concerns about leading questions could and should have been addressed in cross-examination both of GO and of the interviewing police officers. Likewise the prosecution submits that concerns regarding details of information given by or on behalf of GO to the police preceding the recorded statement could have been addressed in cross-examination. That appears to rely on the second of the three principles from *R v F.A.R.* referred to in paragraph 29 above. However, I think that misses the point particularly in relation to cross examination of the victim given that did not occur contemporaneously with the making of the recorded statement. It was clearly difficult for Mr Noud to effectively cross examine GO regarding her recorded statement. This was no doubt due to issues typically encountered when dealing with the recollection of young children

and variations in recall which occur with the passage of time. Some nine months had elapsed between when GO made the recorded statement and when she commenced her evidence in Court.

34. The Act requires me to accept the recorded statement unless I can consider that there is "*good reason*" for not admitting it. The wording used is significantly narrower than that which applied in Queensland at the time of the authorities previously referred to. There the legislation allowed rejection "*…if for any reason it appears to it to be inexpedient in the interest of justice that the statement should be admitted*." (emphasis added).

35. In *R v FAR,* Fitzgerald P, after identifying the warning regularly given in relation to the evidence of children, went on to say that the warning is not wholly compatible with the implicit premise which underlies the equivalent of the recorded statement provisions in the Queensland legislation. He then listed a number of broad propositions which he extracted from published writings of experts with respect to the reliability of children's evidence. The propositions he formulated were:

    1. The ability of children to give reliable evidence depends on complex interactions between life experiences and age related factors such as recognition, recall and articulateness.

    2. While children generally do not experience full cognitive development until about 14 years of age, children, even children of tender years can give reliable evidence if questions are tailored to their cognitive development.

    3. With younger children, recall is less likely to be organised because of underdevelopment in concepts such as time, place and distance.

    4. From about age six onwards children do not generally have a less accurate memory than adults, although children's memory of familiar events will be more accurate than the memory of unfamiliar events. Recall is more likely to decline with time for children than for adults, and children are likely to recount much less detail than adults.

5. Children have the ability to distinguish between fact and fantasy and the danger of a child fabricating allegations without the encouragement of an older person is minimal. However, children are suggestible.

6. Children, especially younger children, are vulnerable to leading questions in the course of interview or evidence.

7. Children may experience difficulty in supplying information at a particular time. While psychological factors which might reduce a child's capacity to supply pertinent information in a court room or other formal situation might be alleviated by such mechanisms as are provided for in the Evidence Act, some experts have doubts concerning whether the credibility and reliability of evidence so obtained can be accurately assessed. This concern is exacerbated by the use of inappropriate techniques to question children in the investigation phase or in the recording of evidence.

36. Much has been learnt in relation to children and their giving of oral evidence in recent times. These issues are amplified in the case of young children who are victims of a sexual offence and more so if they are indigenous children with the additional issues of language, cultural and conceptual matters. One recent study (*Questioning of Child Witnesses,* Lyon & Matthews, *CLCLA,* 2006) concluded that:-

1. Children are reluctant to correct mistakes from adults or persons in authority. (I think this is particularly relevant where Browne v Dunn matters are put to children so that despite possibly not agreeing with a proposition, they may simply gratuitously concur);

2. Children are more suggestible when they believe the person questioning them already knows what happened. (I think that a child will always believe that a lawyer questioning them in Court, or any person in authority has knowledge of the topic they are being questioned on such that they may be reluctant to disagree, thereby affecting the quality of their evidence);

3. Examination of child witnesses cannot be entirely confined to open-ended questions eliciting narrative testimony. However, the use of closed-ended or leading questions may inhibit the child from giving detailed evidence, and even distort the accuracy of the child's evidence;

4. Simple yes/no questions are not highly suggestive, but can be problematic if a child has a response-bias, i.e., a tendency to answer all questions "yes" or "no", or is reluctant to say "I don't know".

