

CITATION: *The King v Yovanovic* [2024] NTSC 45

PARTIES: THE KING

v

YOVANOVIC, Danny

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 22126844

DELIVERED ON: 27 June 2024

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19, 20, 21 July 2023

JUDGMENT OF: Huntingford J

CATCHWORDS:

EVIDENCE – Admissibility and relevance – Application to cross-examine complainant as to sexual activity with a person other than the accused – Sexual Offences (Evidence and Procedure) Act (NT) s 4 – historic child sex abuse – issue of identification of the alleged offender - Application to cross-examine on matters of credibility – Evidence (National Uniform Legislation) Act 2011 (NT) s 103 – disclosure of alleged historic sexual offending – risk of unfair trial - leave granted on limited basis for cross-examination

Evidence (National Uniform Legislation) Act 2011 (NT) s 41, s 55, s 103(1), s 103(2)(a), s 192A, s 192(2)(b)
Criminal Code Act 1983 (NT) s 192(3), s 192(4)
Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4(1)(b), s 4(2), 4(3)

The Queen v GH (No 2) [2018] NTSC 23; *The King v LJ* [2023] NTSC 17;
referred to

REPRESENTATION:

Counsel:

Crown:	L Barnes
Accused:	P Crean

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 Yovanovic [2024] NTSC 45
No. 22126844

BETWEEN:

THE KING

AND:

DANNY YOVANOVIC

CORAM: Huntingford J

REASONS FOR DECISION ON VOIR DIRE

(Delivered 27 June 2024)

- [1] The accused seeks an advance ruling pursuant to s 192A of the *Evidence (National Uniform Legislation) Act 2011* (NT) (UEA) for leave to cross-examine the complainant about aspects of her sexual history.

The Crown Case

- [2] By indictment dated 17 July 2023, the accused is charged with seven counts of sexual intercourse without consent and seven counts of performing an act of gross indecency, pursuant to s 192(3) and s 192(4) of the *Criminal Code Act 1983* (NT) respectively. The

complainant in all counts is KR, who was aged between three and five years at the time of the alleged offending.

- [3] It is alleged that all of the conduct comprising the various counts took place at Alcoota in the Northern Territory between December 2013 and June 2015. At that time the accused was in a domestic relationship with MR, the complainant's sister. The complainant lived at Alcoota with her sister and the accused from late 2013 until she returned to Darwin around the middle of 2015.
- [4] The Crown case is that there were three main occasions on which the conduct comprising the alleged offences occurred. Counts 1 to 3 are alleged to have occurred when the complainant was left alone in the house with the accused for an afternoon. The Crown alleges that the accused made the complainant touch his penis (count 1), the accused licked the side of the complainant's buttock (count 2) and that the accused ejaculated on her face (count 3).
- [5] Secondly, the facts comprising counts 4 to 8 are summarised as events which happened on a different occasion at night when everyone was asleep in the Alcoota house. The Crown alleges that the accused licked the complainant's buttock (count 4), put his penis into the complainant's mouth (count 5), digitally penetrated her vagina (count 6), engaged in penile-anal intercourse (count 7), and ejaculated on the complainant's face (count 8).

[6] Thirdly, the facts comprising counts 9 to 14 are alleged to have occurred on another night at Alcoota while everyone was asleep. The Crown alleges that on this occasion, the accused digitally penetrated the complainant's vagina (count 9), that he forced the complainant to touch or rub his penis (count 10), put his penis into her mouth (count 11), penetrated the complainant's anus with his fingers (count 12), engaged in penile-anal intercourse with the complainant (count 13), and ejaculated on her body (count 14).

[7] The Crown case is that the complainant did not tell anybody about what happened at the time of the alleged offending because she was scared of the accused because she had witnessed him assaulting her sister and because she was threatened by him. The first disclosure by the complainant was to a family member, TN, in about April 2021 when the complainant was aged 11 years. The complainant provided statements to police about the alleged offending in 2021 and 2023.

Leave to cross-examine KR as to her sexual history

[8] The accused seeks leave, pursuant to s 4(1)(b) of the *Sexual Offences (Evidence and Procedure) Act 1983 (NT)* (SOEPA), to cross-examine the complainant in relation to her sexual activity with SN. SN is an adult male cousin of the accused on his mother's side who also resided at the Alcoota house for an unknown period around the time of the alleged offending.

[9] The evidence relied on in this application is:

- a. The child forensic interview (CFI) of KY given on 22 March 2023;
- b. Proofing notes from a discussion between KY and a prosecutor in July 2023;
- c. Transcript of a police statement given by JY dated 18 December 2022; and
- d. Transcript of conversation between SN and police on 26 June 2023.

