The Queen v XZ [2016] NTSC 14

PARTIES:	The Queen
	v
	XZ
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING CRIMINAL JURISDICTION
FILE NO:	21405513
DELIVERED:	15 March 2016
HEARING DATES:	22, 23 February 2016
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

EVIDENCE – Voir dire- Sexual Offences – Tendency Evidence - Whether a reasonable possibility of collusion, concoction or contamination– Whether Counsel could re-open the issue of admissibility of tendency evidence – Cross-examination - Real chance of collusion, concoction or contamination - Child witnesses –Effect of concoction, collusion on probative value – Leave granted to recall some witnesses.

EVIDENCE – Voir dire- Sexual offences - Tendency evidence – Context evidence – Relationship evidence - Whether a reasonable possibility of collusion, concoction or contamination–Child witnesses – Evidence to prove a sexual interest – Effect of concoction, collusion on probative value – Risk of contamination going to the substance of the evidence – Real chance of collusion, concoction or contamination – Reasonable Possibility of Collusion or Concoction - Assessment of probative value a matter of

common sense and experience – Application of Hoch v The Queen under the Uniform Evidence Act- Portion of Tendency Evidence excluded – balance of evidence admitted.

EVIDENCE – Sexual offences - Tendency Evidence Notice requirements – Proof of a sexual interest - Notice dispensed with pursuant to s 100 of the Uniform Evidence Act in the use of evidence from one witness.

Evidence (National Uniform Legislation) Act (NT) ss 97, 100, 101

Director of Public Prosecutions v Boardman [1975] AC 421; *R v OGD (No 2)* [2000] NSWCCA 404; *R v Murdoch (A Pseydonym) v The Queen* (2013) 40 VR 451; *SLS v R (2014)* 42 VR 64*; Velkoski v The Queen* [2014] VCSA 121, referred to.

BP v The Queen [2010] NSWCCA 303; *R v Altomonte* [2015] NTSC 57; *R v Hoch* (1988) 165 CLR 292; *R v JRW* [2014] NTSC 52, followed.

REPRESENTATION:

Counsel:

Appellant:	T Berkley
Respondent:	T Lee

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Halfpennys Lawyers

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

The Queen v XZ [2016]
No. 21405513

BETWEEN:

THE QUEEN
Appellant

AND:

XZ
Respondent

CORAM: BLOKLAND J

Rulings on Tendency Evidence
(Delivered 15 March 2016)

Introduction

[1] This matter has some history. For reasons of brevity I will not set out all of the background, save that on 12 May 2015, after hearing an application to sever the indictment, one count of assault with circumstances of aggravation was ordered to be severed from an indictment originally charging seven counts.

[2] A trial took place in relation to that count. On 25 May 2015, a verdict of guilty for the offence of aggravated assault was returned, the circumstance of aggravation being that the offender was male and the

victim female. A verdict of not guilty was returned with respect to the circumstance of aggravation alleging indecency.

[3] The six remaining counts charged indecent dealing of a child under 16 years, contrary to s 132 (2)(a) of the *Criminal Code (NT)*. There were four alleged victims, all school students. The accused was their teacher. The substance of the indecent dealing allegations involved two of the complainants being touched or wiped on the legs, one complainant being touched on two occasions on her breast and another complainant being touched on her bottom and breasts.

[4] After relatively confined argument in the context of the earlier severance argument, on 12 May 2015, I ruled that certain proposed evidence outlined in the Tendency Evidence Notice served by the Crown could be led in proof of the six remaining counts. Other parts of the proposed tendency evidence were excluded. The rulings were made prior to the pre-recording of the complainants' evidence and of the tendency evidence witnesses who were not complainants.

[5] Since the arguments and rulings made on 12 May 2015, and the trial that concluded on 25 May 2015, both parties changed counsel. Current counsel for the accused, Ms Lee, sought to re-open the issue of the admissibility of tendency evidence on the grounds that no argument was put and no consideration was given by the Court at the previous hearing on the question of whether there was a reasonable possibility of collusion

or concoction. The ultimate submission was that certain evidence should not be admitted as tendency evidence.

