

CITATION: *The King v Kopp* [2024] NTSC 22

PARTIES: THE KING

v

KOPP, Gregory

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising
Territory Jurisdiction

FILE NO: 22239231

DELIVERED: 5 April 2024

HEARING DATE: 3 April 2024

JUDGMENT OF: Grant CJ

REPRESENTATION:

Counsel:

Crown: T Gooley
Accused: B Le Comte

Solicitors:

Crown: Office of the Director of Public
Prosecutions
Accused: Northern Territory Legal Aid
Commission

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The King v Kopp [2024] NTSC 22
No. 22239231

BETWEEN:

THE KING

AND:

GREGORY KOPP

CORAM: GRANT CJ

REASONS FOR DECISION

(Delivered on 5 April 2024)

- [1] The accused is charged by indictment with four counts of aggravated assault, two counts of sexual intercourse without consent and one count of deprivation of liberty alleged to have been committed against the one complainant over the course of three days. The defence has filed a notice of its intention to adduce evidence of previous incidents involving the complainant in order to establish that she has a tendency to act in a particular way and have a particular state of mind. The purpose of the tendency evidence is to establish what the defence says is a reasonable possibility that the injuries sustained by the complainant at the material times were self-inflicted. The Crown objects to the receipt of the evidence for that purpose.

The Crown case

- [2] The Crown case is that at the time of the offending in late-2022, the accused and the complainant had been in an intermittent and dysfunctional relationship since 2015. The accused and the complainant were both recreational users of methamphetamine and at the time of the alleged offending had been using methamphetamine on a fortnightly basis.
- [3] It is alleged that on Christmas Day 2022, the accused grabbed the complainant by her arms and threw her to the ground, and on a later occasion lifted the complainant up by her throat, slapped her across the face and flung her across the room into a bookshelf, causing a 2.5 cm long laceration to her scalp. These allegations constitute the conduct alleged in the first and second counts of aggravated assault.
- [4] It is alleged that on Boxing Day 2022, the accused threw a mobile telephone at the complainant which hit her nose causing it to bleed, and on a later occasion forced her to make a cut on her throat with a knife. These allegations constitute the conduct alleged in the third and fourth counts of aggravated assault.
- [5] It is alleged that later on that same day the accused had non-consensual penile-vaginal sexual intercourse with the complainant, and then had non-consensual penile-anal sexual intercourse with the complainant.

These allegations constitute the conduct alleged in the fifth and sixth counts of sexual intercourse without consent.

- [6] It is alleged that on 27 December 2022, the accused forced the complainant into his car and detained her there while he drove to various locations. These allegations constitute the conduct alleged in the seventh count of deprivation of liberty.
- [7] The Crown intends to adduce evidence of the visible injuries with which the complainant presented at the Emergency Department of the Alice Springs Hospital on the afternoon of 27 December 2022. Those injuries included:
- (a) a 3cm x 8mm laceration on the right parietal scalp;
 - (b) a 1cm linear laceration on the bridge of the nose with surrounding bruising and dried blood in both nostrils;
 - (c) purple-pink bruising under the left eye with no visible eye trauma;
 - (d) 3 x curvilinear superficial skin breaks on the anterior neck with dried blood;
 - (e) multiple bruises on the left arm, including 3 x grey circular bruises 1cm x 1cm on the bicep, a larger yellow-brown bruise on the medial arm, a yellow-blue 1cm x 1cm bruise on the distal arm and a 3cm x 3cm grey bruise near the left elbow;
 - (f) a red bruise on the base of the left thumb and the first web space;

- (g) multiple bruises on the right arm, including a green-blue bruise 1cm x 2cm on the back of the arm, a grey-blue bruise 1cm x 2cm on the back of the arm, a 2cm x 2cm green-blue bruise over the anterolateral arm, a 2cm x 2cm blue bruise on the forearm proximally, a 1cm x 1cm brown bruise on the distal forearm, and a pink bruise and graze on the base of the thumb and first web space;
- (h) superficial grazes on the left anterior knee;
- (i) multiple bruises of varying sizes on the right upper arm and forearm;
- (j) a 4cm x 5cm purple bruise on the left mid-back over the lower ribs; and
- (k) a 2cm x 2cm grey-blue bruise on the midline of the lower lumbar spine at L2/3.

[8] The Crown also intends to adduce photographs which depict those injuries in a manner which is consistent with the descriptions in the clinical notes.

[9] The defence says that these injuries are self-inflicted, and that the complainant has certain tendencies, evidence of which is relevant to and probative in establishing a real possibility that the injuries are self-inflicted.