KY's evidence

[10] KY is the biological daughter of the accused and MR, and is therefore the niece of the complainant. KY lived at the Alcoota house at the time of the alleged offending. KY was 14 years of age at the time when she gave the CFI in 2023, and was aged about 5 years at the time of the alleged offending.

[11] In the CFI, KY stated that she used to sleep in the lounge room and her mother and father slept in another room of the Alcoota House. She said that SN "... was really drunk and he didn't even know what he was doing. He grabbed my little aunty when she was only three or four years old. He took her to the room and raped her."¹ She said that this happened "more than one time." KY also said that when family were drunk "my mum, she would always put us into a room and lock it so

¹ CFI of KY dated 22 March 2023, page 4.

no-one can come in and hit us.”² Then she said “But they’d go through the window and then clarified that “SN, he would.”³

[12] When asked to give details, KY said “I can’t remember it really.”⁴ She said she could only remember one time. Then she said “he [SN] would always do this at night time when everybody’s asleep.”⁵

[13] KY said in the CFI that she overheard a conversation between SN and her father when she was at Alcoota. She said that SN was “planning for something at night for my little aunty, KR” and that “he wanted to make my dad do it with him. He was planning it. But my dad told him no.”⁶ Later in the CFI, KY said that SN was planning to rape her little aunty (the complainant) and “try kill my little uncle, my mum’s little brother.”⁷ She said that her mum stopped him, that she “grabbed my little uncle from him”, and that after that her little uncle was sent back to Darwin.⁸

[14] When asked what happened after what she heard she said “I don’t even know what he did, what [unclear] ‘cause she, she still remember it.”⁹

KY then said that KR “told me that he was touching her in that room

2 Ibid.

3 Ibid page 5.

4 Ibid page 5.

5 Ibid.

6 Ibid page 11.

7 Ibid page 13.

8 Ibid.

9 Ibid page 11.

everywhere.” Then she said: “And then next he put her back on the bed, then the next day he wasn’t there, he was gone.”¹⁰

[15] When asked if she heard or saw SN raping the complainant, KY said that she did not see or hear that.¹¹

[16] KY gave further details of the conversation she said she overheard between the accused and SN later in the CFI.¹² She said she was playing around the corner with the complainant when she overheard SN and the accused talking at the back of the house.¹³ She said that the conversation was in language and that SN said to the accused “bro, I hope you’ll do this thing here with this girl, KR.”¹⁴ KY later clarified that he actually said “rape” not “thing”.¹⁵ KY said that SN said to the accused “let’s rape that girl, KR and kill that brother.”¹⁶ KY said that her father said no that he did not want to do that, which made SN angry.

[17] The proofing notes record that KY said that SN used to pick up KR every night when she and KR were sleeping on the mattress. However, she confirmed that she did not see that happen. She said “I was

¹⁰ Ibid page 12

¹¹ Ibid page 19.

¹² Ibid page 18.

¹³ Ibid page 18 to 21.

¹⁴ Ibid page 20.

¹⁵ Ibid page 20.

¹⁶ Ibid page 20.

knocked out sleep I didn't know what's happening." She also said "he pushed me off the bed... he took her to the room and did something to her."

- [18] KY said initially to the prosecutor that the complainant was "too shame to tell me about anything" but then said that KR told her what had happened "the next day" and that was "one time when we was little." When asked whether KR told her any other time, KY said "Last year that's when she started telling me." She said that she thought that the conversation was at her mum's house, meaning the house of the complainant's sister, MR, in Darwin.

JY's evidence

- [19] The accused's sister, JY, gave a statement to police on 26 June 2023. She said that KY told her that "They [KR and KY] were asleep in the lounge room out at Alcoota and ... SN woke up KR and took her out in the bush and then when she came back KY told me that she had dirt all over and she smelt really bad and all of that."¹⁷ It is not completely clear from the transcript of her interview whether JY thought that this was something that KY had observed herself, or something that the complainant had told KY. However, there is no evidence from KY about seeing KR being taken into the bush by SN, to the contrary she clearly stated that she did not see or hear anything.

17 Police statement of JY dated 26 June 2023, page 7.

[20] Further, in the proofing notes KY was asked whether she had ever told JY anything that the complainant had said. She replied that she had not.

[21] In so far as the evidence of JY comprises what she says that KY says that the complainant told her, those representations are second hand hearsay and are not admissible to prove the truth of the facts apparently alleged.

SN's evidence

[22] In a conversation with police which was recorded on body-worn camera, SN said that he lived in Alcoota in 2013 in the same house with the accused and MR. He agreed that he had known the complainant since she was little. He said that in 2014 he was living in Adelaide and in 2015 in Alice Springs. Precise dates were not given. In the same conversation SN said that in 2015 to 2016 he used the name "Danny" but he does not use it any more. SN was then told that the accused had made an allegation that it was he who assaulted KR, not the accused. SN denied that. SN was not cautioned by police before he answered these questions.

