CITATION:	*The Queen v TA* [2017] NTSC 46
PARTIES:	The Queen v TA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

EVIDENCE – Sexual intercourse without consent – admissibility of DNA evidence – DNA evidence obtained in contravention of s 29 of the *Youth Justice Act* – failure to provide a support person during intimate forensic procedure – whether to exercise discretion to admit evidence – evidence had significant probative value – admission of evidence did not unduly prejudice the rights of the defendant – DNA evidence admissible – *Youth Justice Act* (NT) s 29, s 59.

EVIDENCE – Sexual intercourse without consent – admissibility of DNA evidence – DNA evidence obtained in contravention of s 29 of the *Youth Justice Act* – failure to provide a support person during intimate forensic procedure – whether to exercise discretion to admit evidence – evidence had significant probative value – desirability of admitting the evidence outweighed the undesirability of admitting the evidence – DNA evidence admissible – *Evidence (National Uniform Legislation) Act* (NT) s 138(1).

Evidence (National Uniform Legislation) Act (NT) s 138(1)
Youth Justice Act (NT) s 29, s 59

R v Helmhout (2001) 125 A Crim R 257; [2001] NSWCCA 372; *Tasmania v Seabourne* [2010] TASSC 35; *The Queen v DA* [2017] NTSC 2, referred to.

REPRESENTATION:

Counsel:

Prosecution:	D.Dalrymple
Accused:	B.Cassells

Solicitors:

Prosecution:	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 DARWIN

The Queen v TA [2017] NTSC 46
No. 21547394

BETWEEN:

THE QUEEN
Appellant

AND:

TA
Respondent

CORAM: BLOKLAND J

REASONS FOR RULING

(Delivered 19 June 2017)

Background

[1] These are the reasons for a ruling given on 28 April 2017 that allowed the admission of certain DNA evidence obtained as a result of conducting an intimate forensic procedure. The intimate forensic procedure was performed in contravention of s 29 of the *Youth Justice Act* (NT) (the Act). However, the evidence was admitted in exercise of the discretion conferred by s 59(2) of the Act. The issue of the admissibility of the evidence has some history across two trials and voir dire hearings.

[2] The accused was charged with one count of having sexual intercourse without the consent of the complainant contrary to s 192(3) of the *Criminal Code* (NT). At the relevant time the accused was a youth within the meaning of the Act. The specific contravention of s 29 was the failure by police to ensure a support person was present while the intimate forensic procedure was carried out.

[3] The accused first stood trial before a jury that commenced on 5 December 2016. On 6 December 2016 objection was taken on his behalf to evidence obtained as a result of penile swabs taken from him. A voir dire was conducted. The statements of two police officers who arranged for the swabs to be taken were received into evidence. The officers were not at that time available to give evidence on the voir dire. The issue of non-compliance had not been raised in any pre-trial procedure. Counsel for the accused advised the Court he had first realised the evidence was not compliant with s 29 of the Act on the second day of the first trial.

[4] During the course of argument on the voir dire the Crown produced a copy of an application by police to a Magistrate[1] for an order authorising the taking of the swabs. A copy of the order authorising the procedure was received into evidence. The police statements tendered at that time did not provide any explanation for the contravention of s 29 of the *Youth Justice Act*, although clearly the approval of a Magistrate had been obtained.

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1 The events in question occurred in September 2015, prior to the change of title from Magistrate to Local Court Judge.

[5] Despite the significant probative value of the evidence, in the absence of any explanation for the failure to comply with s 29 of the Act, a provision which is expressed in mandatory terms, the evidence was excluded. As the jury were aware of the existence of the excluded evidence, their discharge was required and the trial re-listed. All that could be assumed from the failure to comply on that occasion was that investigating officers were unaware of their obligations under s 29 of the Act. It was accepted, as submitted on behalf of the Crown, that *mala fides* should not be assumed, however, in my view some explanation was required when investigators failed to comply at all with a mandatory provision of the Act. At that time there was no material before the Court detailing the extent of any attempted compliance by investigating police, a factor relevant to s 59(3)(a) of the Act. Counsel for the Crown also submitted that a warning to police should suffice to send a message about the significance of the non-compliance, rather than excluding highly probative evidence. In my view, some explanation was still required. The discharge of the jury and the need for a retrial might be seen to send the message.

[6] Fortunately, the evidence of the complainant had been pre-recorded. The retrial did not require the complainant's further attendance. This was not, however, an ideal situation.

The second voir dire

[7] At the conclusion of the first trial, counsel for the Crown indicated that if further evidence could be brought to bear on the issue, the Crown would seek to apply to have the same evidence admitted. Given the circumstances in which the issue came to light, I agreed that if there were further relevant material, the issue could be re-opened.

[8] The evidence under consideration was the result of swabs taken of the accused's penis by a medical practitioner, as arranged by investigating police. Later analysis showed the presence of DNA on the swab that matched the complainant's profile. In the context of a denial by the accused that sexual intercourse had taken place, the probative value of the evidence was plainly high.

