CITATION:	*Gjonaj v The Queen* [2018] NTCCA 13
PARTIES:	GJONAJ, Gjergj v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 7 of 2017 (21613773)
DELIVERED:	25 July 2018
HEARING DATE:	29 November 2017
JUDGMENT OF:	BLOKLAND and HILEY JJ and GRAHAM AJ

CATCHWORDS:

CRIMINAL LAW – Appeal against conviction – evidence – appellant found guilty of supplying commercial quantity of cannabis – whether coincidence evidence of prior cannabis offences was of no significant probative value – whether erroneously admitted – level of similarity required between events requires consideration of purpose of admitting evidence – "event" sufficiently broad to cover evidence in issue – evidence did not invoke tendency reasoning – substantial evidence to infer improbability of mere coincidence – coincidence evidence had significant probative value as could rebut innocent explanation and went directly to establishing knowledge cannabis was in car – appeal dismissed – *Evidence (National Uniform Evidence) Act* (NT), s 98(1)(b).

CRIMINAL LAW – Appeal against conviction – evidence – whether evidence of prior convictions wrongly admitted as probative value did not substantially outweigh prejudicial effect – prejudice not directly proportional to strength of evidence – question is whether prejudice may be mitigated by directions – evidence directly relevant to knowledge and admitted solely to establish familiarity with cannabis odour – convictions would not arouse emotional response or partiality in jury – probative value far exceeded likely prejudice – appeal dismissed – *Evidence (National Uniform Evidence) Act* (NT), s 101(2).

JURISDICTION, PRACTICE AND PROCEDURE – Leave sought to add additional ground of appeal – whether trial judge erroneously directed jury regarding coincidence evidence and error incurable by any other direction – appeal ground not allowable as no objection to directions taken during trial and no possibility of real injustice – trial judge's directions and warnings regarding how to use coincidence evidence were clear – leave refused – *Supreme Court Rules* (NT), order 86.08.

Evidence Act 1995 (NSW) s 98
Evidence (National Uniform Evidence) Act (NT) ss 94, 94(3)(a), 94(3)(b), 97, 97(1)(b), 98, 98(1), 98(1)(b), 101(2)
Misuse of Drugs Act (NT) ss 5(1), 40(1)(c)

Supreme Court Rules (NT) order 86.08

Azzi v The Queen [2013] NSWCCA 249; *BD v The Queen* [2017] NTCCA 2; *Christian v The Queen* [2013] NSWCCA 98; *CV v Director of Public Prosecutions* [2014] VSCA 58; *Dupas v The Queen* (2010) 241 CLR 237; *Grosvenor v The Queen* [2014] NTCCA 5; *Harriman v The Queen* (1989) 167 CLR 590; *IMM v The Queen* (2016) 257 CLR 300; *R v DH* [2000] NSWCCA 360; *R v Dickens* [2016] NTSC 7; *R v Ford* (2009) 201 A Crim R 451; *R v Lockyer* (1996) 89 A Crim R 457; *R v Lumsden* [2003] NSWCCA 83; *R v Ngatikaura* (2006) 161 A Crim R 329; *R v Quach* (2002) 137 A Crim R 345; *R v Zhang* (2005) 158 A Crim R 504, referred to.

Stephen Odgers, *Uniform Evidence Law*, (Thompson Reuters, 12th ed, 2016)

REPRESENTATION:

Counsel:

Appellant:	J Peluso & C Goodhand
Respondent:	M Nathan SC

Solicitors:

Appellant:	J Franz
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Number of pages:	26

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gjonaj v The Queen [2018] NTCCA 13
CA 7 of 2017 (21613773)

BETWEEN:

GJERGJ GJONAJ
Appellant

AND:

THE QUEEN
Respondent

CORAM: BLOKLAND and HILEY JJ and GRAHAM AJ

REASONS FOR JUDGMENT

(Delivered 25 July 2018)

THE COURT:

Background

[1] On 10 February 2017 a jury convicted the appellant of one count of supplying a commercial quantity of cannabis contrary to s 5(1) of the *Misuse of Drugs Act* (NT). He appeals the conviction.

The grounds of appeal

[2] There were originally three grounds of appeal as follows:[1]

(i) That coincidence evidence revealing the appellant's prior criminal conduct was erroneously admitted into evidence by the trial judge

1 AB 533.

because it did not have significant probative value within the meaning of s 98(1)(b) of the *Evidence (National Uniform Evidence) Act* (NT) *("UEA")*.

