CITATION:	*The Queen v Graham* [2019] NTSC 59
PARTIES:	THE QUEEN
	v
	GRAHAM, David Edward Lindsay
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21819574
DELIVERED:	6 August 2019
HEARING DATE:	18 July 2019
JUDGMENT OF:	Hiley J

CATCHWORDS:

CRIMINAL LAW – Jurisdiction, practice and procedure – Application to quash indictment – Severance – Multiple complainants – Presumption of joint trial of sexual offences – Application for separate trials – Evidence of complainants cross admissible as tendency evidence – Application refused - *Criminal Code 1983* (NT) ss 309, 339(a), 341, 341A

EVIDENCE - Admissibility and relevance – Tendency – Probative value - Common factors between offending – Whether significant probative value outweighs any prejudicial effect to defendant – Evidence admissible as tendency evidence – *Evidence (National Uniform Legislation) Act 2011* (NT) ss 97, 101(2)

Crimes Act 1958 (Vic) s 372
Criminal Code Act 1983 (NT) ss 303, 309, 339, 341, 341A
Evidence (National Uniform Legislation) Act 2011 (NT) ss 97, 101

Hughes v The Queen [2017] HCA 20; 264 A Crim R 225; *R v Bauer* [2018] HCA 40; 92 ALJR 846, applied.

De Jesus v R [1986] HCA 65; 22 A Crim R 375; *Hoch v The Queen* [1988] HCA 50; 165 CLR 292; *IMM v The Queen* [2016] HCA 14; 257 CLR 300; *McPhillamy v The Queen* [2018] HCA 52; 92 ALJR 1045; *Papakosmas v R* [1999] HCA 37; 196 CLR 297; *R v Boardman* [1975] AC 421; *R v O'Brien* [2017] NTSC 34l; *R v PWD* [2010] NSWCCA 209; 205 A Crim R 75; *R v TJB*[1998] 4 VR 603; *Sutton v R* [1984] HCA 5; 152 CLR 528; *The Queen v AW* [2018] NTSC 29; *The Queen v Hampton* [2017] NTSC 87; *The Queen v JRW* [2014] NTSC 52, referred to.

REPRESENTATION:

Counsel:

Crown:	S Geary
Accused:	T Berkley

Solicitors:

Crown:	Office of the Director of Public Prosecution
Accused:	Darwin Family Law

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

The Queen v Graham [2019] NTSC 59
No. 21819574

BETWEEN:

THE QUEEN

AND:

DAVID EDWARD LINDSAY GRAHAM

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 6 August 2019)

Introduction

[1] By single indictment dated 10 February 2019 the accused has been charged with eight sexual offences committed between 1 May 2006 and 31 January 2008. The complainant in relation to four of the offences is R, born […], and the complainant in relation to the other four offences is S, born […].

[2] On 10 and 11 February 2019 the Crown served tendency notices which forms the basis of leave to permit the Crown to lead evidence from each of the complainants as tendency evidence. The accused objects to

the leading of such evidence and seeks severance of the indictment so that the charges involving each of the two complainants be heard separately.

The charges

[3] Counts 1 to 4 relate to R and counts 5 to 8 to his older brother S.

[4] Count 1 alleges that on an unknown night between 1 May 2006 and 4 January 2007 the accused indecently dealt with R by fondling his penis and testicles when the two of them were camped in a tent in the backyard of the family's residence in […].

[5] Count 2 alleges that on an unknown night between 1 June 2006 and 15 October 2008 the accused indecently dealt with R by fondling his penis and testicles when R slept in the accused's bed while staying the night at the accused's apartment in […].

[6] Count 3 alleges that on an unknown night between 4 January 2007 and 31 December 2008 the accused indecently dealt with R in R's room by fondling his penis and testicles when the accused stayed the night at the family's residence at […].

[7] Count 4 alleges that on an unknown day between 1 January 2008 and 31 December 2008 the accused unlawfully assaulted R while he was seated at a computer in a room at the family's residence at […]

[8] Count 5 alleges that on an unknown night between 13 January 2007 and 31 December 2007 the accused committed an act of gross indecency upon S by masturbating him when S spent the night at the accused's apartment in […].

