

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ

PHILLIP JOHN GRAHAM

APPELLANT

AND

THE QUEEN

RESPONDENT

Graham v The Queen (S58/1998) [1998] HCA 61
Date of Order: 6 August 1998
Date of Publication of Reasons: 30 September 1998

ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Court of Criminal Appeal of New South Wales. In lieu thereof, order that the appeal to that Court be allowed, the appellant's convictions quashed and a new trial ordered on all counts on which the appellant was convicted.*

On appeal from the Supreme Court of New South Wales

Representation:

S J Odgers with M A Marty for the appellant (instructed by T A Murphy, Legal Aid Commission of New South Wales)

G S Hosking SC with A M Blackmore for the respondent (instructed by S E O'Connor, Solicitor for Public Prosecutions (New South Wales))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Graham v The Queen

Criminal Law – Evidence – Hearsay – Exception to Hearsay Rule – Complaint of sexual assault – Prior complaint evidence – Whether complaint made when facts "fresh in the memory" of complainant.

Criminal Law – Evidence – Credibility – Exception to Credibility Rule – Whether evidence fabricated – Discretion to admit prior consistent statement – Factors affecting discretion.

Words and Phrases – "fresh in the memory".

Evidence Act 1995 (NSW), ss 66, 108, 192.

1 GLEESON CJ. I agree with the reasons for judgment of Callinan J.

2.

2 GAUDRON, GUMMOW AND HAYNE JJ. We agree with Gleeson CJ and Callinan J that the appeal should be allowed and orders made as proposed.

3 The evidence of complaint by the appellant's daughter, K, to her friend, N, was not admissible under s 66 of the *Evidence Act* 1995 (NSW). The complaint was made six years after the last of the acts alleged against the appellant. When K made the complaint to N the occurrence of the asserted facts could not be said to have been "fresh in the memory of the person who made the representation" (the complainant, K). Too long had elapsed between the events and the complaint.

4 The word "fresh", in its context in s 66, means "recent" or "immediate". It may also carry with it a connotation that describes the quality of the memory (as being "not deteriorated or changed by lapse of time"¹) but the core of the meaning intended, is to describe the temporal relationship between "the occurrence of the asserted fact" and the time of making the representation. Although questions of fact and degree may arise, the temporal relationship required will very likely be measured in hours or days, not, as was the case here, in years.

5 There are several reasons for adopting this construction. First, the section applies only where the person who made the representation has been, or is to be, called to give evidence. To permit leading of evidence of out of court statements made by that person based upon some assessment of the vividness or quality of the recollection (as opposed to its being made very soon after the events) would be to distract attention from the quality of the evidence that the witness gives in court. Secondly, whatever a person may believe, and no matter how earnestly that person may try to be accurate, experience demonstrates that the memory of events does change as time passes. Thirdly, the exception created by s 66 should be limited in its application to those cases where the tender of the earlier statement is likely to add to the useful material before the court. If a witness claims to have a vivid recollection of events when called to give evidence, permitting the tender of some earlier statement made well after the events (but while they were, in the view of the witness or the court, still vivid) adds little useful to the material before the court. By contrast, to permit the tender of a statement made at the time of (or very soon after) events in question may well be useful. Such a statement may give the best available account of what the witness knows of the events.

6 Because the evidence of complaint was not admissible under s 66, it was admissible only if s 108 applied: in this case if "it [was] ... suggested (either expressly or by implication) that evidence given by the witness ha[d] been

1 *The Oxford English Dictionary*, 2nd ed (1989), "fresh" sense 7a.

3.

fabricated or re-constructed (whether deliberately or otherwise) or [was] the result of a suggestion"² and if the court gave leave to adduce it.

7 The appellant's denial of the charges and the course of cross-examination of the complainant may well have amounted to a suggestion that the evidence of the complainant had been "fabricated". (It was not suggested in this case that the complainant had reconstructed her evidence or had been affected by suggestion.) But it was by no means inevitable that leave should have been given to adduce evidence of the prior consistent statement of the complainant.