5. Young children are reluctant to answer "I don't know" to yes/no questions. Moreover, children's responses to yes/no questions are less accurate than their responses to open-ended questions;

6. It is generally inappropriate to ask a child "how many times" an event occurred, because of the likelihood that a child will not know how to answer, and may arbitrarily pick a number. Adults may not realize how difficult it is for a child with limited math and reasoning skills to estimate how many times something has occurred;

7. Unless a child is looking at a clock or calendar during an event, subsequent recall of the time or date requires inferential skills which most children lack;

8. Some temporal terms can be especially confusing for the young child. Terms such as "yesterday" and "today" are difficult for young children, in part because of their shifting meaning (today is tomorrow's yesterday) and the amount of time is unclear to many children, e.g., for a young child "yesterday" often refers to anything in the past, and "tomorrow" refers to anything in the future;

9. Young children will often describe events in the order in which they occurred, regardless of whether one asks about what happened "before" or "after";

10. It is important in questioning a child to use names and specific nouns instead of pronouns, and specific nouns instead of deictics i.e., "the broom" and "the garage" instead of "that" and "there". Children often become confused or lose track of what a pronoun or deictic refers to.

37. Many of the foregoing had application to the evidence of GO and VO to varying extents. These verify the rationale for the special measures made by the Act in relation to child victims of sexual offences and highlight the importance of the special measures provided for in the Act. The most well known concern with evidence of children is that children's recollections vary with time. It is known that children have a good recollection contemporaneous with events but that recollection as to specifics degrades

considerably with time. That is one of the primary benefits of a recorded statement namely that it can be conducted very proximately to the relevant events. The giving of evidence on the other hand could not realistically occur for months later.

38. The matters that GO was led on were not matters which the police had conjured up. It derived from what GO had said to her aunty contemporaneously with the relevant events. The interviewing police officers were aware of that both as to the allegation regarding the pulling at the shorts and as to GO's identification of the defendant as the culprit. The prompting therefore did not have the effect of introducing or making the allegation for the first time. Nor can it be said therefore that the police officers were fishing. I would characterise the nature of the interviewing technique as more akin to prompting or reminding. I think this is precisely what the Legislature contemplated as being necessary in such cases and adds further weight to the conclusion that leading questions should be allowed to a point. Different considerations would apply however where the interviewers go too far, where they probe for or introduce matters which the witness has not previously said or where the questions are otherwise based on suspicion or information which cannot be established by admissible evidence.

39. In my view the provisions are designed to reduce the trauma which can result in the case of a child victim, particularly in relation to a sexual offence, by the adversarial system. As Part IIA of the Act only relates to the admissibility of the recorded statement not the weight to be given to it, the defendant's rights are preserved there in combination with the continuation of the right to cross examine a child victim. The legislation facilitates the reception of the evidence and in my view all of the factors indicated in the foregoing paragraphs confirm an intention of the Legislature not to proscribe the nature of the questions asked for the purposes of that recorded statement. Based on the nature and effect of the leading questions as

discussed above, I consider that it is not appropriate to reject the recorded statement and I rule that the recorded statement is admissible. I do not consider that the extent of the leading questions in the circumstances, when balanced against the need to accommodate young children giving evidence, to be such as to warrant rejection of the recorded statement pursuant to section 21D(3).

40. It is opportune to add at this point that the process in section 21B of the Act relates only the admissibility of a recorded statement. Although I have come to the conclusion that the Legislature intended not to limit the nature of the questions that may be asked of a child witness in the course of a recorded statement, there is however nothing at all to suggest that the process adopted by Courts of weighing up evidence is intended to be modified in any way. Therefore, once a statement is admitted, it is to be assessed and acted upon in the ordinary way. That evidence, like all other evidence, must be weighed up to ascertain whether the prosecution has proved the case beyond reasonable doubt. The arguments raised by the defence in relation to the admissibility of the recorded statement remain relevant to the assessment of the reliability of that evidence. In appropriate cases, as when a witness is lead in evidence in the normal process, the Court may give less weight to an answer which results from a leading question. That is the safety net for defendants. The new rules are intended to facilitate the reception of the evidence and I am of the view that this should be the emphasis, i.e., the reliability of the witness's evidence rather than being concerned as to how the evidence was extracted from the witness.

