

CITATION: *The King v TT* [2024] NTSC 62

PARTIES: THE KING

v

TT

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 22306201 and 22327677

HEARING DATE: 8 May 2024

RULING GIVEN: 5 June 2024

REASONS DELIVERED: 18 July 2024

JUDGMENT OF: Kelly J

Evidence (National Uniform Legislation) Act 2011 NT, s 55, s 137

Phillips v The Queen (2006) 225 CLR 303; *RP v The Queen* (2016) HCA 53;
R v McCormack [2002] QDC 343, referred to

REPRESENTATION:

Counsel:

Crown:	C McKay
Accused:	A Pyne with J McHugh

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Territory Criminal Lawyers

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

The King v TT [2024] NTSC 62
No. 22306201 and 22327677

BETWEEN:

THE KING

AND:

TT

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 18 July 2024)

The charges

[1] The accused, TT, has been charged with five offences:

- Count 1 - aggravated robbery of a handbag, car keys and a vehicle (aggravated by the fact that TT was in company with BS, that he was armed with a knife and BS was armed with a large stick, and that the victim suffered harm);
- Count 2 – aggravated assault against a female victim in company with BS, with the use of a large stick and a steak knife;
- Count 3 – aggravated assault against a second female victim in company with BS, with the use of a large stick and a steak knife;

- Count 4 – unlawful use of a motor vehicle with BS causing danger to the lives and safety of the public and damaging the vehicle; and
- Count 5 – another aggravated robbery (aggravated by the fact that TT was in company with KM and that TT was armed with a metal spike).

The issue

- [2] The conduct the subject of counts 1 to 4 all occurred on the same occasion, 23 February 2023. The conduct the subject of count 5 occurred on a later date, 29 August 2023.
- [3] TT was 13 years 5 months and 23 days old when he engaged in the conduct the subject of counts 1 to 4. He was 13 years, 11 months and 29 days old when he engaged in the conduct the subject of count 5.
- [4] The physical conduct constituting the offences will be admitted by the accused. The only issue at the trial will be that of *doli incapax*.

The admitted physical conduct the subject of the charges

- [5] The Crown case against TT in relation to counts 1, 2, 3 and 4 (the bulk of which will be admitted by the accused) is that on the afternoon of 23 February 2023, TT and at least three other youths, including BS, went to the Red Cross Australia store in Gray. The store was staffed by the three victims, LF (a 79 year old woman), SH (a 71 year old woman) and PC (a 59 year old woman).

- [6] TT, BS and the other youths walked around the shop pretending to look at items of clothing. PC asked if she could help them with anything and TT said he was looking for a present for his mother's birthday.
- [7] The youths walked outside the store, then TT and BS went back in armed with weapons: TT had a black handled steak knife and BS had a 60 cm stick which he removed from the waistband of his shorts.
- [8] BS advanced on two of the women, LF and PC holding the stick in front of him in a threatening manner. He yelled at them, "Give me your keys! Give me your keys!" He struck the stick on the desk beside them.
- [9] TT followed BS holding the knife towards the two women as the women backed away towards the corner of the room. PC pleaded with them, "Please don't. Please don't," but the two youths continued to demand the keys.
- [10] Then TT walked towards the third woman, SH holding the knife out in a threatening manner.
- [11] A delivery driver arrived to drop things off at the store and one of the other youths came into the store to warn TT and BS. LF was sitting with her handbag on her lap. BS grabbed it. LF tried to struggle, saying, "No, you're not getting it." Eventually BS pulled the handbag from her grasp, breaking one of her fingernails in the process.
- [12] TT and BS then left the store and emptied the contents of LF's handbag onto the ground. They found and took the keys to LF's car (a red Toyota).