Tendency evidence

[10] Section 97 of the *Evidence (National Uniform Legislation) Act 2011*

(NT) ('the *ENULA*') provides for the admissibility of tendency evidence subject to the requirements of notice and significant probative value:

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.
- (2) Subsection (1)(a) does not apply if:
 - (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
 - (b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note for section 97

The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

[11] The tendency evidence is said in the notice to relate to '[w]hether the complainant's injuries are as a result of an assault by the accused, or rather as a direct or indirect result of the complainant self-harming'.

[12] The tendencies sought to be proved on the part of the complainant are said in the notice to be '[t]o engage in self-harming behaviour'; and '[t]o consider self-harm and suicide'.

[13] The tendency notice particularises the conduct to be established in proof of those asserted tendencies to be as follows.

- (a) At some time between 1 January 2018 and 31 December 2019, the complainant had an argument with her daughters, left the house in which the argument had taken place, got into a car and deliberately drove into a tree at the back of the property. The defence intends to adduce that evidence from the complainant in cross-examination, and from the accused in the event he is called to give evidence in his own defence.
- (b) At some time between 1 January 2020 and 31 December 2020, the complainant was admitted to the Alice Springs Hospital after hitting herself and threatening to cut herself with a knife. The defence intends to adduce that evidence from the complainant in cross-examination, and from the accused in the event he is called to give evidence in his own defence.
- (c) On 27 December 2022, the complainant expressed suicidal ideation. The defence intends to adduce that evidence from the complainant in cross-examination.

[14] In conjunction with the service of the tendency notice, the accused's legal representatives served a subpoena on the Alice Springs Hospital seeking production of the complainant's medical records. One purpose of that subpoena was clearly to seek further evidence and/or substantiation of the incidents referred to in the notice of tendency evidence. The bulk of those medical records deal with complaints and conditions – principally chest and abdominal pain, migraines, irritable bowel syndrome and chronic fatigue syndrome – unrelated to any suggestion of self-harm or suicidal ideation. However, a number of histories given by the complainant make general reference to depression and the feeling that she 'did not want to live anymore'. The only record disclosing anything which might be described as self-harm or a suicide attempt appears at page 88 of the medical records. That is a report of an attendance by the complainant at the Emergency Department on 5 June 2017 after self-inflicting a laceration to her left forearm with a Stanley knife. The wound was superficial and closed with sutures.

[15] As a consequence of the receipt of that material, the defence made an oral application to amend the table in the notice of tendency evidence which sets out the particulars and substance of the evidence. The Crown did not object to the amendments, but maintains its objection to the receipt of the evidence for any tendency purpose. The amendments to the particulars and substance of the evidence are as follows.

- (a) The particular that between 1 January 2020 and 31 December 2020, the complainant was admitted to the Alice Springs Hospital after hitting herself and threatening to cut herself with a knife has been amended to expand the relevant date range to, 'Between 1 January 2017 at 31 December 2020'. The circumstances and conduct falling within that date range have been amended to provide, '[The complainant] was admitted to Alice Springs Hospital on one or more occasions after she either threatened to cut herself with a knife and/or cut herself with a knife and/or was hitting herself'. The evidence substantiating that conduct has been amended to include, 'Alice Springs Hospital records, p 88'. The defence is unable to confirm whether the attendance recorded on 5 June 2017 is the occasion on which the complainant was admitted to the Alice Springs Hospital as originally asserted in the tendency notice.
- (b) On 7 May 2018 at the Alice Springs Hospital, the complainant admitted suicidal ideation by saying that she did not want to live anymore. The evidentiary reference for that is 'Alice Springs Hospital records, p 83'.
- (c) On 23 July 2019 at the Alice Springs Hospital, the complainant admitted suicidal ideation by saying that she did not want to live anymore. The evidentiary reference for that is 'Alice Springs Hospital records, p 47'.

The assessment of significant probative value

[16] The Dictionary in the *ENULA* defines the ‘probative value’ of evidence to mean ‘the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue’. The accused contends that the evidence of tendency could rationally affect the determination of whether the accused applied physical force to the complainant causing the injuries which the Crown alleges, or whether those injuries were self-inflicted.

