

**Flowers v R**

**9 February, 13 May 2005  
(BR) Martin CJ, Riley & Southwood JJ  
[2005] NTCCA 5, 189 FLR 423, 153 A Crim R  
110**

The applicant was found guilty by a Darwin Supreme Court jury of one count of assault with two circumstances of aggravation and one count of having sexual intercourse with another person without consent.

The victim of the assault was the applicant's de facto wife and the victim of the sexual assault was a 12 year old girl.

The applicant was intoxicated at the time when police officers initially made contact with him at his home. The police officers told the applicant that they were investigating the sexual assault of a child aged 12 years. The applicant, in response, denied knowing anyone of that age. He was then arrested and taken into custody. It was not until some time later, when police officers assessed that the applicant was sober, that a formal interview was conducted. During the formal interview, the applicant acknowledged that he did know the child.

At trial, the Crown led evidence of the applicant's initial denial. The Crown did not, however, lead evidence of the subsequent exculpatory admission given during the formal interview.

The applicant sought leave to appeal against his convictions on the grounds that (i) the formal interview should have been admitted into evidence and (ii) that the verdict was unsafe and unsatisfactory because the evidence given by his de facto wife and child was inconsistent. Leave to appeal was refused by a single judge on 18 August 2003. The applicant then applied to have the application determined by the Court of Criminal Appeal constituted by three judges.

The court, by majority (Southwood J dissenting) refused leave to appeal holding that:

1. The formal interview was not admissible at the behest of the applicant. The applicant's submission, that the formal interview was admissible in order to disprove the inference that the initial denial was the result of a guilty mind, was not sustainable. The applicant's admission that he knew the child was made on a separate and distinct occasion. The applicant had time to consider his position and determine his response. It was no longer a spontaneous response. Rather it was a considered response made some time after the event and could not be regarded as part of the *res gestae*. The admission was part of an exculpatory version of events that the Crown was entitled not to introduce into evidence.
2. The Crown should have identified the purpose for which the evidence of the applicant's initial denial was led. If the Crown indicated that it was led as evidence of a consciousness of guilty, the applicant would have been entitled to cross-examine the police officer who conducted the formal interview in order to establish that, later in the day when he had sobered up, the applicant gave an exculpatory account in which he admitted to knowing the child. The

present case was not one in which a sober suspect, having made an initial false denial, had time to reflect or to obtain legal advice before giving an exculpatory explanation. When the formal interview occurred several hours later, it was essentially the first time the applicant was able to properly respond to the allegation. However, the applicant did not lose a chance of acquittal that was fairly open to him. The evidence against the applicant was strong and he would have been convicted even if cross-examination about the formal interview had been allowed.

3. It was open to a reasonable jury to be satisfied beyond reasonable doubt of the guilt of the offender. An independent examination of the relevant evidence disclosed that the Crown case was very strong and that although there were some discrepancies in the evidence given by the child, her evidence in relation to the essential elements of the offence was corroborated by the de facto wife.