

CITATION: *The Queen v Winchcombe and Park*
[2018] NTSC 70

PARTIES: THE QUEEN

v

WINCHCOMBE, Janelle Kaye

&

PARK, Ilho

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 21749337 & 21749339

DELIVERED: 9 October 2018

HEARING DATE: 24 August 2018

JUDGMENT OF: Blokland J

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – WHETHER TENDENCY EVIDENCE
ADMITTED.

Evidence of a previous episode of supply Schedule 1 drug with indicia of supply – whether tendency established in respect of elements of current offending – whether evidence could rationally affect to a significant degree the proof of a fact in issue – whether probative value of proposed evidence outweighs its prejudicial effect – whether proposed tendency relevant to conduct of persons other than accused – tendency evidence not admitted.

Evidence (National Uniform Legislation) Act (NT) 2011 (NT) ss 97, 101
Misuse of Drugs Act (NT) ss 5A(1), 7(A)(1)

Donahue v Tasmania [2016] TASC CA 17; *Gjonaj v The Queen* [2018] NTSC 13; *Hughes v The Queen* [2017] HCA 20; *IMM v The Queen* (2016) 257 CLR 300; *Papakosmas v The Queen* (1999) 196 CLR 297; *The Queen v Bauer* [2018] HCA 40; *The Queen v Hiko* [2018] NTSC 35; *The Queen v Lock* (1997) A Crim R 356; *The Queen v Lockyer* (1996) 89 A Crim R 457; *R v Lumsden* [2003] NSWCCA 83; *The Queen v McKerlie* [2016] NTSC 37; *The Queen v Perner* [2017] NTSC 23, referred to.

REPRESENTATION:

Counsel:

Prosecutor:	J Ibbotson
Defendant (Winchcombe):	J Tippet QC
Defendant (Park):	F Kepert

Solicitors:

Prosecutor:	Office of the Director of Public Prosecutions
Defendant (Winchcombe):	Maleys Barristers and Solicitors
Defendant (Park):	Northern Territory Legal Aid Commission

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

The Queen v Winchcombe & Park [2018] NTSC 70
(21749337 & 21749339)

BETWEEN:

THE QUEEN

AND:

JANELLE KAYE WINCHCOMBE

AND:

ILHO IAN PARK

CORAM: BLOKLAND J

REASONS FOR RULING

(Delivered 9 October 2018)

Background

- [1] Janelle Winchcombe and Ilho Park are to stand trial for different offences arising out of the same incident, charged against the *Misuse of Drugs Act*. Count 1 on the indictment charges Janelle Winchcombe with supplying Ilho Park a commercial quantity of methamphetamine, a Schedule 1 drug, contrary to s 5A(1) of the *Misuse of Drugs Act*. Count 2 alleges she supplied a commercial quantity of a Schedule 1 drug, methamphetamine, to unknown persons, contrary to s 5A(1) of the *Misuse of Drugs Act*. Count 3 charges

that Ilho Park possessed a traffickable quantity of the same Schedule 1 drug, methamphetamine, contrary to s 7A(1) of the *Misuse of Drugs Act*. All three counts are alleged to have been committed on 18 October 2017.

- [2] The Crown has served a Tendency Notice pursuant to s 97(1) of the *Evidence (National Uniform Legislation) Act* (“UEA”) with respect to both accused. Argument was heard on 24 August 2018. For the reasons that follow, in my view the proposed tendency evidence should not be admitted.

Outline of the Crown Case

- [3] The Crown will allege that on 18 October 2017 at 3:20pm, a person who identified himself as Damien Harden checked into room 202 at the Argus Hotel. On checking in, he wrote down the name of ‘Jannell Whitcoom’ (sic) as a secondary guest and gave the registration number for car parking as CB98RV. That registration plate is listed as being for a black Holden Rodeo utility, registered to “Janelle Winchcombe”.
- [4] Sometime prior to 5:18pm, it is alleged Janelle Winchcombe came into possession of a commercial quantity of methamphetamine which was placed inside a sandwich-sized clip seal bag. She then attended room 202 with the intention of dealing the methamphetamine. Ilho Park and Leslie Clarke also attended the same room.
- [5] The Crown alleges that some time prior to 5:18pm inside room 202, Janelle Winchcombe weighed out 3.5 grams of methamphetamine and placed it into a small clip seal bag which she then sold to Ilho Park for \$2,500.

