A DEFENCE LAWYER'S PERSPECTIVE

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It is not easy being a defence lawyer at the best of times, but when you find yourself cross-examining a five year old child in front of a jury about matters that are not generally discussed in public, you cannot help but feel a bit sorry for yourself.

There are few other cases where your cross-examination of a witness is as vital as it is in a sexual assault trial. Often the complainant's evidence is the only evidence. In addition, the complainant is not necessarily telling the truth or the whole truth. The fact is that false allegations are made and for a variety of reasons.

For example, in *R v GB*[1] the complainant, after the trial had concluded, wrote to the accused admitting that the allegations had been untrue and apologising for the harm that they caused. At the trial, it was contended that the complainant had made false accusations due to resentment at the break down of a relationship between his mother and the accused. His mother had previously accused her own father of being a serial rapist but the falsity of those allegations was conclusively established by DNA evidence.

In *R v KW*,[2] a 13 year old girl made allegations against Mr W. He was charged. After a number of charges were dismissed at committal, she made further allegations. This time Mr W had an alibi. He was not charged. Further allegations were made. He again had an alibi. The girl was then charged and convicted of public nuisance.

In *R v G*,[3] Ms G was sentenced after pleading guilty to perjury. She had made what she later admitted was a false complaint that the father of her child had raped her. She gave that evidence at his trial. He was convicted and sentenced to a term of imprisonment of eight years. He served one year and 15 days of the sentence before she admitted that she had lied. She said she lied to get him out of her life. She said:

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1 (1998) 148 FLR 222.

2 A NSW case where the complainant was ultimately dealt with in the Children's Court. The matter was raised in the NSW Parliament: NSW, *Parliamentary Debates*, Legislative Assembly, 16 November 1994, 5167 (Peter Anderson).

3 (Unreported, District Court of New South Wales, Judge Hosking, April 28 2004).

> prior to going to the police I hadn't given any pre-thought as to the story I was going to give regarding how or what happened at the rape. I then went to the hearings. Once I had lied I had to continue lying because I had taken it too far.[4]

As those who make false allegations are not courteous enough to wear a sign proclaiming 'I am making this up', you have to tread carefully to avoid losing the jury from the outset. If you are too aggressive, you are likely to harm your client's chances. If you are not firm enough, the jury is likely to think that you are not persuaded by what you are saying. Jurors are generally unschooled in the ways of the criminal law and at the time you come to cross-examine the complainant, they have not necessarily absorbed what it means to be satisfied beyond reasonable doubt. Understandably, these jurors cannot help but think to themselves: why would the complainant be making it up if it were not true?

As a defence lawyer, your armoury is rarely extensive. Changes made to the law to make the process less confronting for complainants have meant that an accused person cannot get access to material that might have made a difference to the view the jury forms of a complainant's evidence. It is almost impossible to get access to counselling records and to any documentation that might be held by the Victims Compensation Tribunal which may reveal that: the complainant, on a previous occasion, gave a different story; the allegations were the product of some other trauma; or the complainant has a longstanding psychiatric disorder which might reflect upon his or her reliability. If you do manage to get access to material that, for example, reveals that the complainant has a history of making false sexual assault allegations, you are prevented from using the material by s 293 of the *Criminal Procedure Act 1986* (NSW).[5] In addition, the accused is not necessarily in a position to assist you in understanding why a false allegation might have been made.

Those not telling the truth can be just as persuasive as those who are. Once an allegation is made, a process is set in train. Parents, police, the Department of Community Services, counsellors and doctors may become involved. All of these people are encouraged to support the complainant and not to challenge his or her version in any way. For this reason, it is usually not until the complainant is cross-examined that there is any challenge to his or her account. Unsurprisingly, whether or not their account is true, by the time the matter comes to court the complainant may well believe that it is.

It is not unusual for complaints of sexual assault to be made up to 30 years after the alleged events. New South Wales does not have in place any time limits within which such prosecutions must be brought; nor are the courts prepared to grant a permanent stay in such cases unless some other significant prejudice over and above the obvious difficulties in establishing alibi evidence is present. In *R v McD*,[6] the Court was unprepared to permanently stay the trial even though potential witnesses who could have given evidence favourable to the accused had

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4 Psychiatric report tendered as an exhibit in sentence proceedings (copy on file with author).

5 See *M v R* (1993) 67 A Crim R 549; *R v Bernthaler* [1993] (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Kirby P, Badgery-Parker and Ireland JJ, 17 December 1993).

6 (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Gleeson CJ, Allen and James JJ, 2 May 1996).

died. All an accused person can say in that particular situation is 'I am not guilty' and hope that the jurors understand the import of the directions that a judge gives on that topic.

We have recently become accustomed to the evidence in chief of a child being in the form of an interview recorded at about the time that the allegations were first made to the police. This means that the child does not have to give the court his or her account of what happened. The result of this, in a situation where the trial is held well after the interview is conducted, can be that the child has little memory of the alleged event. This makes it virtually impossible to cross-examine at all, let alone effectively. The regular refrain when you seek to question in any detail about what the child alleges took place is 'I don't remember'. In this context, an out of court statement, which hitherto would have been inadmissible, assumes a terrible significance. Directions have not yet been fashioned to deal with this situation and some judges are resistant to the suggestion that a firm direction is required about the effect of the difficulties that the situation creates for an accused.

Concern has been expressed that not enough people charged with sexual assault offences are being convicted and measures have been and are being introduced to increase the number of convictions.[7] In fact in 2003, 52.7 per cent of all people charged with a sexual assault offence that was dealt with in the District and Supreme Courts were found guilty.[8] This is not an insignificant percentage when it is borne in mind that, unlike other offences, the proof of sexual assault offences often rests on the evidence of just one person, the complainant. As our system requires proof beyond reasonable doubt, one witness evidence standing alone is often just not enough.

Recent changes to the laws of sentencing have introduced the notion of a standard non-parole period for certain offences.[9] The standard non-parole periods are much higher than the non-parole periods imposed before the introduction of the legislation. A number of sexual assault offences are included in the standard non-parole period provisions.

This introduces a further difficulty for a defence lawyer. Crown Prosecutors are often willing to accept a plea to a lesser charge to avoid the need for the complainant to give evidence. The lesser charge may or may not carry a standard non-parole period. In any event, the accused will be sentenced much more leniently if he or she were to plead guilty. Sometimes it is as stark a choice as a plea of not guilty with a 15 year non-parole period on conviction versus a 0–2 year non-parole period on a plea to a lesser charge. For an innocent accused the position is untenable.

Some of the changes to the way sexual assault complaints are investigated and presented are long overdue. No one questions that it is difficult for a legitimate sexual assault complainant to participate in the prosecution of an alleged

7 See, eg, New South Wales, *Report on Child Sexual Assault Prosecutions: Standing Committee on Law and Justice,* Parl Paper No 208 (2002); NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004).

8 NSW Bureau of Crime Statistics and Research (2004) Request No: 04/2562 (copy on file with author).

9 *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).

offender. Despite this, great care must be taken to ensure protections traditionally afforded to an accused person are not sacrificed in an endeavour to make the process less confronting for a complainant.