8 In exercising the discretion under s 108(3) to permit the adducing of evidence of a prior consistent statement, it is important to bear two matters in mind. First, s 108 creates an exception to the "credibility rule" - the rule that evidence that is relevant *only* to a witness's credibility is not admissible³. Second, it is important to identify how the evidence relates to the statutory premise for its admission. Whether, if admissible, the complaint becomes evidence of the truth of what is asserted is not relevant to the exercise of the discretion to give leave under s 108. The exercise of the discretion under s 108 depends upon the effect of the evidence on the witness's credibility: here, the suggestion of fabrication.

9 How does the making of a complaint six years after the events bear upon that question? Unless the making of the complaint can be said to assist the resolution of that question, the evidence of complaint is not important⁴ and would do nothing except add to the length of the hearing⁵. And in this case, it is by no means clear that the making of a complaint six years after the event does assist in deciding whether the complainant had fabricated her evidence. Although trial counsel for the appellant suggested to the complainant, by his last question in cross-examination, that she was "making it all up" the allegation of fabrication of evidence did not loom large in the trial. No question was put, and no answer was given, from which the time of alleged fabrication could be identified. The complaint having been made in 1994, and it having led at once to the start of police investigations, it may be doubted that a jury could gain assistance from its making in deciding whether the complainant had fabricated her story.

10 Because the trial was conducted without reference to the *Evidence Act* by those who then appeared for the prosecution and the defence and was conducted

2 s 108(3)(b).

3 s 102.

4 cf s 192(2)(c).

5 cf s 192(2)(a).

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as if the common law applied, unaffected by the passing of the statute, evidence of the complaint by K to N was admitted without consideration of the issues just mentioned as affecting the discretion to admit it. Because its admission was not inevitable, we cannot say that the appellant did not lose a significant chance of acquittal and it follows that the appeal should be allowed. It is not necessary to consider the other issues that it was sought to agitate.

11 We add one further comment. The use that may be made of the complaint, if admitted, may depend upon the effect of s 60 of the Act⁶. The appeal was conducted on the assumption, also to be found in the judgment of the Court of Criminal Appeal, that, if the evidence of the complainant's conversation with her friend, N, satisfied the requirements of s 66, it was admissible to prove the facts related in that conversation, not merely her complaint as to those matters.

12 The relevance, at common law, of evidence of recent complaint in cases involving sexual offences was recently explained in *Suresh v The Queen*⁷. As there explained, the evidence is not evidence of the offence charged, but is admissible because of the general assumption that the victim of sexual offences will complain at the first reasonable opportunity and that, if complaint is not then

6 Section 60 provides:

"The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation."

7 (1998) 72 ALJR 769; 153 ALR 145.

5.

made, a subsequent complaint is likely to be false⁸. Clearly, s 66 alters the common law position in so far as it requires that a representation be "fresh in the memory". The question whether the combined operation of ss 60 and 66 of the Act otherwise alters the common law position and, if so, in what way may require consideration in an appropriate case. It is not a question that arises in this case.

8 *Suresh v The Queen* (1998) 72 ALJR 769 at 770 per Gaudron and Gummow JJ; 153 ALR 145 at 147. See also *R v Lillyman* [1896] 2 QB 167 at 177-178; *Kilby v The Queen* (1979) 129 CLR 460 at 472 per Barwick CJ, 474-476 per Menzies J.

- 13 CALLINAN J. This appeal from the Court of Criminal Appeal of New South Wales was heard and allowed on 6 August 1998. On that date the Court said that it would publish its reasons in due course.

Factual background

- 14 The appellant was convicted in the District Court of New South Wales of indecent assault by a person in authority⁹ (3 counts) and sexual intercourse with a person under the age of ten years¹⁰ (3 counts). He appealed against his convictions to the Court of Criminal Appeal. The appeal was dismissed and the convictions upheld. The appellant has served all but one month of the minimum term of his sentence.