[6] Counsel for the Crown contended that the previous ruling should stand; that there was no evidence of collusion or concoction; and that if the matter were to be revisited, the accused would need to make an application to cross examine the witnesses further, leading to delay and inconvenience for witnesses. All relevant witnesses were children, bringing into operation the principles relevant to child and vulnerable witnesses. Counsel for the Crown also submitted the way the case was conducted on behalf of the accused in May 2015 would have been on the basis of tactic and forensic decisions. It was argued that in fairness to all parties, the forensic decisions made on behalf of the accused and the subsequent rulings should stand.

[7] On the basis of fair trial principles I agreed to revisit the issue. A review of the transcript from May 2015 indicated no submission was made by either counsel on the subject of reasonable possibility of collusion or concoction. Further, no reference was made to that consideration in the brief reasons given at the time. In May 2015, relevant witnesses giving pre-recorded evidence were examined and cross examined generally about the alleged incidents, the subject of the charges, and the events and circumstances comprising the tendency evidence.

[8] Critical questions were directed to the innocence of any touching that was alleged to have occurred or in some instances that an asserted event did not happen at all. Collusion was not suggested to relevant witnesses. Arguments about potential tendency evidence were made in the context of the severance argument, the primary matter being dealt with at that time. The Court did not take into account in a tangible way, the issue of possible collusion or concoction in the assessment of the probative value of the posited evidence, as the issue had not been raised. In my view the provision of a fair trial required this matter be considered afresh.

The Tendency Sought To Be Proved

[9] The tendency sought to be proved by counsel for the Crown, as set out in the Tendency Evidence Notice, is the tendency of the accused to:

(a) Act in a particular way, namely:

- To be friendly and liberal (compared to other teachers)
- To make comments/jokes with an adult sexual flavour with students in a way that teachers normally would not
- To pay special attention to a group, and female groups particularly
- To give treats or privileges to select students or groups, particularly female
- To touch or get physically close to female students in a way that a teacher normally would not

- To ingratiate himself with a group of students, so that he could either opportunistically or deliberately target certain teenaged female students and touch them in an indecent manner for his sexual gratification; and

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

- A sexual interest in his teenaged students upon which he was prepared to act, at significant risk, when an opportunity arose.

[10] These reasons will not set out each of the items of evidence listed in the Tendency Evidence Notice, with the exception of material sourced in the Incident Reports of 9 December 2013. In relation to the evidence that was before me, I confirm my previous view that while each of the items of evidence taken alone may not clearly fulfil the requirements of s 97 and s 101 of the *Uniform Evidence Act*, the proposed items of evidence taken together have a strong capacity to prove the sexual interest and tendency to act on it as contended by the Crown. The tendency sought to be proved was not prejudicial in the sense contemplated by the Uniform Evidence Act. Evidence of sexual interest is well amendable to orthodox directions. The danger of unfair prejudice is consequently significantly lowered if clear directions are given to the jury.

Application of the Relevant Principles

[11] In this matter it was clear that in the context of school friends, many of whom were in the same year and class, there was opportunity for discussion. Certainly witnesses were open about who they had discussed the alleged actions of the accused with, and when. Some witnesses (e.g.

C1) had made complaints prior to discussion with other witnesses, while others had discussed peripheral parts of what they said had occurred. Ultimately on revisiting the issue, evidence sourced in the Incident Reports dated 9 December 2013 was excluded from the tendency evidence on the basis of diminished probative value due to a discussion between witnesses after they had given one account to the school assistant principal, followed by further accounts on 9 December 2013. The Court was referred to a number of authorities illustrating the application of the relevant principles.

[12] In *R v JRW,*[1] Riley CJ dealt with an indictment containing four counts of indecent assault upon three victims, the accused's stepdaughters. While it was plain from the evidence that each of the sisters were aware the others had been molested, "there was no discussion in any detail of what each complainant said."

[13] The proposed tendency evidence in *JRW,*[2] sought to establish that the accused acted in a particular way, namely engaged in inappropriate sexual touching of young females from the same family, and that he had a particular state of mind, namely a sexual interest in young females in the same family upon which he was prepared to act. The Crown also sought to use this evidence to rebut any suggestion of accidental or unintentional touching.