41. I now turn to deal with the defendant's record of interview. That can be quickly disposed of. A record of interview, being classic hearsay, is only admissible due to an exception to the hearsay rule in the case of a record of interview made by a defendant. The rationale for this exception is that as an admission or a declaration against interest will not be lightly made, it is therefore likely to be reliable and probative.

42. Noting that the rationale for the exception to the hearsay rule is based on the likely reliability of a declaration against interest, a record of interview which contains only exculpatory statements is therefore not admissible in the hands of the prosecution. Nor is it admissible in the hands of the defendant given that it is, in that event, clearly a self serving statement.

43. Mr Noud argues against the admissibility of the record of interview on two bases. Firstly, that the defendant has not made any admissions to the charged act. Specifically, the defence relies on the defendant's answer of "*…can't even believe that what happened there…I got no idea of doing that…*" when confronted with the allegation. The defence submits that this does not represent a statement against defendant's interest.

44. However, the record of interview must be considered as a whole to ascertain if there are any admissions and not just on the basis of isolated questions or answers. I consider that the comment "*…I got no idea of doing that…*" alone is equivocal. When viewed in the context of the record of interview overall, it is inculpatory.

45. The defence also submits that the defendant has made admissions to uncharged acts namely, the smoking of cannabis as well as a vague reference to a possible assault on his wife. It appears that the latter is imaginary or possibly results from substance induced delusions and is not truly an admission of an uncharged act. Nonetheless, Mr Noud submits that overall it is prejudicial and therefore the record of interview should be excluded as the prejudicial value exceeds the probative value. At best that might result in exclusion of the offending parts of the interview only, not the whole interview. Having regard to the nature of the admission, I am not convinced that Mr Noud's submission is correct. The admissions were spontaneously volunteered by the defendant and no fault can be attributed to the interviewing police officer in that respect. They were also made in the context of the defendant demonstrating how much he was under the

influence of substances at the time of the relevant events and in the context of attempting to rationalise his claimed lack of recall. That puts the equivocal comment of "*…I got no idea of doing that…*" into context such that it is clearly a declaration against interest.

46. There being no other basis to challenge the record of interview I rule that it is admissible.

47. I now summarise the balance of the evidence. Some detailed discussion of the evidence in the context of the issue of admissibility has already occurred and I will endeavour to avoid any unnecessary repetition.

48. The essential allegation is that some time overnight between the 1st and 2nd April 2007 the defendant indecently dealt with GO. The evidence reveals that she was ten years of age at the time. The offence occurred at Nguiu and it occurred on the Saturday night of the Tiwi Island grand final which was played at the oval at Nguiu.

49. The evidence reveals that GO and two of her sisters had been playing at the home where the defendant was an occupier. The defendant apparently lived there with his girlfriend Rowena Tipiloura, his cousin brother Shannon Cook and Shannon's girlfriend Fabiana Kantilla.

50. The defendant and Shannon Cook had been at the Nguiu Club until closing time where they had been drinking, not necessarily together, for the whole time. At some time after the closing time of the club the defendant went home. At that time there were a number of other people at the house and in various states of intoxication. In summary, present at that place at various times throughout that evening were the defendant and his girlfriend, Shannon Cook and his girlfriend, GO and her sisters VO and RO and numerous other unidentified persons, some children and some adults.

51. The room occupied by the defendant and his girlfriend at the residence had two mattresses. GO and her two sisters, and perhaps some other children at

different times, were watching a DVD in that room. At certain times during the viewing of that DVD, the defendant and his girlfriend were also in the room.

52. GO and her two sisters fell asleep on one of the mattresses. GO was wearing a T-shirt and a pair of shorts. There is some suggestion of the girls sleeping under a cover but that is not entirely clear.