(ii) That in the alternative, the evidence should not have been admitted because the probative value of the evidence did not substantially outweigh any prejudicial effect within the meaning of s 101(2) of the *UEA*.

(iii) That a miscarriage of justice arose because of the erroneous admission of the evidence.

[3] At the commencement of submissions before the Court, counsel for the appellant conceded the third ground was not a "stand-alone" ground but was subsumed by grounds (i) and (ii). This effectively left two grounds to be argued.

[4] The appellant, however, sought to rely on the following further ground:

> The trial judge erred in her direction to the jury in relation to the coincidence evidence and the error could not be cured by any other direction.[2]

[5] The appellant requires leave to rely on this proposed further ground in the circumstances now under consideration. During the hearing of the appeal, we agreed to hear argument on the proposed ground in order to determine whether leave should be granted.

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2 The relevant directions are at AB 521-522.

The nature of the Crown case

[6] On 19 March 2016 police stopped a Queensland registered white Subaru Outback vehicle at Adelaide River. The appellant was the driver. Inside the car were three suitcases and a backpack holding a total of 44 sealed silver foil packages. Each of the silver foil packages contained at least one other form of packaging such as a knotted shopping bag, Cryovac or other plastic bag. In all, 19.719 kilograms (40 pounds) of cannabis were found in the packaging. Two of the suitcases were located in the rear of the car. One suitcase and a backpack were located in a space-saver container on its roof.

[7] There was no dispute that the appellant was driving the car and therefore by the operation of s 40(1)(c) of the *Misuse of Drugs Act*, he was taken to be in possession of the cannabis unless he could satisfy the jury that he neither knew nor had reason to suspect the cannabis was in the car.[3] In addition, the appellant's fingerprints were located on one Cryovac bag contained inside the silver packaging from the suitcase in the space-saver. His fingerprints were also found on a birthday card addressed to him, which in turn was found within the backpack that contained cannabis. The appellant's DNA was located on the following items: the knot of a shopping bag that was contained inside the silver packaging in one of the suitcases in the rear of the car, on the outside surface of the silver packaging in the other suitcase in the rear of the car, on the outside surface of the silver packaging in the backpack, and on the outside surface of a Cryovac bag contained in the

3 *Grosvenor v The Queen* [2014] NTCCA 5 at [29]-[31].

silver packaging of a package in the backpack. DNA attributable to persons unknown was located on some of the packaging space. In response to being asked by police if there were drugs in the car, the appellant said there were not.[4] When a drug detection dog indicated one of the suitcases in the back of the car the appellant said he thought it was his brother's suitcase and that he, the appellant, did not own it.[5] The appellant told police he had come from Mt Isa where he had been working and was going to Darwin to look for work at INPEX.[6] The Subaru was registered to "Peter Gjonaj" of 167 Hub Drive, Aberfoyle Park, South Australia. This was the last address recorded for the appellant on the police database.[7] No enquiries were made as to the identity of "Peter Gjonaj" and whether or not he was related to the appellant.[8] A central question was whether the appellant's car smelt of cannabis and whether the appellant would have been aware that the odour detected was cannabis. The Crown sought to rely upon evidence relating to previous cannabis offences committed by the appellant in South Australia in 2001, 2002 and 2006, and the subsequent pleas of guilty to those offences as coincidence evidence and as circumstantial evidence from which to prove knowledge due to the appellant's prior familiarity with the smell of cannabis.

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4 AB 128 and 189.

5 AB 217.

6 AB 167 and 210.

7 AB 173.

8 AB 127.

[10] In terms of coincidence evidence, the significant probative value was said to lie in rebutting innocent association and proving knowledge of the appellant's familiarity with the smell of cannabis. Consequently, the evidence would also be relevant as circumstantial evidence from which to prove knowledge on the basis of the appellant's prior familiarity with the smell of cannabis. The Coincidence Evidence Notice states in part that the evidence was relevant to the following facts in issue in the trial: "[k]nowledge of the presence of a commercial quantity of cannabis plant material within a motor vehicle driven by the accused for the purpose of supplying the quantity of dangerous drugs".[9]

[11] This issue was very much at the heart of the trial. There was a voir dire and a *Basha* inquiry that canvassed the admissibility of the evidence. The evidence was sought to be admitted on the basis that it would tend to rebut any explanation consistent with innocence that might be proffered for the cannabis located in the vehicle driven by the appellant, as he would well know what cannabis smelt like.

