

## SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

**Case Title:** SMA v John XXIII College

**Citation:** [2020] ACTSC 198

**Hearing Dates:** 15 July 2020, 16 July 2020, 23 July 2020

**Decision Date:** 23 July 2020

**Before:** Elkaim J

**Decision:** See [25]

**Catchwords:** **CIVIL LAW** – EVIDENCE – Admissibility of First-Hand Hearsay – Maker available – private conversation recorded – whether recording is admissible

**Legislation Cited:** *Evidence Act 2011* (ACT) ss 64, 67, 136, 138  
*Listening Devices Act 1992* (ACT) ss 4, 10

**Cases Cited:** *Dong v Song* [2018] ACTSC 82

**Parties:** SMA (Plaintiff)  
John XXIII College (First Defendant)

**Representation:** **Counsel**  
A Bartley SC with J Ronald (Plaintiff)  
J Chapman (First Defendant)

**Solicitors**  
Shine Lawyers (Plaintiff)  
Sparke Helmore Lawyers (First Defendant)

**File Number:** SC 354 of 2018

### ELKAIM J:

1. These reasons deal with two separate, but connected, decisions arising from the evidence of the plaintiff during her evidence in chief.
2. The plaintiff alleges that she was sexually assaulted by a Mr NT in the alleyway outside the Mooseheads establishment on 6 August 2015 or 7 August 2015. The assault is said to have occurred in the course of an event associated with the first defendant.
3. The plaintiff has no memory of the assault. About 10 days after the above event a friend told her that she had been told that NT had sexual intercourse with the plaintiff in an alleyway. The plaintiff spoke to NT on 19 August 2015. She asked him, amongst other questions, whether or not sexual intercourse had taken place between them. He replied that it had.
4. The plaintiff later complained to the first defendant about the assault and requested that NT be removed from the first defendant's residence.

5. NT apparently recanted on his admission sometime later.
6. The plaintiff alleges that the first defendant is liable for damages because of breaches of its duty of care owed to her. In the very simplest terms the plaintiff says that the first defendant's tolerance of events like Pub Golf and the associated overconsumption of alcohol led to the sexual assault upon her. Secondly, the plaintiff says that the first defendant inappropriately dealt with her complaint about the assault.
7. It is not disputed that the admission made to the plaintiff by NT can be used in support of the latter allegation. It is whether or not it can be used in support of the first allegation, in particular as to whether or not the assault had occurred at all, that is in dispute.
8. At the conclusion of the opening made by the first defendant I asked its learned counsel whether or not the first defendant disputed the occurrence of the assault. She said that it did dispute the assault.
9. The plaintiff, after some fluctuation, ultimately said the evidence is admissible under s 64 of the *Evidence Act 2011* (ACT). There was no dispute that NT was available to give evidence. The plaintiff submitted however that it would not "be reasonably practicable" to call NT.
10. I agree with the plaintiff. Whether a matter is reasonably practicable can take into account a number of circumstances. These include the willingness of the person to give the evidence contained in the representation. Clearly NT would not be so inclined because there is an abundance of evidence to the effect that he now denies the assault ever took place.
11. Before s 64 can assist the plaintiff it is necessary to deal with the notice requirements under s 67. Notice had not been given to the first defendant before the evidence was led from the plaintiff. I directed the plaintiff to give notice by 5pm on 15 July 2020. I assume this occurred. No submission has since been made concerning the giving of notice.
12. Clearly notice should have been given, but the failure, in my view has not led to any prejudice to the first defendant. The first defendant has been on notice for some time of this evidence and would have expected the admission to be relied upon. The first defendant actually admits in its pleadings that the admission was made (see [40] of the Amended Defence).
13. In my view therefore the admission made by NT is effectively admissible for all purposes. That of course does not mean, without more, that it proves the assault took place. Ultimately it will be a question of what weight is given to the evidence, especially in the light of his subsequent denials.
14. The second evidentiary issue arises from the same conversation between the plaintiff and NT. The plaintiff recorded the conversation on a mobile telephone (in fact on two telephones). The fact that the conversation was being recorded was not made known to NT.

15. The plaintiff wishes to tender the recording. The first defendant objects. Prima facie the recording is not admissible because it contravenes the *Listening Devices Act 1992* (ACT). Section 10(1) says the recording is not admissible as evidence. But there are exceptions.

**10 Admissibility of evidence obtained using listening devices**

...

- (2) Subsection (1) does not apply, relevantly, if:
- (c) if the listening device was used in the circumstances referred to in section 4(3)(b)(i)-so as to render any evidence inadmissible for the purpose of protecting the lawful interests of the principal party to the conversation who consented to the use of the device...

16. Section 4(3)(b)(i) states:

**4 Use of listening devices**

...

- (3) Subsection (1) (b) does not apply to the use of a listening device by, or on behalf of, a party to a private conversation if —

...

- (b) a principal party to the conversation consents to the listening device being so used, and-
- (i) the recording of the conversation is considered by that principal party, on reasonable grounds, to be necessary for the protection of that principal party's lawful interests.

17. The application of the above sections and subsections was considered by McWilliam AsJ in *Dong v Song* [2018] ACTSC 82. Her Honour conducted a comprehensive examination of this legislation with which I respectfully agree. It is clear from this analysis, and the authorities to which her Honour referred, that each case is to be taken on its merits and there is not a binding description of the contents of a party's lawful interests.
18. The purpose of the plaintiff's recording of the conversation was no doubt to capture any admission made by NT. As submitted on behalf of the first defendant, the fact that a recording is made to obtain an admission in a criminal proceeding is not necessarily enough. To reach such a conclusion would negate the effects of the *Listening Devices Act*.
19. There are however two added elements to the present case. Because the plaintiff has no memory of the event the recording goes beyond capturing a mere admission by the alleged perpetrator. It provides the plaintiff with an explanation of an event which has only been made known to her through possibly inadmissible material, in particular material which might not be allowed to be given as evidence in court because, for example, it is hearsay evidence, and in this case, perhaps even hearsay evidence of a secondary nature.
20. In addition to the plaintiff's interests in respect of any possible criminal proceeding, there are also her lawful interests in her capacity to assess any civil legal proceedings against NT.
21. I am therefore satisfied that the recording does fit into an exception above and should be allowed into evidence. The first defendant, contemplating that I might reach this

conclusion, also asked for the need to consider whether the evidence is admissible under s 138 of the *Evidence Act* and further, if the evidence is admissible, sought a limitation pursuant to s 136.

22. Section 138 is effectively dealt with by my decision in respect of the *Listening Devices Act* because it is that Act that would have rendered the evidence to have been improperly obtained. I think my above decision, of itself, disposes of the s 138 argument. If I'm incorrect then I am satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting it having regard to the manner in which it was obtained.
23. It is important to remember that this recording was listened to, I understand a number of times by Mr Johnston, the Head of College, employed by the first defendant. His actions are at the core of this case and, in turn, his dealings with the plaintiff in the light of him having heard the recording.
24. As to s 136, to limit the effect of the recording is suggested, would be to create an inconsistency with my conclusion about the evidence of the admission, absent the recording, as set out above. It would be a very strange finding for me to say that the admission made by NT to the plaintiff was admissible for all purposes, but the recording of the same conversation was not similarly admissible.
25. Accordingly I am of the view that the conversation between the plaintiff and NT and the recording of that conversation are admissible without limitation.

I certify that the preceding twenty-five [25] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Elkaim.

Associate:

Date: 23 July 2020