

The Queen v RFK [2013] NTSC 40

PARTIES: THE QUEEN

v

RFK

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: (21143073)

DELIVERED: 23 July 2013

HEARING DATES: 7 June and 18 July 2013

JUDGMENT OF: BARR J

CATCHWORDS:

CRIMINAL LAW – Mental impairment – finding of not guilty by mental impairment – supervision orders – unconditional release – relevant considerations – finding that RFK unlikely to endanger himself or others – RFK released unconditionally

STATUTORY INTERPRETATION – *Criminal Code* (NT) Part IIA Mental Impairment and Unfitness to be tried – section 43ZM interpreted to apply to persons who are ‘candidates’ for unconditional release.

Criminal Code (NT) s 43V, s 43X, s 43Z, s 43ZM, s 43ZN

REPRESENTATION:

Counsel:

Plaintiff:	M Nathan
Defendant:	J Hunyor

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	North Australian Aboriginal Justice Agency

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

The Queen v RFK [2013] NTSC 40
No. 21143073

BETWEEN:

THE QUEEN

AND:

RFK

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 23 July 2013)

- [1] At a special hearing pursuant to s 43V *Criminal Code* which took place on 7 June 2013, a jury found RFK not guilty because of mental impairment of the charge that on 17 December 2011, at Katherine, in public and in a public place, he knowingly committed an act of gross indecency. On 18 July 2013, I ordered that RFK be released unconditionally pursuant to s 43X(2)(b) *Criminal Code*. I now provide reasons for my decision.
- [2] RFK was born on 24 April 1971, and so was 40 years old at the date of relevant events. He is now 42 years old.

- [3] I set out in par [4] to par [18] below the admitted facts relating to the events giving rise to the charge against RFK and his mental state at the time.¹
- [4] In the evening of Saturday 17 December 2011, he was at home at his residence in Pearce Street, Katherine, drinking beer on his own. He became intoxicated.
- [5] At approximately 11.00 pm, he left his residence, carrying a can of beer and wearing only a pair of khaki shorts.
- [6] At approximately 11.45 pm, he walked up to a nearby residence in Pearce Street where three young women, one aged 15 years, were in a vehicle just about to leave that residence to go to the shop.
- [7] He pulled his pants down to his knees and stood beside the driveway entrance to that residence, next to the gate. He then took hold of his erect penis and began masturbating, facing the vehicle as it reversed out of the driveway.
- [8] The driver of the vehicle pulled back into the driveway of her residence in Pearce Street and RFK then walked into the yard, standing in front of the vehicle, directly in the headlights, and once again began masturbating his erect penis with his right hand while holding a can of beer in his left hand and grinning at the young women through the windscreen of the vehicle.

¹ Taken from exhibit P1 at the special hearing.

- [9] The female driver of the vehicle turned off the headlights and sounded the horn whereupon RFK left the yard. He then returned to his own residence briefly, before walking back out of his yard, naked at this stage, and standing under a street light where he began masturbating again.
- [10] When the same three young women drove away from the nearby residence, they saw what RFK was doing, and drove back into their residence. RFK followed, walking into their yard for a second time that evening.
- [11] The driver of the vehicle sounded the horn again and RFK left the yard, returning to his own residence.
- [12] Police attended at the scene and RFK met them at his front gate, wearing a pair of khaki shorts. He was arrested and taken to Katherine Police Watch House where he participated in a formal interview with police.
- [13] When questioned by police as to what had occurred, he said "I pulled my pants down and showed them my dick". He told the police that he had drunk about 12 cans of Melbourne Bitter and was drunk. He told police that he had difficulty recalling the incident. He said that he remembered the sound of girls laughing and nearly being run over by a car, and feeling horrible. He denied that he had been masturbating.
- [14] He was charged and released on police bail.
- [15] RFK was interviewed and assessed by Dr Kevin Smith, a specialist psychiatrist and Director of NT Forensic Psychiatry, in March 2012 and then

in February 2013. Dr Smith diagnosed him with chronic untreated schizophrenia on the basis of a number of symptoms: formal thought disorder, grandiose and persecutory delusions, abnormal affect or emotional response, and a lack of insight into his illness and its effects.

[16] Dr Smith formed the opinion that at the time of the events giving rise to the charge, RFK's mental illness was such that he barely understood the real nature and quality of his conduct; that he was not able to reason with a moderate degree of sense and composure about whether his conduct, as perceived by reasonable people, might be wrong; and was not able to control his actions because of the combined effect of his mental illness and the fact that he was intoxicated.²

[17] Additional evidence provided to the jury at the special hearing was the following extract from the report of Dr Kevin Smith dated 13 February 2013:

10.2 Mr K's offending behaviour itself is bizarre in nature, and it is not even clear that it was aimed at achieving sexual gratification. This became evident in the police interview, in which he stated that he believed he was sexually attractive, but also said that he had no real interest in being sexually active. In my opinion his sexual ideation has more to do with attempts to deal with his psychotic feelings of vulnerability, and less to do with overt sexual interest per se. In my opinion Mr K's offending behaviour has come about as a result of complex medley of grandiose beliefs about his attractiveness to women, self-referential ideation about the significance of the victims' giggling in their home, and persecutory notions about his past psychiatric treatment. The logic of his offending behaviour is grossly abnormal, and it is clear from his interviews with myself and the police that there is a further

² A reference to the statutory criteria for the defence of mental impairment contained in s 43C(1) *Criminal Code*.

component of psychotic thought disorder in Mr K's decision to take this course of action. His statement that he acted as he did because he believed he was highly attractive to white women and should therefore be able to express himself sexually with Aboriginal females is grossly illogical, as are his statements about being frustrated in his attempts to form a meaningful relationship because his friend could not give him a name of a woman who praised him on the internet."