[1] [2014] NTSC 52
[2] Ibid

[14] In relation to section 97(1) of the *Uniform Evidence Act*, his Honour confirmed that tendency evidence is inadmissible unless the court thinks that the evidence will, either by itself or in combination with other evidence, have significant probative value. It was held the evidence of each complainant had significant probative value.[3] In considering the possibility of concoction in relation to the admissibility of tendency evidence, the principles were summarised as follows:

> In order to determine the admissibility of the tendency evidence it is necessary to consider the possibility of joint concoction in relation to the evidence of each of the complainants. If joint concoction cannot be excluded, the evidence will not possess the same probative value as would otherwise be the case. It is the possibility of concoction, not the probability or a real chance of concoction, which will lead to the evidence being excluded**.** [4]

[15] After considering *Murdoch (A Pseudonym) v The Queen,*[5] *SLS v R,*[6] *BP v The Queen,*[7] and *Velkoski v The Queen,*[8] it was concluded that it is not the risk of any contamination whatsoever which necessarily requires the exclusion of tendency evidence, but rather, there must be a risk of contamination going to the substance of the evidence and not merely to the incidental details.

[16] The Crown must exclude "a real chance of contamination going to the substance of the evidence" to enable the tendency evidence to be

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[3] *R v JRW* [2014] NTSC 52, [32]
[4] Ibid [34]
[5] (2013) 40 VR 451, [7]
[6] (2014) 42 VR 64, [178]
[7] [2010] NSWCCA 303, [123]
[8] [2014] VCSA 121,[173 (c)]

admitted.[9] There must be an identified basis found in the evidence for a conclusion that it is reasonably possible that there may have been concoction, collaboration or contamination. It is not enough the opportunity existed; a mere speculative suggestion of concoction, collusion, collaboration or contamination is not sufficient.[10]

[17] In *JRW*[11], his Honour considered "motive" and the timing of the complaints. While it was accepted there was opportunity for the witnesses to collude, it was determined that a jury acting reasonably could not find a reasonable possibility of collusion or collaboration between the complainants, or that their accounts were contaminated.[12]

[18] In *R v Altomonte*,[13] the proposed tendency evidence was a tendency by the accused to engage in inappropriate sexual touching of his massage clients and possessing a sexual interest in his massage clients upon which he was prepared to act. Neither of the complainants knew one another there was no relationship between them, and there was no opportunity to jointly concoct.

[19] In relation to concoction, Barr J noted:

> Where there is a reasonable possibility of concoction of the evidence of a proposed tendency witness, and the Crown fails to exclude that possibility, the evidence must be excluded. The reason is that concoction deprives the tendency evidence of its significant

[9] *R v JRW* [2014] NTSC 52, [37]
[10] Ibid [40]
[11] [2014] NTSC 52
[12] Ibid [34]
[13] [2015] NTSC 57

probative value. Moreover, where the Crown fails to exclude the reasonable possibility of concoction, the probative value of the evidence of the tendency witness would be outweighed by its prejudicial effect.[14]

[20] In reliance on *BP v The Queen,*[15] it was held the Crown must exclude "a real chance of contamination going to the substance of the evidence" for the tendency evidence to be admitted.

[21] It was also observed that a suggestion of contaminated evidence by a person other than one of the complainants "is an ordinary matter of credit and does not affect the ability of [the complainant] to give tendency evidence at the trial of the charges of [the other complainant]. It is the risk of joint contamination between a complainant and a tendency witness which deprives the tendency evidence of significant probative value." [16]

[22] In *SLS v The Queen,*[17] the Victorian Court of Appeal set aside the decision of the trial judge, ruling that evidence between two complainants was not cross admissible. In considering possible collusion or concoction in the assessment of the tendency evidence, the Court noted that the possibility of joint concoction or contamination was to be assessed in order to determine the probative value of tendency or coincidence evidence. It was the reasonable possibility (not a probability or real chance) of

[14] *R v Altomonte* [2015] NTSC 57
[15] [2010] NSWCCA 303
[16] *R v Altomonte* [2015] NTSC 57, [33]
[17] *SLS v The Queen* (2014) 42 VR 64

concoction, collusion, collaboration or contamination, which rendered such evidence inadmissible.[18]

[23] In *SLS,*[19] it was held that for the purpose of assessing whether there is a reasonable possibility of collusion or contamination the trial judge must engage in a fact-finding exercise, in which the objective record about matters such as relationship, opportunity and motive are to be considered.