[9] Count 6 alleges that on the same night and place the accused performed another act of gross indecency on S by masturbating him.

[10] Count 7 alleges that on the same night and place the accused indecently dealt with S by compelling S to masturbate him.

[11] Count 8 alleges that one night between 1 January 2008 and 31 January 2008 the accused attempted to have unlawful sexual intercourse with S by attempting to insert his fingers in S's anus when the two were camped together at a campground south of Alice Springs.

[12] Counsel for the Crown referred to s 341A of the Criminal Code which provides that "if an accused person is charged with more than one sexual offence in the same indictment, it is presumed that the charges are to be tried together." That presumption is not rebutted merely because "evidence on one charge is not admissible on another charge" or "there is a possibility that evidence may be the result of collusion or suggestion."

Complaint evidence

[13] In September 2017 R and S disclosed aspects of the alleged offending to each other when they met in a bar in Canada. S later told his father about the alleged offending.

[14] Prior to September 2017, S had not mentioned any of this to anyone else. However, R had told his girlfriend in mid 2014, when he was in year 10 at school, that a family friend who was a male would touch him inappropriately and would do things to his penis and this happened whenever he was left alone with him.

[15] Subsequent to the September 2017 discussion between R and S, R told others about what the accused had done to him when he was a child. These included his girlfriend AC in October 2017, his sister C in November December 2017, and his brother J in March 2018.

Tendency

[16] The Crown has served tendency notice as required by s 97(1) of *Evidence (National Uniform Legislation) Act 2011* (NT) (**ENULA**). They state that the relevant facts in issue are whether the accused sexually assaulted R and S. The tendency sought to be proved is the tendency of the accused to:

(a) act in a particular way, namely to sexually assault children to whom he has been given trust by parents of those children; and

(b) have a particular state of mind, namely to look for opportunities to be alone with a child he is trusted to be with to sexually assault.

[17] The notices then identify the conduct of which the evidence is to be adduced, particulars of date, time and place at and the circumstances in which the conduct occurred, and the name of each person who saw, heard or otherwise perceived that conduct.

Relevant law

[18] The tendency rule applies to evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, which may prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind.[1] If a relevant tendency is established, the person's tendency may be used to infer that it is more probable or more likely that the person behaved in accordance with that tendency on one or more of the occasions which are subject of the counts on the indictment.

[19] For the evidence to be admissible s 97(1) requires that:

(a) reasonable notice be given by the Crown[2];

(b) the Court thinks that the evidence will, either by itself or having regard to other evidence to be adduced, have significant probative value[3]; and

1 ENULA s 97(1).

2 ENULA s 97(1)(a).

(c) the probative value of the evidence must substantially outweigh any prejudicial effect it may have on the accused[4].

[20] The tendency rule has been considered by the High Court in *Hughes v The Queen*[5], *R v Bauer*[6] and *McPhillamy v The Queen*[7]. In *Hughes* the plurality held that there need not be 'striking similarities' or a distinct 'modus operandi' for the evidence to be significantly probative to a fact in issue. However, such factors may be taken into account in an assessment of the admissibility of the evidence.[8]

[21] In *Bauer*, the plurality stated (at [58]):

> …in a multiple complainant sexual offences case, where a question arises as to whether evidence that the accused has committed a sexual offence against one complainant is significantly probative of the accused having committed a sexual offence against another complainant, the logic of probability reasoning dictates that, for evidence of the offending against one complainant to be significantly probative of the offending against the other, there must ordinarily be some feature of or about the offending which links the two together. More specifically, absent such a feature of or about the offending, evidence that the accused has committed a sexual offence against the first complainant proves no more about the alleged offence against the second complainant than that the accused has committed a sexual offence against the first complainant. And the mere fact that an accused has committed an offence against one complainant is ordinarily not significantly probative of the accused having committed an offence against another complainant. If, however, there is some

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3 ENULA s 97(1)(b).