[12] We have assessed whether there was evidence that the jury could rely on of the odour of cannabis generally and whether the smell of cannabis was present in the appellant's car. It is fair to say that in this Court, the appellant's written submissions in relation to the evidence before the jury in regard to the smell of cannabis are incomplete. There was substantial

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9 Coincidence Evidence Notices at AB 3-5 and AB 19-22.

evidence upon which the jury could rely. The forensic chemist Kelsey McGorman described the odour of cannabis generally as follows:[10]

> Cannabis has a very distinct odour. To describe it is a bit subjective. I'd say it's quite sweet. It's definitely pungent but it's a very distinctive odour for cannabis.

The witness Kennon said:[11]

> He opened [the rear door of the vehicle] and there was a strong smell of cannabis emanating from the vehicle.

The witness Hutchinson-Goncz said:[12]

> [T]he front driver side window was open. I leant down to look inside the car and I noticed the extremely strong smell of cannabis coming from the vehicle. And after that I went around the back and removed the two suitcases that were in the rear of the car.

[13] It is not suggested the above references are exhaustive. However, they are emblematic of the evidence that was available to the jury, particularly about the smell of cannabis in the car.

[14] There was some argument about the substance tetrahydrocannabinol ("THC"). It was put by the appellant's counsel that in the absence of evidence of THC in the subject cannabis, the odour that is characteristic of cannabis would not be present. This argument was largely based on a misconception. The appellant's counsel at trial made this very argument in relation to THC in a short voir dire and in his closing. Counsel for the respondent at trial put paid to this misconception submitting, "Regardless of

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10 AB 269.

11 AB 181.

12 AB 227.

how its grown cannabis has a distinctive smell".[13] An associated issue arose as to whether the cannabis the appellant had been charged with cultivating in 2001, 2002 and 2006 in South Australia could be said to have the same odour.

[15] Relevant to these issues was the evidence from the forensic chemist Kelsey McGorman who, as mentioned, said cannabis has a "very distinctive odour"[14] and that THC is the active part of cannabis. Further, Ms McGorman stated that unless specifically grown to have very low levels of THC such as hemp, all cannabis has THC in it.

[16] Ms McGorman could not say whether the odour of cannabis comes specifically from THC, but that there were no conditions or methods of cultivation she was aware of that would change the smell of cannabis. It did not matter what growing method was used, there would be no change to the distinctive odour. Ms McGorman said in cross examination with respect to the particular cannabis that she was not sure when she became aware of the smell of that cannabis, in terms of whether it was before or after the silver packages were opened. She explained that was not part of her scientific examination. In all instances the cannabis she examined was within a sealed silver bag.[15]

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13 AB 281.

14 AB 179.

15 AB 264-293.

[17] There was clearly evidence from which the jury could conclude that the subject cannabis possessed a distinctive odour and that all cannabis possesses the same odour.

[18] The evidence admitted on a coincidence basis that was set out in the two filed Coincidence Evidence Notices may be summarised as follows:[16]

> At about 12:10pm on 5 July 2001 police executed a search warrant at 19 Deepolene Avenue, Bellevue Heights, South Australia which was the appellant's residence. Police found four cannabis plants growing hydroponically in a bedroom. The plants were about 1.5 metres tall. When asked about the plants, the appellant said he grew them for his own use. On 13 November 2001 at the Adelaide Magistrate's Court he pleaded guilty to a charge of "Producing a Controlled Substance". He was fined without a conviction being recorded.
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> On 13 March 2002 police again executed a search warrant at the appellant's same address. Three cannabis plants were found growing in three different pots in a room in what was described as a "fairly standard hydroponic set-up". As well as the appellant, another male and female were present at the house. On 14 May 2002 the appellant pleaded guilty to one charge of "Taking Part in the Production of a Controlled Substance". He was convicted and fined $250.
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> On 15 September 2006 police executed a search warrant at the appellant's same address. Police located six plants grown hydroponically. The plants were described as being in a "fairly mature" stage of growth in a "grow room", a more sophisticated form of hydroponic production than on the previous occasions. Police also found instructions and substances used to promote the growth of the cannabis. The plants and hydroponic equipment were seized and analysed. The appellant's fingerprints were located on a piece of hydroponic equipment, namely one of the light shades. On 13 October 2008 the appellant pleaded guilty to one charge of "Taking Part in the Production of a Controlled Substance" in the Adelaide Magistrate's Court and without conviction was fined $350.

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16 AB 3-5, 19-20; written submissions on behalf of the appellant at [25]; written submissions on behalf of the respondent at [5].

