

CITATION: *The King v Eaton* [2024] NTSC 63

PARTIES: THE KING

v

EATON, Beau Anthony

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 22215645

HEARING DATE: On the papers

RULING GIVEN: 12 July 2024

REASONS DELIVERED: 18 July 2024

JUDGMENT OF: Kelly J

Evidence (National Uniform Legislation) Act 2011 (NT), s 97(1), s 101,
s 101(1), s 137

Hughes v The Queen [2017] HCA 20; *R v Lockyer* (1996) 89 A Crim R 457,
referred to

REPRESENTATION:

Counsel:

Crown: C McKay
Accused: B Houen

Solicitors:

Crown: Office of the Director of Public
Prosecutions
Accused: Maleys

Judgment category classification: C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The King v Eaton [2024] NTSC 63
No. 22215645

BETWEEN:

THE KING

AND:

BEAU ANTHONY EATON

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 18 July 2024)

- [1] The defendant is charged with one count of unlawfully causing serious harm to MZ (“the complainant”).
- [2] By a Tendency Notice (“the Notice”) dated 6 February 2024 the Crown has given notice pursuant to s 97(1) of the *Evidence (National Uniform Legislation) Act 2011* (NT) (“ENULA”) that it intends to adduce tendency evidence at the trial of the accused. The Notice states that the proposed tendency evidence relates to the following facts in issue:
- (a) whether on or about 5 April 2022, the defendant unlawfully assaulted the complainant;
 - (b) whether the complainant consented to an application of force/s;

(c) to rebut any defence raised including self-defence.

[3] The tendency sought to be proved by adducing the tendency evidence is the tendency of the accused to:

(a) act in a particular way, namely:

(i) to become angry and engage in violence towards the complainant;
and/or

(ii) to persist in violent behaviour towards the complainant
notwithstanding a lack of engagement by the complainant; and/or

(iii) to pursue violent retribution towards the complainant for a
perceived wrong/s;

(b) have a particular state of mind, namely:

(i) a violent disposition towards the complainant and a preparedness
to act on the same despite the complainant's unwillingness to
engage; and/or

(ii) a desire for retribution for a perceived wrong and a preparedness
to act on the same.

[4] In summary, the evidence which the Crown proposes to adduce as tendency evidence is evidence of the conduct the subject of the present charge and evidence of a prior incident in which it is alleged the defendant attended at the complainant's workplace while he was working high on a scissor lift and

made threats to assault the complainant due to perceived wrongs. The complainant refused to come down from the lift; he called his supervisor for assistance and the accused was eventually removed from the site.

- [5] The Crown proposes calling evidence of the earlier incident from the complainant, a workmate who was present when the conduct occurred and the supervisor who received the phone call for help.
- [6] The accused opposes the application to lead tendency evidence.
- [7] On 12 July 2024, I ruled that the evidence the subject of the tendency notice would be admitted as tendency evidence and also as relationship evidence. These are the reasons for those rulings.
- [8] ENULA s 97(1) provides:

The tendency rule

- (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.

- [9] ENULA s 101 provides (relevantly):

Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

- (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
- (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant.

The defence contentions

[10] Although conceding that it is not necessary for the Crown to show that there are “striking similarities” between the proposed tendency evidence and the conduct the subject of the charge,¹ the defendant relies on what it says are “significant contextual differences” between the conduct the subject of the tendency notice and the alleged conduct the subject of the charge, presumably to show either that the evidence does not establish the alleged tendency or that the alleged tendency does not make it substantially more likely that the defendant committed the conduct the subject of the charge. Which, if either, of these contentions is urged by the defendant is not clear from the defendant’s submissions.

[11] The defendant points to the following “significant contextual differences”.

Previous interaction	Alleged assault (current proceedings)
<ul style="list-style-type: none"> • Occurred at both parties’ work place • Witnesses who give relatively vague statements of the interaction 	<ul style="list-style-type: none"> • Occurred at residential address • No witnesses other than the complainant • Alleged that the

1 *R v Lockyer* (1996) 89 A Crim R 457

<ul style="list-style-type: none"> • No physical contact between the parties • Defendant removed • Several months before the incident the subject of trial 	<p>complainant was assaulted spontaneously by the defendant with a weapon</p> <ul style="list-style-type: none"> • Defendant leaves the residence after altercation voluntarily
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[12] The defendant contends that there is a significant difference between a verbal altercation, even one of a threatening nature, where the parties crossed paths on a worksite, and a targeted attack in the complainant’s home with a weapon that causes serious harm.

[13] With respect, this submission fails to engage with the reasoning process behind the relevance, and hence the probative value, of tendency evidence. That reasoning process is not based on similarity. As the High Court said in *Hughes v The Queen*:²

The probative value of evidence is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue. Tendency evidence will have significant probative value if it could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent. The trier of fact reasons from satisfaction that a person has a tendency to have a particular state of mind, or to act in a particular way, to the likelihood that the person had the particular state of mind, or acted in the particular way, on the occasion in issue.

...

