CITATION:	*The King v Small* [2024] NTSC 93
PARTIES:	THE KING
	v
	SMALL, Kelvin
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22303511
HEARING DATE:	31 October 2024
REASONS DELIVERED:	12 November 2024
JUDGMENT OF:	Kelly J

CATCHWORDS

CRIMINAL LAW – Whether the statement of facts established the charge on the indictment – Demurrer application – Facts did not establish the charge of indecent dealing – Assault not inherently indecent and facts insufficient to establish sexual connotation – application allowed – accused discharged without being required to plead.

Criminal Code 1983 (NT), s 132(2)(a), s 132(4), s 349

Child Protection (Offender Reporting and Registration) Act 2004 (NT), s 13, s 13(3), s 14, s 37,

Sentencing Act 1995 (NT), s 78F

BD v The Queen [2017] NTCCA 2; *DF v Rigby* [2019] NTSC 46; *R v Harkin* (1989) 38 A Crim R 296, applied

R v Coombes [1961] Crim LR 54; *R v Court* [1989] AC 28; *Rv Culgan* (1898) 19 LR (NSW) 166; *R v George* [1956] Crim LR 52; *R v RL* [2009] VSCA 95; *R v Whitehouse* [1955] QWN 76, referred to

REPRESENTATION:

Counsel:

Crown:	A Lonergan
Accused:	L Carr

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
Judgment ID Number:	Kel2409
Number of pages:	15

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

The King v Small [2024] NTSC 93
No. 22303511

BETWEEN:

THE KING

AND:

KELVIN SMALL

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 12 November 2024)

Introduction

[1] This matter was listed for a plea before me on Thursday 31 October 2024. As is the custom, the Director of Public Prosecutions ("DPP") provided the Court with an emailed copy of the indictment and what was described as the "statement of facts" prior to the plea date. The indictment charged Mr Small with one count of indecent dealing with a child under the age of 16 aggravated by the fact that the child was under the age of 10, namely 6 years old, contrary to s 132(2)(a) and (4) of the *Criminal Code 1983* (NT).

[2] The statement of facts read as follows.

CROWN FACTS

(1) The offender in this matter is Kelvin Small (DOB: 17/03/1988).

(2) The victim in the matter is [redacted].

(3) The offender and victim are unrelated and not known to each other.

(4) On an afternoon between the 19th and 23rd of December 2022, the victim was at house [redacted] Mulga Camp, Tennant Creek.

(5) The victim was in the company of [her mother], and [her aunty]. The three of them were on the verandah at the front of the house.

(6) The offender was in Tennant Creek drinking alcohol at a unit on Blackmore Road. He consumed nine cans of VB, rendering himself intoxicated.

(7) The offender began walking to the BP Service Station and then onto Mulga Camp asking if any family were playing cards.

(8) The offender approached House [redacted] Mulga Camp from the vacant land next to Mulga Camp, calling out to people.

(9) The offender entered the yard and came to the verandah where the victim and her family were seated.

(10) The offender asked [the victim's mother] if the victim was a boy or a girl, to which [the victim's mother] told him he didn't need to know and to leave the group alone.

(11) The offender looked at the victim and said "Aww my little granddaughter".

(12) The offender then leant down and pressed his lips against the victim's lips, and kissed her for a short time.

(13) [The victim's mother] said "Don't fucking kiss my daughter like that. I don't know where your lip was."

(14) The offender apologised.

(15) [The victim's mother] took the victim inside [redacted] Mulga Camp to wash her mouth.

(16) The offender went inside [redacted] Mulga Camp to sleep.

(17) The offender was arrested on 31 January 2023 at the Tennant Creek Police Station.

(18) At the time of the offence the offender was 34 years of age and the victim was aged 6.

(19) The offender had no lawful excuse for his actions.

[3] When the matter came on, before Mr Small was arraigned, I expressed concern that the facts set out in the statement of facts provided to the Court may not establish the charge on the indictment. The act alleged was a short kiss on the lips in the presence of the child's mother and aunty preceded by the words, "Aw, my little granddaughter," and I queried whether that could constitute an indecent dealing, given that to constitute indecency the alleged dealing must have a sexual connotation. I adjourned the matter for a short time to enable the prosecutor to obtain instructions and for the parties to discuss the matter.