- [13] BS unlocked LF's car and climbed into the driver's seat. TT got into the front passenger seat. BS started the car and drove off.
- [14] BS drove dangerously, in wet weather in peak hour traffic, going through multiple red lights, squeezing between vehicles at major intersections, crossing thick white lines, pushing vehicles out of the way to change lanes, changing lanes erratically and driving at high speeds well in excess of the speed limit. This went on for over 80 minutes. Police tracked this by tracking the electronic monitoring device worn by TT, as well as in person and remotely by CCTV.
- [15] At just on 5.30 pm, TT cut off his electronic monitoring device so police lost the ability to track the car but still saw it driving erratically around Palmerston.
- [16] At just after 6.00 pm, BS was driving dangerously through the streets of Moulden when he lost control of the vehicle on Bombax Street, struck a curb, spun out of control onto the other side of the road, knocked down a light pole and then crashed into the front fence of [redacted] Bombax Street. The vehicle was extensively damaged.
- [17] Police saw the crash and arrested TT and BS who were still in the vehicle.
- [18] The Crown case in relation to count 5 (the bulk of which will also be admitted by the accused) is that the victim ThT, a 34 year old woman, went to the Palmerston Library with her 12 month old baby to meet her sister for

their babies to play together. While there, she noticed two boys watching them from the bookshelves.

[19] ThT and her sister left the Library, and ThT walked alone with her baby to her car, a black Prado.

[20] ThT unlocked the car, then opened the back door to put her baby daughter into her car seat. She put her handbag on the floor in front of her and put her baby into the car seat but had not yet fastened the straps when TT reached around in front of her and grabbed the handbag. ThT grabbed the strap and tried to pull the handbag away from TT but TT managed to grab the bag from her. The co-offender, KM was standing beside TT, watching.

[21] ThT yelled out repeatedly, "Anyone, help me!"

[22] Once TT had the handbag, he and KM ran to a nearby tree and emptied the contents of the handbag onto the ground. The bag contained the victim's car keys, house keys and purse. She went towards the two boys to try to get her stolen property back.

[23] TT picked up the victim's car keys from the ground and he and KM ran back towards the victim's vehicle. ThT was panicking because her daughter was still in the car.

[24] She ran back to the vehicle yelling at the boys to stop. When she got to the car, TT had opened the driver's door and had the car keys. KM was armed with an edged weapon or a metal spike and was holding it in his right hand.

KM held the weapon close to ThT's body and repeatedly yelled at her,
"Take your baby!"

[25] A witness heard the victim's screams for help. He ran to the car and yelled at TT to drop the keys. TT ran away. The witness chased after TT, but TT got away with the keys.

[26] Other members of the public blocked KM between two cars and stopped him from getting away. The witness allowed KM to use his phone to tell TT to bring the keys back, but instead KM told TT to get away so the witness took the phone back.

[27] Police found TT at Palmerston at about 6.40 pm and told him he was under arrest. TT ran away. A police officer was eventually able to place TT under arrest. He had the stolen car keys with him.

[28] Police seized TT's mobile phone which revealed:

- a telephone call from KM that morning,
- a text message from TT to KM that same day saying, "don't snitch my name",
- internet searches on that same day including, "can you use 200 series car keys in another 200 series", "car park beside palmo library" and "black land cruiser",
- photographs and internet images of car keys,

- a snapchat communication between TT and KM that morning, and
- text messages between TT and other people relating to the attempted robbery and stolen car keys including where the robbery took place; the type of vehicle involved; the fact that KM would have been taken to the watch house by police; querying whether the car had been towed away (to facilitate a further attempt to steal the vehicle); and the accused saying he refused to be “done for aggravated robbery”, that he “robbed some cunt there keys”, and that he “might have to do another robbery”.

The Crown case on *doli incapax*

[29] The Crown intends to rely on a combination of evidence in order to establish the knowledge of the accused as to the wrongness of his actions:

- (a) the circumstances of the offending in relation to both files, including pre and post offence conduct;
- (b) TT’s prior contact with the criminal justice system between early 2023 and August 2023 including:
 - the fact that TT was on bail at the time of the conduct in relation to counts 1 to 4;
 - the accused’s history and interactions with police;
 - prior appearances before the Youth Justice Court;
 - remand periods in Don Dale Detention Centre;

- breaches of bail; and a bail review application before the Supreme Court on 6 March 2023 at which TT was present;
- (c) text messages sent by TT immediately following the offending which the Crown submits reveals TT's understanding of the wrongness of his actions; and
- (d) TT's upbringing, home life, schooling/education, academic performance/results, and extracurricular activities.