- [6] At 5:18pm Northern Territory Police executed a search warrant on room 202. On entering the room, police observed three persons in the room. It is alleged Janelle Winchcombe was standing in front of the kitchen bench holding a sandwich-sized clip seal bag containing the commercial quantity of methamphetamine which she was seen to drop into a rubbish bin below her. It is alleged Ilho Park was standing at the end of the kitchen bench and that Leslie Clarke was seen sitting in a chair next to the closed sliding door. On seeing police, he was seen to remove a glass pipe from his mouth, throw it to the ground, and then step on it.
- [7] When searched, Ilho Park was found to have a small clip seal bag with 2.09 grams of cannabis in his pocket. Leslie Clarke had a small clip seal bag with 0.08 grams of methamphetamine. There was \$1,640 in currency found in Janelle Winchcombe's purse.
- [8] Police located and seized the following items on the kitchen bench:
- A set of digital scales that were turned on (belonging to Ilho Park);
 - A pack of empty clip seal bags;
 - A tea spoon;
 - A small clip seal bag containing a white substance that when analysed was found to be 3.47 grams of methamphetamine;
 - 0.41 grams of a white substance loose on the bench that when analysed was found to be methamphetamine;
 - A banded bundle of notes totalling \$2,500 in Australian currency (belonging to Ilho Park); and
 - A handbag belonging to Janelle Winchcombe which contained the purse with the \$1640.00 in it and a small canister of CS gas.

[9] In the rubbish bin near the kitchen bench, police located and seized the following:

- A sandwich-sized clip seal bag containing a white substance that was open and some of the contents spilling into the bin that when analysed were found to be methamphetamine;
- A small clip seal bag containing a white substance that when analysed was found to be methamphetamine; and
- The bin liner with the spilled white substance that when analysed was found to be methamphetamine.

[10] The total amount of methamphetamine seized from inside the rubbish bin was 42.09 grams. Under the *Misuse of Drugs Act*, a commercial quantity of methamphetamine is 40 grams or more.

[11] The Crown alleges that the methamphetamine in the sandwich-sized clip seal bag located in the bin was in the possession of Janelle Winchcombe, who had removed 3.47 grams and placed it in the small clip seal bag on the kitchen bench for Ilho Park to purchase for \$2,500. Further, the Crown asserts that the sandwich-sized clip bag with the drug was the item Janelle Winchcombe was seen to drop in the rubbish bin.

[12] The small clip seal bag containing 3.47 grams of methamphetamine found on the kitchen bench was examined for fingerprints and found to have the fingerprint of the right index finger of Janelle Winchcombe.

[13] The Crown alleges that Ilho Park was in the room to purchase methamphetamine worth \$2,500 from Janelle Winchcombe and that the particular transaction had been completed or was in the process of being

completed. Evidence relied on for that conclusion includes the presence of the scales (turned on), the clip seal bag with 3.47 grams of methamphetamine, and the banded bundle of \$2,500 cash which is alleged to be the payment for the 3.47 grams of the drug.

[14] Ilho Park participated in an electronic record of interview in which he said that the scales and \$2,500 cash were his but denied taking part in any drug transaction with Janelle Winchcombe. He also told police the money was from gambling. A traffickable quantity of methamphetamine under the *Misuse of Drugs Act* is more than two grams.