4 ENULA s 101(2).

5 (2017) 264 A Crim R 225 (***Hughes***).

6 (2018) ALJR 846 (***Bauer***).

7 (2018) 92 ALJR 1045 (***McPhillamy***).

8 *Hughes* per Kiefel CJ, Bell, Keane and Edelman JJ at [34] and [39] – [41].

common feature of or about the offending, it may demonstrate a tendency…

Submissions and consideration

[22] Mr Geary for the Crown contended that the evidence sought to be used as tendency evidence has significant probative value. He stressed the last sentence in the passage from *Bauer* quoted above, and pointed to several "common feature[s] of or about the offending".

[23] The Crown alleges a similar modus operandi in that the accused used his position of trust to gain supervision access to each of the complainants. He would then abuse this trust for the purpose of his own sexual gratification. Counsel pointed to other relevant similarities namely that:

(a) the complainants were brothers;

(b) the complainants were both under 16 years (except possibly S in Count 8 of the indictment);

(c) the complainants were in the accused's care or supervision at the time of the alleged offending, except for count 4 when R's mother was also present at the house when that offending occurred;

(d) the accused was trusted to be alone with the complainants, including sleeping in the same tent and at the accused's apartment, with no parent nearby;

(e) the accused effectively groomed the complainants;

(f) the accused assaulted the complainants in ways which would not leave markings until he did attempt anal sexual intercourse with S in Count 8 on the indictment;

(g) the offending, with one exception, involved the accused fondling and or masturbating the complainants.

[24] Mr Berkley contended that there were no common features of the kind referred to by their Honours in *Bauer*. I disagree. He emphasised the penultimate sentence in the passage in *Bauer* that I have quoted above. That sentence would apply where a person was accused of committing two offences, not necessarily sexual offences or offences of the same kind, against two different complainants with no relevant features in common. Even where two offences are of a similar kind and the offending was of a sexual nature the evidence may not be capable of meeting the requirement of significant probative value for admission as tendency evidence if the only thing in common was the nature of the conduct and there was a significant gap in time between the two events with no other evidence of a tendency to engage in similar conduct during that significant gap in time. This was the case in *McPhillamy*.

[25] I agree with Mr Geary's contentions that there were a number of common features about the offending which may demonstrate a tendency on the part of the accused to act in the ways he is accused of

acting, namely sexually assaulting children to whom he has been given trust by their parents, and to have had a particular state of mind, namely to look for opportunities to be alone with a child in his care or trust in order to sexually assault the child.

[26] The evidence of each complainant has significant probative value in establishing the facts in issue: it could rationally affect, to a significant degree, the jury's assessment of the probability that the accused had that state of mind and acted in that way on the occasions the subject of the charges.

[27] An additional factor stressed by the Crown provides additional justification for allowing the tendency evidence to be admitted. That results from the fact that R and S only became aware that the accused had indecently assaulted the other when they mentioned it to each other during the conversation in the bar in Canada. This evidence is likely to be the most important complaint evidence in the trial of all of the charges. Unless each brother was permitted to recount the complete conversation between them when they told each other what had happened to them the jury would not have a proper understanding of the similarities in the conduct underlying each complaint. Consequently they might be left to wonder why the accused had done these things to one of the brothers while he was in his care or under his supervision but not to the other. For example in a trial that only involved counts 1 to 4 (where R is the complainant) the jury could be

told what he said to S at the bar but not S's reply at least insofar as it involved him telling R that the accused had done similar things to him. The jury would be left with the wrong impression that the accused had not engaged in similar conduct with S because if that had happened S would have said so during that discussion. This in turn might cause the jury to doubt R's evidence.

[28] I also consider that the probative value of the tendency evidence substantially outweighs any prejudicial effect it may have on the accused.[9] This is particularly so where the evidence of tendency alone strongly supports the proof of important facts that make up the offences charged such as in this case. This is not the case for example of a housemaster who assaults three students in different ways and a decade apart in a school with hundreds of students at any one time[10]; but a family and two brothers.