[19] Plainly, the significance of the evidence from the respondent's point of view was seeking to show that the appellant would have been well aware that he was transporting a large amount of cannabis. The fact that he had prior convictions involving cannabis cultivation was a circumstance that simply tended to indicate that he was well aware of the smell of cannabis. On the other hand, the appellant was desperate to avoid the jury knowing of his previous convictions.

[20] It is worth noting that the respondent at trial had offered to simply submit an agreed fact even to the level of not referring to prior convictions, but rather referring to the fact that the appellant simply had knowledge of the smell of cannabis. The offer to lead the evidence in that manner was rejected. Attempts to then have the "bare-bone" convictions in agreed facts were also rejected. Counsel for the respondent informed this Court that the Crown was put to proof on everything. This included calling evidence from police officers in South Australia to testify about the previous convictions and related facts. Counsel for the appellant did not challenge the information counsel for the respondent put to this Court about how this part of the case unfolded at trial.

The admissibility grounds

[21] As mentioned above, the appellant submits a miscarriage of justice has taken place due to the erroneous admission of coincidence evidence relating to his prior familiarity with cannabis, which was proven through his previous cultivation convictions.

[22] In relation to whether the evidence met the requirements set out in s 98 of the *UEA*, the appellant submitted similarities were required to be identified between the past offences and the offence of suppling cannabis before the evidence could be admitted. In this case the only similarity, it was submitted, was that in all matters the substance he was charged with was cannabis.

[23] Similarities in the relevant sense are a consideration when determining the admission of coincidence evidence. Generally the closer and more particular the similarities, the more likely it is that the evidence will have significant probative value. Particularly in a case involving proof of identity or modus operandi, similarities are likely to assume far more significance on the question of probative value. However, the issue here was not of that kind.

[24] The primary purpose for the admission of the evidence was to show that the appellant would have been familiar with the smell of cannabis, making it unlikely that he could have driven from Mount Isa or Adelaide with a boot full of cannabis and not known it was there. The trial judge told the jury this evidence could be used to add to the general unlikelihood of all of the circumstances having happened together by chance. The trial judge specifically warned the jury not to reason that the accused was guilty of drug offences in the past so therefore was likely to be guilty of the charge being tried.

[25] In essence, the two central issues the trial judge had to consider were, first of all, whether the evidence was admissible as coincidence evidence, and secondly, whether the evidence had significant probative value which outweighed its prejudicial effect.

[26] Section 98 of the *UEA* relevantly provides:

> **The coincidence rule**
>
> (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:
>
> (a) …..
>
> (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.

[27] The appellant's case before this Court suggested the evidence of the previous contact with cannabis through the cultivation convictions was weak tendency evidence, as opposed to coincidence evidence, and should not have been admitted. The Court was referred to the decision of *R v Zhang*[17] where the New South Wales Court of Criminal Appeal affirmed the correctness of a trial judge's determination that evidence of crystal methamphetamine found in the accused's house, in her bedroom wardrobe, and an importation of the same drug at around the same time were related events for the purposes of s 98 of the *Evidence Act 1995* (NSW). The evidence was relevant to the charges on indictment because the Crown case was that the

17 [2005] NSWCCA 437; 158 A Crim R 504.

drug found in the wardrobe was derived from an earlier importation involving the same offenders about two months before. The appellant points out that although the evidence was found to be admissible under s 98, the Court in *Zhang* also said it had some of the "hallmarks" of tendency evidence. Simpson J noted the evidence was not tendered on a tendency basis and no argument to that effect was raised.[18]

[28] The question for the trial judge in *Zhang* was whether the similar circumstances between the two counts made it unlikely the appellant lacked the requisite knowledge so as to give the evidence significant probative value. Relevant to proof of knowledge, the admissibility issue is much the same here.

[29] A further argument put was that the evidence was presumptively inadmissible under s 94 of the *UEA*. Section 94 relevantly provides Part 3.6 of the *UEA* does not apply to evidence of the "character, reputation or conduct of a person",[19] or "tendency that a person has or had if that character, reputation, conduct or tendency is a fact in issue".[20] It was argued that on its terms, s 94 of the *UEA* provides an exception for tendency evidence under s 97 but not for evidence admitted under s 98. We reject the appellant's suggested construction of s 94 of the *UEA* and how it may apply here. This is not a case where the fact in issue is the appellant's character or

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18 *R v Zhang* (2005) 158 A Crim R 504 at [150], per Simpson J.

19 *UEA*, s 94(3)(a).

