

CITATION: *Police V DS [2024] NTYJC 4*  
PARTIES: *Police*  
*v*  
*DS*  
TITLE OF COURT: YOUTH JUSTICE COURT  
JURISDICTION: YOUTH  
FILE NO(s): 22138998  
DELIVERED ON: 28 March 2024  
DELIVERED AT: Darwin  
HEARING DATE(s): 4 October 2023 & 19 February 2024  
DECISION OF: Deputy Chief Judge Fong Lim

**CATCHWORDS:**

CRIMINAL LAW – Youth Justice Act - Voir Dire - “separation”- improper use of power – failure to provide food - evidence – exclusion of evidence - undesirability of admission of evidence – causal link to impropriety

*Evidence (National Uniform Legislation) Act 2011 (NT) s 138*  
*Youth Justice Act 2005 (NT) s 59 & 155A*

*Kadir v The Queen [2020] HC 1*

**REPRESENTATION:**

*Counsel:*

Informant: Ms K Smith

Defendant: Mr C Dane

*Solicitors:*

Informant: Director of Public Prosecution

Defendant: Territory Criminal Law

Decision category classification: A  
Decision ID number: [2024] NTYJC 4  
Number of paragraphs: 60

IN THE YOUTH JUSTICE COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 22138998

BETWEEN:

Police  
Informant

AND:

**DS**  
Defendant

REASONS FOR DECISION

(Delivered 28 March 2024)

JUDGE FONG LIM

1. The Defendant has been charged with an assault on two Youth Justice Officers (YJO) while he was in detention in 2021. The Defendant was 15 at the time and 18 at the time of the hearing. It is alleged that after the Defendant had threatened the YJOs that he had a shank and he was going to “shank them all” he was placed into separation in his cell. When YJO A and YJO O went to check on the Defendant he sprayed them with urine out of a bottle. The Defendant is also alleged to have rained punches upon both A and O and some of those punches made contact with the YJOs. Part of the incident was captured on CCTV.
2. The court received evidence on the basis that there would be a voir dire on the exclusion of the evidence of the alleged assaults relying upon section 138 of the *Evidence (National Uniform Legislation) Act 2011* (“ENULA”). The defence submitted the “separation” of the Defendant was illegal and the actions of the YJO before the incident improper and therefore the evidence of the alleged assaults should be excluded. The defence submitted because the evidence was “in consequence of an impropriety or contravention of an Australian law”<sup>1</sup> it ought not to be admitted. Further the “desirability of admitting the evidence does not outweigh the undesirability of admitting evidence obtained in that way.” In short the defence say the Defendant only acted in the way which has been alleged because he had been improperly separated and denied food.
3. The Court received oral evidence from the Officer in Charge of the investigation and three YJOs. The incident reports of each of the YJOs were tendered as well as the CCTV footage from within the detention centre of the relevant time.
4. The Defendant claimed that he was wrongly placed into separation in his cell as none of the requirements under section 155A of the *Youth Justice Act 2005* had been complied with and

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<sup>1</sup> Section 138(1)(b)

the evidence of his reaction to that wrongful separation constituting the offences of assault should be excluded.

5. The Defendant's narrative is that the day in question was Sunday barbecue day and he and three of his fellow detainees were in the meal room waiting for their lunch. His three fellow detainees were served with their food, he was not. He requested his meal several times but was not provided with a meal even though other meals were taken from the kitchen and out to other detainees who were not in the meal room. He then had a conversation with YJO K and went to the other room where his friends were eating. He was then approached by YJO A, directed to his cell and escorted there.
6. The evidence of the YJOs was that the Defendant had made continual threats to the YJOs about having possession of a shank and threatening to use that shank on all of the YJOs. YJO A was the senior officer on the day and he made the decision to isolate the Defendant because he feared for the safety of his officers and other detainees.
7. Section 155A of the *Youth Justice Act 2005* only allows separation of youths when certain criteria are fulfilled:

