CITATION:	*The Queen v Rolfe (No 7)* [2022] NTSC 1
PARTIES:	THE QUEEN
	v
	ROLFE, Zachary
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21942050
DELIVERED:	20 January 2022
HEARING DATES:	20 and 21 December 2021
JUDGMENT OF:	Burns J

CATCHWORDS:

EVIDENCE – Admissibility – Tendency evidence – *Evidence (National Uniform Legislation) Act 2011* (NT), s 97 – Whether tendency evidence of significant probative value – Whether evidence supports proof of the alleged tendency – Whether proof of tendency makes more likely the elements of the offences charged – Whether probative value of the evidence outweighs any potential prejudicial effect on the accused – evidence inadmissible

Criminal Code Act 1983 (NT) s 43BD, s 156, s 160, s 161A, s 208E
Evidence (National Uniform Legislation) Act 2011 (NT) s 55, s 56, s 97, s 101, s 135, s137
Interpretation Act 1978 (NT) s 17
Police Administration Act 1978 (NT) s 5, s 25, s 126, s 148B

AC v R [2016] NSWCCA 21; *Aravena v R* (2015) 91 NSWLR 258; *Armstrong v R* [2017] NSWCCA 323; *BD v The Queen* [2017] NTCCA 2; *BP v R*; *R v BP* [2010] NSWCCA 303; *DAO v The Queen* [2011] NSWCCA 63;

El-Haddad v R (2015) 88 NSWLR 93; [2015] NSWCCA 10; *Elomar v The Queen* [2014] NSWCCA 303; *Festa v The Queen* (2001) 208 CLR 593; *HML v The Queen* (2008) 235 CLR 334; *Hughes v The Queen* [2017] HCA 20; *Ibrahim v Pham* [2007] NSWCA 215; *IMM v The Queen* [2016] HCA 14; *KJR v R* (2007) 173 A Crim R 226; [2007] NSWCCA 165; *Middendorp v The Queen* [2012] VSCA 47; *O'Keefe v R* [2009] NSWCCA 121; *Papakosmas v R* (1999) 196 CLR 297 at 325; [1999] HCA 37; *Patel v R* (2012) 247 CLR 531; [2012] HCA 29; *Qualiteri v R* (2006) 171 A Crim R 463; [2006] NSWCCA 95; *R v Allen* [2020] NSWCCA 173; *R v BD* (1997) 94 A Crim R 131; *R v Cook* [2004] NSWCCA 52; *R v Ford* [2009] NSWCCA 306; *R v GAC* (2007) 178 A Crim R 408; [2007] NSWCCA 315; *R v MM* [2014] NSWCCA 144; *R v PWD* [2010] NSWCCA 209; *R v Suteski* (2002) 56 NSWLR 182; [2002] NSWCCA 509; *RH v R* (2014) 241 A Crim R 1; [2014] NSWCCA 71; *Saoud* v R [2014] NSWCCA 136; *Sokolowskyj v R* [2014] NSWCCA 55; *SSN v R* [2012] NSWCCA 163; *Taylor v The Queen* [2020] NSWCCA 355; *The Queen v Hoffmann* [2021] NTSC 31; *The Queen v Rolfe* [2021] HCA 38; *The Queen v Rolfe (No 5)* [2021] NTSCFC 6; *Townsend v Townsend* [2001] NSWCA 136; *Washer v Western Australia* (2007) 234 CLR 492, referred to.

EVIDENCE – Admissibility – Police powers of search and seizure – Whether evidence obtained lawfully – *Police Administration Act 1978* (NT) s 144 – Temporal proximity of search and seizure – Whether search and seizure must be incidental to arrest –– evidence admissible

Evidence (National Uniform Legislation) Act 2011 (NT) s 138
Interpretation Act 1978 (NT) s 62
Police Administration Act 1978 (NT) s 144

Bessell v Wilson (1853) 118 ER 518; *Botton v Winn* (unreported, Supreme Court of Victoria, 18 December 1987); *Dillon v O'Brien* (1887) 16 Cox CC 245; *Director of Public Prosecutions v Tupper* (2018) 55 VR 720; *Elomar v The Queen* [2014] NSWCCA 303; *Field v Sullivan* [1923] VLR 70; *Leigh v Cole* (1853) 6 Cox CC 329; *Lindley v Rutter* [1981] QB 128, referred to.

