CITATION:	*The Queen v EJGPR* [2019] NTSC 30
PARTIES:	THE QUEEN v EJGPR
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21829253 and 21844278
DELIVERED:	3 May 2019
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JUDGMENT OF:	Kelly J

CATCHWORDS:

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

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

Hughes v The Queen [2017] HCA 20; *HML v The Queen; SB v The Queen*; *OAE v The Queen* (2008) 235 CLR 334; *McPhillamy v The Queen* (2018) 361 ALJR 13; *R v Bauer* (2018) ALJR 846; *The Queen v AW* [2018] NTSC 29, applied

REPRESENTATION:

Counsel:

Crown:	M Nathan SC
Accused:	M Aust

Solicitors:

Crown:	Director of Public Prosecutions
Accused:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v EJGPR [2019] NTSC 30
No. 21829253 and 21844278

BETWEEN:

THE QUEEN

AND:

EJGPR

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 3 May 2019)

[1] The accused is charged with nine counts of sexual assault against two different victims. Both complainants were his step-daughters. They were living in the same house as the accused and their mother, with whom the accused was in a domestic relationship at the time of the alleged offending. He is charged with eight counts of sexual assault including indecent touching, anal sexual intercourse, fellatio and cunnilingus against the child BH and one count of indecent dealing with the her older sister AT. (AT was born on 2 April 2007. BH was born on 15 March 2009.)

[2] In summary, the Crown case on count 1 is that between 2 September 2017 and 1 July 2018, the accused was watching a movie in the mother's room with BH and her younger sister FH. FH was sitting on the front of the bed

and BH was lying on the accused's stomach. The accused kept pulling BH's hand back towards his penis and he told FH not to turn around.

[3] The Crown case on count 2 is that between the same dates, the accused was again watching a movie in the mother's room with BH and her younger sister FH. FH was sitting on the front of the bed. The accused told FH not to turn around. He put his finger in his mouth and then into the anus of BH. Then he put his penis into the anus of BH.

[4] The Crown case on count 3 is that between the same dates the accused was in the lounge room of their residence watching football on TV. During an interruption to the TV show, the accused took BH into a dark corner of the lounge room. He pulled BH's hand to his penis; she would pull her hand away and he would bring her hand back to his penis.

[5] The Crown case on Count 4 is that, between the same dates, in that dark corner of the lounge room, the accused held BH down by the neck and put his penis in her mouth.

[6] The Crown case on count 5 is that between the same dates, on the couch in the lounge room, the accused forced BH to bend over a couch, put his finger into his mouth and then put that finger into her anus.

[7] The Crown case on count 6 is that between the same dates, on the couch in the lounge room, the accused put his penis into the anus of BH as he held her by the neck and she tried to push him away.

[8] The Crown case on count 7 is that between the same dates, on the couch in the lounge room, the accused opened BH's legs and performed cunnilingus on her.

[9] The Crown case on count 8 is that between the same dates, in the mother's bedroom, the accused touched BH on the vagina and bottom on the outside of her clothing with his hand.

[10] The Crown case on count 9 is that between 4 February 2016 and 3 February 2017, AT was lying on the bed in the mother's room. The accused came into the room, lay on the bed with AT, and with his hand he touched the outside of AT's clothing over her vagina. Then he showed her his erect penis out of his shorts as he was leaving the room.

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

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

(a) to act in a particular way, namely to sexually assault his step-daughters in his care at times when their mother was not there and/or where other adults or siblings were present but occupied and busy elsewhere in the house; and

(b) to have a particular state of mind, namely a sexual interest in his pre-pubescent step-daughters to whom he was in a position of trust and responsibility for their care.

[13] The conduct about which evidence is sought to be adduced is the conduct the subject of the current charges as well as one uncharged act against the child AT alleged to have been committed in Queensland in January 2014 and one uncharged act alleged to have been committed against the child BH some time in 2014. In relation to AT, it is alleged that the accused touched the outside of AT's vagina with his hand. This evidence is proposed to be given by AT.

