CITATION:	*The King v Lyons* [2025] NTSC 11
PARTIES:	THE KING
	v
	LYONS, Kyle
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22411391
DELIVERED:	6 January 2025
PUBLISHED:	26 February 2025
HEARING DATES:	18 October; 29 October; 28 November; 16 December 2024 and 6-8 January 2025
JUDGMENT OF:	Blokland J

CATCHWORDS:
Rulings – potential *Dietrich* stay resolved – tendency evidence notice amended and evidence admitted by consent – context evidence shedding light on the relationship between the complainant and accused – whether admissible.

Criminal Code; ss 221(1), 217(1), 218.

Anthony David Craig v South Australia (1995) 184 CLR 163; *Barton v The Queen* (1980) 147 CLR 75; *Dietrich v The Queen* [1992] HCA 57; *R v Chaouk and Others* (2013) 231 A Crim R 337; *R v Fuller* (1997) 69 SASR 251 at 257; *RCA v The King* [2023] NTCCA 4; *The Queen v RCA* [2021] NTSC 54; referred to.

REPRESENTATION:

Counsel:

Applicant:	B Houen
Respondent:	K Nichols

Solicitors:

Applicant:	Maleys
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	BLO2503
Number of pages:	17

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

The King v Lyons [2025] NTSC 11
No. 22411391

BETWEEN:

THE KING
Appellant

AND:

KYLE LYONS
Respondent

CORAM: BLOKLAND J

RULINGS

(Published 25 February 2025)

Background

[1] The following are reasons for various rulings made during pre-trial management and at the commencement of the trial.

[2] This was initially an application for a stay of proceedings on the basis that the accused, Kyle Lyons was indigent, had his grant of legal aid terminated and consequently would not be legally represented at trial. The stay was sought on the basis of the principles *Dietrich v The Queen*.[1]

1 [1992] HCA 57, 177 CLR 292.

[3] I indicated to counsel at two mentions of the matter that I had all but decided to stay the proceedings. Counsel for the Director of Public Prosecutions took a neutral position on the application. Fortunately funding issues were resolved in December 2024, shortly before the trial was to commence.

[4] The accused faced three counts on indictment: as a trespasser, entry of a building with the intention to commit an indictable offence, namely theft (s 221(1) of the *Criminal Code*); dishonest appropriation with the intention to permanently deprive the owner (s 217(1) of the *Criminal Code*) and robbery with circumstances of aggravation, namely possession of an offensive weapon and causing harm to the complainant, KM (s 218 of the *Criminal Code*).

[5] The matter was listed for trial for five days commencing on 6 January 2025. From October 2024 until the listing of 16 December 2025, the trial was put in doubt.

[6] The accused had previously been granted legal aid by the Northern Territory Legal Aid Commission ('NTLAC') to be represented at the trial. In order to be granted legal aid for trial a person must be assessed as coming within the means test and the case must have merit. On 28 October 2024, NTLAC

wrote to the accused's lawyer advising that legal aid had been terminated.

The letter was as follows:[2]

> We wish to advise that legal aid has been terminated in relation to the following legal matter/s: aggravated robbery, stealing (except breach of trust), unlawful entry.
>
> Legal Aid NT has limited available funds for criminal legal matters and have restricted the services that we are able to offer. In accordance with Chapter 5, Part 1, Guideline 1B of the Legal Aid NT Guidelines, we have prioritised legal aid for criminal law matters where the client has been charged under the Youth Justice Act 2005 (NT).
>
> Unfortunately, your client's matter does not meet our priorities and their application for legal aid is refused.
>
> Your client has the right to have this decision reconsidered. If your client wishes to seek a reconsideration a written request should be made to Legal Aid NT by 26 January 2025.
>
> There are a range of legal and related services which may be able to assist your client.
>
> If you would like more information about these services, please go to the following link: www.legalaid.nt.gov.au.
>
> Yours faithfully,
>
> GRANTS SECTION

[7] Earlier in October NTLAC wrote to members of the legal profession in the following terms to explain the approach to restrictions to be taken more generally.[3]

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2 Exhibit D3.