*(2) the superintendent of a detention centre may authorise the separation of a detainee from other detainees if any of the following applies:...*

*...*

*(c) a separation is necessary for a detainee's protection of the protection of another person or property*

Section 155A(3) provides that an authorisation may only be given if :

*(a) all reasonable behavioural or therapeutic measures to resolve the situation have been attempted and those measures have failed to resolve the situation: and*

*(b) no other course of action is reasonably practicable*

8. When questioned about his use of his power to separate the Defendant into his cell YJO A said that he, as the senior officer on the day decided to separate the Defendant because the Defendant continued to make threats and was in an agitated state. He decided to separate the Defendant from the other detainees for the protection of the YJOs and the other young people because he was concerned the situation would escalate. He also claimed to have exercised all reasonable and therapeutic measures and there was no other course of action which was reasonably practicable.
9. If the evidence of the YJOs can be accepted as reliable and truthful, that the Defendant was agitated and making continual threats after all other therapeutic measures had been tried and failed then I would have no difficulty in finding the exercise of the separation power was lawful and proper.
10. The submission of Defence counsel is that I cannot make the finding that the evidence of the YJOs was reliable and truthful because it was internally inconsistent and in stark contrast of what is depicted on the CCTV footage.
11. I heard evidence from three YJOs and was provided with their incident reports.

12. **YJO K** was the officer who was the subject of the original threat the Defendant made regarding a shank.<sup>2</sup> He remembers the threat that the Defendant had a shank in his room and he was going to shank all of the officers.
13. His evidence was his conversation with the Defendant was a short exchange which he immediately reported to his senior as he was required to do. He described the Defendant's mood as frustrated but "he was alright."<sup>3</sup> He didn't think the Defendant was angry at him he "was just frustrated he wasn't getting his food."<sup>4</sup>
14. YJO K's next recollection was that the Defendant was placed in separation but did not have any memory of any other conversations the Defendant had with anyone else before being placed into separation. YJO K was present in the meal room for the whole of the time the Defendant was waiting for the food. He was present as other YJOs walked out through the meal room with the Defendant at the time he was escorted out to his cell. The Defendant was in very close proximity to YJO K at relevant times yet he does not remember any more conversations either continual threats to the officer or anyone trying to reason with the Defendant. One would expect given that proximity and other YJO's evidence of continual threat being made YJO K would have overheard those threats.
15. In his incident report<sup>5</sup> YJO K reported the threat was made because "he needs his food now" and that was reported to YJO A at the same time. There was no mention of any continual threats in that report.
16. **YJO O**, the alleged victim subject to charge 2, made himself unavailable to give evidence; he advised the prosecutor he would not be available. He now lives interstate and refused to give the prosecutor the details of where he now lives and works. He clearly wanted nothing to do with the prosecution of the Defendant.
17. **YJO M**'s evidence was internally inconsistent. After the incident he produced two incident reports. The first report did not mention anything about the fact that the liquid was urine. In his second report the description of the incident was in almost exactly same wording as YJO A's report except in reference to the names of the officers involved - in that report he states that the liquid was urine. Further in his oral evidence he stated that he has smelt the urine and that is why he knew it was urine.
18. Further there is a strong inference that YJO M cut and pasted his second report from YJO A report. YJO M's first incident report<sup>6</sup> made no mention of the alleged threats made by the Defendant before the Defendant was placed into separation yet his description of that event in the first paragraph of his second report<sup>7</sup> was identical to the paragraph in YJO A report<sup>8</sup> except the references to YJO A in the first person. When challenged as to the accuracy of his reports and the content of them YJO M became evasive claiming not to remember the

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<sup>2</sup> Transcript page 35

<sup>3</sup> Transcript page 30

<sup>4</sup> Transcript page 42

<sup>5</sup> Exhibit P4

<sup>6</sup> Exhibit P6A

<sup>7</sup> Exhibit P6B

<sup>8</sup> Exhibit P3

circumstances in which the second report was produced and relying on the passage of time to explain that lack of memory.<sup>9</sup>