[4] When the matter resumed, the prosecutor filed a fresh indictment charging assault with four circumstances of aggravation including that the assault was indecent. That did not fully address the concern and I adjourned the matter to 2.00 pm on that day to enable both counsel to consider their positions.

[5] To place the matter in context, all parties considered that it was important for the matter to be dealt with urgently, preferably that day, as Mr Small had already served over seven months on remand, which was acknowledged by

both prosecution and defence to be substantially more than would be warranted by the objective seriousness of the offending conduct, whichever charge was proceeded with. Further, indecent dealing and assault aggravated by indecency are sexual offences with two practical consequences for sentencing.

(a) Both enliven the mandatory sentencing regime in s 78F of the *Sentencing Act 1995* (NT) which obliges the Court to record a conviction and to impose a sentence of actual imprisonment which may not be wholly suspended. (Given the time already served on remand this may not have mattered very much to Mr Small.)

(b) Both are offences caught by the *Child Protection (Offender Reporting and Registration) Act 2004* (NT). The effect of s 14 of that Act is that once there was a plea of guilty to either of the potential charges, Mr Small would be subject to the registration and reporting regime in the Act for eight years[1] – a considerable, unjust burden if Mr Small had not in fact committed an indecent act warranting a finding of guilt of a sexual offence. This would be especially so for a person in Mr Small's personal circumstances involving the possibility of continued engagement with the criminal justice system should he breach the

1 Section 37(1)

reporting conditions.[2] The learned prosecutor fairly conceded that if s 13 of the Act had been applicable rather than s 14 (ie if the Court had a discretion whether or not to place the offender under the provisions of the Act) the Court would have no difficulty in concluding that an order should not be made placing him under the reporting regime as the Court could not be satisfied that Mr Small poses a risk to the lives or the sexual safety of any children.[3]

[6] In the meantime, defence counsel filed a demurrer application "in relation to all Crown indictments in this matter". In that document headed "DEFENCE DEMURRER APPLICATION" the defence contended, "Defence implicitly accepts the allegations contained in the indictment but challenges whether those allegations constitute a criminal offence".

[7] I took that to mean that the defence accepted the facts set out in the statement of facts and was seeking to argue the point under discussion – ie whether the statement of facts in which the Crown had particularised the charge would support a charge which involved indecency as an element.

[8] I indicated to defence counsel that now that the Crown had filed a fresh indictment charging aggravated assault, the statement of facts would

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2 Mr Small is a 34 year old Aboriginal man from Ali Curung, with limited schooling and a very limited employment history. He has been a drinker since his teens and has a long history of alcohol related offending and breaches of court orders. Section 48 of the *Child Protection (Offender Reporting and Registration) Act* provides that a reportable offender who, without reasonable excuse, fails to comply with any of his or her reporting obligations commits an offence and is liable to a maximum penalty of 100 penalty units or imprisonment for 5 years.

3 *Child Protection (Offender Reporting and Registration) Act* s 13(3); Mr Small has no prior convictions for any sexual offence and no prior convictions for any offences against children.

constitute an assault and support at least three of the four charged circumstances of aggravation. While emphasising that it was not for me to tell the DPP what to charge or defence how to plead, I suggested that one possibility might be for the accused to plead guilty to the charge of assault and admit the Crown facts and three of the four circumstances of aggravation, but for there to be a disputed facts hearing on the factual question of whether the conduct set out in the agreed facts was indecent.

[9] That suggestion was not taken up. Defence counsel indicated a preference to proceed that way but the prosecutor indicated that if the accused was not going to plead guilty to the charge on the fresh indictment, including the circumstance of aggravation that the child had been indecently assaulted, then the Crown would file a third indictment reverting to the original charge. That was duly done and the prosecutor asked for the matter to be referred to the Criminal Callover ("CCO") to allocate a trial date.

