CITATION:	*The King v Riley* [2025] NTSC 7
PARTIES:	THE KING
	v
	RILEY, Dionna
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22232980
DELIVERED:	21 February 2025
HEARING DATES:	18-22 November 2024
JUDGMENT OF:	Kelly J

CATCHWORDS:

EVIDENCE – *Evidence (National uniform Legislation) Act* 2011 (NT) s 137 - Accused charged with unlawfully causing serious harm – Application to exclude evidence of events proximate to the facts in issue – Probative value is not outweighed by the danger of unfair prejudice – Appropriate directions can ameliorate any risk of propensity reasoning – Application to exclude refused

Criminal Code 1983 (NT), s 69, s 181
Evidence (National Uniform Legislation) Act 2011 (NT), s 137

Dupas v The Queen (2012) 40 VR 182; *ES v The Queen (No.1)* [2010] NSWCCA 197; *HML v The Queen*; *SB v The Queen*; *OAE v The Queen* (2008) 235 CLR 334; *R v Tangi (No 7)* [2020] NSWSC 542; *The Queen v Jennings* [2020] NTSC 71; *The Queen v Shamouil* (2006) 66 NSWLR 228, referred to

REPRESENTATION:

Counsel:

Crown:	C McKay
Accused:	L Waugh

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Legal Aid NT

Judgment category classification:	C
Judgment ID Number:	Kel2505
Number of pages:	11

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The King v Riley [2025] NTSC 7
No. 22232980

BETWEEN:

THE KING

AND:

DIONNA RILEY

CORAM: KELLY J

REASONS FOR DECISION ON VOIR DIRE

(Delivered 21 February 2025)

Introduction

[1] On 14 November 2024, I declined to exclude evidence of the behaviour of the accused before the alleged offending proposed to be led by the Crown at trial. I gave ex tempore reasons, and I now publish those reasons.

[2] By an indictment dated 1 June 2023, the accused was charged with one count of causing serious harm to PF ("the complainant") and one count of going armed in public without lawful occasion in such a manner as to cause fear to a person of reasonable firmness and courage contrary to ss 69 and 181 of the *Criminal Code 1983* (NT), alleged to have been committed on 23 October 2022.

[3] The Crown alleged that the accused assaulted the complainant with a baseball bat inside his unit after the complainant had refused to provide the accused with alcohol. The Crown alleged that in the time proximate to the alleged assault on the complainant in his unit, the accused was heavily intoxicated and in a continuing, or at least intermittent, state of drunken aggression in the area surrounding the unit complex.

[4] The matter was listed for trial commencing on 18 November 2024.

[5] On 13 November 2024, defence counsel notified the Court that objections were to be made to the admissibility of certain evidence sought to be led by the Crown.

Application to exclude evidence

[6] On 14 November 2024, defence counsel outlined in their written submissions[1] objections to the admissibility of evidence that, on 23 October 2022, the accused:

(a) urinated next to the fence at [redacted] Bernhard St, Katherine South;

(b) threatened KT and MP; and

(c) said to KT and MP that she had been at Don Dale/in prison.

[7] The application was made pursuant to s 137 *Evidence (National Uniform Legislation) Act 2011* (NT) ("ENULA"), which requires the Court to refuse

1 Defence written submissions dated 14 November 2024 [1]

to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.

[8] At the voir dire on 14 November 2024, the Crown conceded that evidence that the accused had told two of the witnesses that she had been in Don Dale or in prison had no relevance to any fact in issue in the proceedings. The Crown did not propose to lead any evidence on the subject. The Crown opposed the application to exclude other evidence.

[9] In summary, the impugned evidence relates to the behaviour of the accused before entering the complainant's house where the facts in issue are alleged to have occurred. The Crown proposed to adduce evidence of an earlier incident on the same evening in which it is alleged that the accused approached a neighbouring unit and urinated next to their fence and garden bed area; the neighbours told the accused to do that somewhere else; and the accused became aggressive and verbally abusive towards them.[2] The Crown proposed calling evidence of this incident from both of the neighbours, KT and MP.

[10] Defence counsel objected to the admissibility of both the urination incident and the verbal threats pursuant to s 137 ENULA.

Relevant Legal Principles

[11] ENULA s 137 provides:

---

2 Draft Outline of Crown case dated 17 August 2023

Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

[12] In a general context, "prejudice means the danger of improper use of the evidence. It does not mean its legitimate tendency to inculpate. If it did, probative value would be part of prejudicial effect."[3] For the prejudicial evidence to be excluded, more is required, such as the possibility that the evidence may be used improperly by a jury in some respect. In order for there to be a danger of unfair prejudice to the accused '[t]here must be a real risk that the evidence will be misused by the jury in a way that the risk will exist notwithstanding the proper directions which it should be assumed the Court will give.'[4]

[13] In *Dupas v The Queen*,[5] the Victorian Court of Appeal described the test as being that there is a real risk that the evidence will be misused by the jury in some unfair way, and may arise, for example where there is a danger that the jury will adopt an illegitimate form of reasoning or misjudge the weight to be given to particular evidence, such as where there is an inability to test the reliability of the evidence, but evidence is not unfairly prejudicial because it inculpates the accused.