53. Much of the evidence to this point is common to a number of witnesses. However, the actual specifics of the allegations rely entirely on the evidence of GO. The evidence of GO reveals that she fell asleep at the defendant's home and was woken by a noise. She said that she woke to find someone pulling at her shorts. Not surprisingly this appears to have startled her so she woke her two sisters. She identified the person pulling at her shorts as the defendant. Further questioning revealed that she claimed the defendant was lying on her tummy. She recalled that Rowena Tipiloura was in the room and asleep and did not wake up. She recalled that the defendant was wearing shorts but no top. When woken, according to her, the light must have been on as she recalled the defendant switching the light off. This sounds most unlikely. However at another point she said that the light was on when she and her sisters were leaving the room.

54. She said that she and her sisters then went to her home and told her mum or aunty, Inez. She says it was night time and that Inez was asleep. She said she woke her and a number of other people that were at the place. This may have occurred sometime near dawn as GO said that it was dark inside the house and light outside. VO was later to say that it was at about one o'clock. GO said she told Inez what occurred and that Inez called the police. That is at variance with the evidence of Senior Constable Russell and omits the intermediate involvement of health clinic staff which I think is clearly an innocent omission by GO and an instance of either failure to recall specifics or expected errors in the sequence of events.

55. The defendant's sister VO also gave evidence. She confirmed that GO woke her while it was still night time and told her to go home. She said this occurred at one o'clock. She said that she and GO and her other sister went home. Although it was difficult to get clear answers from her, when asked what GO reported to Inez, she confirmed that GO used the word "*rape*" in that context. In cross-examination she agreed that the three girls slept on a mattress together and that they were snuggled close together and underneath a sheet. She said the room was dark when GO woke her.

56. The police officers who conducted the recorded statement were called to give evidence. The evidence reveals that they had no discussions with GO prior to the commencement of the recorded interview. They were aware of the existence of a briefing note prepared by Senior Constable Russell, who was in charge of the case, but couldn't recall its contents. Senior Constable Sanderson confirmed that the defendant was known to be a suspect in the case at the time that GO participated in the recorded interview. She said that she did not speak to GO's family prior to the recorded interview.

57. Shannon Cook gave evidence and he confirmed that there were a lot of drunk people around the relevant house that night. He was apparently quite intoxicated but recalled getting up during the night to go to the toilet but didn't say at what time that occurred. He said all lights were off at that time and everything was quiet.

58. Fabiana Kantilla also gave evidence and she said that she did not hear anything happen during the night.

59. Senior Constable Russell, who was the officer in charge of the investigation, gave evidence in the matter. His evidence was largely confined to matters relevant to GO's complaint and events in the lead up to the recorded statement. He said that he first became aware of events when he was called in the morning of 2 April 2007 by the Health Clinic manager reporting that a young female had been brought into the Clinic by her aunty, that her aunty

had told the Clinic manager that she was concerned that the girl may have been raped. He said that he then attended at the Clinic and spoke with the aunty. He said that the aunty had told him that GO had come running to her house earlier that morning stating that the defendant had tried to rape her but had only succeeded in pulling her shorts down.

60. There is also some evidence in the form of statements tendered by consent. There was also evidence of the record of interview of the defendant which is discussed in sufficient detail above.

61. I now consider whether the prosecution has proven the charge beyond reasonable doubt and firstly I consider the relevant law. The charge is that the defendant has indecently dealt with GO who is a child under 16 years of age. For the purpose of the section creating the offence, the term "*deals with*" is defined in section 132 of the *Criminal Code* as any act that, if done without consent, would constitute an assault as defined by sections 187 and 188 of the *Criminal Code*. Noting that there is satisfactory evidence as to the age of GO, put in its simplest form the case is made out if I am satisfied beyond reasonable doubt that the defendant has dealt with GO, as that term is defined in section 132, and that such dealing is "*indecent*". The defence concedes that the evidence of the alleged actions may, if proved, satisfy the former but not the later.

62. The evidence led by the prosecution at its highest shows that the defendant has knelt down next to or over GO as she lay asleep, pulled at the shorts in a downward motion, albeit not removing the shorts, and at some point the defendant is laying on GO's tummy. As the evidence that the defendant was laying on GO's tummy is controversial and there are major reliability issues specifically with that evidence, I will deal with that separately for the moment.