REPRESENTATION:

Counsel:

Crown:	P M Strickland SC with J Poole
Accused:	J D Edwardson QC with L Officer

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Tindall Gask Bentley

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

The Queen v Rolfe (No 7) [2022] NTSC 1
No. 21942050

BETWEEN:

THE QUEEN

AND:

ZACHARY ROLFE

CORAM: BURNS J

REASONS FOR JUDGMENT

(Delivered on 20 January 2022)

Introduction

[1] The accused Zachary Rolfe is awaiting trial on a charge (Count 1) that on 9 November 2019 he murdered Charles Arnold Walker (the deceased) (contrary to s 156 of the *Criminal Code Act 1983* (NT) ('the Code')). The indictment against the accused contains two alternative charges to the charge of murder: Count 2 alleges that he engaged in conduct that caused the death of the deceased, being reckless or negligent as to causing the death of the deceased (contrary to s 160 of the Code) and Count 3 alleges that he engaged in conduct involving a violent act to the deceased, namely

discharging a firearm causing the death of the deceased (contrary to s 161A(1) of the Code).

[2] The Crown case, expressed very briefly, is that the accused, who is a member of the Northern Territory Police Force, shot the deceased three times while arresting him in company with Constable Adam Eberl at Yuendumu on 9 November 2019 thereby causing his death. The Crown does not rely on the first shot in order to establish the charges, only on the second and third shots.

[3] The accused has entered pleas of not guilty to all charges and his trial is due to commence on 7 February 2022.

[4] The Crown served on the accused an amended notice ('the notice') dated 3 December 2021, pursuant to s 97(1) of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('the ENULA'), notifying him that the Crown intends to adduce tendency evidence against him at his trial. The notice was further amended by the Crown at the hearing of the application. The accused objects to the Crown leading the proposed tendency evidence.

[5] In addition, the Crown proposes leading evidence at the trial of two text messages downloaded from the accused's mobile phone. The Crown submits that the content of these messages should also be considered in determining whether the proposed tendency evidence should be admitted. The accused objects to the admission of this evidence for either purpose on the ground that it was unlawfully obtained. It is convenient to address this issue first.

Admissibility of the text messages

[6] The accused was arrested on 13 November 2019 and was taken to the Darwin City Watch House ('the Watch House'). Following his arrest, police allowed the accused to collect his personal belongings, including his mobile phone, and retain them on the journey to the Watch House. The accused was accompanied into the area of the front counter of the Watch House by Detective Senior Sergeant (subsequently, Superintendent) Kirk Pennuto, Detective Senior Sergeant Mark Malogorski and Detective Acting Senior Sergeant Wayne Newell. They arrived at the Watch House at about 5.45pm. At the front counter, Detective Pennuto said to the accused, "Put your stuff up there for us, please". At that time the accused was holding his mobile phone in his hand. He placed the mobile phone, together with his other personal belongings, on the counter of the Watch House. He then underwent a physical search. All of those items, including the mobile phone, were secured in a clear plastic bag by Constable Abdul Khan. An arrest card was completed by another police officer which recorded all of the property taken from the accused into the possession of Constable Khan and secured inside the security bag, which was then sealed. The plastic security bag containing the personal property of the accused was then placed in a box and taken into a room behind the counter. The accused was then placed in a cell.

[7] The arrest card is a printed document with spaces for hand written notations. None of the Crown witnesses called on the voir dire were able to remember who had completed the hand written notations on the bottom half of the

document which included a list of the accused's personal property. Next to the entry fields "Mobile phone" and "Others" are two items that have been scratched out in what appears to be ink. The evidence did not reveal the nature of those entries or who scratched them out. The inevitable inference is that the entry which has been scratched out next to the entry field "Mobile phone" is an entry evidencing the fact that the accused's mobile phone was part of the property placed in the secure property bag and then stored in the room behind the counter. This is consistent with what is seen in the video of the processing of the accused at the Watch House. It is clear from that video that the accused's mobile phone was placed in the property bag, which was then placed in a box and removed from the area of the front counter.

[8] At about 6.10pm that same day, another police officer involved in the investigation into the death of the deceased, Detective Andrew Kren, attended the Watch House and removed the accused's mobile phone from the accused's personal property in the Watch House. The accused was not present when this occurred. The mobile phone was subjected to analysis which revealed, amongst other things, the two text messages the Crown seeks to adduce in evidence. It is this seizure of the accused's mobile phone that the accused says was unlawful, with the consequence that the text messages themselves were obtained unlawfully by the Crown.

[9] The Crown submits that the seizure of the accused's mobile phone was permitted by s 144 of the *Police Administration Act 1978* (NT) ('the PAA') (emphasis added):

Search of persons in lawful custody

(1) A member of the Police Force may search a person in lawful custody, including the clothing the person is wearing and any property in the person's immediate possession, and may use the force that is reasonably necessary to conduct the search.

(2) A member may seize any weapon or other article capable of being used to inflict injury on a person or assist an escape from custody, **or anything relating to an offence**, found as a result of a search under subsection (1).