Section 4 of the SOEPA

[23] Section 4(1) of the SOEPA requires that leave not be granted to elicit evidence about the complainant's sexual activities with another person unless the court is satisfied that the evidence sought to be adduced has

substantial relevance to the facts in issue. Section 4(1)(b) can apply to both consensual and non-consensual sexual activity.¹⁸ I do not consider that this is a situation where the provisions of s 4(2) are relevant.

[24] Section 4(3) provides that, for the purposes of s 4(1)(b), evidence of an act or event that is substantially contemporaneous with an offence with which an accused is charged, or that is part of a sequence of acts or events that explain the circumstances in which the alleged offence was committed, shall be regarded as having substantial relevance to the facts in issue.

[25] In accordance with s 55 of the UEA, evidence is relevant in a proceeding where, if it were accepted, it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. Section 4 of the SOEPA sets a higher bar. The requirement for ‘substantial’ relevance means, first, that the evidence could be reasonably regarded as important to the outcome of the proceeding and, second, that the evidence would have ‘a real, persuasive bearing’ on the reliability of the witness or some part of his or her testimony.¹⁹

18 *The Queen v GH (No 2)* [2018] NTSC 23, [21] – [22] and the authority cited there.

19 *The Queen v GH (No 2)* [2018] NTSC 23, [23].

Cross-examination of the complainant about sexual activity with SN

- [26] The accused denies any form of sexual activity with the complainant. Whether the accused engaged in the conduct relied upon in relation to each charge is therefore the central issue in the proceeding.
- [27] Counsel for the defence argues that the evidence of KY demonstrates that the complainant, who was a very young child at the time, may have been sexually assaulted by SN around the same time as the alleged offending by the accused, potentially giving rise to doubt as to the reliability of KR's account as to the identity of her assailant. Further, defence argue that the evidence that the complainant told KY she had been assaulted by SN also raises doubts as to her honesty. I note that the alleged prior representation as to an assault by SN is not logically inconsistent with her allegations against the accused, because both things could have happened. However, the complainant has not made any complaint about SN to police and there is therefore an implied inconsistency.
- [28] Defence argues that it is in the interests of justice to cross-examine the complainant about offences which may have been committed against her by SN at Alcoota. Defence submits that the evidence to be adduced in cross-examination could rationally affect the assessment of whether the accused committed the offences because it could affect the

probability that the complainant, a small child at the time, has mistakenly confused or misremembered her evidence about the identity of the perpetrator. In the alternative, it is put that the cross-examination may show that the complainant is not being honest in her evidence as to the identity of the perpetrator.

[29] The complainant's CFI²⁰ contains passages which indicate that she may have had difficulties with her recollection about the details and the timing of relevant events. The complainant did not give evidence that SN, or any other person, committed sexual offences against her at the relevant time. There is no expert evidence suggesting that KR has been the victim of sexual assault by any other person. In this way this case can be distinguished from the facts in both *The King v LJ*²¹ and *The Queen v GH (No 2)*²².

[30] The first alleged disclosure by the complainant to KY was made in Alcoota when the complainant was between three and five years old. The second statement was made in 2020 (CFI), or 2022 (proofing notes), when the complainant was about 10 - 12 years old. Few details of either conversation are given, but the evidence in relation to the first conversation is particularly vague.

20 Played at the commencement of the trial in July 2023, before the trial was vacated.

21 [2023] NTSC 17.

22 [2018] NTSC 23.

[31] The evidence of KY about the conversation she says she overheard in Alcoota between the accused and SN when she was aged between three and five years does not in my view make it more likely than not that the complainant was sexually assaulted by SN. Taken at its highest, and setting aside any view as to its credibility, the proposed evidence does not establish that any assault took place.

[32] The only other piece of evidence from KY which could be relevant is the statement that SN came into the room through a window after her mother had locked the children in a room in the Alcoota house to stop people hitting them. However, this statement does not appear to be directly connected with the allegation that SN came at night and took the complainant off the mattress in the lounge room and raped her, particularly in view of KY's clear statement that she did not see or hear SN doing anything of that sort. In my view this evidence also falls far short of what would be required to establish that a sexual assault of the complainant by SN was likely to have taken place.

[33] Therefore, the evidence on the voir dire is insufficient to establish on the balance of probabilities that the complainant was assaulted by SN. It follows that cross-examination of the complainant on the basis that such an assault(s) occurred will not elicit evidence which is substantially relevant to the facts in issue in the proceeding.