[15] Exhibit 1 on the *voir dire* contains the relevant prosecution brief, including witness statements. Counsel for the Crown, Mr Ibbotson has carefully taken the Court through those materials. The statements of both lay witnesses from the Argus Hotel, some CCTV footage and photos of both accused at the hotel, along with the statements of attending police giving their observations of persons and things in room 202 would seem, on the face of it, to have the capacity to prove the case. This is, of course, looking at the evidence without challenges that are anticipated on behalf of the accused. More details tending to support the Crown case are given in the statements beyond what has been summarised above; however, it is not necessary for current purposes to set out the further details of the content of the proposed evidence.

The proposed tendency evidence against Janelle Winchcombe

- [16] The importance from the Crown's perspective of the proposed tendency evidence is that it is likely that Janelle Winchcombe will deny she was in possession of a commercial quantity of methamphetamine and will deny supplying methamphetamine to Ilho Park or any other person.
- [17] The Tendency Notice states the tendency sought to be proved is the tendency of Janelle Winchcombe to act in a particular way, namely, to engage in the supply of methamphetamine and to obtain money from the supply of methamphetamine. The particular state of mind sought to be proved is a willingness and interest in being involved in the supply of methamphetamine.
- [18] The evidence relied on to prove the asserted tendency is as follows: the certificate of conviction and agreed Crown facts following a plea of guilty on 5 July 2017¹ to two counts of supplying less than a commercial quantity of a Schedule 1 dangerous drug (methamphetamine), alternatively the sentencing remarks of Southwood J on the same date or, if necessary, the foundational evidence substantiating the agreed facts. In my view there is no issue with the cogency of the proposed evidence. Either of the methods of proof outlined would be sufficient to prove the relevant facts. The date of the offending for both counts was 6 January 2017. It is not the bare convictions that are sought to be adduced as tendency evidence, but

¹ Supreme Court file no. 21700788.

particular aspects of the offending revealed in the Crown facts, including Ms Winchcombe being contacted by a buyer with a message: “Or \$3500 + G”, the presence of cash (\$3,455), ledgers detailing a sale and money owed to her, possession of clip seal bags, scales and pipes, and recorded conversations of 6 January 2017 that clearly reveal drug transactions and possession on that date.²

[19] The Crown submits the proposed evidence is relevant to the facts in issue, in particular whether Janelle Winchcombe supplied Ilho Park with methamphetamine, whether Ilho Park possessed a traffickable quantity of methamphetamine, whether Janelle Winchcombe possessed a commercial quantity of methamphetamine and whether the Crown can rebut any innocent explanation for the presence of Janelle Winchcombe’s fingerprint on the clip seal bag containing 3.47 grams of methamphetamine on the kitchen bench.

[20] The Crown submits the significant probative value required by s 97(1) of the *UEA* is made out as the purpose of the proposed evidence is to:³

- (a) Establish the identity of the person who possessed the commercial quantity of methamphetamine;
- (b) Establish the identity of the person who supplied the traffickable quantity to Ilho Park;
- (c) Establish the identity of the person who possessed the traffickable quantity;

² Set out in the table, paragraph 5 of the Tendency Notice relating to Janelle Winchcombe.

³ Crown submissions at [22].

- (d) Rebut any defence suggestion that the co-accused and/or Leslie Clarke were in possession of the commercial quantity of the drug or were supplying the drug; and
- (e) Rebut any defence suggestion that there is an innocent explanation for the presence of the accused's fingerprint being found on the small clip seal bag containing 3.47 grams of methamphetamine.

[21] Further, although it is acknowledged similarity between the two sets of circumstances is not required, it was submitted there was a strong degree of similarity between the circumstances in which the offending on 6 January 2017 occurred and the circumstances of the alleged offences on 18 October 2017. The similarities were said to be:

- In both matters the dangerous drug involved is methamphetamine;
- The accused was found in circumstances where similar indicia of supply was present, namely methamphetamine, scales, small clip seal bags both with and without methamphetamine and cash;
- The location of the ledger in the previous offending with \$3,455 cash and a record of 3.4 grams being sold for \$2,200 which was owed to Janelle Winchcombe. In the current case police found a small clip seal bag containing 3.47 grams of methamphetamine and \$2,500. The accused also had \$1,640 cash in her purse.

