

CITATION: *The King v TC* [2024] NTSC 43

PARTIES: THE KING

v

TC

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory  
jurisdiction

FILE NO: 22134946

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**CATCHWORDS:**

Evidence – sexual intercourse without consent – whether evidence may be admitted as tendency evidence – evidence admitted for context, relationship and tendency purposes.

Statutes:

*Criminal Code*, s 192(3)

*Evidence (National Uniform Legislation) Act* (NT), s 97(1)(b) & s 101.

*Director of Public Prosecutions v Benjamin Roder (A Pseudonym)* [2024]

HCA 15; *JS v The Queen* [2022] NSWCCA 145, *Hughes v The Queen* [2017]

HCA 20 referred to.

## **REPRESENTATION:**

### *Counsel:*

Crown:

J. Moore

Accused:

T. Kassimatis KC/M. Rabsch

### *Solicitors:*

Crown:

Office of the Director of Public  
Prosecutions

Accused:

North Australian Aboriginal Justice  
Agency

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

*The King v TC* [2024] NTSC 43  
No.22134946

BETWEEN:

**THE KING**  
Appellant

AND:

**TC**  
Respondent

CORAM: BLOKLAND J

**RULING ON TENDENCY EVIDENCE**

(Delivered 23 May 2024)

**Background**

- [1] TC is to be tried on four counts of having sexual intercourse with SM without her consent, knowing about or being reckless as to her lack of consent, contrary to s 192(3) of the *Criminal Code*.
- [2] The complainant is the accused's former partner. Count 1 is alleged to have taken place between 1 January 2020 and 31 December 2020; count 2 between 1 January 2020 and 31 January 2021; count 3 between 1 January 2020 and 31 December 2020 and count 4 between 1 January 2020 and 6 January 2021. All of the offending is alleged to have taken place in Tennant Creek at SM's home.

- [3] In brief terms, the background on the Crown case is that the accused and the complainant met at Tennant Creek High School in their mid to late teens. They were in an intimate relationship which lasted for about one year. They first had consensual sexual intercourse when the complainant was 16 and the accused was 17.<sup>1</sup>
- [4] On the Crown case the relationship broke down in 2018. There is likely to be some dispute about when that occurred. The defence case is that the relationship started in 2018, when SM was in year 10 and the accused in year 12. It continued for around one year, breaking down in 2019.<sup>2</sup> For present purposes it is not necessary to resolve that point.
- [5] The Crown case, based largely on the complainant's statement was that the accused was jealous, aggressive, angry and abusive throughout the relationship. It is alleged that the offending took place in the context of a problematic relationship and its aftermath, throughout which the accused demonstrated an aggressive and controlling disposition towards the complainant.

### **Direct evidence of the offending**

- [6] With respect to count one, although there is far more background and context which will be summarised later, it is alleged the accused came to SM's house where she lived with her family. SM was downstairs alone, the

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1 Outline of Crown case, p1.

2 EROI, 13 November 2021; Defence Submissions at [5].

remainder of the family were upstairs sleeping. The accused knocked on the front door, then the window. The knocking was to such an extent the house shook. He started calling SM's name. She told him to leave, he threatened to hit her; he was slurring his words. She let him in because she was scared and because of the noise he was making. She told him she did not want to talk to him or to see him anymore. She told him she did not want to have sex with him. He became angry. He punched her and dragged her to her bedroom where she had refused to go. During further physical altercations she told him to get off of her. She pushed and hit him to try to get him off of her. He told her to lay down and go to sleep. He took off his clothes and started cuddling her. She told him to stop but he did not. He took her clothes off and positioned himself on top of her. She told him she did not want to have sex with him. He put a condom on and had penile/vaginal sex with her which lasted between 10 and 25 minutes and finished when he ejaculated. They both put their clothes back on and went to sleep. SM did not tell anyone about the incident until she spoke to police. <sup>3</sup>

- [7] In terms of count 2, in brief, SM was at a club with friends. They were drinking alcohol. The accused was also present at the venue. He was also drinking alcohol. SM did not want to interact with him. SM went home after midnight and went to her bed. Shortly after, the accused came to her house and knocked on the window. He did the same thing that he did on other occasions; he told her he was going to hit her and smash cars if she did not

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3 Outline of Crown case, p5-6.

let him in. Out of fear, and with a view to preventing her relatives (who were upstairs sleeping) from waking up, SM opened the door. The accused entered the house. SM told the accused she did not want any sexual activity and that she was drunk. She went into her room, and the accused followed her. SM left the room (leaving the accused) and got onto the lounge in the living area. She fell asleep. The accused came out and woke her up. He told her to go into the room. She said she did not want to. He grabbed her shirt and pulled her into the room.