[24] It was pointed out the task of the trial judge was not to undertake an assessment of the reliability and credibility of the witness when deciding whether there was a real possibility of concoction or contamination. It was held the trial judge had fallen into plain error as the question was not whether a jury could accept the complainants' exculpatory accounts and reject a reasonable possibility of concoction or contamination, but whether a jury acting reasonably could find there was a reasonable possibility of collusion or collaboration between the complainants or that their accounts were contaminated.[20]

[25] In *SLS,*[21] it was the circumstances in which the victims complained to their school, the uncontroversial evidence that the complainants were best friends, and among other things, had discussed the appellant's conduct,

[18] *SLS v The Queen* (2014) 42 VR 64, [178]
[19] Ibid 176] – [178]
[20] Ibid [178]
[21] [2014] NTSC 52

that led to the conclusion that collusion or contamination was a hypothesis that the Crown could not exclude.[22]

[26] In considering the question of concoction, in *BP v The Queen*,[23] the New South Wales Court of Criminal Appeal summarised the position as follows:

> One matter that powerfully affects both the probative value of tendency evidence and the possibility of prejudicial effect is the risk of concoction or contamination of evidence. If the evidence of tendency from different witnesses is reasonably capable of explanation on the basis of concoction, then it will not have the necessary probative value: *Hoch v The Queen* (1988) 165 CLR 292.
>
> However, this will be so only if there is a real chance rather than a merely speculative chance of concoction: *R v Colby* [1999] NSWCCA 261 at [111], *R v OGD* (No 2) [2000] NSWCCA 404; (2000) 50 NSWLR 433 at [74], [112]. The onus is on the Crown to negate the "real chance" of concoction: *OGD* at [74], *R v F* [2002] NSWCCA 125; (2002) 129 A Crim R 126 at [48].
>
> Relevant to consideration of concoction are the factors mentioned in *Hoch*[24] at 297, namely relationship, opportunity and motive. One of these on its own is not sufficient to base a finding of a real possibility of concoction: *R v RN* [2005] NSWCCA 413 at [15], *OGD*[25] at [111] – [112].[26]

[27] In *BP*,[27] it was found that the features of the appellant's conduct described by each complainant were sufficiently similar and sufficiently unusual for the evidence to have significant probative value in showing the specified

[22] [2014] NTSC 52
[23] [2010] NSWCCA 303
[24] *Hoch v The Queen* (1988) 165 CLR, [297]
[25] *R v OGD* (No 2) [2000] NSWCCA 404
[26] Ibid [110]
[27] [2010] NSWCCA 303, 112]

tendencies; and that the existence of those tendencies would have significant probative value in supporting the other evidence that the appellant committed the offences charged.

[28] It was concluded that "there was no real chance of concoction, and that consideration of the question of concoction [did] not alter the conclusion that the evidence had significant probative value, and that this probative value substantially outweighed any prejudicial effect." [28]

[29] In *Hoch v The Queen,*[29] the High Court considered the admissibility of similar fact evidence at common law, in circumstances where the question of concoction was raised. The plurality (Mason CJ, Wilson and Gaudron JJ) made reference of Lord Wilberforce in *Director of Public Prosecutions v Boardman,*[30] and stated:

> His Lordship there posited that the possibility of concoction - not a probability or real chance of concoction - served to render such evidence inadmissible. Indeed we think that must be right. Similar fact evidence is circumstantial evidence, as is implicit in what was said by Dixon J in *Martin v Osborne* [1936] HCA 23; (1936) 55 CLR 367 at 375 and as pointed out by Dawson J in *Sutton v The Queen* [1984] HCA 5; (1984) 152 CLR 528 at 564. In *Sutton* (at 564) Dawson J expressed the view, with which we agree, that to determine the admissibility of similar fact evidence the trial judge apply the same test as a jury must apply in dealing with circumstantial evidence, and ask whether there is a rational view of the evidence that is inconsistent with the guilt of the accused.
>
> In cases such as the present, the similar fact evidence serves two functions. It's first function is, as circumstantial evidence, to

[28] *BP v The Queen* [2010] NSWCCA 303, [120]
[29] (1988) 165 CLR 292
[30] [1975] AC 421 at 444

corroborate or confirm the veracity of the evidence given by other complainants. Its second function is to serve as circumstantial evidence of the happening of the event of events in issue. In relation to both functions the evidence, being circumstantial evidence, had probative value only if it bears no reasonable explanation other than the happening of the events in issue. In cases where there is a possibility of joint concoction there is another rational view of the evidence. That rational view – viz. joint concoction – is inconsistent both with the guilt of the accused person and with the improbability of the complainants having concocted similar lies. It thus destroys the probative value of the evidence which is a condition precedent to its admissibility.