[29] Clearly the tendency evidence, if admitted, would add considerable weight to the Crown case against the accused. Counsel for the accused did not contend and could not have contended otherwise. However counsel contended that the prejudicial effect of the tendency evidence upon the accused would be such that it would not be outweighed by its probative value. Counsel referred to the following passage in *Hughes*, at [17]:

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9 ENULA s 101(2).

10 *McPhillamy* at 31.

> 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.

[30] Counsel contended that the kind of prejudicial effects identified in *Hughes* could not be adequately dealt with by the trial judge's directions. I disagree. The standard tendency directions deal with those parts of the above passage which are likely to be relevant in the present matter. The present matter only involves two complainants both subjected to similar conduct within a period of less than three years.

[31] Counsel also pointed to the possibility of collusion, concoction or contamination particularly between the two complainants, and contended that this too would amount to significant prejudice. However there has so far been no evidence of collusion, concoction or contamination. Section 341A(2)(b) expressly contemplates the possibility that evidence adduced in the course of a joint trial such as this one may be tainted by collusion or suggestion. This is very much

a matter for the jury.[11] Again, this is a matter that would routinely be dealt with by way of directions.

[32] Evidence is not unfairly prejudicial merely because it makes it more likely that the accused will be convicted.[12] The Court must consider how it may be unfairly used and whether that could be cured by direction against any impermissible, generalised propensity reasoning. It will then be for the jury to carefully consider the evidence and the credibility of each witness to come to their own conclusion regarding the matters before the court.[13] The risk of impermissible prejudice is slight with proper directions given.

[33] Accordingly the proposed tendency evidence meets the statutory requirements and is admissible in relation to each complainant and each charge.

Severance

[34] In his written submissions Mr Geary referred to the presumption under s 341A of the Criminal Code of a joint trial of sexual offences. Section 341A of the Criminal Code includes the following:

> (1) Despite any rule of law to the contrary, if an accused person is charged with more than one sexual offence in the same indictment, it is presumed that the charges are to be tried together.

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11 See for example *IMM v The Queen* (2016) 257 CLR 300 at [59] and *Bauer* at [65] – [71].

12 *Papakosmas v R* (1999) 196 CLR 297 per McHugh J at [91] - [92].

13 *R v PWD* (2010) 205 A Crim R 75.

(2) The presumption is not rebutted merely because:

(a) evidence on one charge is not admissible on another charge; or

(b) there is a possibility that evidence may be the result of collusion or suggestion.

[35] In his written submissions counsel for the accused did not respond to the Crown's reliance upon s 341A. However Mr Berkley referred to s 309 which has the heading: "Circumstances in which more than one charge may be joined against the one person." Section 309 provides as follows:

(1) Charges for more than one offence may be joined in the same indictment against the same person, whether he is being proceeded against separately or with another or others, if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose.

(1A) To avoid doubt, charges for more than one offence may be joined in the same indictment even if the offences are alleged to have been committed against different persons.

[36] Mr Berkley contended that none of the evidence is cross-admissible as between the two alleged victims, and that the two sets of counts are improperly joined. He also referred to s 339(1)(a) of the Criminal Code and applied to quash the indictment on the ground that it is calculated to prejudice or embarrass the accused in his defence because the counts alleging offences against R are improperly joined with those alleging offences against S. At the hearing counsel said that this was in

effect an application to sever the indictment so that the charges against each of the two complainants could be heard separately.

[37] Mr Berkley's main contentions concerning severance at the hearing of the voir dire related to s 309 of the Criminal Code. Counsel contended that, notwithstanding s 341A of the Criminal Code, s 309(1) had the effect that charges for more than one offence could not be joined in the same indictment unless they are "founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose." He contended that the charges on the indictment did not satisfy those requirements. I disagree. It seems to me that the charges "form part of a series of offences of the same or similar character". They relate to offending of an indecent and sexual nature against two of the young sons of a good friend of the accused at times when they were effectively in his care or supervision between 2006 and 2008.