- [8] SM was laying down on the bed. The accused lay behind her. He started hugging her and touching her on her breasts and bottom. She told him that she did not want to have sex with him. He continued touching her. She told him to stop again, and she turned around and pushed him away. The accused took his clothes off. He told SM to take her clothes off and said he would hit her if she did not comply. She took her clothes off out of fear.
- [9] The accused started kissing SM and positioned his body so that he was on top her. He had penile/vaginal intercourse with her until he ejaculated. He ejaculated on her stomach (he was not wearing a condom on this occasion) and on the bed. SM wiped herself down. They both put their clothes back on and went to sleep, although SM struggled to sleep. The accused left early the next morning. SM's relatives did not know that he was there. She did not tell anybody about this incident.<sup>4</sup>

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4 Outline of Crown case at p6.

- [10] Count 3 concerns another unknown occasion in 2020 when broadly, the same conduct is alleged. SM was at home late in the evening. The accused came over and knocked on the window. When SM opened the door, he told her that they would not have sex; he said that they would just “have a sleep”. On that basis, and due to earlier experiences whereby the accused had threatened her if she did not let him inside, SM let the accused inside the house.
- [11] The accused went into SM’s bedroom. She told him that she was going to sleep on the lounge. The accused said words to the effect of “no, just come and sleep in the room”. SM complied. When she got into the bed, she felt the accused’s erect penis on her back. He started hugging and kissing her. She told him that she did not want any sexual activity. She also told him that she was tired and she just wanted to go to sleep. The accused got on top of her and took his clothes off. He took SM’s shorts off. He had penile/vaginal sexual intercourse with her without her consent.
- [12] SM did not physically resist on this occasion. She was scared that he would hit her given the dynamic of their relationship (particularly his threatened and actual violence prior to this point). He ejaculated inside her vagina. He was not wearing a condom. SM asked the accused why he ejaculated inside her vagina. He did not care, and he told her that it was her problem. He put his clothes back on. SM went and had a shower before putting her clothes back on and laying down. The following day SM went to Anyinginyi health

clinic to get a pregnancy test and to obtain contraceptives. She did not tell anybody at the clinic or elsewhere what happened.<sup>5</sup>

- [13] Count 4 concerns another unknown occasion in 2020 or in early 2021, SM was again at home late during the evening. The accused knocked on the window and called her on her mobile phone. He told her that he would hit her and make her “sick” if she did not let him in. She felt that she had no option other than to let him in (as with the other occasions). She did so because she was scared that he would assault her. She said that she did not want to, meaning not want to have sex and that she was tired. Despite this indication, the accused began to touch her sexually. She pushed him away and told him that if he continued she would sleep on the lounge. She fell asleep. When she was asleep, the accused began touching her again. He rolled her over onto her back. She told him to stop. He took her clothes off. He had penile/vaginal sexual intercourse with her without her consent. He ejaculated inside her vagina. He was not wearing a condom. SM remained where she was and the accused fell asleep. The following day, SM went to the United Chemist at Tennant Creek to get the morning after pill. She did not tell anybody about this incident. The reason that she did not tell anybody about the incident is that she did not want anyone to be upset or worried about it.<sup>6</sup>

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**5** Outline of Crown case, p7.

**6** Outline of Crown case, p7-8.



## **Tendency context and relationship evidence**

- [14] The evidence of aspects of the accused's alleged behaviour towards SM is sought to be led on the basis that it gives context to and illustrates the terms and dynamics of the relationship between them. Such evidence is clearly relevant in this matter and on behalf of the accused its admission is not opposed on the basis of context and relationship evidence.
- [15] The proposed evidence will assist to place the conduct comprised in the charges in a real and intelligible context. Evidence of the dynamics of the relationship is important in this matter as it helps explain how the accused was able to continue with acts of a sexual nature without the consent of SM and goes towards explaining SM's actions and responses, including potentially no or delayed complaint. Essentially acts of threatened and actual violence are alleged as a feature of their relationship. The acts took place with such regularity the complainant is unable to recall all specific details but the proposed evidence goes some way towards explaining how the events were able to continue.
- [16] The uncharged acts the Crown relies on for the purpose of context and relationship evidence include the following:<sup>7</sup>
- Following the breakdown of the relationship, the accused would regularly send the complainant text messages threatening to hurt her. He also threatened to smash the cars at her house.

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<sup>7</sup> Outline of Crown case p2-4.

- The accused would regularly attend the complainant's home in the middle of the night whilst intoxicated. He would threaten the complainant if she did not let him inside. The complainant would typically let the accused in because she was scared of him.
- Between 2017 and the end of 2020, the accused would have sexual intercourse with the complainant without her consent on numerous occasions. The complainant estimates that this would occur two or three times per week. The frequency of these occurrences was such that the complainant thought it was normal.
- On many of the occasions when the accused came over, the accused and the complainant would argue, and the accused would hit the complainant, for example on one occasion, the accused came over and asked to see the complainant. She said no. He remained at her front door. She let him in. They were talking and they had an argument. When she said she did not want to deal with the situation, he punched her in the arm and pushed her off the bed. He then left.
- About one week later, the accused return to the complainant's house, again intoxicated, and knocked on the window. He made threats to the complainant to induce her to let him inside. When inside, he told the complainant that if she did not stay with him he would kill himself and get his family to harm her. He then hit her.