- 15 The complainant, K, is the daughter of the appellant. Charges were laid after she told a girlfriend in August 1994 that she had been sexually abused by her father when she was a child. The offences are alleged to have occurred between June 1987 and July 1988, when K was aged 9 and 10.

- 16 In her evidence in chief the complainant gave a detailed account of the events the subject of the charges.

- 17 The first was alleged to have occurred in about June 1987, at the appellant's residence, and involved compulsion on the part of the appellant (Count 1).

- 18 The next incident, which occurred shortly afterwards was of a similar kind (Count 2). The appellant told K that what happened in the room was "between us"

9 Section 61E(1A) of the *Crimes Act* 1900 (NSW), now repealed, provided:

"Any person who assaults another person who-

(a) is under the age of 16 years; and

(b) is (whether generally or at the time of the assault only) under the authority of the person,

and, at the time of, or immediately before or after, the assault, commits an act of indecency upon or in the presence of the other person, shall be liable to penal servitude for 6 years."

10 Section 66B of the *Crimes Act* provides:

"Any person who attempts to have sexual intercourse with another person who is under the age of 10 years, or assaults any such person with intent to have sexual intercourse, shall be liable to penal servitude for 20 years."

7.

and that it was all right to do what they were doing because "I was his daughter and he was my father".

19 A few days after this incident K was asleep in her bed. She awoke to find the appellant engaged again in a similar act (Count 3). K told him that she "didn't want him to do this" and he told her to be quiet; he eventually desisted and left the room. Before he left, he told her not to tell anyone what had happened.

20 About a week later, K was at home with the appellant when she was preparing for school. The appellant called her to his bedroom. The appellant repeated conduct of the kind the subject of Count 1 (Count 4). K then went to school.

21 A further similar act occurred a week or two later (Count 5). It lasted about ten or fifteen minutes before the appellant stopped and left the complainant's room.

22 The events the subject of Count 8 also occurred at the appellant's residence a few weeks afterwards. Again the appellant told the complainant not to tell anyone what had happened.

23 The appellant was found not guilty in respect of Counts 6 and 7.

24 It was in 1994 some six years after the last of the acts alleged, that K became friendly with another girl, N. They shared a flat for several months. N's evidence was, that one night, when the two girls were discussing boyfriends, K had told her about what her father had done to her when she was living at his residence. K, at N's suggestion, told her mother what had happened and the allegations were reported to the police.

25 The appellant denied all of the relevant allegations in an electronically recorded police interview (ERISP).

The appeal to this Court

26 The first ground of appeal argued was that the Court of Criminal Appeal erred in holding that the trial judge did not fall into error in admitting evidence of the complaint to N. Objection was taken at the trial to the reception of this evidence which I have outlined. Admissibility was argued by reference to common law principles although the *Evidence Act* 1995 (NSW), had come into force the previous year.

27 In the Court of Criminal Appeal, Levine J (with whom Newman and Barr JJ agreed) referred to s 66 of the *Evidence Act*¹¹ and said:

"Shortly stated, common sense would seem to indicate that the notion of 'freshness' particularly in this area of the law is not anchored to nor determined by simply notions of the 'lapse of time'. It is concerned with, in my opinion, the 'quality' of the memory. A person might never forget the details of an event many years previously because it took place in circumstances which impressed it into the witness' memory. In the instant appeal there is nothing in the evidence of the complainant, in my view, other than the natural difficulty given her age, in remembering with precision matters of chronology, that derogates from the 'impression' she said the events have made upon her, the memory of which came to her during the conversation with [N]." (emphasis in original)

28 The Court of Criminal Appeal rejected this ground of appeal and concluded that the evidence was admissible, notwithstanding the failure of anyone at the trial to apply the law then in force, the *Evidence Act*, as it in fact satisfied the statutory requirement of freshness.