[17] The test of ‘significant probative value’ requires something more than mere relevance.¹ The evidence will have ‘significant probative value’ if it could rationally affect the assessment of the probability of the existence of one or more of the facts in issue in some important fashion.² This resolves to a judicial evaluation of whether the hypothetical jury would rationally think it likely that the evidence is important in relation to the determination of the facts in issue.³

[18] However, there is a distinction to be drawn in that process of evaluation where the evidence of tendency is sought to be deployed by the defence rather than by the prosecution. That distinction was

¹ *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569 at [72]–[73]; S Odgers, *Uniform Evidence Law*, Thompson Law Book Co, Looseleaf Service, [EA.97.120]; *R v Lockyer* (1996) 89 A Crim R 457; *R v Lock* (1997) 91 A Crim R 356 at 361; *R v AH* (1997) 42 NSWLR 702.

² *R v Zhang* (2005) 227 ALR 311 at [46]; *R v Ford* (2009) 201 A Crim R 451 at [52]; *DSJ v Director of Public Prosecutions (Cth)* (2012) 215 A Crim R 349 at [67], [71], [72]; *R v Lock* (1997) 91 A Crim R 356 at 361.

³ Odgers, *op cit*, [EA.97.120]; *R v Zhang* (2005) 158 A Crim R 504 at [46]; *R v Ford* (2009) 201 A Crim R 451 at [52]; *DSJ v Director of Public Prosecutions (Cth)* (2012) 215 A Crim R 349 at [67], [71], [72].

described in *DPP v Campbell & Ors (Ruling No 1)* in the following terms:

The approach to the question of admissibility of tendency evidence, sought to be adduced on behalf of the accused, must, of necessity, be different to the approach taken by the court to tendency evidence which is sought to be adduced on behalf of the prosecution. In a criminal trial, the accused does not bear any legal onus of proof. Rather, on particular issues, the accused may bear an evidentiary onus of adducing evidence, from which an inference arises that a reasonable possibility, consistent with innocence, exists. Thus, in determining whether tendency evidence, sought to be adduced by an accused, is admissible under s 97(1), it must be borne in mind that that evidence must have significant probative value to the establishment of a particular reasonable possibility of a state of facts consistent with the innocence of the accused person.⁴

[19] A similar observation was made by the New South Wales Supreme Court in *R v Holmes (No 5)*, in which it was stated that the consideration of ‘significant probative value’ when dealing with tendency evidence to be introduced by an accused is directed not to the establishment beyond reasonable doubt of the facts in issue in relation to the legal elements of the offence, but to whether an accused’s exculpatory version of events might be true as a reasonable possibility.⁵

[20] The issue has also been subject to consideration by this court in *R v Smiler (No 2)*. In that matter the defence sought to adduce evidence

⁴ *DPP v Campbell & Ors (Ruling No 1)* [2013] VSC 665 at [41].

⁵ *R v Holmes (No 5)* [2021] NSWSC 115 at [34]-[35].

that the complainant had a tendency to resort to acts of serious violence in order to resolve disputes. Justice Kelly stated:

It needs to be borne in mind that the Crown bears the legal onus of proof on all issues including negating self-defence. The accused need only point to a reasonable possibility that he was acting in self-defence and submit that the Crown has not eliminated that possibility. Very little may be required for evidence to be “significant” or “of consequence” in pointing only to a reasonable possibility that the accused may have been acting in self-defence.⁶

[21] However, in assessing whether tendency evidence is ‘significant’ or ‘of consequence’ in the establishment of a reasonable hypothesis consistent with innocence, it remains necessary for the defence to establish that the tendency evidence could rationally affect the assessment of that matter in some important fashion. That assessment involves a two-step process. In the first step, the relevant question is whether the evidence concerning the conduct would be probative in establishing the tendencies to act or think in the manner alleged by the defence. If it is accepted that an inference of tendency could be sustained, the second question is whether that tendency could sustain the reasonable possibility that, on this particular occasion, the complainant inflicted the injuries upon herself.⁷

[22] The question whether the evidence significantly bears on the facts in issue is ‘a matter of fact and degree, and will be influenced by the

⁶ *R v Smiler (No 2)* [2017] NTSC 31 at [16], citing *R v Lockyer* (1996) 89 A Crim R 457 at 459-460. That passage was cited with apparent approval in *The Queen v Nudjulu* [2020] NTSC 54 at [15].

