What does 'fresh in the memory' mean?

Graham v R [1998] HCA 61

By Gaetana Marjas

Section 66 of the Commonwealth *Evidence Act 1995* states that:

'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.'

The parameters of this section were examined in *Graham v R* [1998] HCA 61, where K (the complainant) alleged that she had been assaulted by her father, Graham (the appellant) in 1988.

In 1994, some six years later, K told a friend what her father had done to her years earlier. At her friend's suggestion, the complainant then told her mother of the acts, and the allegations were reported to police.

The appellant was convicted in the District Court of NSW on three counts of indecent assault by a person in authority and three counts of sexual intercourse with a person under the age of 10 years.

The decision was appealed to the Court of Criminal Appeal. The appeal was dismissed and the convictions upheld. The appellant then appealed further to the High Court.

The grounds of appeal were as follows:

1) That evidence of the complainant's complaint to her friend in 1994 should not have been admitted into evidence as it did not satisfy the requirements of s66 of the *Evidence Act* and in particular, it did not come under the definition of 'fresh in the memory'.

   Levine J in the Court of Criminal Appeal stated that the notion of 'freshness' should not be determined solely by the notion of 'lapse of time' but also with regard to the 'quality' of the memory.

   Counsel for the appellant submitted five arguments in support of his proposition that the complainant's evidence did not satisfy the requirement of freshness required by s66:
   a) '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;
   b) 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';
   c) 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;
   d) There was no direct evidence from the complainant as to the 'freshness' or otherwise or her memories of the alleged assaults; and
   e) 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'.[1]
2) That the trial judge should have given a clear direction to the jury that the complainant's delay in making the complaint was relevant to her credibility and that this should have been considered in evaluating the consistency of the complainant's evidence.
3) That the record of interview between the police and the appellant should not have been admitted into evidence, as:
   a) the appellant's answers to the questions were in substance a denial of the allegations made by the complainant;
   b) the admission of the record of interview allowed into evidence material for cross-examination of the appellant that was prejudicial and irrelevant;
   c) that the fact that the appellant was unable to provide a motive for the complainant to lie about the allegations was irrelevant and not a basis for its admission.

Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ unanimously allowed Mr Graham's appeal and held that: >>

1) 'Fresh in the memory' in the context of s66 of the *Evidence Act* meant 'fresh' or 'immediate' and is a term likely to be measured in hours or days, not years. This was decided for a number of reasons:
   a) Section 66 applies only where a person making a representation has been, or is to be, called to give evidence;
   b) The memory of events does change as time passes;
   c) The exception to the hearsay rule created by s66 should be applied only in cases where the tendering of an earlier statement is likely to add to the useful material before the court.
2) The trial judge failed to properly direct the jury, to consider the complainant's failure to make the complaint, as relevant to her credibility. This may not have been a point of appeal open to the appellant, as counsel failed to take any point with the trial judge on this point. This was irrelevant, as the appeal was allowed on other points.
3) The record of interview of the appellant should not have been admitted in full, if at all.

The appeal was allowed. The verdicts of guilty were quashed and a new trial was ordered.

In response to the unanimous decision of the High Court of Australia in *Graham v R* [1998] HCA 61, s66 of the Commonwealth *Evidence Act* was amended to include a new clause, s66(2A):

'2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:
   a) the nature of the event concerned; and
   b) the age and health of the person; and
   c) the period of time between the occurrence of the asserted fact and the making of the representation.' ■

Note: 1 *Graham v R* [1998] HCA 61 at para 29.

Gaetana Marjas *is a senior associate at Tindall Gask Bentley in Adelaide.* **PHONE** *(08) 8212 1077* **EMAIL** *gmarjas@tgb.com.au*

Propensity evidence

Jones v The Queen [2009] HCA 17 (29 April 2009)

By Gaetana Marjas

On 29 April 2009, the High Court dismissed an appeal brought by a co-accused convicted of murder.

THE FACTS

On 1 April 2005 the body of Morgan Jay Shepherd ('the deceased') was found decapitated and buried in a shallow grave near Dayboro, a township north of Brisbane.

The deceased was last seen alive, drinking with James Patrick Roughan ('Roughan') and the appellant at Roughan's home in Sandgate.

Both the appellant and Roughan were charged with the murder of the deceased. Both pleaded not guilty to the charge of murder, but guilty to 'being an accessory after the fact to the unlawful killing of the deceased by the other and to interfering with a corpse'.[1]

The prosecution submitted that either Roughan and the appellant murdered the deceased together, or that one of them murdered the deceased with the assistance of the other in the attack, with the intent of causing death or grievous bodily harm.

Both Roughan and the appellant made out-of-court statements that the other had assaulted and then stabbed the deceased in the neck with a knife.

The appellant said in his out-of-court statement that Roughan had been charged with stabbing a friend of his on a previous occasion. At the date of the offence against the deceased, Roughan was facing a charge of attempted murder of someone named McKenna and was on bail.

The appellant admitted to being present at the time of the killing of the deceased.

At first instance, Roughan and the appellant were both convicted of murder.

Both Roughan and the appellant appealed their convictions in the Court of Appeal. The appellant's appeal was dismissed.