3 Exhibit D2.

I am writing to you in relation to upcoming changes to the services provided by the inhouse Legal Aid NT practice, and to grants of aid available to the private legal profession.

For the past few years, Legal Aid NT has seen increased demand for legal representation for criminal law matters in the Northern Territory Local Court and Supreme Courts, and in Circuit Courts of the Local Court (Bush Courts). We have been able to meet this increased demand for NT criminal law matters through the regular requesting, and provision, of funds separate to our baseline funding from the NT Government.

Unfortunately, the funding we have been provided to date has not been sufficient to meet the increase in demand and will not be sufficient for us to meet in the 2024/2025 financial year. Legal Aid NT does not have confidence that additional funds will be provided at all or within a time frame which will enable us to continue to offer our current services.

Because of this, the Board of Legal Aid NT have made the very difficult decision to approve a budget for the 2024/2025 financial year based on the implementation of measures which will significantly curtail expenditure. We regret that these measures are expected to impact on the justice system, including vulnerable clients, the Courts, and the practices of our panel practitioners.

These measures include:

From 7 October 2024

Grants of aid for criminal law appeals will be limited to in-house only and exclude disbursement costs.

From 21 October 2024

All new applications for aid for criminal law matters will be refused unless proceedings are brought under the Youth Justice Act.

The referral of grants of aid for criminal law services in Bush Courts will cease. If these services cannot be provided inhouse in the current calendar year, aid will be refused.

NT crime duty lawyer services will be limited to inhouse capacity only, with no duty services being provided by contracted private practitioners.

> Legal aid for all referred matters listed for trial or hearing after 1 January 2025 will be terminated unless proceedings are brought under the Youth Justice Act.
>
> From 1 January 2025 all Bush Court services will cease completely.
>
> We appreciate the impact these measures will have on the representation of and access to justice for vulnerable people and on the practices of the private legal profession who undertake legally aided matters. We acknowledge these changes will have a disproportionate impact on Aboriginal and Torres Strait Islander people owing to their overrepresentation in the criminal justice system.

[8] As a result, given the accused would be unrepresented at trial, given the seriousness of the charges and given his impecunious circumstances were unlikely to change, it was indicated a temporary stay would be granted.

[9] As above, counsel for the Crown remained neutral on the application. Counsel for the accused submitted the Court should apply the principles in *Dietrich* which had been recently applied by Barr J in *The Queen v RCA* ('*RCA*').[4]

[10] The *Dietrich* principles are well known:

> In the absence of special circumstances, a judge faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault is unable to obtain legal representation, should adjourn, postpone or stay the trial until legal representation is available.

4 [2021] NTSC 54.

[11] In *Anthony David Craig v South Australia*[5] the High Court accepted the elements of a case which would enliven a discretion to stay under *Dietrich* were:

- The charges are serious;
- The accused is indigent;
- Legal aid has been refused;
- The accused has no means, or no sufficient means, to fund the cost of [proper] representation;
- The lack of legal representation cannot be said to be a result of any fault on the accused's part;
- There are no exceptional circumstances which would prevent the making of an order.

[12] Those principles have been applied in this jurisdiction most recently in the appeal judgment of *RCA v The King* where the Court of Criminal Appeal found no error in Barr J's reasoning at first instance.[6] It was concluded in *RCA* that without competent legal representation, the applicant would suffer considerable disadvantage in conducting his own defence and that his trial was likely to be unfair if he were to remain without representation through no fault of his own.

[13] The onus is on the accused to prove the above elements on the balance of probabilities. The risk of unfairness to the accused must be likely, rather than just possible.

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5 (1995) 184 CLR 163.

6 [2023] NTCCA 4; [2021] NTSC 54.