Defence objections

[30] The defence made application for an advance ruling that certain categories of evidence be excluded, and/or for an order that count 5 be severed and tried separately from counts 1 to 4. The categories of evidence objected to are:

- (a) remand warrants,
- (b) bail undertakings,
- (c) material relating to the bail review in the Supreme Court on 6 March 2023,
- (d) police statements in unrelated matters,
- (e) evidence relating to TT's arrest on 23 February in relation to counts 1 to 4, which the Crown relies on as evidence of consciousness of guilt and, hence, knowledge of the wrongness of the conduct,

- (f) evidence relating to TT's arrest on 29 August 2023 on count 5, and serious breach of bail,
- (g) telephone downloads from TT's phone, and
- (h) opinion evidence from TT's parents, school teachers/principals and cadet captain about TT's capacity.

[31] The defence also made application for count 5 to be severed from the indictment, should the evidence of TT's interactions with the criminal justice system after 23 February 2023 not be excluded.

Rulings

[32] On 5 June 2024 I made the following rulings. These are my reasons for those rulings.

Remand warrants, bail undertakings, prior proceedings and arrests before 23 February 2023

(a) As at 23 February TT was on conditional bail, subject to an electronic monitoring condition for the following matters:

- File ending 578 – stealing, arson, carrying a knife in public and trespass on a vehicle,
- File ending 714 – trespass, property damage and stealing,
- File ending 030 – unlawful entry, stealing and unlawful use of a motor vehicle,

- File ending 047 – trespass unlawful entry, property damage and disorderly behaviour,
 - File ending 188 – trespass and unlawful entry.
- (b) The Crown seek to adduce evidence of these charges, the bail conditions, and earlier remand warrants, which it is intended will be put before the jury in the form of agreed facts.
- (c) It does seem to me that this evidence is relevant to TT’s knowledge as to the wrongness of his conduct in committing an armed robbery (and the other offences) as at both 23 February 2023 (the date of counts 1 to 4) and 29 August 2023 (the date of count 5).
- (d) Further, I do not consider that the probative value of this evidence is outweighed by the risk of unfair prejudice to the accused and I decline to exclude the evidence under *Evidence (National Uniform Legislation) Act 2011* NT (UEA) s 137.

Evidence of matters which occurred between 23 February 2023 and 29 August 2023 (the date of the conduct the subject of count 5)

- (e) The Crown seeks to adduce evidence of TT’s arrest, his remand in custody in Don Dale for a period of time before he was granted bail; transcripts of what was said to him by various judges and what was put on his behalf by counsel on the hearing of bail applications; his bail conditions (including that he was required to wear an electronic

monitoring device) and breach of his bail, all of which occurred between the two lots of offending, as evidence of TT's knowledge as to the wrongness of his conduct in committing an armed robbery (and the other offences) as at 29 August 2023. (The Crown accepts that these matters can have no relevance to the question of TT's knowledge of the wrongness of his conduct on 23 February 2023 and would not be admissible in relation to counts 1 to 4.)

- (f) I do think this evidence is relevant to TT's knowledge of the wrongness of his conduct on 29 August 2023 and that its probative value is not outweighed by the risk of unfair prejudice to the accused. That evidence will be admitted.

“Consciousness of guilt” evidence

- (g) The Crown seeks to adduce evidence that, in the course of the offending on 23 February, while a passenger in the car being unlawfully used, TT removed his electronic monitoring device; evidence that TT ran away from police when told he was under arrest on 23 February, and evidence as to the circumstances of his arrest on 29 August, again as evidence supporting an inference that he knew that his conduct in committing those offences was seriously morally wrong.

- (h) I agree that that evidence is relevant to that question and I do not consider that its probative value is outweighed by the risk of unfair prejudice to the accused. That evidence will be admitted.