[22] Although it is accepted here the proposed tendency evidence may well satisfy relevance, it is not in my view clear that the proposed evidence actually establishes the tendency sought or whether the proposed evidence possesses the significant probative value required by s 97(1). Even if it does, there is a real question under s 101(2) *UEA* as to whether the

probative value of the evidence substantially outweighs any prejudicial effect it may have.

[23] The Crown relies on the circumstances surrounding the offending on 6 January 2017 to prove the tendency alleged in order for an inference to be drawn that Janelle Winchcombe acted or had the same state of mind in accordance with the tendency on this occasion. The use of evidence of this kind is limited by s 97(1)(b) of the *UEA* that imposes a heightened relevance test, requiring that “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.” The evidence is required to have more than mere relevance, but less than a substantial degree of relevance.⁴ 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.⁵ It must be “important”, “of consequence” or “influential in the context of fact-finding”.⁶ When assessing whether evidence has significant probative value, the Court need not assess the evidence in isolation. The Court may find that the “evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charged”.⁷

⁴ *The Queen v Lockyer* (1996) 89 A Crim R 457; *The Queen v Lock* (1997) 91 A Crim R 356.

⁵ *Hughes v The Queen* [2017] HCA 20 at [16]; *IMM v The Queen* [2016] HCA 14; 257 CLR 300 at 314.

⁶ *The Queen v Lockyer* (1996) 89 A Crim R 457; *Donahue v Tasmania* [2016] TASCRA 17; 262 A Crim R 63 at 73; *IMM v The Queen* (2016) 257 CLR 300 at 73.

⁷ *Hughes v The Queen* [2017] HCA 20 at [40].

[24] In *Hughes v The Queen*⁸ the majority referred to the assessment of whether evidence has significant probative value as an open textured evaluative judgment on which reasonable minds may differ. Further, it was said prosecution agencies should be cautious before relying on tendency evidence in borderline cases, due to the risk that an appellate Court will reach a different conclusion, with consequences for the safety of any conviction. In *Hughes v The Queen* the majority explained that determining whether evidence has significant probative value involves two separate but related matters: first, the extent to which the evidence proves the alleged tendency and second, the extent to which the alleged tendency makes the facts in issue more likely.⁹ The majority observed that:¹⁰

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 tendency strongly supports the proof of a fact that makes up the offence charged. This may require a comparison between the tendency alleged and the facts in issue. The strength of the connection will depend on the degree of particularity of the tendency.

A high degree of similarity between the occasions may be required when the issue is identity. However, where the issue is whether the crime was committed at all, significant probative value can come from features other than a high level of similarity.¹¹

8 [2017] HCA 20 at [42].

9 *Hughes v The Queen* [2017] HCA 20 at [41].

10 *Hughes v The Queen* [2017] HCA 20 at [64].

11 *Hughes v The Queen* [2017] HCA 20 at [39].

[25] While it is plain the identity of Janelle Winchcombe is known, in the sense that there does not appear to be dispute that she was in the room when police seized exhibits and made the observations described above, there is clearly a question about the identity of the person who possessed the commercial quantity, the identity of who supplied Ilho Park, and the identity of the person who possessed the traffickable quantity; so much is clear from the outline of the Crown case and submissions. Whether other persons may be shown to be in possession of the commercial quantity or supplying the drug or excluding those persons from consideration may similarly be an issue. Although it is accepted this is not a classic question of proof of identity, the question of the probative value of the evidence must be seen in the factual context described, including the likely issue of whether it was another person who was in possession of or supplying the drugs. In this unusual context, with the possibility of another person being responsible for the presence of the drug and indicia of supply, the proposed evidence should be required to possess a level of specificity in order to be considered influential in the fact finding, namely on the issue of the identity of the offender.