[14] The principles have also been said to apply in the following circumstances:[7]

> Where an accused...is unrepresented and the court considers that, as a consequence, an essential aspect of a fair trial is missing, the court may (and probably will) stay or adjourn a trial until arrangements are made for counsel to appear... The basis for that principle derives from the fundamental principles associated with natural justice or procedural fairness. Every party, particularly a party facing a serious criminal charge, is entitled to an adequate opportunity to prepare and to present the desired case (and answer the charge as preferred).

[15] Whether a matter is a "serious offence" depends on the nature and number of the charges, the complexity of the evidence, and the potential for unfairness in the proceedings and the risk of improper conviction. It does not solely turn on whether or not a charge is an indictable offence or carries a significant maximum penalty (including imprisonment).

[16] The power to grant a stay or an adjournment arises from the inherent power of the Court to ensure that an accused is afforded a fair hearing. It is the 'ineluctable concomitant of the court's duty to ensure that a criminal trial is as fair as we can reasonably make it'.[8]

Application to this case

[17] The accused in this matter was charged with serious offences:

- There are three separate charges;
- There are circumstances of aggravation on one charge;

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7 *R v Chaouk and Others* (2013) 231 A Crim R 337.

8 *R v Chaouk and Others* (2013) 231 A Crim R 337, citing *Barton v The Queen* (1980) 147 CLR 75 and *Dietrich* at 329.

- The offending is alleged to have taken place in a domestic violence context;

- The maximum penalties are:

  Count 1: 14 year's imprisonment.

  Count 2: 10 year's imprisonment.

  Count 3: life imprisonment.

[18] The accused's personal circumstances were as follows:[9]

a. He is 36 years old;

b. He attended school at Dripstone Middle School to Grade 9;

c. He attended various other education and practical courses, such as his loader ticket and forklift licence but has no formal or informal legal training;

d. His first language is English;

e. Prior to his arrest, and subsequent remand, he was essentially homeless. He was denied bail to live with his parents, subsequently he was granted conditional bail on supervision.

f. He owns no real property;

g. He is not employed.

Indigent

[19] As above the accused was previously the recipient of legal aid funding.

Plainly the inference can be drawn that he, at that time, met the

9 Submissions of the accused, 27 October 2024, at [15].

requirements for obtaining a grant of aid, which includes a “means test”. His circumstances differed from those in *RCA*, where the applicant had been denied legal aid.

[20] On the affidavit material before the Court it was clear that the accused was indigent. He was not employed, and had no “net annual surplus”. His parents were clear about their own financial circumstances. It was a plain case of lack of means.

[21] The accused had attempted to obtain assistance for his trial from NTLAC. The evidence before the Court was that at that time the NTLAC would not provide assistance due to lack of funding. This was no fault of the accused.

Education

[22] The applicant in *RCA* was assessed as “quite intelligent” and “articulate and a reasonably effective communicator”, having completed year 11 and a subsequent Associate Diploma. With that level of education, it was still found that he could not appropriately appear without representation at trial.

[23] In this case, the accused did not possess education at a level adequate to conduct his own legal proceedings.

Access to evidence

[24] The accused was in a position of vulnerability. Further, prior to the trial counsel for the Crown had indicated there may be further disclosure of evidence, including statements from civilian witnesses who were central to

establishing some elements of the charges. Without access to legal advice, it was unlikely that the accused would be in a position to determine how he would ultimately plead to the charges, let alone conduct a trial if he maintained his plea of not guilty. There was a real possibility of unfairness arising from his lack of access to all known material evidence.

