

CITATION: *The King v Roberts* [2024] NTSC 81

PARTIES: THE KING

v

ROBERTS, Gregory

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising
Territory Jurisdiction

FILE NO: 22233873

DELIVERED: 8 October 2024

HEARING DATE: 4 October 2024

JUDGMENT OF: Grant CJ

REPRESENTATION:

Counsel:

Crown: D Payne
Accused: I McGuiness

Solicitors:

Crown: Office of the Director of Public
Prosecutions
Accused: Northern Territory Legal Aid
Commission

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The King v Roberts [2024] NTSC 81
No. 22233873

BETWEEN:

THE KING

AND:

GREGORY ROBERTS

CORAM: GRANT CJ

REASONS FOR DECISION
(Delivered on 8 October 2024)

- [1] The accused is charged by indictment dated 20 November 2023 with one count of sexual intercourse without consent, two counts of aggravated assault and one count of choking, strangling or suffocating in a domestic relationship. All four offences are alleged to have been committed against the same complainant. The matter is listed for trial commencing on 18 November 2024.

The Crown case

- [2] The Crown case may be summarised as follows. At the time of the alleged offending the accused and the complainant were married and living together in the Charles Creek town camp. On the afternoon of 31 October 2022, the accused and complainant were drinking together

and became intoxicated. They then engaged in consensual penile-vaginal sexual intercourse. Later that evening the complainant told the accused that she wanted to return to her home community in Western Australia. The accused became upset and they began arguing.

[3] During the course of that argument the accused pinned the complainant down and bit her on the face on a number of occasions. That conduct constitutes the offence charged in count 1.

[4] The accused then told the complainant he wanted to have sex with her. The complainant said no, but the accused pulled the complainant onto his lap and forcibly inserted his fingers into her vagina. That conduct constitutes the offence charged in count 2.

[5] On the following morning the accused and the complainant resumed their argument, during which the accused pulled off the T-shirt the complainant was wearing and threw the complainant's belongings out of the tent in which they were then living. The accused then ran away towards the creek beside the town camp with the complainant chasing him. The complainant hit the accused once, whereupon the accused repeatedly punched and kicked the complainant, including as she lay on the ground, and bit her on the face and head. The accused was wearing steel capped boots at the time. That conduct constitutes the offence charged in count 3.

[6] As the complainant lay on the ground, the accused began strangling her and holding his hand over her mouth in an attempt to suffocate her. As he was doing so he was shouting that he was going to kill her. The accused then grabbed sand and began stuffing it into the complainant's mouth in a continued attempt to suffocate her. The complainant only managed to escape by tricking the accused into believing that police had been called. That conduct constitutes the offence charged in count 4.

[7] After she had escaped, the complainant called police who attended on her at the shopping centre from which she had made the call. At the time police attended they observed that the complainant had cuts to her lip, that the area around her nose and lips was swollen, that there were bite marks on her face and head, and that she was having difficulty talking because there was sand in her mouth. The complainant gave attending police an account of what the accused had done to her that morning. The ambulance was called, and the complainant told the ambulance officers that the accused had tried to sexually assault her. She was taken to the Alice Springs Hospital, where she told the treating clinicians that she had been sexually assaulted by the accused. She was treated for her injuries and underwent a sexual assault examination. Forensic analysis of swabs taken from the complainant during the course of that examination resulted in a positive match to the accused's DNA on the complainant's hands, fingernails, leg and

cervix. The DNA match from the cervical swab was from the accused's semen.

- [8] The accused was located by police later that day and arrested. While under caution, the accused denied the offending and told police he had been out bush and had just returned from Mount Allan. The accused also told police that the complainant had fabricated her account because she was jealous of his relationship with another woman.

Tendency evidence

- [9] Section 97 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('the *ENULA*') provides for the admissibility of tendency evidence subject to the requirements of notice and significant probative value. By notice dated 20 September 2024, the defence has indicated its intention to adduce tendency evidence to prove that the complainant has a tendency to commit assaults on her domestic partners and then provide a false account to police. That tendency is said to be relevant in determining whether on this occasion the complainant committed an assault on the accused and then gave a false account to police.
- [10] The evidence sought to be relied upon for that purpose is:

- (a) evidence from the witness and attending police that during the course of the incidents from which these particular charges arise the complainant pursued the accused into a nearby creek and assaulted him;

- (b) evidence of an incident which is said to have taken place in Kalgoorlie on 25 July 2024 in which the complainant assaulted her domestic partner by punching him to the face, pulling his hair and kicking him in the face, and told the attending police that she was defending herself;
- (c) evidence of an incident which is said to have taken place in Kalgoorlie on 30 July 2024 in which the complainant breached her bail conditions by approaching her domestic partner, grabbing his hair and pulling him to the ground, and told the attending police she was trying to get away.