Thus, in our view, the admissibility of similar fact evidence in cases such as the present depends on that evidence having the quality that is not reasonably explicable on the basis of concoction. That is a matter to be determined, as in all cases of circumstantial evidence, in the light of common sense and experience. It is not a matter that necessarily involves an examination on *voir dire*. If the depositions of witnesses in committal proceedings or the statements of witnesses indicate that the witnesses had no relationship with each other prior to the making of the various complaints, and that is unchallenged, then, assuming the requisite degree of similarity, common sense and experience would indicate that the evidence bears that probative force which renders it admissible. On the other hand, if the depositions or the statements indicate that the complainants have a sufficient relationship to each other and have the opportunity and motive for concoction then, as a matter of common sense and experience, the evidence will lack the degree of probative value necessary to render it admissible. Of course there may be cases where an examination on the *voir dire* is necessary, but that will be for the purpose of ascertaining the facts relevant to the circumstances of the witnesses to permit an assessment of the probative value of the evidence by reference to the consideration whether, in the light of common sense and experience, it is capable of *reasonable explanation* on the basis of concoction. It will not be for the purpose of the trial judge making a preliminary finding whether there was or was not concoction" (emphasis on original).[31]

[30] Brennan and Dawson JJ said:

[31] *Hoch v The Queen* (1988) 165 CLR 2012, [296]

> If there is a real danger of the concoction of similar fact evidence it is consistent with the attitude which the law adopts toward evidence of that kind that it should exclude it upon the basis that its probative value is depreciated to an extent that a jury may be tempted to act upon prejudice rather than proof. That consideration is of special importance in cases where the fact to be proved is inferred not from similar facts which have been clearly established but from the concatenation of the testimony of a number of witnesses who depose to the occurrence of similar facts. The credibility of that testimony bears directly on the probative force of the evidence. Several witnesses all giving evidence to a similar effect are generally easier to believe than one witness. But if the witnesses have put their heads together that is not the case.[32]

[31] In *Murdoch (A Pseydonym) v The Queen,*[33] the Victorian Court of Appeal confirmed the approach taken at common law as set out in *Hoch v The Queen,*[34] continues to apply under the *Uniform Evidence Act.*

[32] In relation to whether there was error admitting the accounts of two complainants as tendency and coincidence evidence when the reasonable possibility of collusion and concoction could not be excluded, Redlich JA and Coghlan JA said:

> It was for the trial judge to determine only whether those features of the complainants' accounts which had the requisite degree of similarity were capable of reasonable explanation on the basis of collusion and concoction. If there was a rational view that those features of the two complainants' account could be so explained, the evidence of one could no longer have probative value as confirmatory of the others account. The requirement of section 101(2) of the *Evidence Act* 2008 could

[32] *Hoch v The Queen* (1988) 165 CLR 292, [302]
[33] [2013] VSCA 272
[34] (1988) 165 CLR 2012

> not be satisfied as the evidence did not have the necessary degree of cogency.[35]

[33] Redlich JA and Coghlan JA made clear the continued application of *Hoch:*

> Where with respect to tendency and coincidence evidence there exists a real possibility of concoction, collusion or contamination, the position under the *Evidence Act* is akin to that at common law following *Hoch*. [36]

[34] Further, their Honours stated this threshold test could include unconscious influence: "Where there is a real possibility of contamination-concoction, collusion, unconscious influence and the like – evidence and coincidence will fall at the threshold, since it will not possess the significant probative value which is necessary to its reception. It will be inadmissible." [37]

Discussion of the Evidence Relevant to the Question of Reasonable Possibility of Collusion or Concoction

[35] As a review of recent authorities makes plain, if witnesses have a sufficient relationship with each other, opportunity and motive for concoction, then as a matter of common sense and experience, the evidence will lack the degree of probative value required for admission. Not all three factors need to be present.

[35] (1988) 165 CLR 2012
[36] *Murdoch (A Pseydonym) v The Queen* [2013] VSCA 272, [72]
[37] Ibid.

[36] Counsel for the Crown contended that the evidential material before the Court at the time the question fell for consideration was insufficient to justify the exclusion of the tendency evidence. It was argued the evidence raised only a suspicion and it would be speculation to place the relationships and discussions between the witnesses into the category of concoction.

