

CITATION: *The King v Thompson (No 2)* [2025]
NTSC 18

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 – Admissions – Criminal proceedings – Improperly obtained –
Whether the accused had been properly cautioned prior to being questioned
– Whether the accused knew he had the right to remain silent – Evidence not
admitted

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

Evidence (National Uniform Legislation) Act 2011 (NT) s 90, s 138, s 139

R v Anunga (1976) 11 ALR 412, 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:	Las2502
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The King v Thompson (No 2) [2025] NTSC 18
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 prosecution 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 it will be said that it was consensual, as is consistent with the accused's statement in his record of interview.

Admissibility of Body Worn Camera Device Footage

- [8] This ruling is concerned with events occurring at the time of the arrest of the accused and the admissibility of part of the accused's preliminary conversation with police. The evidence indicates that after a complaint by BD was made, police obtained an image from a CCTV camera showing the accused and complainant together in the vicinity of where the offence was alleged to have been committed.
- [9] As a result, at about 11:06 pm on the night of 10 June 2024, Senior Constable D and Constable K approached the accused on Smith Street in Darwin. Senior Constable D had a conversation with the accused and that was recorded on his body-worn camera device, which

has been played to the Court. That conversation lasted for about 18 minutes.

[10] At the conclusion of the conversation, at about 11:21 pm, the accused was arrested, placed in a police van and taken to Palmerston Watch House to be processed into custody. The Crown originally sought to rely upon the whole of the conversation on the basis that in answer to questions from Senior Constable D, the accused denied sexual intercourse took place with the complainant, something which he now admits.

[11] The prosecution thus sought to rely on that conversation as a false denial or a lie demonstrating a consciousness of guilt on the part of the accused. Mr Bach, of counsel for the accused, objects to the admission of the record of the conversation. Initially, that objection was primarily based on the fact that much of the conversation occurred prior to any caution being administered to the accused by the police officer in circumstances where the accused was being investigated for the offence of rape and was suspected of being the perpetrator.

[12] Upon analysis and after fair consideration by Ms Everitt of counsel who appears to prosecute in this matter, the only section of the conversation which is now sought to be admitted is effectively the last

three minutes of it, which occurs after the police officer begins to administer a caution to the accused.

[13] The conversation is in the following terms:

D: Okay. Vincent, I'll tell you now, okay. That you are arrested for, uh sexual assault ...

Thompson: With who?

D: Without consent. With a young lady that's made an allegation. Now I dunno if that's true or not.

Thompson: Who young lady?

D: I dunno, she only just met you, but she knew you were from Ngukurr. When you went over Esplanade just before.

Thompson: No.

D: Okay, so, so listen, I'm. I'm going to tell you a good way, okay? You're under arrest for that offence. I don't know if it's happened or not, but the detectives are going to come and have a talk to you a bit later, okay? Do you understand what I'm saying?

Thompson: No.

D: Okay, so, so listen, I'm. I'm going to tell you a good way, okay? You're under arrest for that offence. I don't know if it's happened or not, but the detectives are going to come and have a talk to you a bit later, okay? Do you understand what I'm saying?

Thompson: Can't be

D: True God, that's what she said.

K: That's what she said.

D: We're going to follow it up.

Thompson: I didn't. I didn't.

D: So turn around. Just turn around.

Thompson: Can you grab my phone?

D: Yeah, we're going to grab, we're going to grab everything. Just keep your arms there. You got the handcuffs?

Thompson: I didn't do anything.

D: Yeah, we, we, like I said Vincent, we're not a hundred percent sure, but we're going to look into it.

Thompson: No.

D: We'll grab all your stuff. We won't leave it behind.

Thompson: I was just walking around today.

D: Yeah. A young lady's made some certain allegations.

Thompson: [Inaudible] Young Lady.

D: Umm, I dunno off the top of my head.

Thompson: Can I have [inaudible] in the bag?

D: Oh, we'll bring all that. You can have your bumpers and everything. We'll put it into your hat. How's that? Did you check his other pocket? I'll check. Yeah I'll check.

Thompson: Who's the young lady?

D: Uh, I think you just sort of met her. That's what she said. She said she didn't know your name.

Thompson: Fuck off.

D: No, I'm just telling you what she said.

K: That what she said.

D: Okay. I'm not telling you something that I don't know. Okay. And she made these allegations. So now we've got to You've got on him for a second? I'll just put all your stuff in this hat just so we don't lose it. ... And if, if it turns out that it's not true, then we'll we will release you. Okay. Sound good? Okay. So the time is 23:22. Okay? Yeah. Like I said to you just a second ago, you are under arrest for sexual intercourse without consent. You don't have to say anything, but anything that you do say or do will be recorded and may later be used as evidence. Okay? Now you have the right to contact or attempt to contact a friend or relative to let them know of your whereabouts. Is there any family or friend that you want us to tell that you are with us? You think about it. If you think of someone later on when we get to the watch house, um, then we can try and call them. But we'll call NAAJA and let them know that you're with us. Okay? Do you understand?