The assessment of significant probative value

- [11] The Dictionary in the *ENULA* defines the ‘probative value’ of evidence to mean ‘the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue’. As already described, the relevant fact in issue in this case is said by the defence to be whether the complainant committed an attack on the accused and then lied to police about what he had done.
- [12] The test of ‘significant probative value’ requires something more than mere relevance.¹ The evidence will have ‘significant probative value’ if it could rationally affect the assessment of the probability of the existence of one or more of the facts in issue in some important

¹ *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569 at [72]–[73]; S Odgers, *Uniform Evidence Law*, Thompson Law Book Co, Looseleaf Service, [EA.97.120]; *R v Lockyer* (1996) 89 A Crim R 457; *R v Lock* (1997) 91 A Crim R 356 at 361; *R v AH* (1997) 42 NSWLR 702.

fashion.² This resolves to a judicial evaluation of whether the hypothetical jury would rationally think it likely that the evidence is important in relation to the determination of the facts in issue.³

[13] However, there is a distinction to be drawn in that process of evaluation where the evidence of tendency is sought to be deployed by the defence rather than by the prosecution. That distinction was described in *DPP v Campbell & Ors (Ruling No 1)* in the following terms:

The approach to the question of admissibility of tendency evidence, sought to be adduced on behalf of the accused, must, of necessity, be different to the approach taken by the court to tendency evidence which is sought to be adduced on behalf of the prosecution. In a criminal trial, the accused does not bear any legal onus of proof. Rather, on particular issues, the accused may bear an evidentiary onus of adducing evidence, from which an inference arises that a reasonable possibility, consistent with innocence, exists. Thus, in determining whether tendency evidence, sought to be adduced by an accused, is admissible under s 97(1), it must be borne in mind that that evidence must have significant probative value to the establishment of a particular reasonable possibility of a state of facts consistent with the innocence of the accused person.⁴

[14] A similar observation was made by the New South Wales Supreme Court in *R v Holmes (No 5)*, in which it was stated that the consideration of ‘significant probative value’ when dealing with tendency evidence to be introduced by an accused is directed not to the

² *R v Zhang* (2005) 227 ALR 311 at [46]; *R v Ford* (2009) 201 A Crim R 451 at [52]; *DSJ v Director of Public Prosecutions (Cth)* (2012) 215 A Crim R 349 at [67], [71], [72]; *R v Lock* (1997) 91 A Crim R 356 at 361.

³ Odgers, op cit, [EA.97.120]; *R v Zhang* (2005) 158 A Crim R 504 at [46]; *R v Ford* (2009) 201 A Crim R 451 at [52]; *DSJ v Director of Public Prosecutions (Cth)* (2012) 215 A Crim R 349 at [67], [71], [72].

⁴ *DPP v Campbell & Ors (Ruling No 1)* [2013] VSC 665 at [41].

establishment beyond reasonable doubt of the facts in issue in relation to the legal elements of the offence, but to whether an accused's exculpatory version of events might be true as a reasonable possibility.⁵

[15] The issue has also been subject to consideration by this court in *R v Smiler (No 2)*. In that matter the defence sought to adduce evidence that the complainant had a tendency to resort to acts of serious violence in order to resolve disputes. Justice Kelly stated:

It needs to be borne in mind that the Crown bears the legal onus of proof on all issues including negating self-defence. The accused need only point to a reasonable possibility that he was acting in self-defence and submit that the Crown has not eliminated that possibility. Very little may be required for evidence to be “significant” or “of consequence” in pointing only to a reasonable possibility that the accused may have been acting in self-defence.⁶

[16] However, in assessing whether tendency evidence is ‘significant’ or ‘of consequence’ in the establishment of a reasonable hypothesis consistent with innocence, it remains necessary for the defence to establish that the tendency evidence could rationally affect the assessment of that matter in some important fashion. That assessment involves a two-step process. In the first step, the relevant question is whether the evidence concerning the conduct would be probative in establishing the tendencies to act in the manner alleged by the defence.