[37] Counsel for the accused contended the evidence disclosed a reasonable possibility of concoction therefore lacking the probative force required for it to be led. In particular it was pointed out the evidence revealed there were rumours within the school among the students about the accused.

[38] After reviewing the material before the Court, comprising primarily the Incident Reports, recorded interviews with police and pre-recorded evidence, I indicated that in my opinion there existed relationships of the type spoken of in *Hoch*,[38] and with many of the witnesses there had been some discussion, however a motive to concoct or innocent contamination was not a real possibility. The substance of the allegations made by the complainants differed noticeably. While there was no doubt discussion, it was primarily concerned with matters peripheral to the evidence of the offending. It would have been speculative and giving way to simple suspicion to hold collusion or concoction a real possibility. As mentioned, no motive could be detected, it was quite the opposite for a

[38] (1988) 165 CLR 2012

number of witnesses, who clearly liked the accused. Accounts varied as between witnesses. This was not indicative of collusion or even innocent concoction.

[39] The complainant with respect to count 1 (C1) gave evidence that she and the complainant with respect to count 2 (C2) became dirty after emptying bins. They started washing their legs and the accused said “no, no you’re doing it wrong”, so he started to wash them, and pulled up the shorts of C1 who said “that’s not appropriate.” C1’s aunt gave evidence of C1 telling her about the incident on the same day after school. This detracted significantly from a conclusion of reasonable possibility of concoction.

[40] In her Incident Report dated 4 December 2013, C1 described the allegation. She also wrote about another incident where the accused rested his hand very close to her bottom. She stated in the Incident Report dated 4 December 2013: “A group of us have noticed that he will never go near or help the boys, he will only help the girls with their projects.” She nominated “other people” with “more information” as W2, W3 and W1 (witnesses but not complainants) and C2 (complainant with respect to count 2). C1 and C2’s accounts of the incident, the subject of counts 1 and 2, varied in a way that was not at all indicative of concoction.

[41] In C1’s interview with police she was asked “And like you speak amongst your friends about this stuff?” and she said “Yeah”. She answered that

she had told one of her best friends and had told her "about all the stuff he's done and she was in one of the classes but she said that he's never done anything to her." She also spoke of telling W5 and W1. She said W5 helps them and makes them feel more comfortable.

[42] The way C1 said she came to tell the school principal was that some girls in one class told another teacher that XZ "was really creepy and stuff"; that the particular teacher was saying it was rumour and not true and said "if you really want to talk to me about it come and stay after school." C1's aunt, also a teacher said "Oh C1 and her friends have some stuff to say". The principal took C1 out of the class and wrote down the names of "Other people with more information."[39] Those names were the witnesses W2, W3, and W1 and C2 (the complainant in count 2).

[43] Cross examination of C1 focused on the nature of the allegations. It was suggested that the acts comprising count 1 were not entirely as she described them, however it was not suggested the overall incident did not take place. It was suggested the touching of her back on another occasion was a push. It was also suggested she was wrong about her description of an incident where her aunt drove XZ home and had chosen to sit in the back of the car with her.

[44] C2's description of the events in counts 1 and 2 differed. She added the accused had said "nice legs girls." It was suggested to her he had said

[39] Incident Report of C1 dated 4 December 2013

"nice clean legs girls." As well as being the complainant with respect to count 2, C2 was to give certain tendency evidence. The anticipated tendency evidence was in respect of the accused giving her and other girls chocolates. On one occasion, she said a chocolate was placed on her shoulder and it fell off down the front of her shirt. She was cross examined about this and agreed she was not the only person who was given chocolates. She did not know if students were given chocolates for chores such as cleaning up.

[45] As well as describing the allegation in count 2 in her Incident Report dated 9 December 2013, C2 wrote a letter to the principal. In both that Incident Report and the later letter she said XZ "now and then" would come behind her, put his hand on her shoulder and "it got a little bit awkward, and creepy." She wrote "he teases all us girls." She wrote that W3, W1 and W2 "told us everything XZ did." She listed a number of allegations adding "Don't know if these really happened." She wrote that a number of the students started to get "really creeped out" so they told W5 who has been "looking out for them." She then listed a number of names.

[46] W1 was not a complainant witness however provided two Incident Reports. The first on 5 December 2013 and the second on 9 December 2013. She stated the accused had touched her lower back to push her forward. She said he comes very close to her and she would move away. In response to her asking for help she said the accused said "I will do

anything for you, W1." She stated he gives girls special treatment. She banged her knee and he said, "I'd rub it better but I'm not allowed to." She stated she thinks he put a chocolate in W3's pocket.