[10] I declined to refer the matter to the CCO to be set down for trial but said that now the indictment had returned to its original form charging indecent dealing, I would hear and determine the defence demurrer application. I refused to adjourn the demurrer application because while there was a degree of difficulty, even potential unfairness to the prosecutor in having to deal with the matter on such short notice, the central issue was a simple one, the prosecutor Mr Lonergan was across the issues, and it would have been more unjust to require Mr Small to spend more time in custody than he had already served: he should be sentenced or discharged that afternoon, noting

that any sentence he received would already have expired. There was in any event no indication from defence counsel that Mr Small would no longer plead guilty if the demurrer application was unsuccessful. In the event, Mr Lonergan did a more than competent job responding to the application.

[11] Mr Carr for the defence argued that the statement of facts did not support the charge of indecent dealing on the indictment. The charged act consisted of a single kiss on the lips of short duration preceded by the words, "Ah, my little granddaughter." The conduct took place on the verandah of a house in Mulga Camp in the presence of the child's mother and aunt.

[12] Mr Carr for the defence relied upon *R v Harkin*[4] *("Harkin"), BD v The Queen*[5] *("BD")* and *DF v Rigby*[6] *("Rigby"),* contending that to be "indecent" the act complained of must have a sexual connotation; that kissing a child briefly on the lips in the circumstances did not objectively, unequivocally offer a sexual connotation; and that there was no evidence of any intention on the part of Mr Small to obtain sexual gratification from the act. In *Harkin*, in the New South Wales Court of Criminal Appeal, Lee J, with whom the other justices of appeal agreed, said:[7]

> [I]f there be an indecent assault it is necessary that the assault have a sexual connotation. That sexual connotation may derive directly from the area of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would

4 (1989) 38 A Crim R 296

5 [2017] NTCCA 2

6 [2019] NTSC 46

7 *Harkin* at 301

> give rise to a sexual connotation in the carrying out of the assault. The genitals and anus of both male and female and the breast of the female are relevant areas ….
>
> The purpose or motive of the appellant in acting that way is irrelevant. The very intentional doing of the indecent act is sufficient to put the matter before the jury. But if the assault alleged is one which objectively does not offer a sexual connotation, then in order to be an indecent assault it must be accompanied by some intention on the part of the assailant to obtain sexual gratification.

[13] In *Harkin*, in the New South Wales Court of Criminal Appeal, Lee J, with whom the other justices of appeal agreed, said:[8]

> [I]f there be an indecent assault it is necessary that the assault have a sexual connotation. That sexual connotation may derive directly from the area of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of the assault. The genitals and anus of both male and female and the breast of the female are relevant areas ….
>
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[14] The remarks in *Harkin* concerned the charge of indecent assault. "The same general considerations which govern the operation and interpretation of the term "indecent" in the statutory crime of indecent assault also have application to the offence established by s 132(2)(a) of the *Criminal Code*."[9]

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8 *Harkin* at 301

9 *BD* at [9]

[15] In *BD*, the Court embarked on an extensive review of the authorities on indecency,[10] and concluded:[11]

> In order to satisfy the element of indecency it was necessary to prove either that the dealing was indecent in itself, or that it was committed in circumstances of indecency. For the dealing to be indecent in itself it must be plainly and obviously indecent.[12] For that purpose, "indecent" imports a sexual connotation which:
>
> > *… may derive directly from the areas of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of the assault. The genitals and anus of both male and female and the breast of the female are relevant areas …*[13]
>
> It is not necessary that the touching be directed to one of those areas in order to be capable of characterisation as plainly and obviously indecent. Lord Ackner's hypothetical example of an assault involving the removal of clothing might also be characterised as patently indecent even where there was no contact with those areas of the body which might inherently give rise to a sexual connotation.