[26] Although recent authority on tendency evidence has emerged from the context of sexual offending against children,¹² the same principles are to be applied in other types of cases, having regard to any relevant appropriate

12 E.g. *IMM v The Queen* (2016) 257 CLR 300; *Hughes v The Queen* [2017] HCA 20; *The Queen v Bauer* [2018] HCA 40.

distinctions by virtue of the different context. As was pointed out in *The Queen v Hiko*,¹³ the rules concerning tendency evidence have been applied by this Court in charges concerning the supply of drugs. Decisions on tendency and coincidence evidence concerning alleged drug offending in other jurisdictions were considered by the Court of Criminal Appeal in *Gjonaj v The Queen*,¹⁴ although a number of authorities were inconclusive. While each case must be considered on its merits, it is instructive to consider the circumstances in which this Court has considered tendency evidence in the context of drug offending. In my view, generally speaking the facts comprising the proposed tendency evidence in broadly comparable cases tend to have greater probative force than those offered in the evidence alleged against Janelle Winchcombe.

[27] Attention was drawn to *The Queen v Hiko*.¹⁵ In *Hiko*, the tendencies sought to be proved were that the accused had a tendency to engage in the supply of cannabis by sourcing cannabis and using other people to transport it, and had a willingness to supply cannabis plant material to other people. Without going through all of the facts, what was striking about *Hiko* was the sheer number of separate acts of supply, namely 11, all to remote areas, generally to Indigenous people, over a three-month period. The subject offending occurred approximately 18 months after his release from prison for the previous supply offending, and approximately three years before the

13 [2018] NTSC 35 at [13].

14 [2018] NTCCA 13.

15 [2018] NTSC 35.

subject offending. A high degree of specificity and similarity of conduct between the different occasions was found.¹⁶ Although it is accepted that a single act or a single episode may in certain circumstances possess the significant probative value required, in this matter it is one episode only of previous offending particularly with the surrounding indicia of supply that is said to constitute the tendency and the significant probative value.

[28] In *The Queen v McKerlie*,¹⁷ evidence of supplies of cannabis other than those charged were permitted to be led as tendency evidence close to the timeframe of drug-dealing activity between the accused and a deceased alleged co-offender in the Katherine region. This involved evidence of the sourcing of cannabis interstate and arrangements made for its distribution in the Katherine area. Earlier alleged activity potentially associated with supplies of approximately one year before was not permitted to be led as the facts of earlier conversations and arrangements were vague, incomplete and were not considered to be of significant probative value. Tendency evidence was permitted to be adduced in *The Queen v Perner*¹⁸ of an accused's previous drug-dealing activity where the tendency sought to be established was that he dealt with drugs on the instructions of a particular person. A striking matter in the relevant facts establishing the tendency and significant probative value was that there were 15 instances of the accused obtaining instructions in relation to drug supply from the particular person.

16 *The Queen v Hiko* [2018] NTSC 35 at [12].

17 [2016] NTSC 37.

18 [2017] NTSC 23.

[29] The episode in this matter of offending on 6 January 2017, although it covers a number of activities constituting supplies on that day, and shows familiarity on the part of the accused with methamphetamine, supply of methamphetamine and the use of drug paraphernalia, has relevance to the current charges but in my view, the evidence is generalised and would not help in a significant way to prove the current charges in the unusual factual context. It is appreciated the facts of the current charge may go some way towards proving the tendency, although there is a danger of circular or bootstraps reasoning in using evidence of the current charge in these circumstances. The facts supporting the alleged tendency are not specific. They show familiarity with methamphetamine and common drug paraphernalia, and supply over one episode. The probative value is not strong and there is a risk of the jury engaging in base propensity reasoning. I do not consider the timeframe between the acts on 6 January 2017 and the alleged offending of 18 October 27 to be problematic *per se*; however, in my view it is not a clear case of a tendency specific to this accused being proven in the relevant sense. The number of occasions of the particular conduct relied upon, the time gaps between them and the degree of specificity or generality of the alleged tendency are all matters that may be considered in the assessment of significant probative value.¹⁹ Although I have considered in particular the presence of scales, bags and other indicia, in my view the test under s 97(1)(b) is not met. The proposed tendency

19 Stephen Odgers, *Uniform Evidence Law*, (Thompson Reuters, 13th ed, 2018) 704-5.

evidence has relevance but does not rationally affect the assessment of the probability of the existence of the facts in issue to a significant extent.