- On another occasion the Crown alleges the accused assaulted the complainant is as follows:
  - (a) At some stage on an evening in 2020, the complainant was at home listening to music. She heard the accused banging on the window. He also called out her name. He called her phone on No Caller ID. She looked outside and saw him.
  - (b) The accused threatened to hit the complainant if she did not let him inside. He also said he would smash the cars. Out of fear, she let him inside the house. They argued, because she did not want him to be there. She told him to leave, otherwise she would call the Police. She told him that he cannot be doing that to her. She said she did not want anything to do with him.
  - (c) The accused hit the complainant in the back of her shoulder with his fist. She picked up a broomstick in case she needed to defend herself. She told him he needed to leave otherwise she would hit him with the broomstick. He grabbed a broomstick from her and threw it on the ground. The complainant pushed the accused outside and locked the door. Then the accused punched the screen door before he took off.
  - (d) The complainant's mother and brother woke up and queried what the noise was. The complainant told them the accused was there, but she did not tell them anything further.

(e) Nobody else saw the accused at the house on this occasion.

The complainant and did not tell anyone about the incident.

- Throughout the relationship, the accused would also slap the complainant in the face and pull her hair. The accused would assault the complainant when nobody was around. To that end, nobody has witnessed any of the assaults. However, there was an occasion before they had broken up when KC (the complainant's cousin) was at her house and KC heard thumping noises in the bedroom (that is, the room where the accused and the complainant were). KC heard the complainant yell out. The complainant came out of the room appearing as though she had been crying, but she did not tell KC what happened.
- The complainant never sought or received any medical attention in relation to any of the assaults. The Crown does not contend that she suffered any injuries as a result of any of the assaults.
- The accused would also send the complainant threatening text messages, such as threats to hurt her and her family.
- The accused was controlling. For instance, he would tell her that she was not allowed to go anywhere, and she would listen to him because she was scared of him. The complainant's mother, MR also observed that, throughout the relationship, the accused was controlling; he would tell the complainant what to wear, where she could go, and

when she was required to stay home. MR was concerned for the complainant and her safety. She was also told by the complainant that there were regular arguments because the accused was jealous. KC, a friend of the complainant, also observed that the accused was controlling. KC recalls one occasion when the complainant told her that the accused came to her house drunk and yelled at her for being with other guys. The complainant told the accused to leave but he refused.

[17] It is understood the accused does not dispute that he would often attend SM's home unannounced whilst intoxicated, but denies demanding to be let inside or using threatened violence as a means of doing so.<sup>8</sup>

[18] While the accused does not dispute that such evidence is admissible to give context and to show the terms of the relationship, the accused objects to any tendency use of the evidence.

[19] Tendency evidence is presumptively inadmissible. It is for the Crown to show it possesses the 'significant probative value' required by s 97(1)(b) of the *Evidence (National Uniform Legislation) Act* (NT) 'EUA'. Further, tendency evidence cannot be used against a defendant unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant.<sup>9</sup>

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8 Defence Submissions at 5(c).

9 Section 101(2).

[20] A review of the available material, including the accused's record of interview with police<sup>10</sup> indicates consent will be a principal issue and whether the accused knew or was reckless about the fact SM did not consent to having sexual intercourse. I will not detail all of the accused's statements in the record of interview with police save that with respect to count 1 he told police he did not want to have sex with SM but she insisted he sleep with her. In relation to count 2 he said they were both really drunk and the sex was consensual.

[21] The Tendency Notice sets out the alleged tendencies sought to be proved, namely that the accused has the tendency to:

(a) Have a particular state of mind, namely:

- (i) a violent and controlling disposition towards the complainant, upon which he is prepared to act.
- (ii) an indifference about the complainant not consenting to having sexual intercourse with him, and a preparedness to engage in sexual intercourse with her irrespective of whether she consents.

(b) Act in a particular way, namely:

- (i) to behave violently towards the complainant, including by threatened and actual violence towards her and/or towards property, particularly when he is angry, and often as a means of exerting dominance/control over the complainant and to get her to do things against her will.

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**10** The EROI of 13 November 2021 covers questioning of two counts.

- (ii) to have sexual intercourse with the complainant in circumstances where she does not consent, including (but not limited to) situations where she expressly indicates a lack of consent (him knowing about, or at least being reckless in relation to, that lack of consent).