[16] In *BD*, the Court of Criminal Appeal was concerned with a Crown allegation of "touching [that] involved at its highest the appellant washing an area on the complainants' legs between the knees and upper thighs with a washcloth and soap, and moving the hem of the shorts worn by one of the complainants up past the "tan line" ostensibly for that purpose."[14]

[17] The Court held that the alleged conduct "could not be characterised as plainly and obviously indecent"; nor could it be "necessarily regarded as

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10 *BD* at [9]-[26]

11 Ibid at [33]-[34]

12 *R v Whitehouse* [1955] QWN 76

13 *Harkin* (1989) 38 A Crim R 296 at 301; cited by Nettle JA in *R v RL* [2009] VSCA 95 at [9]

14 *BD* at [35]

innocent or incapable of carrying a sexual connotation".[15] The question of whether the dealings were committed in circumstances of indecency was one of fact for the jury to decide; if the appellant's conduct had a sexual motivation it was capable of characterisation as indecent.[16]

In *Rigby* Grant CJ heard an appeal from a decision of the Local Court in which the trial judge found the appellant guilty of an assault on his son including the circumstance of aggravation that the assault was indecent. The substance of the Crown case was that the appellant had bitten his seven-year-old son on his naked buttocks, causing him pain, markings and abrasions.[17] The Chief Justice made the following determination:[18]

> In order to satisfy the element of indecency it is necessary to prove either that it was committed in circumstances of indecency by reason of the offender's motive or purpose, or that the dealing was inherently indecent in the sense of being plainly and obviously indecent. Those two different modes of proof were described by Nettle JA in *R v RL*:[19]
>
> > *There is also some authority for the proposition that, even where an assault is not such as unequivocally to offer a sexual connotation, it may still constitute an indecent assault if accompanied by an intention on the part of the assailant thereby to obtain sexual gratification.*
>
> As already described, the trial judge did not find any sexual motive or purpose.[20] The trial judge also correctly found that in order to be characterised as inherently indecent the conduct must carry a sexual

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15 *BD* at [36]

16 *BD* at [37]

17 *Rigby* at [4]

18 *Rigby* at [27] – [31]

19 *R v RL* [2009] VSCA 95 at [9], citing *Harkin v R* (1989) 38 A Crim R 296 at 301; *R v George* [1956] Crim LR 52 at 53; *R v Coombes* [1961] Crim LR 54 at 55; cf *R v Culgan* (1898) 19 LR (NSW) 166 at 167; *R v Court* [1989] AC 28 at 33 and 42

20 *BD* at [33]-[34]

connotation. The trial judge made express reference to the passage from *Harkin v R* to the effect that the sexual connotation:[21]

> *... may derive directly from the areas of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of the assault. The genitals and anus of both male and female and the breast of the female are the relevant areas ...*

The trial judge also made obvious reference to Lord Ackner's hypothetical example of an assault involving the removal of clothing which might also be characterised as patently indecent even where there was no contact with those areas of the body which might inherently give rise to a sexual connotation.[22]

Having correctly stated the relevant test and principles, the factors identified by the trial judge were no doubt sufficient to characterise the conduct as abhorrent, disturbing and perverse. There can also be no doubt that the conduct was plainly unbecoming and offensive to common propriety. One might even conclude that the appellant was using the child as a proxy to vent his hostility towards the child's mother. However, the child's age, his relationship to the appellant, his disability, and the force of the bite and its impact on the child could not properly inform the question whether the conduct had a sexual connotation. The child's naked condition, the application of a bite to the buttocks in these circumstances, and the fact that it took place in the appellant's bedroom were not sufficient to give rise to a finding beyond reasonable doubt that there was a sexual connotation, either by themselves or in combination with the other factors. This is not to say that touching the buttocks of another person, be they child or adult, cannot be characterised as plainly and obviously indecent in some circumstances. It is only to say that those circumstances did not present in this case.

[18] The prosecutor contended that it was not open to the Court to determine the demurrer application on the basis of the statement of facts provided to the defence and the Court and agreed between the Crown and the defence as the factual basis for the proposed plea of guilty. The submission was that this document was provided only for the purpose of the guilty plea and was not

21 *Harkin* at 301

22 *R v Court* [1989] AC 28 at 42–43

otherwise in evidence before the Court. (Defence counsel did not tender the document.)