---

3 *HML v The Queen*; *SB v The Queen*; *OAE v The Queen* (2008) 235 CLR 334 at [12] per Gleeson CJ

4 *The Queen v Jennings* [2020] NTSC 71 at [20] per Grant CJ, citing *The Queen v Shamouil* (2006) 66 NSWLR 228 at [72] per Spigelman CJ (Simpson and Adams JJ agreeing)

5 (2012) 40 VR 182 at [175] per Warren CJ, Maxwell P, Nettle, Redlich and Bongiorno JJA

Facts in Issue

[14] The major issue in the trial would be whether the actions of the accused in assaulting the complainant inside his unit were an act of self-defence triggered by the accused's PTSD, or as a result of her continuing drunken aggression.

[15] Defence counsel submitted that as regards the application of s 137 to the impugned evidence, the relevant facts in issue are:[6]

I. whether the accused believed that it was necessary to hit the complainant on the back and head with the baseball bat to defend herself; and

II. whether that conduct was a reasonable response in the circumstances as the accused perceived them.

Defence Contentions

[16] Defence counsel contended that the impugned evidence has, at most, modest probative value as regards the facts in issue and that, in contrast, the danger of unfair prejudice is significant.[7]

[17] Defence counsel contended that the evidence of the public urination is only relevant to the facts in issue as evidence that the accused was intoxicated, and that this was of limited probative value noting the various other pieces

6 Defence written submissions dated 14 November 2024 [6]

7 Defence written submissions dated 14 November 2024 [7]

of evidence that would be adduced which speak to her level of intoxication. On the other hand, it is an act which members of the jury might find particularly distasteful and off-putting which may cause jurors to dislike the accused and scrutinise the case against her less carefully. This creates a danger of unfair prejudice which outweighs the negligible probative value.[8]

[18] In relation to the second item of impugned evidence, the evidence of the threats made to the neighbours, defence counsel submitted that this evidence only has probative value insofar as it is evidence that the accused was in a persistent or continuing state of aggression throughout the night in question. Viewed as a whole and alongside the evidence of the complainant, defence counsel contended that the evidence does not support the proposition that the accused's aggression was persistent or continuing. Rather, that it merely supports the finding that the accused was acting aggressively at two distinct points separated by about an hour and involving different people.[9]

[19] It was submitted that if the evidence that the accused threatened the neighbours is admitted, there is a danger that it will be used as tendency evidence, i.e. that the jury will impermissibly reason that the accused is the sort of person who behaves aggressively without lawful justification.[10]

---

8 Defence written submissions dated 14 November 2024 [10]

9 Defence written submissions dated 14 November 2024 [11]

10 Defence written submissions dated 14 November 2024 [12]

[20] Defence counsel referred to the decision of the New South Wales Court of Criminal Appeal, *ES v The Queen (No.1)*[11] where the admission of evidence of uncharged acts as context evidence was held to have amounted to a miscarriage of justice. In finding that the admission of the evidence was a miscarriage of justice, Hodgson JA (Whealy J and Buddin J agreeing) stated:[12]

> In my opinion, the evidence objected to potentially had considerable probative force, particularly because it was evidence that could be considered as corroborating the complainant; but it would have that force only as motive/tendency evidence. If it were considered as doing no more than enabling the charged acts to be seen in context, and as not supporting the complainant at all by way of motive/tendency reasoning, its probative value was at best extremely modest. *However, since the evidence was not admissible in this case as motive/tendency evidence because of failure to comply with s 97, its considerable probative force in that character must be considered as being unfairly prejudicial.* In my opinion, it is clear that accordingly the modest probative value as context evidence was plainly outweighed by the danger of unfair prejudice from its probative force as motive/tendency evidence (which, for the reasons I have given, must be considered as unfairly prejudicial). (*Emphasis added.)*

[21] Defence counsel also took the Court to the decision in *R v Tangi (No 7)*[13] where the temporal dislocation in events gave rise to a risk that the jury would impermissibly use it as a form of tendency evidence. Rothman J said:[14]

> The difficulty with para 15 [of the statement of Witness D] is one that attributes to the accused a state of anger…

---

11 [2010] NSWCCA 197

12 [2020] NSWSC 542 ("*Tangi*") at [43]

13 *Tangi*

14 *Tangi* at [8]