The assessment of whether evidence has significant probative value in relation to each count involves consideration of two interrelated but separate matters. The first matter is the extent to which the evidence supports the tendency. ... In summary, there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the

2 [2017] HCA 20 (“*Hughes*”) at [16]

tendency strongly supports the proof of a fact that makes up the offence charged.³

The test posed by s 97(1)(b) is as stated in *Ford*: “the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged”. The only qualification to this is that it is not necessary that the disputed evidence has this effect *by itself*. It is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charged.⁴

[14] That is to say, the first question in assessing the probative value of proposed tendency evidence is whether the proposed evidence (alone or with other evidence) supports the existence of the alleged tendency, and if so, how strongly it supports the existence of the alleged tendency. The second question is, whether the alleged tendency, if established, makes it more likely that the defendant committed the charged offences – ie whether “the tendency strongly supports the proof of a fact that makes up the offence charged”.

[15] Seen in this context, it can be seen that the “significant contextual differences”, relied upon by the defendant are not material differences which affect the probative value of the proposed tendency evidence.

[16] In my view, the evidence of the prior altercation in the workplace does tend to support the tendencies alleged by the Crown - ie the tendency to have a violent disposition towards the complainant and a desire for retribution against the complainant for a perceived wrong and a preparedness to act on

3 *Hughes* at [41]

4 *ibid* at [40]

the same; also a tendency to become angry and engage in violence towards the complainant for a perceived wrong despite the complainant's unwillingness to engage. That evidence, it seems to me is highly probative of the existence of the alleged tendencies.

[17] In my view, the existence of those tendencies, if established, does make it substantially more likely that the defendant had those tendencies on the date of the conduct the subject of the charge and acted on them by assaulting the complainant in the way alleged by the Crown – ie that he committed the conduct with which he is charged. The proposed tendency evidence, therefore, passes the threshold test in s 97: it has significant probative value.

[18] The next step in determining whether tendency evidence should be admitted is to address the question in s 101(2) set out above.

[19] The High Court in *Hughes* addressed the question of the potential prejudice in tendency evidence in these terms:⁵

In criminal proceedings in which the prosecution seeks to adduce tendency evidence about the accused, s 101(2) of the *Evidence Act* imposes a further restriction on admissibility: the evidence cannot be used against the accused unless its probative value substantially outweighs any prejudicial effect that it may have on the accused. The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way. In either case the tendency

5 *Hughes* at [17]

evidence may be given disproportionate weight. In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury's emotional response to the tendency evidence. And prejudice may be occasioned by requiring an accused to answer a raft of uncharged conduct stretching back, perhaps, over many years.⁶

[20] The defence submissions recite some of the possible kinds of prejudice in which the reception of tendency evidence in a criminal trial may occasion prejudice to an accused, namely that:

- a. the jury may be influenced to convict as punishment for conduct other than that charged;
- b. the jury may overestimate the probative value of the evidence; and
- c. the jury may be distracted from the prosecution evidence in relation to the elements of the offences charged.

[21] The defence then contends that “due to these reasons mentioned above it would be unfair to the accused to allow this tendency evidence to be admitted”.⁷ However, the defence has not identified any specific way in which it is contended that this particular tendency evidence may be misused by a jury. In my view none of the three kinds of potential prejudice recited by the defence is likely to pose a real risk of prejudice to the accused by the

⁶ This paragraph of *Hughes* refers to the need for the probative value of the tendency evidence to “substantially outweigh” any prejudicial effect that it may have on the accused, and both the Crown and the defence in written submissions used this formulation. However, s 101 has been amended since the decision in *Hughes* to remove the word “substantially”. Section 101(2) now reads:

Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant.

⁷ Defence submissions [16] and [17]

reception of this particular tendency evidence in this particular trial, and any potential prejudice of these kinds can in any event be guarded against by appropriate directions. Balanced against this, I consider the probative value of the evidence to be high. I do not consider that the probative value of the tendency evidence is outweighed by any potential prejudice to the accused and I decline to exclude it under s 101(2).

Relationship evidence

[22] The same evidence is sought to be relied upon by the Crown to throw light on the relationship between the accused and the complainant which gave rise to the incident the subject of the charge. That evidence is that at some time in the past, the accused's partner, KR, was for a short time the partner of the complainant. KR told the accused something that she said occurred during that relationship which made the accused very angry at the complainant, as a result of which, the Crown says, the accused confronted the complainant in the earlier incident at the workplace and later assaulted him in the incident the subject of the charge.

[23] That evidence is self-evidently relevant to a consideration of the charge on the indictment. It throws light on what the Crown says was the motive for the accused's animosity towards the complainant, and helps to explain what might otherwise seem inexplicable, why the accused would launch an assault on the complainant when visiting the complainant's residence.

- [24] The defence contends that this evidence should be excluded under ENULA s 137 which provides that in a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of prejudice to the accused. This is essentially the same test as in s 101(2) and courts have reiterated many times that what is meant by prejudice is some potential misuse of the evidence, not its legitimate tendency to inculcate the accused.
- [25] The defence has not identified any specific way in which it is contended that this particular tendency evidence may be misused by a jury or any other danger of unfair prejudice to the accused arising out of the reception of this evidence. The probative value of the evidence is high, both as tendency evidence and relationship evidence. That probative value is not outweighed by any danger of prejudice to the accused.
- [26] For these reasons, the evidence was admitted as both tendency evidence and relationship evidence.