⁷ *Hughes v The Queen* (2017) 263 CLR 338 at [40]-[41], as necessarily adapted to accommodate an assertion of tendency on the part of a complainant rather than an accused.

nature of the fact in issue sought to be proved (or disproved)'.⁸ The requirement that the evidence must have the capacity to inform the question whether the complainant may have inflicted these particular injuries upon herself does not mean that it must demonstrate a tendency on the part of the complainant to act in that specific manner. Section 97(1) of the *ENULA* does not condition the admissibility of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue. It is not necessary that the evidence exhibit an 'underlying unity', 'a modus operandi' or a 'pattern of conduct'.⁹ Depending upon the issue to which it is directed, a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it.¹⁰

[23] However, the evidence does need to demonstrate a tendency 'to act in a particular way' or 'to have a particular state of mind'.¹¹ For that reason, similarity remains a guide in determining whether tendency evidence has sufficient probative value to pass the test for admissibility.¹² The question is whether the features of commonality or

⁸ *Semaan v The Queen* (2013) 230 A Crim R 568 at [38].

⁹ *Hughes v The Queen* (2017) 263 CLR 338 at [34]. approving the approach in *R v Ford* [2009] NSWCCA 306, *R v PWD* [2010] NSWCCA 209, *Saoud v R* (2014) 87 NSWLR 481 and disapproving *Velkoski v R* (2014) 45 VR 680 at 682.

¹⁰ *Hughes v The Queen* (2017) 263 CLR 338 at [37].

¹¹ See, for example, *R v Li* [2003] NSWCCA 407 at [11].

¹² *R v Fletcher* (2005) 156 A Crim R 308, [60]. See also *AE v The Queen* [2008] NSWCCA 52; *R v Milton* [2004] NSWCCA 195; *R v Harker* [2004] NSWCCA 427; *R v F* (2002) 129 A Crim R 126; *R v WRC* (2002) 130 A Crim R 89.

peculiarity which are relied upon are significant enough logically to imply that because the complainant engaged in the previous type of conduct disclosed by the tendency evidence, there is a real possibility that she inflicted these injuries on herself in the particular circumstances of this case.¹³

[24] The previous incident involving the motor vehicle does not involve any necessary element of self-harm or suicidal ideation. As it was originally described in the tendency notice, the previous incident said to involve the complainant threatening to cut herself and hitting herself also does not involve any necessary element of actual self-harm, or any necessary element of suicidal ideation. However, that incident may be the occasion on which the complainant attended at the Emergency Department on 5 June 2017 after cutting herself with a Stanley knife, which did involve an element of actual self-harm. Taken together, these previous incidents, even if established by the evidence to be three separate incidents rather than two, would say very little about whether the complainant has a general tendency to self-harming behaviour and suicidal ideation.

[25] Even if such a tendency was made out, it would have very little commonality with the nature of the injuries sustained by the complainant in December 2022 and described in the clinical notes, and

13 *CEG v The Queen* [2012] VSCA 55 at [14], as necessarily adapted to accommodate an assertion of tendency on the part of a complainant rather than an accused.

very little similarity in circumstance. As Leeming JA stated in *El-Haddad v R*:

... the specificity of the tendency directly informs the strength of the inferential mode of reasoning. It is easy to see why. It is, for example, one thing to say that a man has a tendency to steal cars; that says something, but not very much, as to whether he stole a particular car the subject of a charge. It is quite another to say that a man has a tendency to steal black European sports cars and then set them on fire, if the fact in issue is whether that man stole and burnt a black Porsche.¹⁴

[26] Leaving aside the question of injury in the incidents sought to be relied on by the defence for tendency purposes, none of those incidents involved the circumstance of the complainant self-harming and then seeking falsely to blame some other person for that harm. On proper analysis, that is the gravamen of the hypothesis consistent with innocence which the defence seeks to establish by this tendency evidence. Moreover, as the Crown has pointed out, the accused has quite frankly stated as part of her account that on 26 December 2022, in the aftermath of the assault which is charged in Count 3, and following an episode of sexual intercourse which the complainant says was consensual in nature, she suffered distress and attempted to harm herself by wrapping a cord around her neck before the accused stopped her from doing so. The Crown's submission is that this illustrates that whatever other tendencies the complainant may have, they do not extend to blaming self-inflicted injuries on any other person.

14 *El-Haddad v R* (2015) 88 NSWLR 93 at [72].

[27] Accordingly, whatever tendency might be established by those previous incidents would have nothing to say about whether there was a real possibility that the multiple bruising and lacerations to the complainant's scalp, face, neck, arms and back recorded in the clinical notes on 27 December 2022 were self-inflicted, but that she sought to attribute blame for them to the accused.