19. **YJO A's** evidence is crucial to this court's assessment as to whether he had exercised his powers under section 155A lawfully. His evidence was that he was faced with a situation where the safety of the YJOs and other detainees was at risk and after he had taken all reasonable therapeutic measures he exercised the power to separate the Defendant.
20. YJO A's evidence had many internal inconsistencies.
21. In his evidence in chief YJO A said he heard the Defendant make a threat to another YJO. He then approached the Defendant and had therapeutic conversations with the Defendant about ceasing his behaviour. The Defendant continued to make threats making all staff feel unsafe and risking the safety of other detainees and that is when he was told to go to his "room" for "time-out."<sup>10</sup> He also observed the Defendant to be physically agitated pacing with his fists clenched. YJO A also stated he did not know why the Defendant was agitated.
22. In cross-examination YJO A vacillated as to whether he actually heard the Defendant's threat or observed the Defendant's agitation and then approached the Defendant to enquire what was going on. He vacillated as to when he decided to separate the Defendant under section 155A. In particular when questioned as to when he had therapeutic conversations with the Defendant, YJO A provided three different versions: first he said he had those conversations immediately after he heard the threat to YJO K, secondly at the time he approached the Defendant in the TV room, and thirdly while he was walking the Defendant back to his room. YJO A was unclear on when he says he exercised his power to separate the Defendant but was insistent that he had exercised all reasonable therapeutic measures.
23. In relation to a search of the Defendant's room, YJO A stated he needed the Defendant to accompany him to his cell so they could conduct a search for the weapon and that was one of the reasons why he was directed to his room.<sup>11</sup> Later in his evidence he said the search was not necessary because there had already been a broad search of all of the cells earlier that day. In re-examination YJO A stated a search was not actually undertaken because the Defendant was heightened and it was unsafe to do so at that point.<sup>12</sup>
24. If the original threat were as reported by YJO K then a search of the Defendant's room would have been logical given safety was apparently in YJO A's mind. When asked if search was done the response was it had not because there were fears that the situation would escalate as the Defendant was already heightened.
25. The objective evidence of the CCTV footage casts doubts on the truthfulness of YJO A evidence. It does not show the Defendant to be agitated or aggressive at any time. What it does show is the following:
  - Four boys including the Defendant enter the rec room.

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<sup>9</sup> Transcript page 30-33

<sup>10</sup> Page 50 of transcript

<sup>11</sup> Page 77 of the Transcript

<sup>12</sup> Page 84-85 of Transcript

- Soon after three of the boys are delivered their meals the Defendant is not given a meal.
- Two other plates of food are taken past the Defendant.
- The Defendant is waiting, sitting on the table with head down.
- The Defendant approaches the window into the cooking area and indicates he was waiting for his meal.
- The Defendant approaches YJOs who are exiting the kitchen area with plates of food and is not given a plate of food. One of those YJOs was YJO A.
- Defendant then moves towards the TV room and has a short conversation with YJO K who is standing at the door. At the time of that conversation YJO A had exited the rec room and had not returned.
- The camera inside the TV room shows the Defendant entering and sitting with his back to his fellow detainees while they eat. There is very little interaction.
- Then about 40 seconds later, YJO A enters and immediately indicates to the Defendant to leave the room.
- The cameras outside the TV room and inside the rec room immediately before that show YJO A returning to the meal room and after having a very brief conversation with YJO K at the door goes immediately to the TV room and escorts the Defendant out.
- The footage shows there to be less than a minute between the time the Defendant leaves the rec room escorted by four YJOs to his cell and YJO A re-entering the rec room.
- The footage also shows the Defendant and four YJO escorting him walking past YJO K at the door to the rec room.
- YJO A then re-enters the rec room within 30 seconds of escorting the Defendant out to his room.

26. What the footage shows is that the Defendant was waiting for his meal in the rec room for about four minutes and not receiving a meal. He does not show any aggression – he is moving around but not pacing and his fists are certainly not clenched as claimed by YJO A. His body is slumped and he seems dejected when he enters the TV room.