[30] Any tendency on the part of Janelle Winchcombe cannot logically prove the identity of another person, such as the person who supplied Ilho Park or who possessed the traffickable amount. Logically, any tendency found in respect of Janelle Winchcombe cannot have probative value in respect of whether another person committed an offence as appears to be suggested by the Crown submissions. The use of the previous episode of offending does not make the general likelihood of the accused owning or being in possession of the bag with the fingerprint on it any greater. The fingerprint on the bag shows she has been in contact with it. The previous matter does not, in an influential way, assist with the assessment of knowledge of the contents of the bag; that is a matter to be assessed according to the direct and indirect evidence relevant to the handling of the bag and any inferences that may be drawn from the surrounding circumstances.

[31] In any event, if I have been wrong in my assessment of the strength of the alleged tendency evidence and its probative value, in my view this would be an appropriate case to exercise the discretion and exclude the evidence under s 101(2) *UEA*. The evidence submitted to be tendency evidence gives rise to a risk of unavoidable unfair prejudice of the impact of a previous conviction for similar offending and its capacity to induce the jury to

engage in impermissible tendency reasoning.²⁰ It is accepted that in some cases the particular nature of the previous offending will possess significant probative value and the use of the evidence for tendency purposes would not be unfair. In *Hughes v The Queen*,²¹ the danger of unfair prejudice was recognised. The majority said:²²

The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to follow 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 this case, in my view there is a danger, even if tendency directions are given, of the jury either giving disproportionate weight to the previous acts of the accused that took place principally on one particular day or of not appreciating that others may share such a tendency. In my view there is a danger that the offending of 6 January 2017 merely be taken as another piece of evidence that can strengthen the Crown case, rather than as an established tendency from which the jury may draw an inference.

The proposed tendency evidence against Ilho Park

[32] The tendency notice in respect of Ilho Park states the evidence relates to the following facts in issue: (a) whether Ilho Park possessed a traffickable

20 *R v Lumsden* [2003] NSWCCA 83 at [4]-[5], per Mason P; cited in *Gjonaj v The Queen* [2018] NTCCA 13.

21 [2017] HCA 20.

22 *Hughes v The Queen* [2017] HCA 20 at [17], per Kiefel CJ, Bell, Keane and Edelman JJ.

quantity of methamphetamine on 18 October 2017, and (b) whether Janelle Winchcombe supplied less than a traffickable quantity of methamphetamine to Ilho Park on the same date.

[33] The tendency sought to be proved is the tendency of Ilho Park to (a) act in a particular way, namely to accept offers of methamphetamine and (b) have a particular state of mind, namely a willingness to receive methamphetamine, and an interest in receiving methamphetamine. The conduct the Crown seeks to adduce is sourced in previous offending.

[34] The first offending in time occurred on 28 July 2006. The facts relied on were that on that date Ilho Park was in his residence when it was searched by police and police located digital scales, three \$50 notes and amounts of diverse types of drugs including methamphetamine. The total amount of methamphetamine seized was 0.4806 grams. He was convicted of that offending on 21 November 2006. The second was an offence of possessing methamphetamine on 10 September 2011. The circumstances were that he flew to Darwin from Adelaide under an assumed name and was searched at Darwin airport. Police located 243.46 grams of methamphetamine in his possession. The Crown facts also indicate he was found with \$950 cash in his jeans pocket and \$235 in his wallet. The third offence was committed on 4 July 2015 when he was stopped by police for a random breath test and his vehicle was searched. As well as other drugs, police located 0.2 grams of methamphetamine and a pipe for administering methamphetamine that belonged to him. He was convicted on 9 February 2016 and fined in the

