

CITATION: *The King v Rory* [2023] NTSCFC 3

PARTIES: THE KING

v

RORY, Eric

TITLE OF COURT: FULL COURT OF THE SUPREME
COURT OF THE NORTHERN
TERRITORY

JURISDICTION: ON REFERENCE from the SUPREME
COURT exercising Territory jurisdiction

FILE NO: 22032423

DELIVERED: 1 November 2023

HEARING DATE: 30 August 2021

JUDGMENT OF: Southwood, Blokland and Barr JJ

CATCHWORDS:

STATUTORY INTERPRETATION – *Criminal Code 1983* (NT) – Part VI
Division 5 – Whether physical contact between an accused and a
complainant is an essential element of the offence of performing an act of
gross indecency contrary to s 192(4) – Accused exposed genitals to and
masturbated in front of the complainant – Accused charged with two counts
of gross indecency – Whether the words “perform” and “on” in s 192(4)
necessitate physical contact – Text, context and purpose of the statute
support a narrow construction of s 192 - Determined that “on” requires
physical contact and therefore, that direct or indirect contact between the
complainant and the accused is an essential element of the offence under s
192(4)

Criminal Code 1983 (NT) s 127, s 192

Criminal Code Amendment (Criminal Responsibility Reform) Act 2005 (NT) s 14

Local Court (Criminal Procedure) Act 1928 (NT) s 52

Summary Offences Act 1923 (NT) s 47

Supreme Court Act 1979 (NT) s 21

AM v The Queen (2006) 18 NTLR 110; *Twentyman v The Queen* [2022] NTCCA 11, referred to.

REPRESENTATION:

Counsel:

Crown: N Papas QC

Accused: P Coleridge

Solicitors:

Crown: Office of the Director of Public
Prosecutions

Accused: North Australian Aboriginal Justice
Agency

Judgment category classification: B

Number of pages: 10

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

The King v Rory [2023] NTSCFC 3
No. 22032423

BETWEEN:

THE KING

AND:

ERIC RORY

CORAM: SOUTHWOOD, BLOKLAND AND BARR JJ

REASONS FOR JUDGMENT

(Delivered 1 November 2023)

THE COURT

Introduction

- [1] The following question was referred to the Full Court (the Court) under s 21 of the *Supreme Court Act 1979* (NT):

Is physical contact between an accused and a complainant an essential element of an act of gross indecency on another person contrary to s 192(4) of the *Criminal Code 1983* (NT)?

- [2] On 30 August 2021, the Court answered the question as follows:

Yes. Direct or indirect physical contact between the complainant and the accused is an essential element of the offence of gross indecency on another person contrary to s 192(4) of the *Criminal Code 1983* (NT).

[3] At the time the Court answered the question the Court stated it would publish its reasons for judgment later. Following are the Court's reasons for judgment.

The assumed facts

[4] The assumed facts of this reference are as follows.

[5] The accused, Eric Rory, stands charged with two counts contrary to s 192(4) of the *Criminal Code* on an indictment filed in the Supreme Court on 21 April 2021.

[6] Subsection 192(4) of the *Criminal Code* states:

A person is guilty of an offence if the person performs an act of gross indecency *on* another person:

- (a) without the other person's consent; and
- (b) knowing about or being reckless as to the lack of consent.

[7] The accused is a 65-year-old Aboriginal man from Borroloola.

[8] The complainant is a 62-year-old woman who is married to the accused's nephew, William Kidd.

[9] At the time of the alleged offending, the complainant and her husband were temporarily residing at the accused's home in Borroloola while their house was under construction.

[10] As to count 1, the alleged facts are as follows.

- [11] On the morning of 8 October 2020, Mr Kidd was at work. The complainant and the accused were alone at the accused's house. The complainant was on the veranda. She had moved outside because she felt uncomfortable being alone with the accused inside the house.
- [12] After Mr Kidd left the house, the accused changed into a pair of shorts that were ripped from the front to the back, and caused his genitals to hang out and be clearly visible. The accused had never previously worn the shorts around the complainant.
- [13] The accused walked around the inside of the house and the veranda, purposely walking back and forth in front of the complainant with his genitals exposed in the ripped shorts. She asked him, "How (sic) are you wearing broken shorts? Can you put something decent on?" She tried to look away, but the accused continually put himself in her line of sight while he laughed and giggled with his genitals exposed.
- [14] The complainant told Mr Kidd about what occurred when he returned from work. Mr Kidd spoke to the accused and told him how his behaviour had affected the complainant.
- [15] As to count 2, the alleged facts are as follows.
- [16] At 9.30 am on 13 October 2020, the complainant returned to the accused's house after shopping in Borrooloola. Mr Kidd dropped her off at the house,

brought the shopping inside and returned to work. The accused and the complainant were alone in the house and she went and sat on the veranda.