27. The CCTV confirms that YJO A could not have heard the original threat made to YJO K as he had already exited the area. YJO A had no conversation with YJO K (or the Defendant) until he, YJO A, re-enters the rec room and has a brief conversation with YJO K (when it must be inferred he is told of the threat). Then he immediately enters the TV room for the conversation he says he had with the Defendant.

28. The footage also confirms YJO A could not have had a “chat” with the Defendant in the rec room after he had observed his “body language” and within the “chat” YJO A could not have explained to the Defendant that he shouldn’t threaten the officers.<sup>13</sup> The footage shows no conversation between the Defendant and YJO A as described by YJO A.
29. The Prosecution called no evidence from any of the other YJOs who assisted in escorting the Defendant to his cell so the only evidence of any therapeutic conversations came from YJO A. None of the other YJOs who gave evidence corroborated YJO A evidence that the Defendant was making continual threats and was agitated.
30. The CCTV then shows YJOs (including A) returning to the rec room very soon after taking the Defendant to his cell. If there were conversations as stated by YJO A then one would expect that other YJO’s would have overheard those conversations. The only previous mention of therapeutic conversations with the Defendant is in the incident report of YJO A and that was after he had separated the Defendant.
31. At its highest YJO A evidence of therapeutic measures taken was to have a brief conversation to tell the Defendant not to make threats otherwise he would be separated. The suggestion that the Defendant was told he should wait because the meals were still being cooked is questionable given he had already waited as meals were taken past him. The footage also showed other boys getting a second serving soon after the Defendant was take to his cell. There was no evidence that it had been considered to offer the Defendant a part meal while waiting for the meat to be cooked as a way of calming his “heightened” state. No evidence of any other reasonably practicable measures taken or considered.
32. The times recorded in the CCTV between the time the Defendant is escorted out and the re-entry of YJO A do not support the claim by YJO A that “we’ve already done the checks the search”<sup>14</sup> or that therapeutic conversations were had on the way to the cell.
33. Another matter which casts doubt on the reliability of the YJO A’s evidence is the fact that the incident reports of YJO A and YJO M are almost identical terms when describing the lead up to the separation of the Defendant. Both officers denied cutting and pasting the description of the incident but the inference is strong that YJO A assisted YJO M with his second report especially when YJOA evidence was that sometimes he assists YJO M because he “doesn’t have proper writing skills” “so lots of times ...he can explain to you what happened ...so he needs you to maybe help him writing.”<sup>15</sup> When challenged about having a conversation with YJO M about the content of his report YJO A denied such conversation. However, given the wording in both reports is almost identical I do not accept that YJO A and YJO M did not discuss the content of YJO M’s second report.
34. It is also very curious, and unexplained, as to why YJO A referred to himself as “I (SYJO J.A....)” in his incident report when in the paragraph before he had already identified himself.
35. Given the above and the objective evidence of the CCTV footage I do not accept the evidence of the YJOs that the Defendant continued to threaten them after being counselled not to do

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<sup>13</sup> Transcript page 56

<sup>14</sup> Transcript page 57

<sup>15</sup> Page 80 of the Transcript



so. I do not accept that the Defendant was in such a heightened state that he posed a risk to the YJOs and other detainees.