[25] Given the complainant and accused had been in a relationship, had the accused been unrepresented, the Court may have determined it was necessary to appoint a legal practitioner to conduct the cross-examination of the complainant.[10] That procedure was unlikely to have remedied the situation. I agree with Barr J in *RCA*[11] who described the deficiencies of that procedure in the context of whether a fair trial could be achieved by use of such an advocate:

> …The appointed person may not exercise professional skill in conducting the cross examination, except perhaps in being able to ask the accused's questions using different words. It is still the accused who must formulate the questions and who thereby determines not only the issues for cross examination but also the substance of the questions to be asked.
>
> There is a serious problem as to how a legal practitioner, appointed for the limited purpose of cross examination, could act in the best interests of an accused if he or she had not been provided with the questions which the accused wanted asked, or who had not otherwise been given instructions. I query also how that person might identify the best interests of the accused without a full and complete understanding of all of the evidence proposed to be adduced by the prosecution and without instructions from the accused as to his or her response to such evidence. Further, in the absence of instructions, the

10 *Domestic and Family Violence Act* (NT), s 104 read with *Evidence Act* (NT), ss 21AB(d) and 21QA.

11 [2021] NTSC 54 at [78].

> appointed person would struggle to identify and put essential *Browne v Dunn* matters to witnesses.

[26] While such procedures are intended to prevent or minimise the complainant's re-traumatisation and embarrassment on being questioned by an alleged perpetrator, any such appointment here could not be taken to materially lessen the prospect of an unfair trial for the present accused.

[27] The fact that a judge in a matter may be able to offer assistance to an unrepresented party has been held to be no answer to a *Dietrich* application:[12]

> The hallowed response that, in cases where the accused is unrepresented, the judge becomes counsel for him or her, extending a "helping hand" to guide the accused throughout the trial so as to ensure that any defence is effectively presented to the jury, is inadequate for the same reason that self-representation is generally inadequate: a trial judge and a defence counsel have such different functions that any attempt by the judge to fulfil the role of the latter is bound to cause problems.

[28] A Supreme Court trial is an evolving legal proceeding that requires a grasp of numerous complex legal principles and procedures. This case had a number of evidentiary arguments to be finalised before trial. The consequences of a guilty verdict in this case clearly attracted terms of actual imprisonment.

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12 *R v Fuller* (1997) 69 SASR 251 at 257.

[29] I agree with Barr J's observations about the difficulties with a self-represented accused forensically assessing the evolving factors of a jury trial, particularly on the question of whether or not to give evidence:[13]

> A competent defence counsel, looking at the prosecution case objectively, is in a much better position to assess those considerations than an accused person. An unrepresented accused is at a significant disadvantage if he or she does not have counsel to provide advice as to the desirability of giving evidence and the proper scope of such evidence. It is certainly not the role of the trial judge to assist the accused in relation to those matters.

[30] For similar reasons, it would have been manifestly unfair for this accused to appear without being represented by counsel. Fortunately, after funding was restored to NTLAC, the accused was reassessed and granted aid for his representation.

Tendency evidence

[31] The Crown sought to lead tendency evidence which with some additions or adjustments suggested by defence, was led by consent. Such agreement would have been unlikely if the accused had remained unrepresented. Even if agreement was reached, it would be unlikely to have been properly considered to cover all aspects of the alleged tendency.

[32] As background, in short form the Crown case was that prior to the offending, the accused and the complainant were in a relationship, living at the complainant's residence. About two weeks before the offending they separated. The complainant told the accused he could not be in her residence

13 *RCA* [2021] NTSC 54 at [48].

anymore. Notwithstanding her expressed wishes, the accused messaged the complainant and asked for money as he needed help. On the morning of the offending the complainant was out of the house for around one hour and upon return noticed a flat screen television, an iPad and charger were missing. She phoned the accused who confirmed he had entered the residence and taken the items. He returned to the house and coerced or forced the complainant to transfer $150 to him if she wanted the items returned. The complainant initially refused, however, she complied when he allegedly threatened her by holding a screwdriver in his hand and holding her jaw and demanded money. She transferred $150 from her bank account to his. The stolen items were returned shortly after.