Telephone downloads from TT's phone

- (i) The Crown seeks to adduce evidence of the following matters revealed on an examination of TT's phone:
- a telephone call from KM that morning,
 - a text message from TT to KM that same day saying, "don't snitch my name",
 - internet searches on that same day including, "can you use 200 series car keys in another 200 series", "car park beside palmo library" and "black land cruiser",
 - photographs and internet images of car keys,
 - a snapchat communication between TT and KM that morning, and
 - text messages between TT and other people relating to the attempted robbery and stolen car keys including where the robbery took place; the type of vehicle involved; the fact that KM would have been taken to the watch house by police; querying whether the car had been towed away (to facilitate a further attempt to steal the vehicle); and the accused saying he refused to be "done for

aggravated robbery”, that he “robbed some cunt there keys”, and that he “might have to do another robbery”.

- (j) Again, I consider this evidence to be relevant and hence admissible.

The defence conceded that the text messages between TT and other people relating to the attempted robbery and stolen car keys were relevant.

- (k) I do not think that the probative value of this evidence is outweighed by any risk of unfair prejudice to the accused. That evidence will be admitted.

TT’s upbringing, home life, schooling/education, academic performance/ results, and extracurricular activities

- (l) Defence counsel initially objected to this category of evidence on the understanding that the Crown was seeking to adduce non-expert opinion evidence about TT’s capacity. The prosecutor has advised that it is only intended to adduce factual evidence about TT’s behaviour, academic performance and relations and interactions with teachers, parents, and fellow students to throw light on TT’s individual intellectual and moral development and in light of that the defence withdrew its objection.

Severance application

- (m) The defence also applied for an order severing count 5 from the indictment. Having considered the submissions of both counsel I am not convinced that it would be appropriate to sever count 5.
- (n) The bulk of the evidence to be adduced at the trial is admissible in relation to all of the counts on the indictment. The evidence of arrests, remand warrants and bail hearings in the period between the two lots of offences is admissible only in relation to count 5, but that is a relatively small part of the evidence. The jury will be directed that they must consider the question of TT's knowledge of the wrongness of the conduct in relation to each date separately. I do not think there is a real risk that they will disregard this direction and adopt a global approach to the issue of capacity. The application to sever count 5 is refused.

Consideration of the objections

- [33] The contentions of the parties in relation to the categories of evidence admitted and my reasons for my rulings in relation to those categories of evidence follows.

Remand warrants, bail undertakings, prior proceedings and arrests (ie categories (a), (b), (c) and (d) above)

- [34] This material needs to be considered in relation to two periods: first, evidence of matters which occurred before 23 February 2023 (the date of the conduct the subject of counts 1 to 4) and second, evidence of matters which

occurred between 23 February 2023 and 29 August 2023 (the date of the conduct the subject of count 5).

Evidence of matters which occurred before 23 February 2023 (the date of the conduct the subject of counts 1 to 4)

[35] As at 23 February TT was on conditional bail, subject to an electronic monitoring condition for the following matters:

- File ending 578 – stealing, arson, carrying a knife in public and trespass on a vehicle,
- File ending 714 – trespass, property damage and stealing,
- File ending 030 – unlawful entry, stealing and unlawful use of a motor vehicle,
- File ending 047 – trespass unlawful entry, property damage and disorderly behaviour,
- File ending 188 – trespass and unlawful entry.

[36] The Crown seeks to adduce evidence of these charges, the bail conditions, and earlier remand warrants as relevant to TT's knowledge as to the wrongness of his conduct in committing an armed robbery (and the other offences) as at 23 February 2023. The Crown contends that these matters are relevant to the question before the Court in these proceedings, namely, whether at 23 February 2023, TT knew that it was seriously morally wrong

to commit an armed robbery – ie to rob three elderly women while armed with weapons, in order to steal the car belonging to one of them.

[37] I consider that this evidence is relevant to that question. The involvement of the police and the Courts, the granting of bail and the conditions attached to that bail had the potential to bring home to TT that the conduct he had engaged in in relation to the earlier offending was regarded seriously by society and by the authorities and was seriously wrong and the conduct TT engaged in in Counts 1, 2 and 3 was obviously more serious again.