36. I find the evidence of YJO A to be contrived and an attempt to justify his actions of separating the Defendant without complying with the requirement to undertake all therapeutic measures. Separation is to be of the last resort as sanctioned by the Act. I cannot accept YJO A to be telling the truth about his actions leading up to the separation of the Defendant nor do I accept he had taken all therapeutic measures before making the decision to separate the Defendant. The inconsistency in YJO A's evidence about how he heard of the threat to YJO K did not accord with that officer's evidence or the CCTV. In addition to that, none of the other YJOs present at the time gave evidence of continual threats being made by the Defendant or of overhearing any therapeutic conversations being held between YJO A and the Defendant.
37. The lack of any corroboration of YJO A evidence that the Defendant was agitated except in the incident reports and the strong inference that the incident reports of YJO A and YJO M were a product of collusion puts further doubt on YJO A's evidence that he had complied with the requirement of section 155A.
38. Further doubt is created as to the truthfulness of YJO A's evidence is that no search was undertaken of the Defendant's cell even though the threat was that he had a shank in his room and apparently that was the purpose of directing him to his room.<sup>16</sup>
39. I cannot be satisfied YJO A decision to separate the Defendant was made in compliance with the requirements of section 155A and find that separation was unlawful. If I am wrong about that I am satisfied that there was impropriety in the YJO's actions not to give the Defendant a meal within a reasonable time.
40. The suggestion by the defence is that YJO A was engaged in bullying behaviour of the Defendant and that bullying was condoned by the other YJOs. It is further submitted the denial of the Defendant his lunch was particularly cruel and if he lashed out having been locked in his cell not knowing when his meal was going to come that may even be understandable. Nonetheless there is no evidence to support the suggestion that deliberate actions of the YJOs which would amount to bullying. However I am satisfied that the Defendant was denied food when others were being provided with meals and there is no logical explanation as to why he was not given a meal at the same time that the other boys in the meal room.
41. I also find there was a causal connection between the unlawful exercise of the power to separate the Defendant and behaviour of the Defendant which constituted the offence and therefore the evidence of that offence has been obtained in consequence of the impropriety of denial of food and the illegality of the separation. But for the impropriety and the unlawful separation the Defendant may not have become agitated in the way he did and may not have thrown the urine at the YJOs as alleged.

**Should the evidence of the offending behaviour be excluded under section 138 of the ENULA?**

42. I must now consider whether I allow the evidence of the alleged assault to be admitted pursuant to section 138 (1) (b) of the ENULA. The evidence is as a consequence of an impropriety or

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<sup>16</sup> See page 76 Transcript

unlawfulness by the YJO and therefore I have to balance whether the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.

43. The most recent High Court authority which considers the application of section 138 of the ENULA is *Kadir v The Queen* [2020] HC 1. In Kadir's case their honours analysed the application of the different factors set out in s 138. Those factors are:
- a) *the probative value of the evidence; and*
  - b) *the importance of the evidence in the proceeding; and*
  - c) *the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and*
  - d) *the gravity of the impropriety or contravention; and*
  - e) *whether the impropriety or contravention was deliberate or reckless; and*
  - f) *whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and*
  - g) *whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and*
  - h) *the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.*
44. Their honours discussed the introduction of section 138 of the ENULA and characterised the section as enacting a discretion which is wider than the discretion in *Bunning v Cross* [1978] 141 CLR 54 and which is available in relation to matters which are not relating to the impropriety of law enforcement officers.<sup>17</sup>
45. The discretion under section 138 of the ENULA is to be exercised by weighing the public interest of all relevant evidence being before the fact finding tribunal against the public interest of the not giving "curial approval, or encouragement , to illegally or improperly obtaining evidence generally."<sup>18</sup>
46. In *Kadir v The Queen*<sup>19</sup> their honours were considering the admissibility of evidence from a hidden camera which recorded live baiting in the greyhound industry. The evidence was obtained by a private citizen through at trespass and then used as the basis for a search warrant which produced further evidence. One of the main focusses of their honours was the difficulty in obtaining the evidence had not illegal behaviour been undertaken by the private citizen in reference to factor (h) of section 138.
47. In the present case the evidence of the YJOs and the CCTV was not obtained illegally rather as a consequence of the illegal exercise of YJO A's power to separate the Defendant and the reckless impropriety of not delivering food to the Defendant within a reasonable time after his requests to be given food.
48. In relation to factors (a) and (b) the evidence of the YJO and the CCTV of the alleged assaults are clearly of high probative value and important in the proceedings.
49. In relation to factor (c) the nature of the offence being an assault of a youth justice officer with bodily fluids is clearly a serious offence. Youth justice officers in youth detention centres have

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<sup>17</sup> *Kadir v the Queen* [2020] 267 CLR 109 at 125

<sup>18</sup> Supra 15 paragraph 13 at 125.