Thompson: I was walking around sober today.

D: Yeah. Doesn't matter whether you're sober or not, but if you have sex with someone without their consent, that's frowned upon. Okay? So, I dunno whether you did. You might've had sex with her and it might've been consensual, but that's what the detectives are looking to. And you might not have had sex with her. I dunno. I wasn't there. Did you just have sex with the lady over in the Esplanade?

Thompson: No.

D: No? Okay. I dunno. So we'll, um, we'll talk to you more when we get to the watch house, okay? But you know what your rights are, hey? Okay. Thank you Vincent.

- [14] In contending that all the above quoted passage should be admitted into evidence before the jury, Ms Everitt submitted that the commencement of that passage illustrates the police officer attempting to caution the accused and that the administration of the caution took some time because the accused was interrupting.
- [15] With respect, I simply do not accept that.
- [16] The obligation on a police officer to caution a suspect requires that the full caution be made before further questioning. In the absence of a proper caution all the material between 15:07 and 16:27 is excluded pursuant to s 138 and s 139 of the *Evidence (National Uniform) Legislation Act 2011* (NT) (*ENULA*).
- [17] The only question left to be dealt with is the admissibility of the material from 16:27 commencing with the words, “Like I said to you just a second ago” through to the end of the conversation. That part of the conversation is relied upon by the Crown with reference to the question asked by Senior Constable D, “Did you just have sex with a lady over in the Esplanade?” Answer, “No.”
- [18] Counsel for the accused also objects to this material being admitted before the jury on a number of bases. As is clear, pursuant to the dictionary of the *ENULA*, an admission is a previous representation that is adverse to the person’s interest in the outcome of the proceedings.

- [19] In the context of this case, the denial by the accused of sexual intercourse with the complainant clearly falls into that category to the extent that the prosecution wishes to rely on it as a lie and therefore evidence demonstrating a consciousness of guilt.
- [20] Mr Bach submitted that I should exclude the evidence pursuant to s 90 of the *ENULA* on the basis that having regard to all the circumstances in which the evidence was made it would be unfair to the accused to use that evidence.
- [21] Those circumstances included the whole of the conversation between the accused and Senior Constable D including the fact that at the time when the denial of sexual intercourse occurred, the accused was in the process of being placed in a police van. He also submitted that insofar as a caution was administered to the accused by Senior Constable D, no genuine attempt was made by that police officer to ensure that the accused understood the meaning of the caution, particularly in the circumstances where an Indigenous man was being questioned by a police officer in uniform and also in circumstances where it was likely that English was not the first language of the accused.
- [22] According to the principles set out in the Anunga Guidelines,¹ “Great care should be taken in administering the caution when the stage has

¹ Formulated by Forster J in *R v Anunga* (1976) 11 ALR 412.

been reached that it is appropriate to do so.”² It is simply not adequate to administer it in the usual terms and say, “Do you understand that?” Or “Do you understand you do not have to answer questions?” Not even that occurred in this case. The nearest it came to occurring was when the police officer said to the accused, “You understand?”

[23] In Mr Bach’s submission the caution was not effective and the answer that his client gave, that the Crown rely on, was equivocal and nonspecific. That submission is primarily based on what had been discussed during the whole of the conversation.

[24] Ms Everitt on the other hand, on behalf of the prosecution, submitted that the caution was clear, would have been understood by the accused and that his denial of sexual intercourse with the complainant was immediately responsive to the question he was asked and therefore being capable of being probative as a lie demonstrating a consciousness of guilt. She argued there was no unfairness within the meaning of s 90 of the *ENULA*.

[25] The purpose of s 90 of the *ENULA* is to exclude evidence if its use would be unfair to the accused rather than to require balancing of public policy interests. ‘Unfair’ is not a defined term in the *ENULA*. It is important to state that s 90 of the *ENULA* invests in the court a discretion to exclude evidence. This is a contrast to, for example,

2 The Anunga Guidelines at 3.1.3.

s 137 of the *ENULA* which requires the exclusion of evidence if its probative value is outweighed by the danger of unfair prejudice. There is no exercise of discretion involved.

[26] In exercising my discretion and assessing unfairness it is open to me to consider the personal condition and characteristics of the accused at the time that he responded to the question including issues of language proficiency, ability to understand questions and cautions and the ability to communicate answers.

[27] In my opinion, at the time the accused made the response that the Crown wish to rely on he was dealing with a uniformed police officer in a language which was not his first language and although a caution has been administered, no attempt had been made by the police officer to establish that the accused understood that he had a choice as to whether to speak or remain silent. No real question of reliability of the previous representation of the accused arises because the Crown rely on it as a lie. At all events, reliability is not determinative in the exercise of the discretion under this section.

[28] In all the circumstances I have concluded that it would be unfair to the accused to use this evidence and in the exercise of my discretion I will exclude it.