[38] Mr Berkley also contended that s 341A did not apply to permit the joinder of offences involving more than one complainant unless s 309(1) was satisfied. Counsel's contentions seem to be at odds with s 309(1A) which makes it plain that charges for more than one offence may be joined in the same indictment even if the offences are alleged to have been committed against different persons.

[39] Counsel did not refer to any authority in support of his contentions, but submitted that "the interests of justice" required that the indictment be severed. Counsel requested and was given further time to identify relevant authority and to otherwise assist the court with these contentions regarding the applicability of s 309 to a trial of the kind contemplated by s 341A.

[40] In his further written submissions counsel stated:

> The accused submits that neither s 309 of the Code, which allows joinder of counts in an indictment, nor s 341 of the Code, which allows severance of an indictment, are *rule(*s*) of law*. The ambiguous *rule of law* referred to in s 341A is a reference to the common law rules concerning the joinder of charges of sexual offending including, but not limited to rules developed by such cases as *De Jesus*[14], and *Boardman*[15], requiring severance unless the evidence was cross admissible, or if there is a real risk of collusion like in *Hoch*[16], those rules now specifically being excluded from operation by s 341A(2).

[41] Counsel said nothing more about s 309 except to submit that it, and other provisions such as ss 303, 339, 341 and 341A, are to be taken into account by the Court when considering a severance application. Counsel stressed s 341 which empowers the Court to direct separate trials. Section 341(1) provides that:

> Where before a trial … the court is of opinion that the accused person may be prejudiced or embarrassed in his defence by reason of his being charged with more than one offence in the same indictment or that for any other reason it is desirable to direct that

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14 *De Jesus v R* (1986) 22 A Crim R 375.

15 *R v Boardman* [1975] AC 421.

16 *Hoch v The Queen* (1988) 165 CLR 292, per Mason CJ, Wilson and Gaudron JJ at 297.

> the person should be tried separately for any offence or offences charged in an indictment the court may order a separate trial of any count or counts in the indictment.

[42] Counsel referred to a 1998 decision of the Victorian Court of Appeal in *R v TJB*[17] where the Court was concerned with the recently amended s 372(3) of the *Crimes Act 1958* (Vic) which was similar to s 341(1) of the Criminal Code. Pointing out that that was the first occasion when that Court had considered that newly enacted provision Callaway JA (Phillips CJ and Buchanan JA concurring) identified the following guidelines for severance applications:

> 1. A presentment should always be severed where that is both desirable and practicable in order to ensure a fair trial. It is for defence counsel to persuade the judge that that is so. In that respect sexual offences are no different from other offences.
> 2. One aspect of a fair trial is the taking of reasonable steps to prevent a jury from misusing evidence. That is not limited to propensity evidence and again is not peculiar to trials of sexual offences. See, for example, *R v Smart* especially at 283 and 289.
> 3. It is usually to be assumed that the jury will comply with any directions they are given by the judge. A fair-minded lay observer takes that very factor into account in considering whether a trial is fair: cf. *Webb v R* (1994) 181 C.L.R. 41 at 55.
> 4. There are nevertheless cases where the risk of prejudice is unacceptable. It will often be found that that is so in the case of offences of an unnatural character or offences that arouse strong emotions or excite revulsion.
> 5. There is also a greater risk that a direction will be ineffectual if evidence in relation to one complainant is probative in relation to another but either the Crown does not rely on it for

17 [1998] 4 VR 603 (***TJB***).

> that purpose or the judge rules that it is inadmissible because of prejudice.

[43] Mr Berkley stressed the point made in the fourth paragraph and the fact that the present charges involve serious allegations of sexual misconduct by the accused against young children who were in his care. These charges are likely to arouse strong emotions or excite revulsion. Whilst that is so, so too are many cases to which the presumption in s 341A would apply.