[9] Section 29 of the Act provides that forensic procedures such as the one under consideration 'must not be carried out … unless a support person is present while the procedure is carried out.' On behalf of the Crown it was acknowledged police did not comply with the mandatory provision. Police did not arrange the presence of a support person, although it seems on the evidence an appropriate support person, either the accused's aunty, or JN, another relative, could have been available. When he was arrested and after receiving legal advice, the accused did not agree to be interviewed by police, hence no attempt was made to contact a support person for the purpose of an interview or other purpose associated with his arrest.

[10] Further undisputed police evidence tendered on the second voir dire[2] indicates one of the investigating officers believed he was authorised to take the accused to a medical practitioner to carry out the intimate procedure, once he had received the approved intimate procedure approval from a Magistrate. He stated, 'I did not consider having a support person present during the intimate procedure as I believed that the Court order was the direction to carry it out.' Further, although in part inconsistent with the statement that he believed no support person was required, the officer stated 'I was aware that TA was a youth, however due to the planning and organising to carry out the intimate procedure at that hour of the night without losing the forensic evidence, we didn't organise a support person.' He stated he was later informed that a support person should have been present pursuant to s 29 of the Act. The intimate procedure was carried out at Palmerston Super Clinic by a medical practitioner with two police officers present. The authorisation by a Magistrate addresses a different obligation under the Act.

[11] A second investigating officer stated it was the first time he had been involved in the process of undertaking a forensic procedure, either intimate or non-intimate, carried out on a youth. He was not aware of the s 29 requirement. Had he been aware of the procedures he would have contacted the accused's aunt who he believed was available to act as a support person. He acknowledged he had previous contact with the aunt. She and another

[2] LD, statement dated 6 January 2017; DM, statement dated 1 March 2017; AH, statement dated 17 March 2017.

relative had delivered the accused to the police station where he was arrested. On behalf of the Crown it was acknowledged JN would have been available and appropriate as a support person in any event.

[12] I can readily find that both investigating officers proceeded with varying degrees of ignorance about the requirement specified in s 29 of the Act. The further fact of significance that emerged in the second voir dire was that at least one of the officers believed the signed authorisation of a Magistrate for a medical practitioner to obtain a penile swab authorised police to proceed. While it was a valid authorisation, it did not relive police of the requirement to arrange the presence of a support person. The application for the authorisation was made on 24 September 2015 by a Superintendent of police setting out the details of the alleged offending and the reasons why the authorisation was sought. The form of the application does not require a notation as to any steps that may have been taken to arrange a support person.

Considerations

[13] Section 59(1) of the Act provides the Court 'may' order that the evidence obtained is not admissible as a consequence of a failure to comply with the Act. Section 59(2) of the Act provides the Court may admit the evidence if satisfied the admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights of any person.

[14] Section 59(3) of the Act provides the Court must have regard to the following matters when deciding whether or not to admit the evidence:

> (a) the seriousness of the offence, the difficulty of detecting the offender, the need to apprehend the offender urgently and the need to preserve evidence of the facts;
>
> (b) the nature and seriousness of the contravention or failure;
>
> (c) the extent to which the evidence might have been lawfully obtained;
>
> (d) any other matters the Court considers relevant.

[15] Further, s 59(4) provides the discretion conferred by s 59 is in addition to any other law or rule under which a Court may refuse to admit evidence. Section 138(1) of the *Evidence (National Uniform Legislation) Act* (NT) *('UEA')* is the most relevant 'other law', however in this particular instance, save for one matter, the relevant considerations are similar under both regimes.

[16] After the first voir dire, but prior to the second, Southwood J published a ruling on a similar subject in *The Queen v DA*.[3] The ruling concerned an investigation into an alleged unlawful entry of a dwelling and the sexual intercourse without consent of an occupant. In an effort to eliminate suspects, and at the request of a senior community member, investigating

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3 [2017] NTSC 2.

police took buccal swabs for obtaining saliva samples from a significant number of men and five youths. The buccal swabs were taken with the consent of the men and youths. The sample taken from DA matched the profile of the sample taken from the complainant. I agree with the observations made by Southwood J that s 59(1), subject to s 59(2), is mandatory in the sense that 'may' means 'must' where it appears in s 59(1).

[17] Although *The Queen v DA* involved a non-intimate procedure, rather than an intimate procedure, it was found there had been non-compliance with a number of safeguards under the Act. First, police had not complied with s 15 of the Act requiring an explanation of the use to be made of the sample. Consequently it was found the youth was incapable of giving informed consent. Second, there was non-compliance with s 32 of the Act that required obtaining consent to the procedure in writing. After weighing the competing considerations, his Honour admitted the evidence. The particular matters weighing in favour of admission were: first, the seriousness of the charge; and second, that no right was identified as prejudiced in the sense contemplated by s 59(2). It was found that s 59(2) referred to a right that may be prejudiced through the admission of the evidence at trial. The admission of 'real evidence' could not be said to prejudice the privilege against self-incrimination.[4] The evidence here, also real evidence, cannot readily be found to have undermined the privilege against self-incrimination.

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[4] *The Queen v DA* [2017] NTSC 2 [85]-[92].