Prior inconsistent statements

- [34] The accused further contends that the evidence of KY about what the complainant told her about being assaulted by SN is relevant because it has the ability to affect the assessment of the credibility of the complainant's account. The ability of the complainant to properly recall the events and identify the offender will be in issue in the trial. As noted above, the complainant was aged between three and five years at the time of the alleged offending, and did not make complaints to police until 2021 and 2023.
- [35] The Crown opposes cross-examination of the complainant on matters of credibility relating to whether she ever said she assaulted by SN.
- [36] Cross-examination as to credibility, in accordance with s 103(1) of the UEA, is only permissible if the evidence has the capacity to substantially affect the assessment of the credibility of the witness. Evidence will have the capacity to substantially affect the assessment of the credibility of the witness where it could rationally affect the assessment of the credit or where it has the potential to have a "real bearing" on the witness's credibility.²³
- [37] Section 103(2)(a) of the UEA provides that in determining whether evidence might substantially affect the assessment of credibility, the

23 *Queen v GH* (No 2) [2018] NTSC 23, [39] citing *R v El-Azzi* [2004] NSWCCA 455 at [183].

court must have regard to whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth, and to the period of time which has elapsed since the acts occurred. The Crown argue that the evidence sought to be adduced is not evidence given when the complainant was under an obligation to tell the truth.

[38] Section 103(2) is not an exhaustive statement of the considerations to be taken into account in determining whether the evidence could substantially affect the assessment of the credibility of a witness. A court must take into account the matters set out in the section, but is not restricted to those considerations.

[39] I do not think that a comment made by a child of three or four years of age, to another child aged four or five, remembered more than 10 years later, is evidence which could substantially affect the complainant's credibility. I note the central importance of the identity of the perpetrator to the prosecution case. However, the evidence lacks any detail as to exactly what was said or the circumstances in which it was made. In addition, it is difficult to see how the complainant could fairly respond to questions on this topic.²⁴ In my assessment, the evidence could not substantially affect the credibility of the complainant.

24 *UEA*, s 192(2)(b).

[40] However, evidence about what the complainant said to KY in 2020 (or 2022) about being sexually assaulted by SN at Alcoota, could have a substantial bearing upon her credibility. The statement is said to have been made much more recently, in reasonable proximity to the time that the complainant first came forward to police, and at a time when she was, although still young, considerably older and therefore more likely to have a greater understanding of the events and what she was saying. The evidence of the complainant's representation to KY in 2020 (or 2022), while far from detailed, does at least have some identifiable particulars which could be put to the complainant.

[41] For the purposes of this voir dire there was no argument about whether cross-examination as to the alleged prior representations of the complainant to KY "related to" the complainant's sexual activity with another person, in circumstances where no such activity has been proven. I have proceeded on the basis that leave in accordance with s 4(1) of SOEPA is required. I do not think it is necessary to examine that issue further here because in this case it seems to me that the application of the test of "substantial relevance" in s 4(1) of the SOEPA would not add anything of significance to the application of the test in s 103(1) of the UEA, which requires that "the evidence could substantially affect the assessment of the credibility of the witness." In circumstances where both must be satisfied, satisfaction of the test for

cross-examination on credibility would, in the particular circumstances of this case, also satisfy the test in s 4(1) of the SOEPA.

[42] The overriding duty of the court is to ensure that an accused person receives a fair trial. That includes ensuring that the accused has a proper opportunity to test the evidence through cross-examination. However, provisions such as s 4 of the SOEPA and s 103 of the UEA are examples of legislative constraints which balance that right with other relevant considerations. Similarly, s 41 of the UEA requires a court to disallow an improper question put to a vulnerable witness, unless it is necessary that the question be put. However, there is no requirement when making a ruling under s 4 of the SOEPA that the probative value of the questions outweigh the distress, humiliation and embarrassment which such questioning may entail.²⁵

[43] I am of the view that the accused should have the opportunity to cross-examine the complainant about her alleged disclosure to KY in 2020 (or 2022) because that matter is substantially relevant to the facts in issue and could substantially affect the assessment of the credibility of the complainant. Whether the cross-examination should go further is a question which may arise in the trial, depending upon the evidence of the complainant, and is more appropriately determined by the trial judge at that time.

25 *The King v LJ* [2023] NTSC 17, [35].

Ruling

[44] I rule that:

- a. Evidence from JY as to what she was told by KY about what she was told by the complainant concerning an alleged sexual assault upon the complainant by SN at Alcoota is second-hand hearsay and is not admissible;
- b. The accused may cross-examine the complainant about her alleged disclosure to KY in 2020 (or 2022) in Darwin that she had been sexually assaulted by SN at Alcoota;
- c. Subject to any future ruling by the trial judge, the accused may not cross-examine the complainant about statements alleged to have been made by her to KY in Alcoota in 2014 or 2015; and
- d. The accused may not cross-examine the complainant generally on the basis that she has been sexually assaulted by SN.

[45] These reasons are published to the parties in confidence, pending conclusion of the accused's trial. Depending upon the outcome of the prosecution, the court may authorise publication of this ruling without further reference to the parties.