[14] In relation to BH it is alleged at some time in 2014, the accused placed his finger onto BH's anus. The evidence of this is proposed to be adduced from the child's grandmother, EJC. In a recorded interview style statement made on 9 October 2018, EJC said that the girls, BH and her little sister FH were allowed to go to her house after Christmas 2014 to pick up their presents. On the way home, BH told her she had worms so EJC raced to the chemist to get her some medicine. Her eldest son, her cousin and the two little girls were in the car with her. In the car, BH told her (and the others) that "Daddy G (the accused) was looking up her bum and in her pants and that". EJC said that she asked the child again, "but she just said that", and then she stopped because by that time they were at the house and BH wouldn't talk to her any more.

[15] Later in the interview, she was asked if she could remember exactly what words the child had used. She said, “Just same thing, Daddy G’s been looking up my bum, and he said, ‘You don’t, you just put your finger up your bum,’ and he put his finger up her bum or something.” She continued, “Yeah, and I said he’s not allowed to do that, and you tell Nanna everything. And after that we weren’t allowed to see the kids anymore.”

[16] Still later in the interview, this exchange occurred.

> POLICE OFFICER: [Y]ou said something about BH saying something, I think you said Daddy G looks at her bum and …
>
> EJC: Yeah, yeah.
>
> POLICE OFFICER: And stick(s) his finger in her bum?
>
> EJC: Sticks his finger … bum. Possibly, possibly, yeah.
>
> POLICE OFFICER: Possibly. Okay. Is that something she said to you, can you remember?
>
> EJC: Yes.
>
> POLICE OFFICER: What BH said to me, yeah. And something similar, like stick milk, milk up your bum.

[17] The grandmother said she contacted Child Services and reported the complaint, but nothing happened.

[18] The tendency evidence is said to be relevant to whether the accused did sexually assault his step-daughters in his care as alleged.

[19] Under UEA s 97 evidence of the conduct of a person is not admissible to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind unless the appropriate notice has been given

and the court thinks that the evidence will (either by itself or having regard to other evidence to be adduced) have significant probative value.

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

[21] The potential probative value of tendency evidence was explained by the High Court in *Hughes v The Queen*:[1]

> The probative value of evidence is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue. Tendency evidence will have significant probative value if it could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent. The trier of fact reasons from satisfaction that a person has a tendency to have a particular state of mind, or to act in a particular way, to the likelihood that the person had the particular state of mind, or acted in the particular way, on the occasion in issue. ... The starting point in either case requires identifying the tendency and the fact or facts in issue which it is adduced to prove. The facts in issue in a criminal proceeding are those which establish the elements of the offence. *(citations omitted)*

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

> The assessment of whether evidence has significant probative value in relation to each count involves consideration of two interrelated but separate matters. The first matter is the extent to which the evidence supports the tendency. The second matter is the extent to which the tendency makes more likely the facts making up the charged offence. Where the question is not one of the identity of a known offender but is instead a question concerning whether the offence was committed, it is

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

2 ibid at [41]

> important to consider both matters. By seeing that there are two matters involved it is easier to appreciate the dangers in focusing on single labels such as "underlying unity", "pattern of conduct" or "modus operandi". In summary, there is likely to be a high degree of probative value where (i) the evidence, 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.

[23] The first question is the extent to which the evidence sought to be adduced tends to establish that the accused had the tendency to act in the way asserted in the notice. The assessment of the probative value of the evidence is to be determined by a trial judge on the assumption that the jury will accept the evidence. This does not involve any assessment of the credibility or reliability of the evidence except in an extreme case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury and so does not meet the criterion of relevance.[3]

[24] In my view, on the assumption that the jury accepts the evidence, the evidence set out in the tendency notice is not only capable of supporting, but in fact strongly supports, proof of a tendency in the accused to sexually assault his step-daughters in his care at times when their mother was not there and/or where other adults or siblings were present but occupied and busy elsewhere in the house and also to have the alleged state of mind, that is a sexual interest in his pre-pubescent step-daughters.