[18] As has been noted, *The Queen v DA* did not involve an intimate sample. Different provisions of the Act were enlivened. A significant distinguishing feature is that in *The Queen v DA* the saliva sample taken for testing and comparison with the swab taken from the victim was the only evidence implicating the accused.

[19] The considerations of particular relevance here are as follows. Section 29 of the Act is expressed in mandatory terms. A support person must be present when procedures such as the one under consideration are to be performed on a youth. This underlines the significance of the procedures and the concern of the legislature that youths be supported throughout sensitive stages of the investigative process. Even when a procedure of this kind is undertaken by a medical practitioner, without support there is significant scope for a youth to misunderstand the nature or purpose of the procedure. Although it was not specifically the case here, there is a risk that the purpose of a procedure of this kind could be misinterpreted by a youth as a personal violation unless appropriate supports are in place. The Court was told TA found the procedure embarrassing.

[20] For the purposes of s 59(3)(a) of the *Youth Justice Act* and s 138(1) of the *UEA*, there is a strong public interest in the prosecution of serious crimes. The offence charged was obviously very serious. The maximum penalty is life imprisonment. There is also a strong public interest in police complying with the *Youth Justice Act* and in youths being treated fairly and in a manner they understand. When considering s 138(1) of the *UEA*, the subjective

characteristics of an accused can be relevant when determining the gravity of an impropriety. [5] In this case the youth of the accused and that he was from a reasonably remote area are relevant factors. There was little or no difficulty detecting or apprehending TA. He was taken to the police station by members of his family. The need to preserve the evidence requires an evaluation that is somewhat speculative in these circumstances, but this consideration did not materially impact on the reason why the presence of a support person was not arranged.

[21] As to s 59(3)(b), the nature and seriousness of the contravention, although not deliberate or reckless, it is of significant concern that the investigating officers were attached to the Sex Crimes Division and did not know about the obligation to arrange a support person for a youth in these circumstances. I have noted that one officer believed the approval from a Magistrate to conduct the procedure was sufficient. Although not at the most serious end of non-compliance, the ignorance of the mandatory statutory duty is of concern. In that light, I regard this as a reasonably significant example of non-compliance.

[22] In terms of s 59(3)(c), the evidence may have lawfully been obtained through contacting a family member to act as a support person, bearing in mind family members took the accused to the police station.

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5 *R v Helmhout* (2001) 125 A Crim R 257; [2001] NSWCCA 372, per Ipp AJA at [12]; Hulme J at [41].

[23] In terms of s 59(3)(d) and other matters the Court considers relevant, it may be noted the accused was almost an adult. Officers knew he was still a youth. While almost an adult, he came from a relatively remote part of the Northern Territory. He had rarely been to Darwin. It would tend towards exclusion had he been a younger teen because of the greater risk of misinterpretation about the purpose of the procedure. I have also had regard to the fact that had a support person been engaged, their presence and support in these circumstances may be distinguished from the role undertaken by a responsible adult attending voluntary procedures such as participation in an interview with police. The procedure under consideration may be undertaken without consent of the suspect, provided the provisions of s 30 of the Act have been complied with.[6] There is also a requirement for a police officer arranging the procedure to advise a youth or their support person that they may have a medical practitioner of their choice present.[7] This requirement is unlikely to be fulfilled in a meaningful way unless a support person is present.

[24] It is acknowledged there was other evidence, both of a direct and circumstantial kind, that implicated the accused, however each item of evidence implicating the accused possessed identifiable weaknesses that do not require elaboration here. The balance of the evidence was not as probative as the evidence the subject of discussion here. As already stated, the probative value of the evidence was high.

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6 See *Youth Justice Act* (NT) s 30(10).
7 See *Youth Justice Act* (NT) s 30(11).

[25] Although in terms of s 59(2) of the Act, admission of the evidence could not be said to unduly prejudice the rights of any person, the discretion to exclude evidence illegally obtained under s 138 of the *UEA* is not expressed in the same terms. A Court is not required to evaluate the rights of any person solely upon admission of the evidence. Section 138 *UEA* is concerned purely with the public interest and the weighing of the relevant criteria within that context.

Conclusion

[26] Given principally the gravity of the charge, the importance of the evidence and the genuine belief of one of the officers that he was authorised to act without a support person, the discretion to admit the evidence was exercised. Police officers, however, need to be made aware of their obligations under s 29 of the Act. If the Act is not complied with, valuable evidence may be excluded. This ruling may well be considered if there is a future case of non-compliance with the Act. Conduct that has been brought to the attention of police previously as non-compliant, can increase the gravity of the contravention.[8] In the case of a breach in the future, previous non-compliance is also relevant to the consideration of the public interest and may swing the pendulum towards exclusion.

[27] Counsel for the Crown has agreed and indeed suggested it was appropriate to bring this ruling to the attention of the Northern Territory Police as a

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[8] *Tasmania v Seabourne* [2010] TASSC 35 at [29] per Wood J.

warning. It may also be prudent for the Northern Territory Police to include a reference to a support person on the application form used to apply to a Local Court Judge for approval to carry out an intimate forensic procedure on a youth. This will assist to ensure the obligation is not overlooked in the future.

[28] These reasons will be forwarded to counsel by prior arrangement with my associate.