[17] The accused stood in the lounge room, leaning against a doorframe. The accused had a clear view of the complainant sitting at the table on the veranda, and she of him. The accused exposed his genitals, untucking them from his shorts, and he started to masturbate while staring at the complainant. She told him she would tell Mr Kidd about what he was doing. The accused stopped masturbating and put his genitals back in his shorts.

[18] The complainant reported the two incidents to police, provided a statement and moved to the Borroloola Safe House.

Section 192(4) of the *Criminal Code*

[19] When first enacted s 192(4) of the *Criminal Code* stated:

Any person who commits an act of gross indecency *upon* another person without the consent of the other person, is guilty of a crime and is liable to imprisonment for 14 years.

[20] As is apparent, when first enacted, s 192(4) contained the word “upon” not the word “on”.

[21] Martin (BR) CJ discussed the meaning of the word “upon” in the text of s 192(4), as originally drafted, in *AM v The Queen*:¹

In the context of the jury being left with the impression that they could convict the appellant of gross indecency charged in count 2 on the basis of the act of taking either or both photographs, counsel for the

1 *AM v The Queen* (2006) 18 NTLR 110 at [92], [94].

appellant submitted that the mere act of taking a photograph could not amount to the crime of gross indecency. Counsel contended that the wording of the crime of gross indecency found in s 192(4) required physical contact between the offender and the victim.

...

Having regard to the wide variety of meanings attaching to the word “upon”, including “against”, “in the direction of” and “toward”, and bearing in mind the purpose of the legislative scheme and the context of the provision under consideration, I tend to the view that physical contact is not an essential feature of the offence. However, as the court did not have the benefit of full submissions with reference to authority, it is not appropriate to finally determine the question.

[22] The Court of Criminal Appeal took a different view of the meaning of “upon” in *Twentyman v The Queen*.² In that case the Court of Criminal Appeal considered whether a charge contrary to s 127(1)(b) of the *Criminal Code* was made out when there was no physical contact (direct or indirect) between the alleged offender and the victim.

[23] Subsection 127(1) of the *Criminal Code* states:

Any person who:

(a) has sexual intercourse with; or

(b) commits any act of gross indecency *upon*,

a child who is under the age of 16 years is guilty of an offence and is liable to imprisonment for 16 years.

[24] The Court of Criminal Appeal held that the use of the word “upon” in s 127(1)(b) made it an essential element of the offence that there be physical contact between the appellant and the complainant.³ The Court held that the

² *Twentyman v The Queen* [2022] NTCCA 11.

³ *Ibid* at [20].

word “upon” denotes a relationship or an act which involves physical contact, observing as follows:⁴

The word “upon” is a somewhat old-fashioned word, and is generally replaced in everyday English conversation and writing by the preposition “on”. The respondent contends that the word “upon”, in the context of s 127(1)(b), means ‘against’, ‘towards’, or ‘directed at’. Those meanings represent a broad meaning of the word “upon”, whereas the appellant contends that “upon” means ‘on’ in a straightforward physical sense.

It may be accepted that the word “upon”, like the word “on”, can be used in a broader or more abstract sense to describe a relationship between two things that does not involve physical contact. One example is an encounter between two persons or groups of persons: “He came upon a large force of enemy soldiers.” Another example is the use of the word to mean ‘towards’ or ‘directed at’: “He practised a significant level of deception upon the elderly victims of his fraudulent scheme.” Further example: “The property developer conferred a corrupt benefit on (upon) the delegate of the Minister.” These examples of a broader or more abstract meaning are not determinative; they simply suggest that a broader meaning for the word “upon” cannot be excluded at the threshold as ungrammatical or otherwise not applicable. We observe, however, that there is no positive indication that the broader meaning is the correct meaning for the purpose of s 127(1)(b).

The offence under consideration is in the same sub-section as the offence of having sexual intercourse with a child, contrary to s 127(1)(a). Our conclusion as to the correct interpretation of the word “upon” in s 127(1)(b) is based on the structure of s 127 and, in substantial part, on the immediate context in which the word “upon” appears: “Any person who ... *commits any act of gross indecency upon a child ...*”. In the context of the indecent act being committed upon a person, we consider that it is inconceivable on a proper construction that the offence could be committed without physical contact.