[47] W1's Incident Report dated 9 December 2013 reveals that she had discussed the accused with W2 and that she, W2 and W3 "know that we have to take precautions to prevent anything creepy. Some things we do is stay together, help each other out. And we also have to know what to do when something creepy happens. Things like walk away and notify someone in our group about it. We always have W5 to look out for us."

[48] In her record of interview with police W1 stated "I didn't notice anything weird in year 7 but I heard – only heard this year that he did some creepy stuff to C1 and I think it was C2." [40] She further explained she initially had no problem with XZ but that he had touched her lower back, and gets close, and she gets uncomfortable.[41]

[49] She also spoke of an incident when XZ almost grabbed her wrist or touched her hand,[42] and said W3, one of (her) best friends gave her a look, like "what happened."

[50] Later in the record of interview she talked about the incident with XZ where he said he would rub her leg but was "not allowed to." [43] She said she would not expect that from anyone except XZ "cause he's like that,

[40] Record of Interview, 10 January 2014 at 7
[41] Record of Interview, 10 January 2014 at 8-9
[42] Record of Interview, 10 January 2014 at 13
[43] Record of Interview, 10 January 2014 at 17

he's a bit strange and he's a bit creepy and he kind of – he gives girls special treatment". Of those girls, she mentioned W3 and another girl who was called to the office with her, the first time she was talking to the principal and counsellor and "she said that sometimes he's done some creepy stuff like she – he pretty much did all of her work in the third term, like that's the first time we had him."[44] She named that girl as W6.

[51] W1 also told police that some of her friends think XZ has done nothing wrong because he has done nothing to them, but, "I always talk to my friends in a group even though they're not in my … class." She also referred to W5 seeing an incident and "he knows what he can be like because we'd tell him stuff like that and he thinks it weird as well and he came up to me and whispered and he's like XZ is behind you."[45]

[52] W1 gave evidence she was friends in year seven with C2, W3, and C1 and in year 8 with W3, W2, W5 and W6.[46]

[53] W2's first Incident Report was prepared on 5 December 2014. She reported witnessing XZ touch W1 above the knee; that XZ pushed her along and touched her upper left side; and that she was not keen to go into the room by herself, so she asked W3 to come. XZ overheard a comment she made to another teacher and remarked "you're still a babe." She listed the students the principal should speak to as W3, W1 and W6.

[44] Record of Interview, 10 January 2014 at 17-18
[45] Record of Interview, 10 January 2014 at 22
[46] Transcript, 12 May 2015 at 117

[54] During her recorded interview with police W2 said of writing two Incident Reports: "The first one I got pulled out of class and I didn't know what was happening and then she explained to me and then I wrote that one from everything I could remember and the whole group of girls and myself decided that we had to go and talk to her but because you can't talk to her altogether, like in a big group, we had to write another one from everything we could remember again." [47]

[55] In her Incident Report of 9 December 2013, W2 wrote that W3 told her by phoning her that XZ had put a chocolate in her pocket. She was asked about this incident in the record of interview with police. She referred to W3 telling her about the chocolate incident and that W3 had said W1 had it done to her also. She referred to being friends with W3 and W1 and said they would regularly or "always" be together.

[56] W5, who did not give evidence, wrote in his Incident Report of 7 January 2014 that he tried to help (W3, W1 and W2) by asking if they are feeling comfortable in particular situations. He reported that C3, one of the complainants, told him that XZ felt her breast and thought it was on purpose. He told her to report it but she did not as she was afraid of what would happen. He also wrote that XZ does work for the girls and not the boys.

[47] Record of Interview, 10 January 2014 at 9

[57] W3 referred to W2 as her best friend. She said XZ only does things to her friends, W1 and W2, and in the other classes C1 and C2.

[58] C3 was the complainant with respect to counts 3 and 4. In her record of interview,[48] C3 referred to the accused as a paedophile, as "like he's too nice. It's weird."[49] C3 told police about the allegations comprising counts 3 and 4, that the accused glided his arm across her breast on one occasion and on another touched her breast with his palm. She said she had not witnessed the accused do anything to anyone else.[50] She also spoke of there being "so many reports on him" and that "our whole school knows that he's a paedophile."[51]

[59] C4 was the complainant with respect to counts 5 and 6. She alleged XZ touched her on the breasts and bottom. Hers was the latest complaint made, well after the school investigation. She gave an Incident Report on 1 April 2014. She wrote a statement outlining her allegations, including that XZ told her to sit on his lap, and on another occasion told her to massage him. Her friends told her XZ was looking down her top. She also said he asked her to "twerk."