20 *UEA*, s 94(3)(b).

that tendency is a "fact in issue". In this context, "fact in issue" should be understood to mean "ultimate fact in issue", not facts related to issues and other facts to be found in the reasoning towards the ultimate finding.[21]

[30] The appellant submitted *R v Ngatikaura*[22] supported the submission that the evidence should not have been admitted as coincidence evidence as it invoked tendency reasoning. In *Ngatikaura* the Crown succeeded in an appeal against the exclusion of tendency evidence on discretionary grounds that comprised evidence of two prior supplies of drugs that the respondent had pleaded guilty to, towards proof of one count of deemed supply of 5.74 grams of heroin. The two previous supplies were committed at different addresses, involved different packaging and the supplies were to undercover police. The Crown sought to prove the respondent was a drug dealer by occupation in order to rebut any defence of innocent association with the drugs found in her house. All members of the Court[23] held the trial judge's decision to exclude the evidence substantially weakened the Crown case, however, the question arose during the appeal of whether the evidence of the previous supplies was tendency evidence. That argument had not been considered by the trial judge. Beazley JA found that even if the evidence on its face may be tendency evidence, it may still be admissible or used for

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21 See ALRC 26, vol 1, para 786 as reproduced in Stephen Odgers, *Uniform Evidence Law*, (Thompson Reuters, 12th ed, 2016) at [94.90] and associated commentary.

22 [2006] NSWCCA 161; 161 A Crim R 329.

23 Beazley JA, Simpson J and Rothman J.

some other purpose as part of a circumstantial case.[24] Ultimately her Honour found the evidence was not tendency evidence. Simpson J concluded the use of the proposed evidence was on a tendency basis, although not necessarily inadmissible. Her Honour noted the appropriate findings of fact and assessments had not been made. Rothman J concluded the evidence was tendency evidence because the only way it could be shown to be relevant to the facts was reliance on tendency reasoning.[25] On the point counsel for the appellant seeks to rely, *Ngatikaura* is inconclusive. Further, the facts are clearly distinguishable from this matter.

[31] Counsel for the appellant also relied on *Christian v The Queen*[26] where it was held evidence that the accused was in possession of a bottle of a particular drug may be relevant to show that he was also in possession of a quantity of precisely the same drug found in another location. The evidence was admitted as circumstantial evidence relevant to the accused's knowledge of the bottle found in the hotel room registered to him. It was found, however, there had been a misunderstanding that both substances were the same colour and therefore it was not correct to infer they were from the same source. At trial it was found the relevant inferences were not necessarily available. Davies J held where the only connection between the two lots of liquid was that both contained the same prohibited drug, the

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24 Citing *R v Quach* [2002] NSWCCA 519; 137 A Crim R 345 and the related issue of the relevance of the common law decision of *Harriman v The Queen* [1989] HCA 50; 167 CLR 590 under the *Evidence Act 1995* (NSW).

25 *R v Ngatikaura* (2006) 161 A Crim R 329 at [92] per Rothman J.

26 [2013] NSWCCA 98.

evidence would only be admissible, if at all, as tendency evidence.[27] It was said the evidence about the liquid in one of the identified bottles could only be evidence the appellant had a propensity, disposition or tendency to have that drug in his possession.[28] Once again, the result in *Christian* was inconclusive on the issue to be dealt with here, as the question of whether the evidence was admissible as tendency evidence was never considered because there was no objection to the evidence being led.[29]

[32] We were also referred to *Azzi v The Queen*[30] where the New South Wales Court of Criminal Appeal held there had been an error in admitting as coincidence evidence a statement made by the appellant to police known as "the sugar lie" when asked about his knowledge of a powder, which he did not deny, but said it was "probably sugar". It was held the statement could not in particular circumstances be considered an "event" or "occurrence" for the purposes of the application of s 98 as it did not bear on the probability that he was in possession of the heroin.[31] It may however be noticed that it was conceded in *Azzi* that the balance of the evidence was properly admitted as coincidence evidence, namely evidence of methamphetamine, steroids and prescription drugs found in a wardrobe, which the accused admitted possessing. The evidence was used to show that he also possessed heroin also found in the wardrobe.

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27 [2013] NSWCCA 98 at [49], [54] per Davies J.

28 [2013] NSWCCA 98 at [62], per Davies J.

29 [2013] NSWCCA 98 at [63] per Davies J.

30 [2013] NSWCCA 249.

31 [2013] NSWCCA 249 at [41] and [42] per Fullerton J.