Court of Summary Jurisdiction. On 25 November 2016 he was apprehended by police while driving his car and during the search 0.22 grams of methamphetamine and a pipe for administering methamphetamine belonging to him were found. He was convicted on 4 August 2017 for the offence of possession of less than a traffickable quantity of a Schedule 1 dangerous drug in a public place. In all instances the Crown relies on the précis and statements of fact that have been tendered to the various Courts dealing with Ilho Park.

[35] Applying the authorities and principles already discussed above in reference to Janelle Winchcombe, and having read the relevant Crown facts and précis, it may be concluded that Ilho Park from time to time has possessed both methamphetamine and other drugs. Aside from file 21129617, committed in 2011, the amounts of methamphetamine found in his possession were small. The offending in 2011 clearly involved a commercial quantity. On two of the previous occasions (2006 and 2016) he was found in possession of both methamphetamine and scales, but was not found with scales on the other occasions. On file 20619088, for offending committed in 2006 he admitted that the 0.4806 grams of methamphetamine was for his own use. On two occasions an ice pipe was found. Assessing the probative value of this evidence is not straightforward. Some of the relevant evidence is, in my view, too remote, particularly the offending in 2006. The evidence in 2011 may be regarded as more influential as it involves possession of a significant quantity; however, there is no evidence

of possession of the drug indicia that is part of the Crown argument in favour of admitting this evidence as tendency evidence. Otherwise, the alleged tendency is expressed in general terms. There is little, if any, information in the various précis or Crown facts to indicate how Ilho Park accepted or received methamphetamine in the past. At the most it is suggested he has from time to time come into possession of (on all but one occasion) small amounts of methamphetamine. In my view this evidence does not possess the quality of “significant probative value” that is required. I cannot see Ilho Park’s previous dealings with methamphetamine being helpful in a significant way to the jury either because of remoteness in time of some of the proposed evidence or the lack of specificity surrounding his previous offending indicative of the tendency alleged. If I am wrong in that assessment, in my view, the proposed evidence would be unfairly prejudicial when weighed against its potential probative value under s 101(2) *UEA*. It is appreciated s 101(2) relates only to unfair prejudice as clarified in the authorities.²³ The lack of specificity not only weakens the probative value of the tendency evidence, but highlights the risk of a prejudicial effect.

[36] There is a further problem in my view. As above, the tendency notice specifies the evidence relates to two facts in issue. The second fact in issue is whether Janelle Winchcombe supplied less than a traffickable quantity of methamphetamine to Ilho Park. I am not sure that tendency evidence

23 *Papakosmas v The Queen* [1999] HCA 37; 196 CLR 297.

may be approached in that manner. Section 97 *UEA* refers to the “tendency that a person has or had”. The tendency evidence relates to that person’s tendency. Whatever tendency is established in relation to Ilho Park, it cannot in my view be probative of the co-accused’s conduct. The Crown further submits the tendency has significant probative value in identifying the person who possessed the commercial quantity of methamphetamine, the supply of the traffickable quantity and to rebut a defence suggestion that another person present was in possession of the commercial quantity or were supplying the drug.²⁴ Any tendency of Ilho Park cannot support the proof of another person’s offending. It is not alleged Ilho Park possessed a commercial quantity.

[37] The tendency evidence will not be admitted. As touched upon in hearing the application to admit the evidence, if the defence case for either accused is conducted in a manner that invites consideration of the evidence that at this time is excluded, the issue may be required to be reconsidered.

[38] This ruling will be supplied to counsel. At this time it is not to be published beyond what is required for either of the parties in terms of their need to obtain advice or instructions.

24 Crown submissions at [22].