(3) Subsection (1) does not authorise a member to require a person to remove any clothing that he is wearing unless the member has reasonable grounds for believing that the removal and examination and detention of such clothing may afford evidence of the commission of an offence, and the person is provided with adequate clothing to replace the clothing removed.

(4) Any search carried out pursuant to subsection (1) shall, wherever practicable, be carried out by a member of the same sex as the person searched.

(5) Nothing in this section shall be taken to prevent the search of the person of a person, or of property under the control of a person and the removal from that person of any property for safe keeping upon his being admitted as an inmate of a lock-up, custodial

correctional facility (as defined in section 11(1)(a) of the *Correctional Services Act 2014*) or like place after being charged with an offence.

[10] The Crown submitted that the procedure to which the accused was subjected at the Watch House, in which he was required to place his personal property on the counter and was then subjected to a body search, was a search pursuant to s 144(1) of the PAA. The Crown submitted that the accused's mobile phone was an article "relating to an offence" found as a result of such a search so as to enliven the seizure provision found in s 144(2) of the PAA.

[11] The Crown submitted that the search of the accused conducted by Constable Khan was a search pursuant to s 144(1) of the PAA. Superintendent Pennuto testified that in directing the accused to place his property on the counter of the Watch House, he was exercising the power of search granted by s 144(1). The accused submitted that this evidence should not be accepted. I do not accept that submission.

[12] At common law, there is an undoubted power vested in police to search an arrested person and seize property found in the course of that search. In *Director of Public Prosecutions v Tupper* (2018) 55 VR 720, Macaulay J cited the conclusion of Phillips J in *Botton v Winn* (unreported, Supreme Court of Victoria, 18 December 1987) that the authorities which considered those common law powers establish three principles:

(1) That a police officer has a right to search a prisoner in lawful custody and take possession of property in circumstances where he or she reasonably suspects the property may be connected with a crime committed by the prisoner (and arguably any other crime) or where part of the property is an object which might be used to do injury to the prisoner or others or to effect an escape or cause damage;

(2) A police officer purporting to exercise this right must have regard to all the circumstances of the particular case to ensure its valid exercise;

(3) At least some searches should be preceded by the police officer informing the person to be searched of the reason or reasons for the search.

[13] There are similarities between the justification for the common law power and the power to search and seize granted by s 144 of the PAA. Amongst other matters, the common law power is directed towards finding items showing that the arrested person is guilty of an offence (*Bessell v Wilson* (1853) 118 ER 518; *Dillon v O'Brien* (1887) 16 Cox CC 245), seizing weapons or implements that could be used to escape (*Leigh v Cole* (1853) 6 Cox CC 329), or preventing the person from harming themselves or others in custody (*Lindley v Rutter* [1981] QB 128).

[14] The initial direction to the accused to place his property on the counter may have taken the form of a request, but the body search of the accused which immediately followed makes it clear that what was occurring was a search. A nice question arises whether the enactment of s 144 of the PAA has abrogated the common law power to which I refer. In the circumstances of the present case it is unnecessary to answer that question.

[15] It is clear from the contemporaneous notes of Detective Pennuto that, before arresting the accused, police contemplated the prospect of seizing the accused's mobile phone. This is consistent with evidence that police were in possession of a statement from Jack Carter dated 12 November 2019 to the effect that the accused had discussed the incident in which the deceased was fatally wounded in a "group chat". The fact that Detective Pennuto's notes raise the possibility of the need to obtain a search warrant to seize the mobile phone and make no reference to s 144 of the PAA does not change my opinion that the evidence establishes that the process at the Watch House by which the accused surrendered his mobile phone, among other items of personal property, was a search pursuant to s 144(1) of the PAA. Detective Pennuto is an experienced police officer who has participated in many arrests. It is entirely credible that he would have turned his mind to the provisions of s 144(1) of the PAA as the basis for what was undoubtedly a search of the accused's person in the Watch House.

[16] The accused's mobile phone was clearly an item that was "found" as a result of the search pursuant to s 144(1). The fact that police knew the accused was

in possession of the mobile phone does not alter that fact. To adopt a narrow approach, interpreting the word "found" as requiring that an item must be discovered unexpectedly by police, would significantly narrow the intended operation of the provision. Such an interpretation is not to be preferred over one which promotes the evident legislative purpose of the provision: s 62 *Interpretation Act 1978* (NT).