[18] The jury's finding that RFK was not guilty because of mental impairment triggered the operation of s 43X *Criminal Code*, which requires that the Court either declare the accused person liable to supervision under Division 5 or order that the accused person be released unconditionally.

[19] If the Court declares that an accused person is liable to supervision under Division 5, the Court must make a supervision order under s 43Z *Criminal Code* which may be a custodial supervision order or a non-custodial supervision order. Under a custodial supervision order, the accused person is committed to custody in a prison or in another place which the Court considers appropriate.³

[20] In giving reasons for decision in the present case it is not necessary to explain in greater detail the implications of a custodial supervision order, because the just and appropriate options for RFK were: (1) a non-custodial supervision order, with conditions, or (2) unconditional release.

[21] Prosecution counsel, Mr Nathan, initially submitted that the nature of the admitted conduct giving rise to the charge, together with various bizarre statements made to Dr Smith in the course of his psychiatric assessment,

³ Section 43ZA *Criminal Code*.

made it clear that RFK should be subject to (non-custodial) supervision, including regular monitoring for alcohol and cannabis use and monthly review by Katherine Mental Health Service. Mr Nathan submitted that RFK had engaged in a course of persistent masturbation on 17 December 2011, involving three distinct episodes. He also referred to the extract from the report of Dr Smith dated 13 February set out in [17] above and to other more detailed passages from the same report of Dr Smith.

[22] Counsel for RFK, Mr Hunyor, stressed the need for the court to apply the principle set out in s 43ZM *Criminal Code*, which (relevant to the present case) provides that, in determining whether to make a declaration that a person is liable to supervision or an order releasing a person unconditionally, restrictions on a person's freedom and personal autonomy are to be kept to "the minimum that is consistent with maintaining and protecting the safety of the community".⁴

[23] Mr Hunyor submitted that the Court should make an order that RFK be released unconditionally. He submitted (and I accept) that the conduct which gave rise to the charge was relatively low level offending.⁵ While the conduct was no doubt disagreeable for the young women who were subjected to it, it was not a sexual assault or an offence of violence. I note

⁴ Section 43ZM is not perfectly drafted, in that it provides that "restrictions on a *supervised person's* freedom and personal autonomy are to be kept to the minimum ...". However, I am satisfied that, in the case of a person who is a 'candidate' for unconditional release, the section is to be interpreted as though the word "supervised" were not included before the word "person's". This is consistent with the definition of the word "order" in the immediately preceding section, s 43ZLA, where "order" is defined to include "an order releasing an accused person unconditionally".

⁵ Under s 133 *Criminal Code*, a person who commits an act of gross indecency in public and in a public place is liable to imprisonment for 2 years.

that one of the three females was only 15 years old, but RFK probably did not know her age, and moreover the effect on that victim, who was in a vehicle and in company with two older female companions, was probably less than it would have been if she had been placed in that situation as a pedestrian on the street, and alone.

[24] Mr Hunyor also referred to RFK's record of prior offending, emphasizing that RFK did not offend in the entire period from 1997 to 17 December 2011. Moreover, whilst on bail following the events of 17 December 2011, he did not re-offend.

[25] Mr Hunyor acknowledged that RFK will not in future be on medication for his psychotic illness, but referred to the fact that Dr Smith did not consider that RFK's condition was such that he should be forced to take medication against his own wishes.

[26] In determining whether to make an order under Part IIA of the *Criminal Code*, including a declaration that an accused person is liable to supervision or an order releasing an accused person unconditionally, the Court is required by s 43ZN(1) to have regard to the following matters:

- (a) whether the accused person is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability;
- (b) the need to protect people from danger;

- (c) the nature of the mental impairment, condition or disability;
- (d) the relationship between the mental impairment, condition or disability and the offending conduct;
- (e) whether there are adequate resources available for the treatment and support of the supervised person in the community;
- (f) whether the accused person or supervised person is complying or is likely to comply with the conditions of the supervision order;
- (g) any other matters the court considers relevant.

[27] After hearing the submissions of counsel, I requested that Dr Smith provide a further report in relation to some of the abovementioned factors in respect of which I considered I did not have sufficient evidence, in particular the likelihood of RFK endangering himself or others because of his mental condition (s 43ZN(1)(a)) and the likelihood of his complying with the conditions of a supervised order, for example, attending at Katherine Mental Health Service (s 43ZN(1)(f)).