<sup>19</sup> Supra 15

a difficult job managing and interacting with youths who often come from trauma-filled backgrounds. The youth justice officers are at risk by the nature of their employment and any assault of them is serious.

50. In relation to factors (d) (e) & (f) the evidence supports a finding that the contravention of section 155A was reckless in that not all therapeutic measures were taken but that was done in a situation that YJO A had a belief that other detainees and YJOs were at risk should he not separate the Defendant. The evidence also supports a finding that there was a reckless disregard for the Defendant's right to be provided with a meal in a timely fashion.
51. It was a serious breach of the requirements under section 155A and should not be condoned. I do not accept that YJO A undertook all therapeutic measures despite being clearly aware of the requirement having referred to them in his incident report.
52. Although I do not accept that YJO A was being truthful in his evidence of his thought processes and what therapeutic actions he took before exercising his powers under section 155A, I cannot find that at the time he deliberately breached those requirements rather than recklessly disregarded them.
53. In relation to factor (g) the possibility of the Defendant having recourse in civil proceedings against the institution or the YJO is remote and in my view that factor is neutral.
54. Factor (h) while the focus of the reasoning in *Kadir's* case is not relevant to the facts of the present case.
55. It is my view on considering the desirability of admitting the evidence against the undesirability of admitting evidence of the assault given how it was obtained, that is in consequence of the illegality or impropriety as set out above, I have to weigh up whether the offending of the Defendant is so serious that public interest dictates I admit the evidence even though there has been the breach of provision of the section 155A.
56. Of course any assault of a youth justice officer by a detainee is serious and should be taken as such. The use of bodily fluids to assault another person is not only a disgusting act and if it had hit the face of the YJO concerned would have placed them at risk of any disease transmission.
57. However it is important to recognise the reason behind the introduction of section 155A arose out of the Royal Commission into the Protection and Detention of Children in the Northern Territory. The purpose of the section is to "prohibit the isolation of the detainees particularly for behaviour management."<sup>20</sup> The explanatory statement recognised  
  
*"Isolation of children and young people in detention centres is psychologically damaging and contributes to poor behaviour and the occurrence of serious incidents."*
58. In the present case the illegal isolation of the Defendant did in fact lead to poor behaviour and a serious incident.
59. It is my view that the failure to comply with the requirements of section 155A in the isolation of the Defendant is a fundamental breach of a provision designed to protect detainees from

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<sup>20</sup> Explanatory statement for Youth Justice legislation Amendment act 2018 Serial no 48

unnecessary isolation and that as a consequence of that fundamental breach the Defendant has acted in the way that he did. The offending is on the lower end of the scale and the public interest of ensuring the youth detainees are treated with respect and dignity by ensuring they are not denied food when others have been weighs in favour excluding the evidence. Children in detention are particularly vulnerable to those who control their basic needs and the community should expect those who are tasked with providing those needs will undertake to do so.

60. At a later date prosecution referred me to Section 59 of the Youth Justice act which also allows for the admission of evidence obtained as a consequence of a contravention of the Act. Subsection (2) allows the Court to allow such evidence if the admission of the evidence would be “specifically and substantially benefit the public interest without unduly prejudicing the rights of any person”. Subsection (3) requires the court to consider certain factors when deciding whether evidence should be admitted. In my view the considerations under section 59 (3) mirror that required under section 138 of the ENULA. The section is stated to be in addition to any law under which the court may refuse to admit the evidence<sup>21</sup>. Given my findings I am not of the view that section 59 adds to my deliberations the failure to comply with section 155A of the Youth Justice Act was fundamental and in my view public interest in admitting the evidence is not outweighed by the prejudice to the Defendant.
61. Any evidence of the alleged offending is excluded and therefore the Defendant must be found not guilty and discharged.

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<sup>21</sup> Section 59 (4) Youth Justice Act