

CITATION: *The Queen v Dixon-Hargraves* [2019]  
NTSC 29

PARTIES: THE QUEEN

v

DIXON-HARGRAVES, Karl

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory  
jurisdiction

FILE NO: 21816477, 21816481 and 21835038

DELIVERED: 30 April 2019

HEARING DATE: 30 April 2019

JUDGMENT OF: Kelly J

CATCHWORDS:

EVIDENCE – Admissibility and relevance – *Evidence (National Uniform Legislation) Act 2011* (NT) s 97 and s 101 - Tendency evidence – Whether tendency evidence has significant probative value – whether probative value of the evidence substantially outweighs any potential prejudicial effect on the accused - Evidence admissible

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

*Hughes v The Queen* [2017] HCA 20, *HML v The Queen*; *SB v The Queen*; *OAE v The Queen* (2008) 235 CLR 334 applied

**REPRESENTATION:**

*Counsel:*

Crown: D Dalrymple

Accused: J Adams

*Solicitors:*

Crown: Director of Public Prosecutions

Accused: Northern Territory Legal Aid  
Commission

Judgment category classification: B

Judgment ID Number: Ke11907

Number of pages: 13

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

*The Queen v Dixon-Hargraves* [2019] NTSC 29  
21816477, 21816481 and 21835038

BETWEEN:

**THE QUEEN**

AND:

**KARL DIXON-HARGRAVES**

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 30 April 2019)

- [1] The accused is charged with one count of unlawfully causing serious harm to Sheena Edwards and three counts of aggravated assault against the same woman in each of which the victim is alleged to have suffered harm and each of which is alleged to have involved the use of a weapon – a rock, a bicycle frame and a plastic milk crate respectively.
- [2] In summary, the Crown case on count 1 (a charge of aggravated assault) is that on 20 March 2018, the accused and the complainant were at Ryan Park in Katherine drinking together during the day. At about 9.00 pm, the accused wanted to leave but the complainant refused to go with him. The accused grabbed her right arm and twisted it, punched her in the face three times and then hit her on the head with a rock causing a laceration and bleeding.

- [3] The Crown case on count 2 (another charge of aggravated assault) is that on 3 April 2018, the accused and the complainant had been drinking together at the Last Chance Hotel in Katherine and were both intoxicated. Later that day they went to the house of a family member at Warlpiri Camp. The accused became angry at the complainant over jealousy issues. He shouted at her. She did not respond. Then he hit her on the head with a metal bicycle frame, then threw the frame at her head. She suffered a 3 cm laceration over her right ear which required five staples and a superficial laceration over her right eyebrow.
- [4] The accused was arrested on 11 April 2018. He denied the offending alleged in relation to count 1. He said the complainant had fallen over and that he had called an ambulance for her. He declined to answer questions in relation to the alleged offending on count 2. He was granted bail on 31 May 2018. On 12 April 2018, he was served with a Domestic Violence Order listing the complainant as the protected person.
- [5] The Crown case on count 3 (a further aggravated assault) and count 4 (the serious harm charge) is that on 7 August 2018, the accused became intoxicated. He and the complainant went to a bush camp behind Maluka Road, Katherine. The accused asked people there for more alcohol. They told him there was no more. The accused became angry with the complainant over jealousy issues. They argued and he hit her over the head, hard, with a plastic milk crate. Then he grabbed her by the hair and dragged her round the camp site. He kicked her in the face five or six times with hard capped

boots. She tried to get up but he kept kicking her down. He punched her in the eye while she lay on the ground.

- [6] Then the accused picked up a log from the camp fire. It was still smouldering on one end. The accused hit the complainant many times on the head, back, arms and hands with the burning log.
- [7] The complainant tried to hide behind a relative who was at the camp. The family member got the burning log away from the accused and threw it away – but the accused picked up another burning stick from the fire and kept hitting the complainant with it. Someone else took the second stick away from him and threw it away, at which point the accused ran away.
- [8] As a result of this attack, the complainant suffered burns, lacerations and multiple compound fractures to both hands and lacerations on her forearm and forehead. I take it that the compound fractures to the hands is alleged to constitute serious harm.
- [9] The accused has a history of violence against the same victim and, before that, against his previous partner.
- [10] In 2016 he was convicted of two assaults against the victim in this matter.
- (a) In January 2016, when the accused was intoxicated he hit her on the head and in the abdomen with a rock and then stabbed her in the back twice.

(b) In February 2016, while the accused was intoxicated, he threw the victim to the floor, causing her to hit her head and then hit her many times with a toilet brush.

[11] The accused also has four convictions for aggravated assault against his former domestic partner, Ms Crowson.