29 The appellant again submits that the evidence of complaint did not satisfy the requirement of freshness imposed by s 66. The appellant advanced five arguments in support of this proposition:

11 Section 66 of the *Evidence Act* 1995 (NSW) provides:

"(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person, or

(b) a person who saw, heard or otherwise perceived the representation being made,

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

..."

9.

1. the natural meaning of the word "fresh" imports a notion of recency as opposed to the concepts of vividness and "quality" relied upon by Levine J;
2. it is clear that the Australian Law Reform Commission intended that a memory of an event 6 years in the past should never be regarded as "fresh";
3. the question had not arisen in the trial – consequently no voir dire was held on the question and the trial judge (who had the benefit of observing the complainant, unlike the members of the Court of Criminal Appeal) had not ruled upon it;
4. there was no direct evidence from the complainant as to the "freshness" or otherwise of her memories of the alleged assaults; and
5. the accounts given by the complainant of the alleged assaults were generally lacking in detail as to dates and surrounding circumstances, indicative of the absence of a "fresh memory".

30 During argument the Court's attention was also drawn to some difficulties that the complainant had experienced in her oral evidence, initially in particular, in recalling what she had told N, although she did manage in due course to give an abbreviated version of the conversation.

31 The Australian Law Reform Commission report, *Evidence*, said of the requirement of freshness of memory¹²:

"Where the maker is called, the proposal is restricted to representations made when the facts were 'fresh in the memory'. ... 'Freshness of memory' introduces flexibility. It is used to limit the tendering of hearsay material where the maker of the representation is called to that which has the value of being fresh. The importance of the concept lies in the fact that it recognises the findings of psychological research which reveals the extent to which and rate at which memory loss occurs, and the decrease in the accuracy of statements that result from unconscious reconstruction and interference."

32 Let it be assumed for present purposes that the appellant's proposition with respect to freshness is correct. The possible admissibility of the evidence by leave (to meet a suggestion of fabrication by the complainant) pursuant to s 108

12 Australia, The Law Reform Commission, *Evidence*, Report No 26 Interim, (1985), vol 1 at par 688.

of the *Evidence Act*¹³ would remain to be considered. Section 108 has to be construed against the background of s 102 which contains the "credibility rule" and provides (subject to exceptions) that evidence that is relevant only to a witness' credibility is not admissible. No leave, as required by s 108 was sought or obtained in this case. However, the respondent submits that the judge at first instance would inevitably have given leave for the evidence of complaint by N to be given pursuant to s 108(3)(a) or (b) because the appellant's whole defence was founded on the falsity of the allegations. In this case little help is to be obtained from s 192 of the *Evidence Act*¹⁴ as that section (by sub-s (1)) confers a very wide discretion,

13 Section 108 provides:

"(1) The credibility rule does not apply to evidence adduced in re-examination of a witness.

...

(3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if:

(a) evidence of a prior inconsistent statement of the witness has been admitted, or

(b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion,

and the court gives leave to adduce the evidence of the prior consistent statement."

14 Section 192 reads:

"(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:

(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and

(b) the extent to which to do so would be unfair to a party or to a witness, and

(Footnote continues on next page)

although, among other things the Court is bound to give consideration to the question of unfairness to parties and witnesses.

33 It cannot be said that leave pursuant to s 108 would inevitably have been given. Section 108(3)(b) of the *Evidence Act* is concerned with a suggestion of fabrication: it does not focus upon any temporal aspects of the fabrication. In this case, had the appellant's counsel been asked whether a suggestion of fabrication would be made, almost certainly he would have answered in the affirmative. That might or might not be the situation were there to be a retrial. The position here is that leave was neither sought nor given and accordingly the judge's discretion as to admissibility pursuant to s 108 was never enlivened or exercised.