[60] C4's friends were W7 and W4. Counsel for the accused pointed out that the complaint by C4 was made after charges had been laid and after the publication of the following: a relevant Channel Nine News Bulletin, the

[48] 15 January 2013
[49] Record of Interview, 15 January 2013 at 3 (This part of the evidence formed no part of the proposed tendency evidence)
[50] Record of Interview, 15 January 2013 at 15
[51] Record of Interview, 15 January 2013 at 15

publication of articles in the NT News, various social media reports and a school newsletter regarding the investigation and charges. It was submitted that given the rumours at the school, the discussion at the school and reports through various media, that there was a real possibility of concoction with respect to the evidence of C4. It was also submitted that it lacked the features usually required of tendency evidence before its admission.

[61] Without witnesses being recalled, my conclusion was that given the difference in timing of each of the allegations raised and the differences in accounts overall about the accused's alleged behaviour, that notwithstanding some similarities (for example allegedly preferring girls or certain groups of girls over boys) in accounts given, there was not a reasonable possibility of collusion or concoction. Although not crucial to the decision, it was not suggested to any witness in May 2015 that they had colluded in their accounts.

[62] After reconsideration of the issue, leave was granted for counsel for the accused to recall C4 (the complainant with respect to counts 5 and 6) and to deal with the pre-recording of W2's evidence on the voir dire.[52] After hearing W2's evidence I concluded that any evidence sourced in the later Incident Reports of 9 December 2013 could not be led as tendency evidence as those witnesses who gave accounts on 9 December 2013 had clearly discussed the allegations and returned to the principal to give

[52] Transcript 23 February 2016 at 42-43

further accounts about the accused after those discussions. In the circumstances, innocent contamination or concoction could not reasonably be excluded. Adjustments were therefore made in respect of what parts of the evidence could be led from C2, W1, and W2 as tendency evidence. Other parts of their evidence that was not sourced in discussions of or about 9 December 2013 was admitted as tendency evidence.

[63] In respect of C4, I did not detect that she had been influenced by the material, including material on social media, said to be available to her about the accused. C4 denied being aware of much of it. In any event, her allegations and the incidents said to prove the tendency were in some instances unique. C4 gave an explanation about how she came to make the Incident Report in April 2014. That explanation was not indicative of collusion or contamination.

[64] Further, after hearing W2, certain parts of her evidence taken in the interview with police were permitted to be led as tendency evidence,[53] despite not being included in the Tendency Evidence Notice. The relevant evidence that was permitted to be led as tendency evidence from W2's interview included her observation that XZ was "touchy and odd"[54] in conjunction with a number of specific incidents, namely XZ touching W2 on the shoulder,[55] touching W1's leg "just above the knee" and W2

[54] Record of Interview, 10 January 2014 at 6
[55] Record of Interview, 10 January 2014 at 6

witnessing this,[56] pushing W2 along and touching her upper left side in a kind of down then up movement,[57] and an incident where XZ referred to W2 as a "babe".[58]

[65] It was clearly evidence capable of proving, in combination with other evidence, the sexual interest contended on behalf of the Crown. W2's evidence was not anticipated to be led for any other purpose. Notice was dispensed with pursuant to s 100 of the *Uniform Evidence Act*. The evidence may have alternatively been admitted as relevant to the relationship and overall circumstances that existed between W2 and the accused, however, essentially at its core it was relevant as proof of the sexual interest the Crown alleged. Taken with the other evidence on the point it fulfilled the requirements of s 97 and s 101 of the *Uniform Evidence Act*. I did not consider it unfair to the accused to admit it on the same basis as other evidence of sexual interest. The relevance of the evidence of W2 was patently clear. The risk of prejudice was capable of being well mitigated by standard tendency evidence directions.

[66] It is intended that these reasons provided to the parties be modified only to protect the identity of any witness, prior to publication.

[56] Record of Interview, 10 January 2014 at 7
[57] Record of Interview, 10 January 2014 at 7
[58] Record of Interview, 10 January 2014 at 8