⁵ *R v Holmes (No 5)* [2021] NSWSC 115 at [34]-[35]. See also *The Queen v Majak* [2022] NTSC 57 at [43].

⁶ *R v Smiler (No 2)* [2017] NTSC 31 at [16], citing *R v Lockyer* (1996) 89 A Crim R 457 at 459-460. That passage was cited with apparent approval in *The Queen v Nudjulu* [2020] NTSC 54 at [15].

If it is accepted that an inference of tendency could be sustained, the second question is whether that tendency could sustain the reasonable possibility that, on this particular occasion, the complainant has concocted the allegations against the accused.⁷

[17] The question whether the evidence significantly bears on the facts in issue is ‘a matter of fact and degree, and will be influenced by the nature of the fact in issue sought to be proved (or disproved)’.⁸ The requirement that the proposed tendency evidence must have the capacity to inform the question whether the complainant attacked the accused and then lied about what the accused had done to her does not require that the episodes relied upon as establishing the tendency demonstrate an ‘underlying unity’, ‘a modus operandi’ or a ‘pattern of conduct’.⁹ Depending upon the issue to which it is directed, a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it.¹⁰

[18] However, the evidence does need to demonstrate a tendency ‘to act in a particular way’.¹¹ For that reason, similarity remains a guide in

⁷ *Hughes v The Queen* (2017) 263 CLR 338 at [40]-[41], as necessarily adapted to accommodate an assertion of tendency on the part of a complainant rather than an accused.

⁸ *Semaan v The Queen* (2013) 230 A Crim R 568 at [38].

⁹ *Hughes v The Queen* (2017) 263 CLR 338 at [34], approving the approach in *R v Ford* [2009] NSWCCA 306, *R v PWD* [2010] NSWCCA 209, *Saoud v R* (2014) 87 NSWLR 481 and disapproving *Velkoski v R* (2014) 45 VR 680 at 682.

¹⁰ *Hughes v The Queen* (2017) 263 CLR 338 at [37].

¹¹ See, for example, *R v Li* [2003] NSWCCA 407 at [11].

determining whether tendency evidence has sufficient probative value to pass the test for admissibility.¹² The question is whether the features of commonality or peculiarity which are relied upon are significant enough logically to imply that because the complainant engaged in a type of conduct disclosed by the tendency evidence, there is a real possibility that she is lying about what the accused did to her in the particular circumstances of this case.¹³

[19] It is important in this analysis to understand that the tendency sought to be established must have significant probative value in establishing a reasonable possibility of a state of facts consistent with the innocence of the accused. For that reason, it is not enough to establish a tendency on the part of the complainant to assault her domestic partners. As the argument was developed by defence counsel in the course of oral submissions, the evidence demonstrated two separate tendencies on the part of the complainant. The first was said to be a tendency on the part of the complainant to assault her domestic partners, and the second was said to be a related but distinct tendency to give a false account about being assaulted by them. There are a number of difficulties with the defence position in relation to the first of those tendencies asserted.

12 *R v Fletcher* (2005) 156 A Crim R 308, [60]. See also *AE v The Queen* [2008] NSWCCA 52; *R v Milton* [2004] NSWCCA 195; *R v Harker* [2004] NSWCCA 427; *R v F* (2002) 129 A Crim R 126; *R v WRC* (2002) 130 A Crim R 89.

13 *CEG v The Queen* [2012] VSCA 55 at [14], as necessarily adapted to accommodate an assertion of tendency on the part of a complainant rather than an accused.

[20] *First*, it is conceded in the Crown case that immediately prior to the alleged commission of the offences charged in counts 3 and 4 the complainant chased the accused into the creek and struck him. In itself, that in no way establishes a reasonable possibility consistent with the innocence of the accused, and has absolutely nothing to say about the nature of the accused's response or its proportionality. For that reason, the establishment of a tendency on the part of the complainant to assault her domestic partners on other occasions could not have significant probative value in establishing a reasonable hypothesis consistent with the innocence of the accused. It may be noted in that respect that any exculpatory version of events which suggested a reasonable possibility that the accused did not apply force to the accused at all during the course of the incident would clearly be at odds with the observations of the complainant's injuries made by attending police and the treating clinicians.