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3 *IMM v The Queen* [2016] HCA 14 at [38], [39] and [41]

[25] Putting to one side for the time being the question of cross-admissibility of the evidence, and dealing with whether the evidence of the uncharged act of each child, in conjunction with the evidence in relation to the charges on the indictment relating to that child, if accepted, would establish that the accused had a tendency to sexually assault that child and to have a sexual interest in that child, there can be no doubt that it would. The Full Court of the High Court in *R v Bauer (a pseudonym)*[4] said:

> Henceforth, it should be understood that a complainant's evidence of an accused's uncharged acts in relation to him or her (including acts which, although not themselves necessarily criminal offences, are probative of the existence of the accused having had a sexual interest in the complainant on which the accused has acted) may be admissible as tendency evidence in proof of sexual offences which the accused is alleged to have committed against that complainant whether or not the uncharged acts have about them some special feature of the kind mentioned in *IMM* or exhibit a special, particular or unusual feature of the kind described in *Hughes*.[5]
>
> …
>
> In such cases, evidence of each charged act is admissible as circumstantial evidence in proof of each other charged act and, for the same reason, evidence of each uncharged act is admissible in proof of each charged act.[6]

[26] The Court in *Bauer*[7] went on to approve the following statement from the judgment of Hayne J in *HML v The Queen*:

> Generally speaking … there usually will be no reasonable view of other sexual conduct which would constitute an offence by the accused against the complainant, even if it is an isolated incident and

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4 [2018] HCA 40

5 at [48]

6 at [50]

7 at [51]

> temporally remote, which would do other than support an inference that the accused is guilty of the offence being tried.

[27] Their Honours concluded:

> And the fact of itself that evidence of uncharged acts is given by a complainant does not mean that it lacks significant probative value. Although there is a lack of independence in the sense that the evidence of uncharged acts depends on the complainant's account, once the evidence is admitted, and assuming it is accepted, it adds a further element to the process of reasoning to guilt and so, therefore, may be seen as significantly probative of the accused's guilt of the charged offences.

[28] Defence counsel submitted that in the context of a discussion about the child having worms, the evidence of EJC about what the child told her in the car was incapable of constituting evidence of a sexual assault. I disagree. While I accept that, in that context, the evidence is susceptible, at least in part, of an alternative explanation, I agree with the contention of the prosecutor that it is difficult to see how evidence that the accused put "his finger in the child's bum" could be anything other than evidence of a sexual assault. In considering whether tendency evidence is admissible, the court acts on the assumption that the jury will accept the evidence and asks whether the evidence is capable of proving that the accused had the relevant tendency. It cannot be said that this evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. In my view, this evidence, in conjunction with the evidence of the charged acts, is strongly probative that the accused had the tendencies set out in the notice.

[29] Considering next the issue of the cross-admissibility of the evidence of the charged and uncharged acts relating to the two children, the High Court has said that there need not be any striking similarities or a distinct *modus operandi* for tendency evidence to be significantly probative of a fact in issue.[8] Nevertheless, where the tendency evidence sought to be adduced relates to sexual misconduct with a person other than the complainant, it will usually be necessary to identify some feature which serves to link the other sexual misconduct with the alleged offending conduct.[9] As the High Court said in *Bauer*:

> If … there is some common feature of or about the offending, it may demonstrate a tendency to act in a particular way proof of which increases the likelihood that the account of the offence under consideration is true.[10]

[30] It was submitted by defence counsel that there really is no common feature between the alleged offending against AT and the alleged offending against BH. The alleged offending against AT consists only of touching her inappropriately on the outside of her clothing and exposing his penis to her. With the exception of count 8, the alleged offending against BH is very different, and much more serious, involving the use of force and a number of instances of anal intercourse.

