EVIDENCE LAW

CASE NOTES

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Contents

Papakosmas v The Queen (1999) 196 CLR 297

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Court Details: The High Court of Australia

Procedural History: The case is on appeal from the Supreme Court of New South Wales

Facts:

- The appellant, Papakosmas, was a television producer who was convicted of raping the complainant, his secretary, at their Christmas party on the evening of 16 December 1995.
- Throughout the evening, they had both been drinking and there was conversation between them about sexual matters in the presence of other people.
- Later that night, after meeting in the hallway, Papakosmas took the complainant into a small room and tried to kiss her and convince her to engage in fellatio.
- Papakosmas then allegedly forced the complainant to have sexual intercourse with him despite her lack of consent and resistance
- Afterwards, Papakosmas left, and the complainant was sick in a waste bin and went to the bathroom to wash her face and her underwear.
- As the complainant was leaving the bathroom, she saw a workmate, Ms Ovadia, to whom she said she had been raped.
- Outside at a table, she repeated the complaint to another friend, Ms Stephens
- The complainant was very distressed and crying, holding her head in her hands.
- Shortly afterwards the complainant repeated her complaint to Ms Fahey who said she was crying uncontrollably and appeared very distressed.
- Soon afterwards, the complainant attended a hospital and was examined by a doctor, who took a history and made clinical observations
- Papakosmas admitted to having attempted fellatio and to have had sexual intercourse, however he argued that it was with complainant's consent.
- He appealed his conviction on the basis that the evidence of the complainant's complaint should not have been admitted.

Issues:

1. Whether the evidence of Ms Ovadia, Ms Stephens and Ms Fahey was relevant under section s 55 of the *Evidence Act 1995*.
2. Whether s 66 of the Evidence Act 1995 makes evidence of a recent complaint of sexual assault admissible as 'first-hand hearsay'
3. Whether the judge exercise the power given under S 136 of the Act if the evidence of the fact in issue is by reason of s 66.

Reasoning/Decision (Commentary): The appeal was dismissed. The court held that evidence of recent complaints in sexual assault cases were allowed in for the purpose of

enabling the jury to decide whether a woman's conduct was consistent with her testimony negating her consent.

When applying section 55 of the *Evidence Act 1995*, the evidence of the complaints was relevant. If the evidence were accepted, it could rationally have affected the assessment of the probability of a fact in issue, which is largely the lack of consent.

However, the evidence was hearsay, and Section 66 is an exception to the hearsay rule. Due to the complainant immediately recounting her alleged rape to her co-workers, this satisfied the 'freshness' test where occurrence of an alleged fact is fresh in the memory of the complainant when the complaint is made.

There was no application to the judge to exercise his discretion under s 135. Papakosmas's suggestion that a judge should always use this discretion when faced with complaint evidence was rejected by the court. There is no general rule to the application of s 135. In this present case, the evidence did not satisfy the requirements of s 136 as it would not be misleading or confusing nor prejudicial to Papkosmas.

Ratio:

- Gleeson and Hayne CJ: 'The legislative provisions in question, insofar as they apply to evidence of complaint, are not limited in such application to evidence of complaint in cases of alleged sexual assault. In that respect, as in other respects, they involve a significant departure from the common law. It is possible to imagine circumstances in which evidence of the fact that a complaint of an alleged crime has been made might be evidence that could not rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue. For example, the nature of the complaint, the circumstances in which it was made, or matters personal to the complainant, might provide a reason why that could be so. However, the present case does not raise an issue of that kind. As the trial judge warned the jury, the fact that an assertion is repeated does not make it any less untrue if it were untrue to begin with. Furthermore, some complaints may be made in circumstances which require particular attention to be given to the danger of fabrication. However, in the circumstances of the present case, it is impossible to deny that the evidence of the complaints made to the three witnesses in question could be regarded by the jury as affecting their assessment of the probability that there was no consent to the intercourse'. (at para [31])

  'It is to be noted that, if the exception to the hearsay rule created by s 66 is to apply, certain conditions need to be fulfilled. The person who made the representation, (in a case such as the present, the complainant), of which evidence is to be given must be available to give evidence about the asserted fact. That condition was fulfilled because the complainant herself gave evidence that she did not consent to the intercourse. If the complainant had, for some reason, been unavailable as a witness,

and the defence had not been able to cross-examine her, then the evidence of her out-of-court representations would not have been admissible under s 66. (Whether the evidence would have been admissible under s 65, which permits hearsay evidence to be adduced in criminal proceedings where the maker of the representation is not available in certain circumstances, is a matter that does not arise for decision.) Secondly, by reason of s 62, the operation of Div 2 of Pt 3.2 of the Act is restricted to first-hand hearsay, a condition that was satisfied in the present case. Thirdly, by reason of s 66(2), it is necessary that the occurrence of the asserted fact was fresh in the memory of the complainant.' (at para [34])

- Gaudron and Kirby JJ: 'The nature and degree of the connection necessary before a statement is probative of the fact asserted in it will, of course, depend on the nature of that fact and, if it be different, the fact ultimately to be proved. Even so, the connection will ordinarily be found in the close contemporaneity of the statement with the fact in issue and the consideration that the statement is a statement of the kind that might ordinarily be expected from the maker if the fact were true. Similarly, a statement that is closely contemporaneous with the fact in issue and is contrary to what would ordinarily be expected if that fact were true rationally bears on the improbability of its having occurred.' (at para [56])

  'The statements to Ms Ovadia, Ms Stephens and Ms Fahey were closely contemporaneous with the events alleged by the complainant and were of a kind that might ordinarily be expected if those events occurred. That being so, they rationally bear on the probability of the occurrence of those events and, thus, were admissible as evidence of the facts asserted in them.' (at para [59])

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