63. GO's evidence was extracted with leading questions in the recorded statement regarding this issue. Against that is GO's very spontaneous

answer of "no" when asked in cross-examination "*…was Michael ever lying on your tummy*". That answer is very unequivocal. It is a single answer to a single isolated question. This is likely to be yet another instance where recollection of details has degraded with the passage of time. It is nonetheless quite a significant and otherwise noteworthy detail. Although there were the usual expected problems with the evidence of GO, i.e., her age, that cross-examination was conducted over a CCTV link and that an interpreter was mostly involved, I could not detect any discernable uncertainty in her relatively spontaneous denial. Likewise, and fully acknowledging the difficulty of categorically doing so in the circumstances, I could not detect any suggestion of gratuitous concurrence.

64. I therefore have significant concerns regarding the reliability of GO's evidence on this issue and I am not be satisfied beyond reasonable doubt that the defendant has laid on GO's tummy.

65. At this point it is appropriate to deal with Mr Noud's submission that the element of indeceny has not been made out. Mr Noud relied on the decision of Mildren J in *R v Eldridge* [2005] NTSC 59 where his Honour referred with apparent approval to the decision of the Full Court of Western Australia in *Drago v R* (1992) 8 WAR 488. That case held that in order to amount to an indecent dealing the conduct must involve the human body, bodily actions or bodily functions in a sexual way. It was held that the section there did not target conduct which was simply outrageous or offensive to common proprietary. The wording of the offence in Western Australia, at least of the time, for purposes of comparison and argument, was substantially the same as the current section of the Northern Territory *Criminal Code*.

66. The conduct alleged to constitute an indecent dealing in this case involves the defendant approaching GO while she slept and then commencing to pull at her shorts. Mr Noud submits that even if I were to accept the evidence in

relation to that, it does not involve the complainant's body in a sexual way. I think that is manifestly incorrect in the circumstances i.e., the age of GO, that she was asleep and that someone began to pull her shorts down as she slept and for no apparent legitimate reason. Noting that the term "indecent" is sufficiently satisfied if an act is offensive to a substantial degree to contemporary standards of decency currently accepted by the community, that requirement is satisfied in my view by the alleged actions even absent any evidence of laying on GO's tummy.

67. That satisfies the requirement of indecency. As to *"deals with"*, section 132(1) of the *Criminal Code* provides:

> "(1) In this section, "deals with" includes the doing of any act if, done without consent would constitute an assault…"

The act complained of would satisfy that and hence in my view the charge can be made out in law if the allegations can be proved beyond reasonable doubt.

68. I conclude that the charge is available in law if suitable findings of fact are made. That then leads to a consideration of whether the evidence establishes the offence beyond reasonable doubt. Leaving aside the issue of corroboration for the present, I have concerns overall as to the reliability of the young complainant's evidence and specifically as to the identity of the defendant as the person who committed the alleged act. These concerns have been discussed in detail in the reasons for ruling on the admissibility of the recorded statement. Notwithstanding my admission of that statement into evidence for the reasons given, those matters impact in a significant way on the overall reliability of the evidence.

69. Identification is often problematic even in optimal circumstances. I am required to warn myself of the dangers inherent in identification evidence. I am obliged to identify all weaknesses in the evidence relevant to identification. In that respect, I note that GO had been asleep and was woken

suddenly. She was startled. The evidence as to the state of the lighting in the room is inconsistent. It is difficult to ascertain from her evidence as to how much of an opportunity GO had to view the assailant. There were many other people at the house on that night and in various states of intoxication. There was no evidence that the room where this is alleged to have occurred was locked. Overall I am of the view that GO's identification of the defendant is questionable and this is only compounded by the leading questions. The use of leading questions resulted in GO focussing on the defendant as the assailant. There was no attempt made to explore the reliability of that evidence. all in circumstances where the reliability of the identification was suspect.

70. For those reasons, on the evidence, I am not satisfied beyond reasonable doubt that the defendant was the person who attempted to remove GO's shorts as she slept and I therefore find the defendant not guilty.

Dated this 6th day of June 2008.

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V M Luppino
STIPENDIARY MAGISTRATE