[44] The kind of prejudice discussed in the second and fifth paragraphs is now addressed in the statutory provisions concerning tendency evidence such as ss 97 and 101(2) of the ENULA which did not operate in Victoria until 2008 when the *Evidence Act 2008* (Vic) came into force. Once tendency evidence is allowed it will be cross-admissible. Accordingly concerns of the kind referred to in the fifth paragraph can be adequately dealt with by appropriate directions.

[45] In *R v O'Brien*[18] Grant CJ said, at [11]:

> [Section 341A] does not abrogate the Court's discretion to sever the indictment and order separate trials where there is a real risk of prejudice that cannot be allayed by directions from the trial judge. The dominant consideration remains ensuring that an accused is not deprived by prejudice of a fair trial.

In that case, severance was not ordered because of the cross-admissibility of the evidence.

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18 [2017] NTSC 34.

[46] In *The Queen v Hampton*[19] Kelly J said, after quoting s 341A:

> This provision must be given full effect. Nevertheless, whether the evidence under consideration is cross admissible will be a very relevant consideration in determining whether there should be separate trials, and the question of whether there may have been collusion or suggestion is relevant to the question of whether the evidence is cross admissible.

[47] Mr Berkley contended that the statutory presumption contained in s 341A is rebutted because:

(a) the evidence is not cross admissible;

(b) the offences are old;

(c) the offences are unnatural;

(d) the offences involve a situation likely to arouse ire in the jury, in that they were allegedly committed in breach of trust that the alleged victims had in the accused, whom they idolized, and was almost a part of the family of the alleged victims, and under the noses of their parents;

(e) the jury are likely to misuse the evidence of allegations by one alleged victim as evidence of a propensity to commit offences against the other alleged victim, or to delve into propensity reasoning generally;

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19 [2017] NTSC 87.

(f) directions from the trial judge are not likely to be able to deter the jury from that course, or to otherwise misuse the evidence;

(g) as Lord Cross said in *Boardman*[20]:

> If the charges are tried together it is inevitable that the jurors will be influenced, consciously or unconsciously, by the fact that the accused is being charged not with a single offence against one person but with three separate offences against three persons. It is said, I know, that to order separate trials in all these cases would be highly inconvenient. If and so far as this is true it is a reason for doubting the wisdom of the general rule excluding [similar fact evidence]. But so long as there is that general rule the courts ought to strive to give effect to it loyally, and not, while paying lip service to it, in effect let in the inadmissible evidence by trying the charges together.

(h) it is the experience of both courts and counsel who appear in them that when there is more than one alleged victim for the same type of offending the chances of acquittal of the accused are considerably reduced. This fact alone, as a matter of logic and common sense, means that the accused cannot secure a fair trial unless the indictment is severed.

[48] I disagree. The evidence is cross admissible. The offences are not particularly old. Like many offences of this kind, these offences are unnatural and may arouse ire in the jury. Regrettably that is not unusual and would often be the case where tendency evidence has been

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20 [1975] AC 421 at 459, approved in *Sutton v The Queen* (1984) 152 CLR 528 per Gibbs CJ at 531.

admitted.[21] As Callaway JA said in *TJB* it is usually to be assumed that a jury will follow the trial judge's directions. The "general rule excluding [similar fact evidence]" has now been replaced by the statutory provisions regarding tendency and coincidence evidence. Finally, even if the chances of acquittal of the accused are reduced as a result of the Crown been able to rely on tendency evidence, this does not mean that the accused cannot secure a fair trial unless the indictment is severed.

[49] As Dawson J observed in *De Jesus v R*[22] at 10:

> Where evidence of the commission of one offence is, upon such a basis, admissible in proof of the commission of another, there will be nothing to be gained by directing separate trials because the same evidence would be admissible in each trial."

[50] I dismiss the accused's application to quash the indictment or to have it severed.

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21 See for example *Hughes*, *Bauer*, and various cases in this jurisdiction where tendency evidence has been admitted such as *The Queen v JRW* [2014] NTSC 52, *The Queen v Hampton* [2017] NTSC 87 and *The Queen v AW* [2018] NTSC 29.

22 (1986) 22 A Crim R 375.