[22] I will not set out the references to the sources of the evidence sought to prove the tendency in the Tendency Notice. Much of it forms the basis of the allegations as above comprising the uncharged acts. The Tendency Notice also includes the acts forming the basis of the charges.

[23] In terms of the objection to the evidence being used as tendency evidence, counsel for the accused submitted that the tendency to be drawn from the uncharged acts does not possess the requisite substantial probative value to overcome the hurdle in s 97 of the *EUA*. Reference was made for example to SM's statements saying it happened two or three times a week, 50 or up to 100 times. It was submitted that such evidence amounts to almost nothing other than the assertion it happened over a period of time, 50 or 100 times. Statements of that kind, even with other evidence were said to be of such poor quality, they should not be permitted to be used as proof of the alleged tendencies, noting tendency evidence as circumstantial evidence has the capacity to allow a witness to self-corroborate.<sup>11</sup>

[24] It was submitted that all the suggested tendency evidence from the uncharged acts could prove was an ongoing violent relationship which

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**11** *Director of Public Prosecutions v Benjamin Roder (A Pseudonym)* [2024] HCA 15 at [23]-[25]; *JS v The Queen* [2022] NSWCCA 145 at [43]; Defence Submissions, 6-10.

although admissible for contextual reasons did not meet the demands of ss 97 and 101.

[25] In my view the cumulative force of the various acts and circumstances described in the uncharged acts raise sufficient particularly that when taken together have a real bearing on proof of a tendency to use forms of controlling and violent behaviour towards SM to then engage in acts of sexual intercourse regardless of consent. It is important to consider all of the proposed evidence together when assessing whether it proves any tendency and the strength of any such tendency. Threats to hurt SM, hurt her family or damage property; to show up unannounced and make demands and threats; specific assaults for example, what has become known as the ‘broom incident’ when SM picked up a broom to defend herself; domineering behaviour about what she could wear, and the various demonstrations of jealousy together point to the tendencies alleged. This is a detailed body of evidence of substantial probative force.

[26] This body of evidence, taken with the evidence forming the basis of the charged acts, remembering that at this stage the Court is taking the evidence at its highest, has significant probative value in the context of alleged sexual assaults taking place in the aftermath of an intimate relationship. It is not uncommon for complainants in cases of this kind, when they state that they cannot recall how many times a certain act takes place to emphasize the occurrence on multiple occasions by stating an approximate number. Talk of 50 or 100 times may well be a mode of expression not meant to be literal,



but to convey the fact that it happened many times. It may on the other hand be dishonest exaggeration. Plainly, that is unknown at this stage, it is a matter of credit but does not diminish the value of the proposed evidence, when all of the evidence bearing on the alleged tendency is taken together towards proof of the asserted tendencies. The charged acts together with the uncharged acts go towards the proof of the tendencies alleged. If one or more of the tendencies is accepted the evidence plainly has the capacity to rationally affect the assessment of the probability of the existence of a number of facts in issue. The extent to which an accepted tendency makes the facts in issue more likely<sup>12</sup> is here substantial. The uncharged acts are not so general as to require exclusion from tendency reasoning. There is some reasonable specificity in that the various acts take place often at the complainant's home, in particular rooms, accompanied by shows of repetitive aggression or threats of and pestering behaviour. While specificity is not required, the acts said to constitute the tendencies are quite specific.

- [27] In terms of s 101, the Court must exclude tendency evidence unless the probative value of the evidence substantially outweighs any prejudicial effect. In terms of genuine prejudice, the proposed evidence will be before the jury in any event, relevant for other purposes, especially context and assessing parts of the relationship as relevant. If the evidence is accepted, it will be a matter for the jury whether it is prepared to accept such evidence proves a tendency as circumstantial evidence towards proof of the charges.

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12 *Hughes v The Queen* [2017] HCA 20 at [41].

In this instance there is no real prejudice. It is unlikely the jury would misuse such evidence or use it illogically or irrationally.

[28] The proposed evidence is to be admitted as context and relationship evidence and may also be used to prove the tendencies set out in the tendency notice. The evidence sought to be used to prove the tendency does not simply prove violence in a relationship. The alleged offending is accompanied by the same behaviours suggested by the uncharged acts, namely, acts which show control, aggression and threatening behaviour, part and parcel of the charged acts and enabling of the same.

[29] I would admit the evidence proposed in the Tendency Notice as tendency evidence.

#### **A note on re-publishing this ruling**

[30] The original ruling was forwarded to the parties on 24 May 2024. Since then, evidence was pre-recorded. The evidence on some crucial points was not in accordance with what was anticipated and not in accordance with the basis on which the original ruling was made. It is likely the ruling would have been re-visited in the light of the pre-recorded evidence. On 2 September 2024 the Crown filed a nolle prosequi and the accused was discharged.

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