[19] I asked the prosecutor for particulars of the Crown's allegation that Mr Small had indecently dealt with the child; and he confirmed that the kiss was the act relied upon as constituting the indecent dealing. I asked if there were any other allegations which formed part of the Crown case outside the matters in the statement of facts that were relevant to the issue of whether Mr Small's actions were indecent.

[20] There was some discussion about additional evidence that might have been led had the matter gone to trial. The prosecutor said that in his electronically recorded interview with police, Mr Small emphatically denied that he knew the victim or her family, which would tend to negative any suggestion that he mistakenly thought the child actually was his granddaughter. However, the fact that Mr Small and the victim were unknown to each other is recorded in the statement of facts. The prosecutor said that there was also a statement by one witness that Mr Small grabbed the child before or when kissing her but conceded that this did not add to the objective indecency of his actions. The prosecutor also fairly disclosed that in his police interview Mr Small denied any sexual motivation for the offending.

[21] Mr Lonergan for the Crown contended that it was not appropriate for the matter to be dealt with by way of the defence demurrer application and that

the question of whether the agreed actions of Mr Small were indecent was a matter for the jury.

[22] Section 349 of the *Criminal Code* provides:

> **349 Demurrer**
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> (1) When an accused person demurs only and does not plead any plea the court is to proceed to hear and determine the matter forthwith.
>
> (2) If the demurrer is overruled he is to be called upon to plead to the indictment.
>
> (3) When an accused person pleads and demurs together it is in the discretion of the court whether the plea or demurrer shall be first disposed of.
>
> (4) No joinder in demurrer is necessary.

[23] I took the view that under the provisions of s 349, the demurrer should be heard first. If the demurrer were successful, Mr Small would be discharged without being required to plead to the indictment. If the demurrer were unsuccessful, Mr Small would be indicted on the third filed indictment and Mr Small would be required to plead to it, my understanding being that in that case Mr Small intended to plead guilty to the charge on the indictment on the basis of the previously agreed statement of facts.

[24] I allowed the demurrer and discharged Mr Small without requiring him to plead to the indictment. In my view, it was appropriate to do so on the basis of the statement of facts which had been agreed for the purpose of the plea as that is what he was being asked to agree to (and had given instructions that he did agree to) and the basis upon which he was being asked to plead guilty to the charge on the indictment. There was no question of the matter

proceeding to trial. Further, the prosecutor confirmed that the act relied upon by the Crown as amounting to an indecent dealing was the kiss on the mouth of short duration. The additional matters adverted to by the prosecutor added nothing to the question of whether that amounted to an indecent dealing.

[25] In my view those facts – even taking into account the additional matters discussed – did not establish the charge of indecent dealing. A brief kiss on the mouth by a drunken stranger, in the presence of the child's mother and aunt, accompanied by the words, "Aw my little granddaughter," while no doubt an assault, and no doubt unpleasant and unwelcome, is not plainly and obviously indecent in the sense of inherently giving rise to a sexual connotation and there is nothing else in the statement of facts that point to any intention by Mr Small to obtain sexual gratification or which would otherwise give the conduct a sexual connotation. The fact that Mr Small did not know the little girl or her family and cannot reasonably be supposed to have mistaken her for his granddaughter does not change matters. The remark has no sexual connotations and would rather point to a more "innocent" intention, as does the fact that the act was done openly in view of the child's mother and aunt.

[26] I would agree with the prosecution's submission that the matter should not be disposed of on the demurrer application if it was a matter like *BD* in which the Court determined that, if the appellant's conduct had a sexual motivation it was capable of characterisation as indecent, and that question

should properly be determined by the jury on a retrial, there being evidence capable of supporting such a motive; or if there was anything in the statement of facts from which an inference could possibly be drawn that Mr Small had an intention to gain sexual gratification from the act thus rendering the kiss indecent. Here, the act relied on was not plainly and obviously indecent, there was no prospect of the matter going to trial, and in my view there was nothing in the statement of facts from which any inference of an intention by Mr Small to gain sexual gratification from the kiss could possibly be drawn. Accordingly, I allowed the defence demurrer application and discharged Mr Small without requiring him to plead to the indictment charging indecent dealing with a child under the age of 16.
