

CITATION: *The King v Thompson* [2025] NTSC 17

PARTIES: THE KING

v

THOMPSON, Vincent

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 22420803

DELIVERED: 20 February 2025

HEARING DATE: 18 February 2025

JUDGMENT OF: Lasry AJ

CATCHWORDS:

EVIDENCE – Admissibility and relevance – *Evidence (National Uniform Legislation) Act 2011* (NT) s 97, s 137 – Tendency evidence – whether probative value of tendency evidence outweighs any potential prejudicial effect on the accused – Evidence not admitted

Criminal Code Act 1983 (NT), s 208H(1)

Evidence (National Uniform Legislation) Act 2011 (NT), s 97, s 97(1), s 97(1)(a)

Hughes v The Queen (2017) 263 CLR 338; *IMM v The Queen* (2016) 257 CLR 300, referred to

REPRESENTATION:

Counsel:

Crown: R Everitt

Accused: J Bach

Solicitors:

Crown: Office of the Director of Public
Prosecutions

Accused: Legal Aid NT

Judgment category classification: C

Judgment ID Number: Las2501

Number of pages: 9

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

The King v Thompson [2025] NTSC 17
No. 22420803

BETWEEN:

THE KING

AND:

VINCENT THOMPSON

CORAM: LASRY AJ

REASONS FOR JUDGMENT

(Delivered 20 February 2025)

- [1] Vincent Thompson is charged on indictment that on Monday 10 June 2024, at Darwin in the Northern Territory, he intentionally engaged in sexual intercourse, namely penile/vaginal penetration, with BD (‘complainant’), without her consent and being reckless as to the lack of consent, contrary to s 208H(1) of the *Criminal Code Act 1983* (NT).
- [2] In broad terms, the Crown alleged that the accused, a 35-year-old Indigenous male, was on Mitchell Street in Darwin on the relevant date. The complainant was also on Mitchell Street and sitting with family members, drinking alcohol. At 8:30 pm, the accused gestured to the complainant for her to come and speak to him, and she did.

- [3] He asked her whether she wanted to come with him and drink alcohol, which he had hidden nearby, to which she responded that he could bring the alcohol to her and her family so they could all drink it. The accused replied that he feared the police would intervene if he did that. The accused is then alleged to have told the complainant that his name was Sonny and that he was from Ngukurr. The accused's claim that he was from Ngukurr made the complainant feel comfortable, because it was familiar to her. The accused is then alleged to have led the complainant along Peel Street and into Bicentennial Park to a set of stairs out of the view of the public.
- [4] The accused is then alleged to have told the complainant to remove her shorts, and when she attempted to leave it is alleged he grabbed the complainant by the shirt and prevented her from leaving. The complainant was of the belief that if she did not comply she would be physically assaulted, and so she began to remove her shorts.
- [5] The accused took over and finished undoing her shorts. He then told the complainant to lie on the ground on her back. The accused then had sexual intercourse with the complainant, which included ejaculating inside her. Very soon after that occurred, both people stood up and the complainant walked to the corner of Mitchell and Peel streets, where she tried to get assistance. She spoke to a security guard, and then the police were contacted.

- [6] The accused was later arrested and taken to the Palmerston Watch House. During that procedure, he participated in an electronic record of interview, in which he told police that he did have sexual intercourse with the complainant, but that it was consensual because she invited him to have sex in the bushes.
- [7] The accused has been arraigned in this court and his counsel, Mr Bach, has informed me that during the trial before the jury, it will be admitted, on behalf of the accused, that sexual intercourse occurred with the complainant, and that it was consensual, consistent with the accused's statement in his record of interview.

Tendency Notice

- [8] On 13 February 2025 the Crown filed a tendency notice pursuant to s 97(1)(a) of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('*UEA*'). In its relevant parts the notice is in the following terms.

3. The tendency evidence relates to the following fact(s) in issue in the proceeding:
 - (a) Whether the accused committed the offence on the Indictment;
 - (b) Whether the accused knew BD was not consenting to sexual intercourse or was reckless as to her lack of consent;
 - (c) Whether the accused gave any thought to whether the complainant consented to the sexual intercourse the subject of the offence of the Indictment;

- (d) Whether accused took any steps to ascertain whether the complainant was consenting to the sexual intercourse.
4. The tendency sought to be proved is the tendency of the accused to:
- (a) act in a particular way namely:
- (i) to act in a sexual manner towards unknown women, who are alone, in public, without regard to the willingness of the said unknown woman;
- (b) have a particular state of mind, namely:
- (ii) willingness to engage in conduct for his own sexual gratification in a public place
5. The conduct of which evidence will be adduced, and particulars of the date, time & place at & the circumstances in which that conduct occurred, and the name of each person who saw, heard or otherwise perceived that conduct, are:

#	Conduct	Date & Time	Place	Circumstance	Witness(es)
1.	While in a public place the accused sat down opposite the victim and masturbated his penis while staring at the victim who was on her own in the same area as the accused. The conduct caused the victim to leave.	11 May 2024	Darwin	The accused and victim were alone in the Laundromat The victim was female	Agreed facts
2.	The accused lured the complainant so they were alone before propositioning her for sexual intercourse. When she declined he persisted, taking her pants off and then having penile/vaginal sexual intercourse with her until he ejaculated.	10 June 2024	Darwin	The accused and the victim were alone on the Esplanade The accused and complainant were in a public location The victim was female.	BD

6. As indicated in Table A below, the substance of the “tendency” evidence which the Prosecution intends to adduce is contained in the document(s) attached and/or the document(s) which has or have been served previously upon the accused.