[33] The appellant submitted that even if the evidence met the test of relevance, on the issue of knowledge, the evidence was only potentially admissible as coincidence evidence, or tendency evidence. It was argued the evidence did not meet the criteria set out in s 98 of the *UEA*. Section 98 required evidence of events that, having regard to the similarities between those events and the charge, or the circumstances in which they occurred, makes it improbable that they occurred coincidentally. Further, there is the requirement that the evidence possess "significant probative value". Clearly that phrase means more than mere relevance; it refers to the evidence being "important" or "of consequence".[32] Referring to the meaning of "significant" in the context of s 97(1)(b) of the *UEA*, in *IMM v The Queen*[33] the majority said:

> The significance of the probative value of the tendency evidence under s 97(1)(b) must depend on the nature of the facts in issue to which the evidence is relevant and the significance or importance which that evidence may have in establishing those facts. So understood, the evidence must be influential in the context of fact finding.[34]

[34] The trial judge's ruling makes clear that she did not regard the evidence of the previous cannabis offending would have value in establishing a particular tendency, however the prior involvement and familiarity with

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32 *R v Lockyer* (1996) 89 A Crim R 457 at 459; *IMM v The Queen* [2016] HCA 14; 257 CLR 300; *R v Ford* [2009] NSWCCA 306; 201 A Crim R 451 at [50].

33 (2016) 257 CLR 300.

34 *IMM v The Queen* (2016) 257 CLR 300 at [46] per French CJ, Kiefel, Bell and Keane JJ.

cannabis was likely to be of significant probative value in the assessment of the knowledge of the source of the strong odour in the appellant's car.[35]

[35] It must also be borne in mind s 98(1)(b) permits the admission of coincidence evidence in circumstances where there is reasonable notice of the party's intention to adduce the evidence and "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".

[36] In our view the evidence in question "having regard to other evidence adduced" that we have already identified possessed significant probative value. Further, the term "event" in s 98(1) of the *UEA* is sufficiently broad to cover the subject evidence which may include an event, the occurrence of which is a fact in issue in the proceedings.

[37] In *R v Dickens*, in a far removed factual situation Mildren AJ considered the relevant principles. His Honour said:[36]

> Evidence sought to be admitted under the coincidence rule is a kind of circumstantial evidence where although each piece of the evidence when considered individually could not lead to any conclusion, the evidence considered as a whole when considered in the light of all of the evidence to be relied upon, enables a trier of fact to conclude the fact in issue has been proven.

[38] His Honour further said:[37]

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35 AB 101, 106.

36 *R v Dickens* [2016] NTSC 7 at [65].

> [T]he contended similarities do not have to be 'strikingly similar' although the more similar they are, the more likely it is that the similarities will have probative value weight.

[39] In *CV v Director of Public Prosecutions*[38] the accused's state of mind was in issue. The prosecution relied on three separate loan applications where the accused had made a gross overstatement of net income in order to prove fraud. In rejecting the need to prove striking similarity in the applications or their circumstances, the Victorian Court of Appeal said:[39]

> There may be such a relationship between the events in purpose, circumstances and mode of conduct that coincidence reasoning will be open. The necessary relationship is not confined to events, each of which possesses unusual characteristics in its execution. The evidence of each may provide strong support for the others, making it just to admit them all notwithstanding the prejudicial effect of admitting the evidence.

[40] As mentioned, the respondent relied on the fact that on three separate previous occasions the appellant had pleaded guilty to the production of cannabis plants in his own home and by inference was familiar with its odour. In the present matter the appellant was the sole occupant of the vehicle. The cannabis was contained in four separate locations in the vehicle. It was significant in quantity and value. It had a potential value of up to $4 million. It had a very strong odour. In addition, one of the packages had the appellant's fingerprints on it and four of the packages had his DNA on them. There was substantial evidence of and from those events and

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37 *R v Dickens* [2016] NTSC 7 at [66].

38 [2014] VSCA 58.

39 *CV v Director of Public Prosecutions* [2014] VSCA 58 at [10].

circumstances to draw the inference that it was improbable that the events and circumstances were mere coincidence.

[41] We reject the appellant's argument that the subject evidence lacks significant probative value and that it was of marginal value as it is circumstantial evidence. The probative value of the evidence went directly to a fact in issue, namely knowledge in circumstances where there was evidence that the odour of the cannabis from the vehicle was strong. The evidence had the capacity to rebut an innocent explanation for the cannabis, which was a live issue at trial. That the evidence was circumstantial, in this particular instance, did not reduce its significance in the sense of its influence in fact finding.