(a) On 25 May 2011, while he was intoxicated, the accused was arguing with Ms Crowson outside Woolworths shopping centre in Darwin. He pushed her in the chest, knocking her over, then while she was on the ground, he punched her in the chest, kicked her in the face and hit her on the forehead with a bottle causing a severe laceration.

(b) On 31 May 2011, near the water tower in Palmerston, the accused was arguing with Ms Crowson over jealousy issues. He punched her in the face twice, knocking her to the ground. Then he kicked her in the forehead, causing the earlier laceration to open up and bleed profusely.

(c) On 8 February 2014, the accused and Ms Crowson had been drinking. The accused punched Ms Crowson several times, knocking her down. He punched her in the head several times as she lay on the ground in the middle of the road. She got up and tried to defend herself and the accused ripped her backpack off and hit her with it. Then he tried to punch her again and finally kicked her in the ribs with a roundhouse kick knocking her sideways.

(d) On 26 December 2014, the accused and Ms Crowson had been drinking. They walked from Darwin CBD to Stuart Park and had a heated argument. The accused picked up a rock 30 cm in diameter and, using both hands, hit Ms Crowson on the forehead with it twice. She suffered a laceration over her left eye.

[12] The Crown has given notice under s 97(1) of the *Evidence (National Uniform Legislation) Act 2011* (NT) (“UEA”) of its intention to adduce tendency evidence.

[13] The notice advises that the tendencies sought to be proved are the tendency of the accused:

(a) to act in a particular way, namely:

(i) to engage in violent behaviour towards his domestic partner, especially after consuming alcohol, and/ or when the accused and the domestic partner have been arguing; and

(ii) to behave towards his partner in a controlling and threatening way; and

(b) to have a particular state of mind, namely “a violent disposition towards his domestic partner, upon which the accused is prepared to act when he is feeling angry and/or jealous, especially after having consumed alcohol”.

[14] The conduct about which evidence is sought to be adduced is the conduct the subject of the current charges as well as the conduct the subject of his previous convictions, summarised above.

[15] The substance of the evidence by which this tendency is sought to be established is set out in statutory declarations of the victims, the agreed sentencing facts and transcripts of plea hearings.

[16] The tendency evidence is said to be relevant to the following facts in issue in the proceeding:

(a) whether the accused caused the injuries to the complainant the subject of the four charges on the indictment;

(b) to rebut any defence proposition that those injuries were self-inflicted;  
and

(c) to rebut any defence proposition that the injuries suffered by the complainant on the relevant dates were accidental or the result of some event other than the application of violent force by the accused.

[17] Under UEA s 97 evidence of the conduct of a person is not admissible to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind unless the appropriate notice has been given and the court thinks that the evidence will (either by itself or having regard to other evidence to be adduced) have significant probative value.

[18] There is no dispute about the adequacy of the notice. The question, therefore, is whether the evidence has significant probative value in relation to the issues set out above.

[19] The potential probative value of tendency evidence was explained by the High Court in *Hughes v The Queen*:<sup>1</sup>

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 starting point in either case requires identifying the tendency and the fact or facts in issue which it is adduced to prove. The facts in issue in a criminal proceeding are those which establish the elements of the offence. (*citations omitted*)

[20] Assessing the probative value of proposed tendency evidence is therefore a two stage process. As the plurality said in *Hughes*:<sup>2</sup>

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. The second matter is the extent to which the tendency makes more likely the facts making up the charged offence. Where the question is not one of the identity of a known offender but is instead a question concerning whether the offence was committed, it is important to consider both matters. By seeing that there are two matters involved it is easier to appreciate the dangers in focusing on single labels such as “underlying unity”, “pattern of conduct” or “modus operandi”. In summary, there is likely to be a high degree of probative value where (i) the evidence,

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1 [2017] HCA 20 at [16] per Kiefel CJ, Bell, Keane and Edelman JJ

2 Ibid at [41]

by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged.

[21] The first question is the extent to which the evidence sought to be adduced tends to establish that the accused had the tendency to act in the way asserted in the notice. In my view the evidence is not only capable of supporting, but in fact strongly supports, proof of a tendency in the accused to engage in violent behaviour towards his domestic partner, especially after consuming alcohol, and/or when the accused and the domestic partner have been arguing; and also to behave towards his partner in a controlling and threatening way. He has been engaging in violent controlling conduct towards his partners since 2011 in a pattern of behaviour involving drinking to intoxication, arguments over “jealousy issues”, and violent assaults. These assaults are often initiated by punching or pushing the victim over and then further assaulting her by punching and/or kicking her while she is helpless on the ground; and more often than not they involve picking up a rock or other weapon and using it to hit the victim on the head and other parts of her body.