- [9] The accused had also been charged with an offence in relation to the incident which occurred on 11 May 2024. In this case, the tendency notice simply contains an extract from the statement of agreed facts that were presented to the Local Court in relation to that incident and for which the accused is presently undergoing a sentence.
- [10] No witness statement has been provided describing the incident in any more detail, and if this evidence were to be admitted no witness would be called. The statement of agreed facts would be read to the jury.
- [11] Mr Bach, of counsel on behalf of the accused, objects to this course being followed by submitting that the evidence ought not to be admitted as tendency evidence. Clearly, as he submits, if it is not admissible as tendency evidence it is not admissible for any other purpose.
- [12] As I have already indicated, the single issue in this trial will be whether or not sexual intercourse between the accused and the complainant occurred consensually.
- [13] The prosecution, obviously, are required to prove beyond reasonable doubt that it occurred without consent.

[14] Tendency evidence means evidence of a kind referred to in s 97(1) of the *UEA*, that a party seeks to have adduced for the purpose referred to in that section. That section provides:

- (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:
 - (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
 - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

[15] My emphasis in setting out this section indicates the important parts of the section for consideration in this case.

[16] Under s 97 of the *UEA*, for the evidence to be used in the way which the prosecution seeks to use it, the evidence is required to have significant probative value. That phrase is not defined in the dictionary of the *UEA*, however, probative value is defined as being an extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

[17] In assessing whether the evidence has significant probative value, the High Court in *IMM v The Queen*¹ determined that questions of credibility are, generally speaking, matters for the jury and not for

¹ (2016) 257 CLR 300

the trial judge. I proceed on the basis that the jury would accept what appears in the statement of agreed facts. In *Hughes v The Queen*,² the High Court made clear that the test was whether the evidence by itself, or together with other evidence adduced, should make more likely, to a significant extent, the facts that make up the elements of the offence charged.

[18] Dealing with that consideration, the only element in issue in this trial is the element of consent. There is no question of whether the act of sexual intercourse occurred, nor any issue of identity. Where the tendency evidence relates to sexual misconduct with a person other than the complainant, as in this case, it will usually be necessary to identify some feature of the other sexual misconduct and alleged offending linking the two together.

[19] In my opinion, the fact that both incidents were broadly sexual, is not sufficient to underpin significant probative value in the trial before me. This is, however, what the prosecutor in this case seeks to do, as appears from the tendency notice. Those links concern the willingness of the accused to act in a sexual manner towards unknown women who are alone in public, without regard to the willingness of those women, and to have a particular state of mind, that being a willingness to engage in the conduct for the accused's own sexual gratification in a public place.

2 (2017) 263 CLR 338

- [20] As I have said, it is important to bear in mind that the issue in this case is not whether it was the accused who had sexual intercourse with the complainant. The only issue is whether the complainant consented to the sexual intercourse which took place.
- [21] It does appear that the earlier incident, which occurred on 11 May 2024, occurred in a public place and involved the accused sitting opposite the alleged victim and masturbating. As I understand the argument, it was the fact of the events occurring in public that the prosecution relied upon as a similarity of some significance.
- [22] However, the outline of the Crown case in this trial, and presumably the evidence that will be called, asserts that “the accused led the complainant along Peel Street and into Bicentennial Park, to a set of stairs out of the view of the public.” The allegation by the complainant does not involve the accused engaging in the act of sexual intercourse in a location which could be easily seen by members of the public, and it could not be inferred that he was indifferent as to whether people could see or not. Also, it is not persuasively clear that in the first incident the victim was a person unknown to the accused, though that may be the case.
- [23] I assume the allegation in the first matter was that the accused was indifferent to the fact that people could see what he was doing. Whereas in the latter matter, the subject of this trial, he sought to

take the complainant to a place where they could not be seen. This is a significant difference for these purposes.

[24] As to the state of mind of the accused, the prosecutor argues that in both cases the facts demonstrated an indifference by him to the willingness of the female involved, to participate in the incidents. But in the first incident there was, effectively, no participation required by the female involved, other than by involuntarily seeing what the accused man was doing, being offended by it and leaving the area.

[25] In the second incident, of course, we are concerned with penetrative sexual intercourse, where the complainant is directly involved physically in what the accused man is doing, and where consent is an element of the offence. In my opinion, the evidence which the Crown wish to rely on as tendency evidence is not capable of making the absence of consent in the incident on 10 June 2024, which the Crown must prove, more likely.

[26] The only reasoning which might lead to that result would be impermissible propensity reasoning. The evidence which the Crown wish to rely on does not, in my opinion, have significant probative value on that issue. Any similarity between the two incidents is too broad to justify the admission of the evidence as tendency evidence.

[27] I would not admit this evidence.