[42] In our view the most significant issue in this case is not so much whether the evidence possesses significant probative force; it clearly does. The real issue, rather, is whether the prejudice attaching to the admission of the evidence outweighs its probative value in the terms of s 101(2) of the *UEA*. It must be borne in mind that unfair prejudice does not mean that there is a weighing up of the prejudice as against the power of the evidence. It would be highly unfair to the Crown case if the more powerful the evidence the greater would be the difficulty of the Crown in putting the evidence before a jury.

[43] Rather, the balancing that is required to be done is to identify the prejudicial effect which the evidence may give rise to and whether notwithstanding the

ameliorating effect of any directions there may still be prejudice which would outweigh the probity. The evidence must be carefully considered together with the directions given.

[44] The appellant argued the risk of prejudice was unavoidable, irrespective of the directions given. Counsel for the appellant drew our attention to the remarks of Mason P in *R v Lumsden*:[40]

> I cannot accept the proposition that evidence of an accused person's involvement in criminal activity other than that charged is highly prejudicial and inadmissible on that account. Thus formulated, it would exclude cogent and properly probative evidence of a high-speed getaway from a bank robbery or of currency offences in connexion with a drug importation.
>
> On the other hand, evidence as to the criminal conviction of an accused person in relation to a discrete offence (especially if of the same nature as that charged) will almost invariably be inadmissible. But that is because of the combined impact of the conviction (which puts guilt or innocence beyond doubt) and its capacity to induce the jury to engage in propensity or tendency reasoning. Such evidence is highly prejudicial and unfair in its trenching upon the presumption of innocence.

[45] We agree evidence of prior convictions will usually be highly prejudicial especially when the convictions are for similar offending. Evidence of previous convictions are therefore rarely admitted. Here, however, the evidence was admitted for the establishment of one matter, familiarity with cannabis, and by inference, its odour. The previous matters were not offences of the kind that would arouse disgust or an emotional response in the jury, nor distract them from their duty to impartially consider the

40 [2003] NSWCCA 83 at [4]-[5].

evidence in the light of the directions given. That the appellant had some years before engaged in the cultivation of cannabis was unlikely to result in the jury giving the evidence more weight than it deserved.

[46] The evidence of the familiarity of the appellant with the smell of cannabis was part of the mosaic that made up the circumstantial and direct evidence bearing upon the case. It tended to negative any argument put forward by the appellant that he did not know there was cannabis in the vehicle. The trial judge made clear in her directions that this was how the jury should use the evidence, together with other evidence including the DNA evidence and fingerprint evidence. In our view not only was the evidence of probative value, but the probative value far exceeded any prejudice that was likely to occur in this particular factual setting. In considering this latter point, the directions of the trial judge are relevant. In this case the jury would have had no difficulty in appreciating how they should use the evidence.

The trial judge's direction on the evidence

[47] During her summing up, the trial judge identified various elements of circumstantial evidence.[41] She noted the Crown relied on evidence that the cannabis in the car had a powerful distinctive odour. Further, that the Crown relied on evidence from witnesses in South Australia that the appellant had been involved in hydroponically growing cannabis at his home in Adelaide on three previous occasions. The significance of this, her Honour pointed out, was that it was the Crown's submission that the previous matters

41 AB 513.

showed the appellant would have been familiar with the smell of cannabis. Her Honour said, "The Crown relies on this for you to draw the inference that Mr Gjonaj knew cannabis was there." She repeated her warning. She said:

> Lastly, the Crown relies on that evidence you heard about from South Australia that three times in the past Mr Gjonaj had been involved in cultivating cannabis in a hydroponic setup in his home. The primary purpose of that evidence is to show that Mr Gjonaj would have been familiar with the smell of cannabis, making it unlikely that he could have driven from Mount Isa or Adelaide with a boot full of cannabis that police described as having an overwhelming odour and not know it was there.[42]

[48] As a matter of completeness, the trial judge pointed to the fact that the defence had noted that there was no evidence that the appellant had been familiar with that smell for nine and a half years, and her Honour commented that that is another use the jury could make of the evidence. She further pointed out that the defence had submitted that there were substantial differences between the past South Australian offences and the one the appellant was now alleged to have committed nine and a half years later. She noted the past offences were minor offences, offences of a different kind, and were disposed of with small fines. They were very different from the present offence of transporting large amounts of cannabis by road.

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42 AB 521.