[38] For essentially the same reasons set out in [45] below, I consider that the probative value of this evidence is high and that it is not outweighed by any danger of unfair prejudice to the defendant. I therefore decline to exclude the evidence under UEA s 137.

Evidence of matters which occurred between 23 February 2023 and 29 August 2023 (the date of the conduct the subject of count 5)

[39] The Crown seek to rely on the following matters which occurred between the two lots of offending, as evidence of TT's knowledge as to the wrongness of his conduct in committing an armed robbery (and the other offences) as at 29 August 2023. (The Crown accepts that these matters can have no relevance to the question of TT's knowledge of the wrongness of his conduct on 23 February 2023 and would not be admissible in relation to counts 1 to 4.) In the course of the offending on 23 February, while a

passenger in the car being unlawfully used, TT removed his electronic monitoring device.

- (a) TT ran away from police when told he was under arrest on 23 February.
- (b) Following his arrest, TT was remanded in Don Dale for four weeks and five days until granted bail.
- (c) During his time on remand, TT had numerous appearances in the Youth Justice Court (on 27 February, 2 March, 10 March, and 15 March).
- (d) He was granted bail on 28 March 2023.
- (e) On 6 March 2023, TT appeared in the Supreme Court on a defence application to review a decision of the Youth Justice Court refusing bail. The Supreme Court affirmed the decision refusing bail. During this bail review hearing, at which TT was present by AVL, Grant CJ said:

... if he is found guilty of these offences, the applicant may or he may not be sentenced to a term of detention. Given that one of the offences is an aggravated robbery, the prospect of an order for detention is very real.

- (f) On 10 March 2023, during a further bail application in the Youth Justice Court, this exchange occurred between TT and a Local Court Judge:

HER HONOUR: So [TT], I'm not saying no to bail, I'm saying no to bail today. I'm going to get a letter from SaltBush. I'm going to get a letter from Territory Families talking about the option for

you at Life Without Barriers. So maybe I'll say yes to Life Without Barriers; maybe I'll say yes to SaltBush, or maybe I'll say yes to some other plan you come up with or maybe I'll say I'm too worried about all this trouble.

TT: Yeah, all right.

- (g) On 15 March, while the accused was still on remand in Don Dale, on summary files ending 186, 578 and 971, where the sole issue was whether the prosecution was able to rebut the presumption of *doli incapax*, the accused was present in Court. At the conclusion of the proceeding, TT's counsel made a further application for bail which was refused. During the course of that bail application, TT's counsel, instructed by TT made the following submission:

... he has been in custody for three weeks now, which is the longest he has ever been in custody. It has, in my submission been a real specific deterrence with respect to his behaviour and [TT] knows that any further trouble, regardless of how little or not it is, is going to land him back in Don Dale.

- (h) During those proceedings, the Judge said:

... [TT], I am not able to give you bail today. I am sorry. There is too much that is really, really serious that is alleged against you ...

- (i) During the bail application on 28 March (on which TT was granted bail), a condition relating to electronic monitoring was discussed. TT's counsel, instructed by TT said:

But, your Honour, [TT] has been in custody for 5 weeks. He is 13 years old. He knows that any further trouble will land him back in Don Dale.

(j) During those proceedings, the Judge said:

All right ... so you won't be wearing a tracker tonight, but if you break the rules, the police will be chasing you pretty quickly, okay, and you don't want to risk going back to Don Dale.

[40] The Crown submits that this evidence is relevant to the issue of TT's knowledge of the wrongness of his conduct as at 29 August 2023, contending that it would be open to the jury to infer that TT must have known that his conduct was seriously wrong because he had been subject to significant interventions and sanctions by the criminal justice system (including the removal of his liberty) as a result of engaging in that conduct. In addition to that, he had been told by a judge in the Youth Justice Court that the allegations against him (which included an allegation of similar conduct to that on count 5) were "really, really serious", and by the Chief Justice of the Supreme Court that there was a "very real" prospect of a sentence of detention for the offence of aggravated robbery. Further, his counsel had acknowledged that TT understood that "any further trouble" would lead to loss of liberty – ie "land him back in Don Dale".