[22] The next question for consideration is whether, if the jury accepts that the accused had a tendency to engage in violent behaviour towards his domestic partner, especially after consuming alcohol, and/or when the accused and the domestic partner have been arguing (and perhaps also to behave towards his partner in a controlling and threatening way), that “strongly supports proof of a fact that makes up the offence charged”.

[23] In my view, it does. Counsel for the Crown submitted that the alleged tendency was highly probative for at least two reasons.

- (a) A pattern of past violent, controlling behaviour and in some instances extreme violent behaviour towards a domestic partner is strongly predictive of ongoing behaviour.
- (b) The established pattern of admitted behaviour points to the unlikelihood of the injuries referred to in the contested charges having been caused by accident, or by some other, unidentified random person.

I agree.

[24] In particular, evidence of that tendency is apt to affect the assessment of the probability of whether the injuries that the complainant suffered on the days in question were self-inflicted or otherwise caused by some means other than the application of violent force by the accused. It is to be noted that this is a live issue in the case. When interviewed by police in relation to the alleged assault constituted by count 1, the accused said that the complainant's injuries were a result of her having fallen over, and that he had called an ambulance for her.

[25] I am therefore satisfied that the threshold test in s 97 has been met. The evidence sought to be adduced as tendency evidence does, both by itself<sup>3</sup> and in conjunction with other evidence which, I presume, will be adduced

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**3** The evidence sought to be relied on as tendency evidence includes the evidence of the complainant as to what the accused did to her in relation to each of the charges on the indictment.

(for example medical evidence about the accused's injuries) have significant probative value.

[26] Defence counsel submitted that “the previous conduct and the currently charged conduct point to no distinctive or individual conduct of the accused” because the tendency proposed by the Crown, namely that of engaging “in violent behaviour towards a domestic partner especially after consuming alcohol, and/or when the accused and the domestic partner have been arguing” is very common in these courts. It was contended that “the commonality of this so called tendency strips it of any significant probative value.” Defence counsel made the same submission with respect to the alleged tendency of the accused “to behave towards his domestic partner in a controlling and threatening way.”

[27] I do not accept that submission. First, it is not a requirement for the admissibility of tendency evidence that the “previous conduct” and “the currently charged conduct” be distinctive, or even similar. As the High Court said in *Hughes*:<sup>4</sup>

Section 97(1) does not, however, condition the admission of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue. The probative value of tendency evidence will vary depending upon the issue that it is adduced to prove. In criminal proceedings where it is adduced to prove the identity of the offender for a known offence, the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence. Different considerations may inform the probative value of tendency evidence where the fact in issue is the occurrence of the offence.

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<sup>4</sup> at [39] per Kiefel CJ, Bell, Keane and Edelman JJ; See also at [41]

In any event, I consider that there are similar features which the accused's admitted past offences share in common with the offences with which he is presently charged. These are set out at [21] above.

[28] Second, it is not to the point that the tendency may be one commonly encountered, although, like similarity, that may be relevant to the strength of the probative value of the evidence in cases where what is in issue is the identity of the offender for a known offence. The questions to be answered are those outlined in *Hughes*: does the evidence support the alleged tendency, and does proof of the alleged tendency strongly support the supports the proof of a fact that makes up the offence charged. In my view, the answer to both of these questions is yes.

[29] The next step is to consider whether the evidence satisfies the requirements of UEA s 101. In a criminal trial such as this, tendency evidence is not admissible unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant. This involves a balancing exercise assessing and weighing the probative value of the evidence against any potential prejudicial effect it may have on the defendant.

[30] When undertaking this balancing exercise, the dominant consideration is to ensure that the accused is not deprived by prejudice of a fair trial.<sup>5</sup> The notion of prejudice in this general context "... means the danger of improper

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<sup>5</sup> *The Queen v AW* [2018] NTSC 29 at [30]

use of the evidence. It does not mean its legitimate tendency to inculcate.”<sup>6</sup>

Something more is required, such as the possibility that the evidence may be misused by the jury in some respect.

[31] The plurality in *Hughes*<sup>7</sup> explained the kinds of potential prejudice that can arise in a criminal trial such as this:

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 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.

[32] In this case, the only potential prejudice identified by the defence is a possibility that the jury may engage in rank propensity reasoning: “The accused has engaged in domestic violence before and therefore he is of a mind to engage in such conduct on this occasion”. I do not think the risk of this is very great and, in my view, it can be adequately guarded against by the usual warnings. The use of this kind of tendency evidence of course

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6 *HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 235 CLR 334 at [12] per Gleeson CJ

7 at [17]

involves a kind of permissible propensity reasoning. As the plurality said in *Hughes*:<sup>8</sup>

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.

[33] Balanced against this, I consider the probative value of the evidence to be very high. I consider that the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant. The tendency evidence specified in the notice will be admitted.

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**8** at [16]