[49] Her Honour noted that counsel for the appellant had complained that the Crown was trying to paint the appellant as a criminal. The trial judge said as follows:[43]

> I do need to now warn you about the use you can make of this evidence. That is not the point. The Crown is most certainly not submitting to you that Mr Gjonaj is a criminal and therefore is likely to have committed these offences. That was not the submission and you may not use it that way. You may not reason that Mr Gjonaj is a bad man likely to have committed a crime.
>
> I have already explained the primary purpose of that evidence is to show that Mr Gjonaj would have been familiar with the smell of cannabis, etcetera and you can use it for that purpose and you can use it, if you wish and if you see fit, to add to the general likelihood of all the circumstances having happened together by chance if you see fit.
>
> What you cannot do is this – you cannot reason this way: "Mr Gjonaj was guilty of drug offences in the past, so he is likely to be guilty of this one". Nor can you reason this way: "Mr Gjonaj is a bad man and he is a criminal, so he is probably guilty". When you put it that way, you can see for yourself how illogical that reasoning is. It just does not follow. It does not make sense. You must be aware of it and you must guard against such illogical thinking. It is simply not permitted.

[50] Though it was argued that there was no clear direction to the jury, there certainly was. The jury were directed what use they could make of the coincidence evidence and how, and were warned against the dangers of mere propensity reasoning. The jury were being asked about the likelihood that the accused as the driver and sole occupant of this vehicle containing a large amount of cannabis, the odour of which clearly permeated the vehicle, would have no knowledge that it was cannabis, despite his previous

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43 AB 522.

involvement with its cultivation. We consider the evidence was admissible in the form and manner in which the trial judge permitted it to be adduced and used by the jury, according to her Honour's directions. The probative value outweighed any prejudice that could have possibly been caused.

[51] There was an express submission by the Crown that it was not seeking to rely on tendency reasoning. It was stated at the *voir dire* that the prosecutor would urge the jury that the evidence not be used in that way. In fact, the evidence was not used as tendency evidence, but was put to the jury as coincidence evidence.

The application for leave to appeal on the additional ground

[52] The right of appeal to this Court is subject to the limitation imposed by Order 86.08 of the *Supreme Court Rules* (NT). This rule provides:

> No direction, omission to direct or decision in relation to the admission or rejection of evidence of the Judge of the court of trial shall, without the leave of the Court of Criminal Appeal, be allowed as a ground of appeal, or for an application for leave to appeal, unless objection was taken at the trial to the direction, omission or decision by the party appealing or applying for leave to appeal.

[53] The purpose of the rule is to ensure that the trial judge receives the assistance from counsel to which that judge is entitled in the task of giving appropriate directions to the jury. An accused will be held to what was done for him or her at trial unless there is a possibility of real injustice.[44]

44 See *R v DH* [2000] NSWCCA 360 at [115]; *BD v The Queen* [2017] NTCCA 2 at [65].

[54] In this case, counsel at trial did not seek any redirection from the trial judge. Further, counsel for the appellant at the appeal hearing fairly conceded that no application was made to discharge the jury after the trial judge's summing up, notwithstanding that it was his submission before this Court that no redirection would have cured the alleged error of allowing the evidence to be heard in the first place. It is our view that no possibility of injustice arose whether real or otherwise.[45] Leave will not be granted to rely on this ground.

[55] Notwithstanding our ruling we have nevertheless considered the substance of the ground with reference to the trial judge's summing up. The basis of the submission was that the summing up was such that it would have left the jury with the view that the appellant was a criminal. This submission arises from the trial judge's explanation to the jury as to the reason why the jury was being permitted to consider what can be described as coincidence evidence.

[56] A properly instructed jury, as was this one, is capable of weighing up evidence and understanding how evidence is to be used. This is at the very heart of our system. In *Dupas v The Queen*,[46] the High Court emphasised the principle that the law proceeds on the basis that the jury acts on the evidence and in accordance with the directions of the judge. The Court

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45 Cf the circumstances in *BD v The Queen* [2017] NTCCA 2 where issues relevant to the definition of the basis of criminal responsibility of the appellant were not identified during the course of the trial leading to injustice. Leave to appeal was granted in those circumstances.

46 [2010] HCA 20; 241 CLR 237.

observed this principle represents the policy of the common law and is more akin to a species of "constitutional fact".[47] In this case the trial judge had in simple terms made it clear how the jury is to use the evidence. The ground is not made out. Leave is refused to add the further ground.

[57] For the above reasons the appeal is dismissed.

Orders of the Court

1. Leave to appeal in respect of the proposed further ground of appeal alleging error in the summing up is refused.

2. The appeal is dismissed.

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47 *Dupas v The Queen* (2010) 241 CLR 237 at [28], per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, Bell JJ.