> …There is no doubt that, if the jury were to perceive the anger expressed or the feelings expressed in para 15 of the statement to have persisted, then the matter is highly probative.
>
> The difficulty I have is that if the anger did not persist then the jury is more likely to use it as a form of tendency evidence, namely that the accused acts in a way described in para 15 in relation to incidents or at least act in that way from time to time. That would be a misuse of the evidence.
>
> As presently advised, there does not seem to be any evidence which would suggest that the feelings of anger and the manner in which the accused would deal with anyone, who "crossed him" (not being a term used by the accused), persisted from mid-morning, which I will assume to be about 10 o'clock until 2 o'clock in the afternoon or even until 1 o'clock in the afternoon, and that is the matter that gives me great concern.
>
> It seems to me, while directions could be given, it would be difficult to give directions that would ameliorate that unfair prejudice because they would have to be qualified by the finding of the jury that there was a persisting feeling of that kind from 10 o'clock in the morning through the two incidents to 2 o'clock in the afternoon. In the absence of evidence that would be an inference that, in my view, would not be available, and use of the material therefore could only be by way of tendency and that would be an unfair prejudice. On that basis, the provisions of s 137 of the Act are satisfied, and I reject the contents of the evidence in para 15 of the statement.

[22] At the voir dire on 14 November 2024, I queried why the matter was not more properly a matter for submissions in closing, as to what the jury could make of the prior behaviour and that, if admitted, the jury would be given a direction in relation to the limited use they could make of the evidence. There would be a judicial warning against general propensity reasoning and it would be up to the jury to make what they would of the submissions and the evidence.

[23] Defence responded that tendency evidence is very seductive and that, even in the face of a judicial warning, there would remain a very real risk that the

jury will engage in tendency reasoning. Further, if the Crown was not leading evidence of the earlier threats as tendency evidence, and if there was no evidence supporting a continuing state of aggression, then the evidence of the earlier threats were of no probative value at all.

Crown Contentions

[24] The Crown submitted the evidence sought to be adduced was not tendency evidence, but rather important contextual evidence of the accused's behaviour immediately proximate to the allegation in relation to serious harm. The Crown case is that the conduct of the accused inside the complainant's house was not an act of violence in response to a sexual advance, which was apparently the defence case, but was part of a continuing state of aggression and violence throughout the evening.

[25] The Crown argued that *Tangi* could be distinguished due to the longer difference in time between the earlier conduct and the offending. In *Tangi,* it was difficult to suggest that the state of anger attributed to the accused by the witness at 10:00am persisted to the time of the alleged incident at 2:00pm. In the present case, the neighbours estimated the urination incident and threats to have occurred between 9:30pm and 10:00pm,[15] and, on the Crown case, the assault in the complainant's unit to have occurred between

15 Recorded statement of Kaitlyn Thorpe, 24 October 2022 p 3

11:00pm and 11:30pm.[16] In *Tangi*, the judge did allow evidence of events more proximate to the charged incident to be admitted.

[26] The Crown submitted further that evidence of the urination incident was relevant to the accused's degree of intoxication and recollection. The evidence of the prior behaviour was relevant to the reliability and credibility of the version of events that the accused provided to the psychiatrist, that being the alleged sexual advance by the complainant, which formed part of their assessment. The Crown contended that the reliability of that version is undermined in circumstances where she was the instigator of the aggression towards the neighbours in the time immediately proximate to the offending behaviour.

[27] The Crown submitted that there was no risk of tendency reasoning after judicial direction, and that the jury would necessarily be required to consider the circumstances related to the actual assault and, irrespective of the earlier matters, decide whether this was triggered by PTSD and not merely a continuation of fluctuating aggression due to her state of intoxication.

Consideration

[28] In my view, the evidence of the urination and the evidence of the threats and aggression earlier in the evening have significant probative value as context evidence demonstrating a continuing or at least an intermittent state of

16 Draft Outline of Crown case dated 17 August 2023

drunken aggression throughout the course of the evening in an extremely proximate time to the event in issue, particularly given that there is evidence of similar aggressive behaviour after the relevant events in the unit. Nor do I think the evidence of the urination can be separated from the evidence of the aggression and threats, as it was all part of the same incident and the evidence of the aggression and threats would make little or no sense in isolation.

[29] I agree with the submissions of the Crown that the risk of the jury engaging in impermissible tendency reasoning can be ameliorated with appropriate judicial warning.

[30] Without this evidence, there is a real risk that the jury will be left with a distorted view of the accused's behaviour on the evening in question which is highly relevant to the issue that will be the major issue in the proceedings, that is, whether the accused's behaviour in the unit in assaulting the complainant was an act of self-defence triggered by PTSD or as a result of her continuing state of aggression.

[31] I did not think that there is a very great risk of unfair prejudice to the accused and I did not consider that the probative value of the evidence is outweighed by the danger of unfair prejudice. For those reasons I declined to exclude it under s 137.