[28] Dr Smith subsequently provided a comprehensive and very helpful report dated 11 July 2013. In that report he set out Mr K's recent psychiatric history and made (or re-stated) a number of recommendations relevant to the

conditions the Court might impose if it made a non-custodial supervision order. I set out below relevant extracts from Dr Smith's report:

Mr K suffers from a chronic mental illness, namely schizophrenia, which has remained untreated for many years without him coming to formal psychiatric attention. It appears from his psychiatric history that he has only required admission to hospital in the early stages of his illness when he was abusing cannabis heavily and his behaviour was particularly chaotic. Subsequent he has adapted to adult life and led an independent social existence. Even though his thought disorder and grandiose delusional beliefs have persisted, his intelligence and artistic ability have enabled him to achieve a meaningful identity as an artist. His mental illness does not appear to have rendered him a dangerous person in any way, either to himself or to others.

In the recent past, when Mr K committed a serious offence and came to the attention of the Courts, consideration was (rightly in my opinion) given to the possibility of dismissing his charge pursuant to section 77 of the *Mental Health & Related Services Act (MH&RSA)*. This led to the need for further psychiatric assessment and Mr K has always been very reasonable and cooperative with his various appointments to see Mental Health Service staff in Darwin and in Katherine. He has been willing to acknowledge that he suffers from a mental illness, but he holds significant concerns about the use of antipsychotic medication, and these concerns have not been able to be overcome.

When his matter was referred to the Supreme Court Mr K was found unfit to stand trial and the question was raised as to whether his unfitness could be cured by taking medication. Mr K has been fully cooperative with the plan I suggested of having KMHS encourage him to take medication, and he has expressed a willingness to be seen again if necessary, and to seek psychiatric assistance as required. However he has not been able to accept the idea of taking antipsychotic medication, and he gives reasons for his refusal that are in my opinion very understandable.

Until he carried out his offending behaviour there has never been any consideration given to forcing Mr K to take medication against his will under the provisions of the *MH&RSA*. He is not, in my opinion, a danger to himself or others on the basis of his mental illness, and I interpret the recent assessments by the KMHS as being supportive of

his view. He is of a benign disposition, and he is capable of respecting the rights of others in society to safety and peaceful living. He shows decency and generosity, and he understands the obligations on all members of society to behave in a generally civil and moral fashion. His offending behaviour has occurred in the context of being intoxicated with alcohol, and has not been a direct function of his mental illness. Even though he holds some grandiose beliefs regarding his attractiveness to women, I do not think that Mr K should be forced to take medication on the basis of this behaviour.

With regard to the sexualised nature of Mr K's offending behaviour, I do not see this as being part of an ongoing pattern, and I am aware of no evidence that would suggest that Mr K is a sexual predator. The fact that one of the victims of his offending behaviour was a minor was, as far as I can tell, [not] something of which he was aware, and it was not an intended part of his behaviour that it be witnessed by an under-age girl. The episode appears to have occurred in the context of erotic preoccupations with his female neighbours that surfaced when he was drinking. Although he seems to have had an unduly casual regard for them that was based on their racial and cultural background, I do not see this as being part of his mental illness, or part of an ongoing pattern. Even though he appears to hold some grandiose notions about his attractiveness to women, there is no evidence that Mr K acts out on the basis of these beliefs, and many would regard them as being based on wish-fulfilling erotic fantasy.

Mr K is capable of showing full insight into the inappropriateness of his offending behaviour, and in my opinion he shows genuine shame, as well as remorse for its effect on the victim. As already stated, it does not appear to have been Mr K's intention that his offending behaviour be witnessed by an under-age girl, and the fact that this happened does not appear to please him in any way.

[29] On the basis of both Dr Smith's opinion and RFK's prior criminal history, I was satisfied that RFK would not be likely to endanger himself or any other person because of his chronic schizophrenia if he were released unconditionally.

[30] In the same report, Dr Smith expressed the view that it would be appropriate for the Court to consider an unconditional dismissal of the charge against RFK for the following reasons:

- (i) his offending behaviour was not part of a serious ongoing pattern;
- (ii) he has genuine shame, remorse, and sympathy for his (unintended) victim;
- (iii) he is willing to accept periodic reviews by the KMHS on a voluntary basis;
- (iv) he does not require involuntary treatment of his mental condition;
- (v) he understands the connection between alcohol abuse and his offending behaviour;
- (vi) he is leading a meaningful social existence and contributes to the public good;
- (vii) he has been able to control his substance abuse; and
- (viii) he has not re-offended in what is now a reasonably lengthy period of time.

[31] I considered that the reasons given by Dr Smith were valid. I was therefore of the view that a non-custodial supervision order with conditions was not necessary to maintain and protect the safety of the community.

[32] When the matter came back before the Court on 18 July 2013, Mr Nathan conceded that Dr Smith's most recent report alleviated the concerns raised

in the prosecution submissions summarised by me in [21] above. In my view, that was an entirely appropriate concession in all the circumstances.

[33] In conclusion, I determined that Mr K should be released unconditionally and made an order accordingly under s 43X(2)(b) *Criminal Code*.