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8 *Hughes* at [34], [39] to [41]

9 *Phillamy v The Queen* (2018) 361 ALJR 13 at [31]

10 *Bauer* at [58]

[31] The prosecutor submits that in this case the common feature is not a physical feature of the offending; rather it is said to be that both children were the accused's pre-pubescent step-daughters and under his care. The alleged state of mind is said to be that the accused had a sexual interest in his pre-pubescent step-daughters. The evidence of both complainants is probative of that state of mind. The prosecutor also relied on similarities in the circumstances in which the offences and the uncharged acts occurred which involved risk taking behaviour – committing indecent assaults while others were nearby: the alleged tendency exhibited by the accused is a tendency to sexually assault his step-daughters at times when their mother was not there and/or where other adults or siblings were present but occupied and busy elsewhere in the house.

[32] Defence counsel submitted that the alleged offence against the child AT (Count 9) lacked this risk taking behaviour as there was no evidence in the child forensic interview with AT that there was anyone else in the house at the time. The prosecutor pointed out that the evidence was that this was a large family. Not counting the babies, the family consisted of five children and two adults. The child's evidence was that her mother had gone to the shops; she did not mention any of the other children going with her. Further, the child's evidence in relation to the uncharged act in Queensland was that the family was staying with the accused's mother when it occurred and, at the time, the accused's mother was cooking in the kitchen when the conduct

occurred in a bedroom. (She later said that it may have been the mother's two sisters who were cooking.)

[33] I agree with the prosecutor that, as a matter of logic, the evidence of each child is apt to prove that the accused had the tendency to have a particular state of mind, namely a sexual interest in his pre-pubescent step-daughters, and a tendency to sexually assault his step-daughters while they were in his care at times when their mother was not there and/or where other adults or siblings were present but occupied and busy elsewhere in the house. Further, those tendencies, if established, significantly increase the likelihood that the accused had that state of mind and acted on it at the times relevant to the charges on the indictment – ie that he committed the offences with which he is charged.

[34] I am therefore satisfied that the threshold test in s 97 has been met. The evidence sought to be adduced as tendency evidence has significant probative value.

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

[36] When undertaking this balancing exercise, the dominant consideration is to ensure that the accused is not deprived by prejudice of a fair trial.[11] The notion of prejudice in this general context "… means the danger of improper use of the evidence. It does not mean its legitimate tendency to inculpate."[12] Something more is required, such as the possibility that the evidence may be misused by the jury in some respect.

[37] The plurality in *Hughes*[13] explained the kinds of potential prejudice that can arise in a criminal trial such as this:

> In criminal proceedings in which the prosecution seeks to adduce tendency evidence about the accused, s 101(2) of the Evidence Act imposes a further restriction on admissibility: the evidence cannot be used against the accused unless its probative value substantially outweighs any prejudicial effect that it may have on the accused. The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way. In either case the tendency evidence may be given disproportionate weight. In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury's emotional response to the tendency evidence. And prejudice may be occasioned by requiring an accused to answer a raft of uncharged conduct stretching back, perhaps, over many years.

[38] In this case, the only potential prejudice identified by the defence is a possibility that the jury may engage in rank propensity reasoning. I do not

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11 *The Queen v AW* [2018] NTSC 29 at [30]

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

13 at [17]

think the risk of this is very great and, in my view, it can be adequately guarded against by the usual warnings. The use of this kind of tendency evidence of course involves a kind of permissible propensity reasoning. As the plurality said in *Hughes*:[14]

> The trier of fact reasons from satisfaction that a person has a tendency to have a particular state of mind, or to act in a particular way, to the likelihood that the person had the particular state of mind, or acted in the particular way, on the occasion in issue.

[39] Balanced against this, I consider the probative value of the evidence to be very high. I consider that the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant. The tendency evidence specified in the notice will be admitted.[15]

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14 at [16]

15 In relation to the evidence of EJC, defence counsel also argued that the transcript of the recorded statement did not make it very clear that EJC asserted that the child had said the accused put his finger in her bum, as she qualified her evidence at some points with words like "possibly". So far as EJC's evidence is concerned, this ruling is made on the assumption that the substance of her evidence will be that BH told her the accused looked up her bum and in her pants and put his finger in her bum. The prosecutor has confirmed that if, when she is proofed, this is not the substance of her evidence, the Crown will not call EJC to give evidence of what the child told her.