[41] The Crown relies on *RP v The Queen*¹ for the proposition that "... what suffices to rebut the presumption ... will vary according to the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it concerns values of which he or she had direct personal experience."

¹ (2016) HCA 53 at [12]

[42] The defence submissions deal with each category of evidence separately.

- (a) In relation to the remand warrants, the defence submits that they do not meet the threshold test of relevance under UEA s 55. Remand warrants are documents produced by the court registry and endorsed by the relevant court officer. They are evidence that on the dates of the warrants, TT was remanded in custody – nothing more. They cannot cast light on what TT knew or was capable of knowing.
- (b) Alternatively, if the remand warrants do pass the test of relevance, their probative value is slight and is outweighed by the potential prejudice to the accused of having the accused's prior interactions with the criminal justice system placed before the jury, and should be excluded under UEA s 137. Such evidence is normally not given to the jury for this very reason.
- (c) Similarly, the defence submits that the bail agreements are proof only that the accused had been on bail before the events constituting count 5 (not counts 1 to 4) and do not bear on the issue of *mens rea*. They do not therefore pass the test of relevance.
- (d) Alternatively, the defence argues that any probative value is marginal at best and is outweighed by the danger of unfair prejudice to the accused of having the jury made aware of bail conditions imposed on TT such as electronic monitoring which might suggest to the jury that TT is a dangerous individual against whom the community needs to be

protected, and that this category of evidence should also be excluded under UEA s 137.

- (e) As to the other evidence of prior interactions with the police, the defence made similar submissions in relation to relevance, and unfair prejudice saying such evidence has no, or at best very little probative value, contending that a person can be told a thousand times not to do something: the direction does not equate to a capacity to understand or to an actual understanding. In relation to the balancing exercise between probative value and potential unfair prejudice required by s 137, the defence relies on the remarks of the High Court in *Phillips v The Queen*:²

Criminal trials in this country are ordinarily focused with high particularity upon specified offences. They are not, as such, a trial of the accused's character or propensity towards criminal conduct. That is why, in order to permit the admission of evidence relevant to several different offences, the common law requires a high threshold to be passed.

- [43] The Crown contends that, taken as a whole, and not merely piece by piece, the evidence of the accused's interactions with the criminal justice system before carrying out the conduct the subject of the charges, has very high probative value. The Crown submits that no single piece of evidence led for the purpose of rebutting the presumption of *doli incapax* needs to establish the accused's knowledge of the serious moral wrongness of his conduct. As with any case based on circumstantial evidence, the Crown relies on a

² (2006) 225 CLR 303 at 327 [78] and [79]

combination of matters which leads to the inference that the accused understood that his conduct was so seriously wrong that it amounted to an aggravated robbery and that serious criminal consequences followed from his conduct such as being remanded in Don Dale Youth Detention Centre, deprivation of liberty being the highest sanction available under our system of criminal justice.

[44] In relation specifically to the evidence of TT's interactions with the criminal justice system between the date of the conduct in counts 1 to 4 and the date of the conduct in count 5, the Crown referred to the New South Wales case of *R v McCormack*³ in which the court considered the admissibility of evidence of interactions with the criminal justice system between the dates of counts 1 and 2 in that matter to rebut the presumption in relation to count 2. In relation to this evidence, the court said:

In the absence of evidence of that kind it is impossible to conclude that the child, if he lacked capacity at the time of the first count, gained it during the intervening period between counts one and two as the result of any external influences that may have triggered his moral conscience.

[45] Finally, on the topic of the potential unfair use of the evidence objected to, the Crown made the point that the task of the jury was to assess whether the Crown has proved that this young accused understood that the conduct he engaged in was seriously morally wrong taking into account his circumstances, and contended that if the evidence objected to were to be

3 [2002] QDC 343

excluded, the jury would, in effect, be assessing the knowledge and understanding of a different boy; they would lack vital evidence as to TT's actual life and circumstances at the time of the acts constituting the alleged offences. I agree.

[46] For these reasons, the evidence in each of the disputed categories was admitted into evidence.