34 I return to the appellant's argument that the Court of Criminal Appeal misconstrued s 66 of the *Evidence Act*. Whilst it cannot be doubted that the quality or vividness of a recollection will generally be relevant in an assessment of its freshness, its contemporaneity or near contemporaneity, or otherwise will almost always be the most important consideration in any assessment of its freshness. The Court of Criminal Appeal took the view that the section laid emphasis on the "quality" of the memory and in consequence, the regard that should have been paid to the delay in making the complaint was not paid. There may be cases in which evidence of an event relatively remote in time will be admissible pursuant to s 66, but such cases will necessarily be rare and requiring of some special circumstance or feature. It is desirable that s 66 be given such a construction not only for certainty but also to avoid as much as possible the delay and expense of voir dire hearings to explore questions of vividness and the like, with their attendant opportunities for the rehearsal of cross-examination and evidence.

35 The next submission here, and in the Court of Criminal Appeal, in the alternative, was that the trial judge's directions to the jury on the complaint were inadequate in that they did not make clear that the delay in its making was relevant to the credit of the complainant and a fact to be considered in evaluating the consistency of the complainant's evidence¹⁵. The appellant also made the point that the absence of a direction that the delay may have prejudiced the appellant in meeting the allegations caused injustice to the appellant. The Court of Criminal Appeal accepted this submission in part. Levine J, for the Court, said:

-
- (c) the importance of the evidence in relation to which the leave, permission or direction is sought, and
 - (d) the nature of the proceeding, and
 - (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence."

15 *Crofts v The Queen* (1996) 186 CLR 427.

"His Honour directed the jury on the issue of delay in complaint in terms of '*the credibility of the complainant*' and as '*strengthening the credit of the complainant*'.

...

These directions which essentially were inadequate and incorrect however cannot be said to have operated adversely to the interests of the appellant, the more so in the absence of any directions by his Honour as to the effect of s 66 and the status of the evidence of complaint going to the truth of the subject matter of the complaint.

It wasn't until the conclusion of his Honour's summing up to the jury that the Crown Prosecutor drew his Honour's attention to s 405B which requires the trial judge to warn the jury that the absence of complaint or the delay in making of a complaint '*does not necessarily indicate that the allegations are false*' and to inform the jury that there may be good reasons why '*complaint*' was not made or was delayed. His Honour to an extent had traversed the issues of delay though he did not use the word itself and the defence case in regard to it but, as I have said, limited to the issue of credibility." (emphasis in original)

36 It must be accepted that the directions did not make clear to the jury as they should have that the delay in making the complaint was relevant to the credibility of the complainant¹⁶ and that the appellant may have been prejudiced in attempting to meet the allegations.

37 The appellant's counsel did not take any point at the trial with respect to the directions given by the trial judge on delay in making the complaint. It is not necessary to consider whether, in this case, that omission, whether accidental or deliberate would be fatal to the appellant¹⁷ because, as will appear, the appeal should be allowed on other grounds.

16 *Crofts v The Queen* (1996) 186 CLR 427; *Kilby v The Queen* (1973) 129 CLR 460; *Young* (1996) 90 A Crim R 80 at 84-87; *Longman v The Queen* (1989) 168 CLR 79; *R v K* (1997) 68 SASR 405 at 409-412 per Doyle CJ.

17 cf *BRS v The Queen* (1997) 71 ALJR 1512 at 1526 per McHugh J, at 1542-1543 per Kirby J; 148 ALR 101 at 120, 142; *Gipp v The Queen* (1998) 72 ALJR 1012; 155 ALR 15. But see s 165 of the *Evidence Act*, especially sub-ss (2) and (5), which provide:

"(2) If there is a jury and a party so requests, the judge is to:

(Footnote continues on next page)

38 The next ground that was argued related to the record of interview between the police and the appellant which was admitted into evidence over objection by defence counsel.