[25] In our opinion, the approach taken by the Court of Criminal Appeal in *Twentyman v The Queen* is the correct approach to the interpretation of the word “upon”. The use of the word “on”, in s 192(4) as amended, makes the construction of s 192(4) even clearer.

4 Ibid at [22]-[24].

[26] S 14 of the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT) enacted the current s 192(4) of the *Criminal Code 1983*.

Subsection 192(4) as amended provided that a person would be guilty of the offence if the person committed an act of gross indecency “on” another person without that person’s consent and knowing about or being reckless as to the lack of consent. It is apparent from the text of s 192(4) and the structure of s 192 that the offence requires actual contact with the complainant. Such a construction of s 192(4) is consistent with the text and elements of s 192(3) of the *Criminal Code*. The use of the word “on” instead of “upon” makes it even clearer that an offence contrary to s 192(4) requires actual contact with the complainant.

[27] We accept the submissions of counsel for the accused that the above construction of s 192(4) is supported by the following further propositions that arise from the text, context and purpose of the subsection.

1. The most common ordinary use of the preposition “on”, like the preposition “upon”, is to describe a relationship that involves physical contact with another person or object. For example, the first definition of “on” in the Macquarie dictionary defines the word “on” as a preposition “expressing ... position above *and in contact with* a supporting surface”. The second definition in the Macquarie dictionary defines the word as a preposition “expressing ... *contact with* any surface”. In the Macquarie dictionary, the first definition given for a word is the “central meaning” of the word, which is generally the most

common meaning” of the word. The usual order after the central meaning is “figurative or transferred meaning, specialized meaning, obsolete, archaic and rare meaning”.

2. Contrary to the use of such words elsewhere in the *Criminal Code*, Parliament did not choose to use the following words in s 192(4):

... perform an act of gross indecency –

- *towards* another person; or
- *against* another person; or
- *in the direction* of another person; or
- that is *experienced or perceived by* another person; or
- *in view of* another person; or
- that is *seen by* another person; or
- *exposes another person* to an act of gross indecency.

Parliament tends to use the above words or expressions in the *Criminal Code* to describe a non-physical criminal act or relationship that is the subject of the offence.

3. Nothing in the immediate statutory context of s 192(4) suggests that Parliament intended the word “on” to bear a broader, abstract and less common meaning. On the contrary, the immediate statutory context of

s 192(4) supports a construction that the use of the word “on” requires physical contact. Subsection 192(4) immediately follows the offence of sexual intercourse without consent in s 192(3). This strongly supports a construction that requires physical contact. Save for the specific words creating each particular offence, the words used in s 192(3) and s 192(4) are almost identical. This legislative design is intended to convey the essential similarity between the two offences in s 192 of the *Criminal Code*.

4. The maximum penalties that Parliament has imposed for offences contrary to s 192(3) and (4) of the *Criminal Code* demonstrate the relative seriousness of both offences. Offences that do not involve sexual contact commonly have lesser head sentences.
5. Subsection 192(4) is in Division 5 of Part VI of the *Criminal Code* that deals with assaults and threatened physical contact.
6. Where Parliament has intended that other provisions of the *Criminal Code* are to apply to conduct that extends beyond physical contact, Parliament has said so unambiguously and the Parliamentary drafter has used phrases such as “against”, “towards”, “expose to”, “person present” and “within the view of”.
7. Where Parliaments in Australia intend to prohibit indecent conduct that extends beyond physical contact, they have said so unambiguously by

employing words and phrases such as “on, or in the presence of”, “with or towards”, or by the doing of acts that “another person sees”.

[28] The adoption of the narrow construction of s 192(4) of the *Criminal Code* pressed by the accused does not create a lacuna in the criminal law in the Territory. For example, the accused could have been charged on complaint with ‘offensive behaviour in or about a dwelling house’, contrary to s 47(d) of the *Summary Offences Act 1923* (NT), subject to the six-month time limitation in s 52 *Local Court (Criminal Procedure) Act 1928* (NT). If it is thought that the penalty provided by s 47 of the *Summary Offences Act* is insufficient, that would be a matter for Parliament to address. It is not a matter for the Court to resolve by extending the meaning of “on” in s 192(4).

[29] If the word “on” had a meaning that is broader than physical contact, it would become very difficult to fix the scope of conduct that may be contrary to s 192(4). Such an approach would be contrary to the principle that a statutory criminal provision should be certain and readily ascertainable by those who are subject to it. There is no obvious answer to the question as to what conduct beyond physical contact would be the subject of s 192(4) – an offence that has a maximum penalty of 14 years imprisonment – if “on” were not confined to physical contact.