[33] The tendency alleged was a tendency to take the complainant's possessions, in particular televisions to obtain money in exchange for those possessions and a particular state of mind, namely to use that mechanism to obtain money. The evidence supporting the alleged tendency involved evidence of the financial history between them; much of it contained in the complainant's bank records, phone records and receipts from Cash Advantage, operating as a pawn broker and loans facility.

[34] After some negotiation, it was agreed between the parties that since the history of the relationship involved both parties agreeing to 'hock' items at various times to obtain money, that fact would be included in the alleged tendency. The Crown case was that regardless of such history of agreeing to hocking articles, at the time of separation, the complainant clearly

communicated that the accused could no longer return to the residence, supported by a bank transfer notation ‘don’t come back, eva’. The accused argued consent was given to be on the premises, use the items and obtain the $150 as it was in keeping with the history of an ‘on and off again’ relationship, notwithstanding the separation.

[35] This agreement reached by counsel on the amended tendency evidence was a commendable example of counsel working collegially to produce a fair and pragmatic outcome.

Application to exclude messages relating to the complainant’s dog

[36] Counsel for the accused sought the exclusion of messages the accused sent to the complainant when she attended the police station on 4 April 2024 to make a statement. The first message stated “the dog is good company.” A second message received shortly after stated “if you want your dog back, I suggest you call me.”

[37] Counsel for the accused submitted the messages were not probative of any issue, including to contextualise the allegations as the messages were sent after the incident. Nothing happened to the dog. The accused was not on the premises at the time. When the complainant returned to her premises, the dog was present. It was argued the importance of the messages would be inflated by the jury such that it was a backdoor way to admit further tendency evidence and was highly prejudicial.

[38] I agreed with the submission made on behalf of the Crown that the proposed evidence was relevant context evidence. The messages were within 24 hours of the alleged offending. Given the jury were required to examine the relationship in any event, given the history and the relevant admitted tendency evidence, it was important the jury not be left with an impression that the relationship was amicable at around the time of separation, at the time of the alleged offending and shortly after. The messages shed light on how they related to each other at the time, even if there was the possibility of some prejudice. The way the accused communicated with the complainant was a necessary part of understanding the relationship and hence the allegations that arose at the conclusion of the relationship.

[39] The prejudicial effect of the content of the messages was to some extent mitigated by the agreed facts contained in Exhibit P10, that there was no evidence the accused was at the complainant's residence when he sent the message and that the dog was not harmed.

Body worn footage of the accused's arrest

[40] Counsel for the accused objected to a portion of evidence of the accused's arrest. There had been some lead up to his arrest when police attended his parent's residence. The accused was not present and police left and spoke to the complainant and later returned and arrested him. The complainant told police about receiving messages from the accused, yelling at her and asking why police were at his house.

[41] The Crown submitted the body worn footage of the subsequent arrest was relevant context evidence. The accused became aggressive during the arrest. He was described as ‘upset and aggressive’ and called the complainant and yelled at her over the phone. The arrest was three days after the alleged offending, and given the accused’s reaction, on one view it could be said to demonstrate his knowledge of the allegations, tending to show his actions were not benign. Counsel for the Crown suggested it was not intended to lead the evidence on the basis of consciousness of guilt or of an admission, but that the evidence was relevant to the credibility of both parties and was relevant context evidence to shed light on the relationship.

[42] The evidence was excluded. It would be difficult for the jury to not interpret the evidence showing a consciousness of guilt even in circumstances where they were informed he was likely told of the allegations previously. In any event, the police intervention by way of arrest and what followed does not shed light on the usual state of the relationship and therefore does not add relevant context. The accused was interacting with police at the time. The fact he yelled at the complainant over the phone after and during such interaction was not probative of context in the relevant sense. It was not illustrative of their usual interactions given the intervention of police. The evidence was significantly prejudicial.

Verdict

[43] On 8 January 2025 the jury found the accused guilty of all three counts, but not guilty of both of the circumstances of aggravation, relevant to count 3, being armed with an offensive weapon and causing harm.

[44] The rulings will be forwarded to counsel.