39 The first objection was that the whole of the record of interview should be excluded because the appellant's answers were, in substance, a denial of the allegations made by the complainant. The trial judge appears to have accepted this view but admitted the evidence on the basis that the interview "allow[ed] the accused at the earliest opportunity to put his version".

40 The denials of the appellant were not capable of being regarded by the jury as admissions¹⁸. They were otherwise irrelevant. The record of interview, once it was admitted, became the source of material for a cross-examination of the appellant on peripheral or irrelevant issues and caused the introduction into evidence of matters which had a real potential for prejudice to him.

41 In the Court of Criminal Appeal, Levine J held that the record of interview should have been excluded in the exercise of the trial judge's discretion (presumably under s 137), but was "not persuaded" that the judge's error in failing to exclude it "amounted to a miscarriage of justice".

42 A further submission about the record of interview was that it introduced into the evidence at trial the question "why would the complainant lie?" and the appellant's response to it. The question "Why would [K] make this allegation?" was repeated and sought of the appellant an opinion why the complainant would falsely allege that he had sexually assaulted her. On a similar basis to his admission of the whole of the record of interview, his Honour the trial judge held that the objectionable material:

"really gives the accused the opportunity at the earliest possible time to give an explanation as to the basis of these allegations."

(a) warn the jury that the evidence may be unreliable, and

(b) inform the jury of matters that may cause it to be unreliable, and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury."

18 *Barca v The Queen* (1975) 133 CLR 82 at 107; *Straker v The Queen* (1977) 51 ALJR 690 at 694; 15 ALR 103 at 109.

43 His Honour also justified the admission of this part of the record of interview upon the basis that questions of the kind asked could quite properly be asked by the investigating police officers as part of the investigative process. That the police officers might do so may be accepted. However, that the police officers may have asked such questions provides no basis for the introduction of this issue into evidence at the trial.

44 The appellant relied on *Palmer v The Queen*, in which Brennan CJ, Gaudron and Gummow JJ said¹⁹:

"It is one thing to permit cross-examination of a complainant in order to elicit, if possible, a motive to lie. It is another thing to permit cross-examination of an accused to show that an accused cannot prove any ground for imputing a motive to lie to the complainant. A complainant knows whether he or she has a motive to lie and, as a motive to lie is a fact that may be proved to impeach the complainant's credit, the complainant may be asked about it. ... But the fact that an accused has no knowledge of any fact from which a motive of the kind imputed to a complainant in cross-examination might be inferred is generally irrelevant. In general, an accused's lack of knowledge simply means that his evidence cannot assist in determining whether the complainant has a motive to lie..."

45 The challenge to the admissibility of the record of interview was correctly made. It should certainly not have been admitted in its entirety, if at all. Even if it had been otherwise admissible this would have been an appropriate case for its discretionary exclusion pursuant to s 137 of the *Evidence Act*²⁰.

46 There were accordingly a number of errors in the conduct of the trial. So too, the construction of s 66 of the *Evidence Act* by the Court of Criminal Appeal does not accord with the construction intended for it and which should be adopted by jurisdictions in Australia in which this Act is in force. Because of the failure therefore to apply and construe correctly the provisions of s 66 of the *Evidence Act*, the appellant may well have lost a significant chance of an acquittal at trial which should have led to the upholding of his appeal to the Court of Criminal Appeal²¹. It is unnecessary to decide therefore whether the other errors to which

19 (1998) 72 ALJR 254 at 257; 151 ALR 16 at 20.

20 Section 137 concerns the exercise of discretion in criminal proceedings:

"In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant."

21 *M v The Queen* (1994) 181 CLR 487; *BRS v The Queen* (1997) 71 ALJR 1512; 148 ALR 101.

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reference has been made, either singly or cumulatively would otherwise justify the allowing of this appeal.

- 47 I would uphold the appeal, quash the verdicts of guilty and order a new trial. Whether such a trial should take place in view of the term of imprisonment served by the appellant will be a matter for the Director of Public Prosecutions.