[21] *Secondly*, as is discussed further below, the incidents sought to be relied upon to establish the relevant tendency post-dated the charged acts by almost two years. Accordingly, that evidence does not and could not establish that the accused was aware of any tendency on the part of the complainant to violently assault her domestic partners which might inform the jury's decision concerning self-defence. That is because the assessment of self-defence is conditioned on the accused's subjective state of mind. Accordingly, what took place in a

later and unrelated incident cannot rationally affect the probability that the accused believed on an earlier occasion that assaulting the complainant in violent fashion was necessary in order to defend himself.¹⁴ Defence counsel says that the tendency evidence would still be relevant for the jury to see that the complainant was capable of inflicting high levels of violence on her domestic partners, and to make the accused's account (whatever that might be) more credible. That use would rise no higher than rank propensity and bad character, and the evidence is inadmissible for those purposes.

[22] For those reasons, for the evidence to be admissible it is necessary that it establishes a tendency on the part of the complainant to concoct and pursue false allegations against her domestic partners, up to and including prosecution action. On proper analysis, that is the gravamen of the hypothesis consistent with innocence which the defence seeks to establish by this tendency evidence. In that inquiry, neither of the subsequent incidents in Kalgoorlie establishes that the complainant concocted an allegation against her domestic partner.

[23] *First*, that conclusion would be inconsistent with the fact that the complainant pleaded guilty to both charges brought against her arising out of those incidents. *Secondly*, the complainant's initial suggestion to police following the first incident that she was defending herself

14 *Elias v R* [2006] NSWCCA 365 at [26].

cannot properly be characterised as an unequivocally concocted allegation. The fact that the CCTV footage of the incident shows an interaction in which the complainant's partner walked into view and the complainant next walked into view and assaulted him has nothing to say about what, if anything, preceded that incident, or what the complainant's conception of defending herself involved. *Thirdly*, the explanation given by the complainant to police following the second incident which took place approximately a week later was to the effect that she was trying to get away. Again, that cannot be characterised as a false allegation against her then domestic partner. *Fourthly*, even if it were accepted for the purpose of argument that the statements made by the complainant on those occasions were untrue, there is, as the Crown submits, a distinction between a person equivocating to police about his or her conduct and a person making false allegations of criminal conduct against another person. Even if the complainant's accounts to police were outright lies, the evidence sought to be adduced would be nothing more than inadmissible credibility evidence unless it satisfied the exception in s 103 of the ENULA – which this evidence clearly does not.

[24] The other difficulty which presents to the defence in its reliance on these two incidents in Kalgoorlie is that they were isolated in nature, involved the same person and were closely related in time and circumstance. There is nothing about them which is probative or

necessarily reflective of a relevant tendency on the part of the complainant. In particular, they fall well short of establishing some pattern of making false allegations. To that might be added the fact that the Kalgoorlie incidents took place almost two years after the incidents the subject of the current proceedings, and have very limited probative value in terms of establishing that the tendency asserted existed at the material time. In particular, there is no conduct on the part of the complainant prior to 1 November 2022 which would suggest any tendency on her part of the nature asserted.

[25] The other piece of tendency evidence relied on by the defence in its tendency notice is the episode from which these offences are charged which took place on the evening of 31 October 2022 and the morning of 1 November 2022. The fact that the complainant rang police and made allegations against the accused following that episode also has nothing to say about whether she has a tendency to make false allegations against her domestic partners (or a tendency to attack her domestic partners). That is because the purpose of the tendency evidence is to establish a real possibility that the allegations she made to police on 1 November 2022 were a product of a subsisting tendency of that nature, rather than the result of any criminal conduct on the part of the accused. That enquiry is not properly informed by proceeding on the circular reasoning that the allegations made on 1 November 2022 are in fact evidence demonstrating the tendency asserted.

[26] For these reasons, the evidence on which the defence seeks to rely does not sustain an inference of the tendencies asserted. The threshold of significant probative value has not been satisfied because the evidence does not properly assist in establishing whether there is a reasonable hypothesis consistent with the innocence of the accused.

Ruling

[27] The ruling on the matter for preliminary determination is that the evidence set out in the notice of tendency evidence dated 20 September 2024, as amended during the course of oral submissions, is inadmissible in the trial for tendency purposes.