[28] The fact that the complainant experienced suicidal ideation on 27 December 2022 during the course of the incidents the subject of these charges also has nothing to say, either by itself or in combination with the other evidence identified for tendency purposes, about whether she has a general tendency either to engage in self-harming behaviour or to consider suicide. That is because the purpose of the evidence, so far as this particular assertion of tendency is concerned, is to establish a real possibility that the complainant's suicidal ideation on 27 December 2022 was a product of her natural and pre-existing proclivities, rather than the result of any criminal conduct on the part of the accused. That enquiry is not properly informed by proceeding on the assumption that the ideation experienced on 27 November 2022 was in fact part of, or referable to, a pre-existing proclivity, and therefore evidence demonstrating the tendency.

[29] The two references in the medical records to the complainant feeling that she did 'not want to live anymore' are not significantly probative in establishing a tendency to suicidal ideation. Even if it was accepted

that an inference of relevant tendency could be sustained on the basis of those references, together with the act of self-harm on 5 June 2017, the ultimate question for the tribunal of fact at trial is whether the assaults described by the complainant took place. The fact that the complainant had a tendency to episodes of spontaneous suicidal ideation would have little or no probative value in the determination of whether the accused engaged in the conduct described by the complainant, or in the determination of whether there is a reasonable possibility that the complainant inflicted those injuries on herself but sought to blame the accused for them.

[30] A line of reasoning which proceeded on the basis that because the complainant has a tendency to spontaneous suicidal ideation, the suicidal ideation she experienced on 27 December 2022 was spontaneous and therefore unrelated to the conduct of the accused, would have no probative force. The issue of suicidal ideation now identified by the defence for this purpose is entirely subsequent and ancillary to the complainant's allegations that the accused deprived her of her liberty after assaulting her in various ways over the preceding two days.

[31] Leaving aside the high level of generality of the tendencies relied on, and the lack of any close or particular similarity between the previous incidents and the present case, the other problem with the defence's reliance on the incidents is their isolated nature and remoteness in

time. The incident involving the motor vehicle is said to have taken place as long as five years prior to the incidents the subject of these charges. The incident involving the admission to the Alice Springs Hospital is said to have taken place as long as three years prior to the subject incidents. The admission to the Alice Springs Hospital involving the Stanley knife, if it is in fact a different incident, took place five-and-a-half years prior to the subject incidents. The effluxion of time between a prior incident or incidents which are said to sustain an inference of tendency and the subsequent conduct of which that inference is said to be probative may suggest that the previous incident or incidents were isolated aberrations, or otherwise not reflective of a relevant tendency. In other words, remoteness in point of time from the circumstances of the offence charged will undermine the probative value of evidence to sustain an inference of tendency.

- [32] Two (or even three) isolated incidents will also ordinarily be less probative of tendency than a series of incidents with similar features. Although evidence of even a single prior episode demonstrating sexual interest in a particular complainant may be probative in establishing tendency in a case of sexual offending, care must be taken in transposing that principle to other categories of asserted tendency. It does not follow that because a complainant has threatened or inflicted self-harm on isolated occasions many years previously, he or she has

an established and demonstrated tendency to the self-infliction of injury. That would fall short of establishing some continuing pattern of self-harming behaviours.

[33] For these reasons, the evidence on which the defence seeks to rely does not sustain the inference of the tendencies asserted. The threshold of significant probative value has not been satisfied. However, that is not to say that the evidence is inadmissible for all purposes. There would be no preclusion on defence counsel putting it to the complainant during the course of cross-examination that she has previously engaged in self-harming behaviours, or that she has previously hit herself during the course of arguments with the accused, and that the injuries she sustained on the present occasion were also self-inflicted. Of course, the pursuit of that line of cross-examination might be prejudicial to the accused's position should the answers disclose conduct on the part of the accused suggestive of poor character, but that is a forensic choice for defence counsel to make. Similarly, there would be no preclusion on defence counsel suggesting to the complainant in cross-examination that she has previously experienced suicidal ideation, and that manifestation of suicidal ideation on 27 December 2022 was unrelated to anything done by the accused.

[34] When deployed in that way, the evidence sought to be adduced by the accused would not be tendency evidence or evidence received for tendency purposes. Rather, it would be evidence adduced in cross-

examination by the defence in order to render less improbable an account by the accused that the injuries were inflicted other than during the course of assaults by him.¹⁵ That course and purpose of cross-examination would be quite different to the receipt of evidence in relation to earlier incidents on the basis that it establishes a relevant tendency on the part of the complainant to self-harming behaviours and suicidal ideation.

Ruling

[35] The ruling on the matter for preliminary determination is that the evidence set out in the notice of tendency evidence dated 27 March 2024, as amended during the course of oral submissions, is inadmissible in the trial for tendency purposes.

15 See, for example, *R v Cakovski* [2004] NSWCCA 280 at [36]-[41].