[17] A comparison between the provisions of s 144 of the PAA and the common law power to search and seize property upon arrest reveals both similarities and differences. Firstly, the common law power arises from the exercise of the power of arrest, and any search and seizure must occur at the time of arrest or, bearing in mind the exigencies of the situation, at a later time which can nevertheless be described as incidental to the arrest. On its face, s 144(1) is not so narrowly framed, permitting, as it does, a search of any person in lawful custody. Secondly, a plain reading of s 144(2) places no limitation on the time at which the seizure of an item may occur, which differs from the common law position that the time of seizure must be sufficiently proximate to the time of arrest as to be incidental to the arrest. Thirdly, the common law power of search is limited in that the police officer proposing to conduct the search must have regard to the circumstances of the case in deciding whether to conduct a search and in determining the nature of any search to be conducted. Finally, at common law a police officer can only seize an item found in such a search where he or she reasonably suspects that, *inter alia*, the item may be connected with a crime

committed by the arrested person. No such requirement for reasonable suspicion on the part of a police officer conducting a search under s 144 of the PAA is found in the plain text of s 144(2).

[18] The above raises some important issues concerning the proper interpretation of s 144. To interpret s 144(2) as not requiring a temporal proximity between the person in custody being searched under s 144(1) and the seizure of property found in the search under s 144(2) is apt to lead to anomalies. For example, if the accused had been granted bail by police and his property, including his mobile phone, had been returned to him, could police later seize the phone without a warrant, relying on the power in s 144(2)? The proposition that this was the legislative intention in enacting s 144 appears highly unlikely. Alternatively, to read s 144(2) as restricting the right of seizure of property to circumstances where it can be established at the time of seizure that the property was "related to" an offence, would place an invidious burden on police. On very few occasions could an officer be certain that property in the possession of a person in custody is related to an offence. Police conducting searches under section 144(1) would be required to choose between potentially unlawfully seizing property and not seizing it despite having a reasonable suspicion that the property related to an offence.

[19] While I incline to the view that the legislature intended that s 144 would replicate the common law with regard to the temporal proximity of search and seizure, and in the degree of satisfaction required on the part of police

justifying seizure of property found as a result of a search under section 144(1), it is unnecessary to finally determine those issues in the present case. The accused's mobile phone was seized at a time of sufficient temporal proximity to the search under s 144(1) that it could be properly described as being incidental to the search. While the accused's personal property, including the mobile phone, left his possession when the property was placed in the security bag by Constable Khan, there was no conversion of the property which could give rise to issues such as those considered in *Field v Sullivan* [1923] VLR 70 at 81 and onwards. Those items placed in the security bag remained the property of the accused and, at least at the point the mobile phone was seized at 6.15pm, the phone remained property that was found as a result of a search under section 144(1). Consequently, I am not satisfied that the text messages were unlawfully obtained by police.

[20] If I had been satisfied that the evidence of the text messages was unlawfully obtained I would not have exercised my discretion under s 138 of the ENULA to admit it. The probative value of the evidence is slight. At its highest, and drawing inferences as are available in favour of the Crown, the evidence reveals an expression of an attitude on the part of the accused that the "rules" do not apply to him in his activities as a police officer. The messages are capable of other interpretations, but for present purposes I accept that they are capable of bearing the interpretation urged by the Crown. The messages were said to have been sent by the accused on 28 February 2019 and 30 July 2019 respectively. They are capable of

establishing that the accused had the attitude alleged by the Crown on those dates, but to extrapolate from that finding to a finding that the accused held the same attitude on 9 November 2019 requires a reasoning process that, because the accused held that state of mind on those earlier dates, then he also held it on 9 November 2019. In other words, it requires tendency reasoning. No objection was taken in the present application by the accused to the reception of this evidence on this basis, but it is a matter which bears upon the probative value of the evidence. If I had been satisfied that the evidence was unlawfully obtained, I would not have been satisfied that the desirability of admitting the evidence outweighed the undesirability of admitting it. I am, of course, aware of the approach taken by the New South Wales Court of Criminal Appeal in *Elomar v The Queen* [2014] NSWCCA 303 regarding proof of states of mind, but the nature of the state of mind held by the appellant in *Elomar* cannot be equated to that alleged by the Crown in the present case.

The tendency application

Relevant legislation

[21] Evidence that is relevant in a proceeding is admissible in the proceeding except to the extent that the ENULA provides otherwise: s 56(1) ENULA. Evidence is relevant where, if it were accepted, it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding: s 55(1) ENULA.

[22] Evidence of an alleged tendency or propensity on the part of an accused person is generally inadmissible unless it complies with the provisions of the ENULA. The "tendency rule" is found in s 97(1) of the ENULA:

> (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:
>
> (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
>
> (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

[23] "Probative value" is defined in the Dictionary to the ENULA as meaning "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue".

[24] A further restriction on the admissibility of tendency evidence is found in s 101 of the ENULA, which relevantly provides:

(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) Tendency evidence about a defendant…that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant.

[25] Section 98 of the ENULA concerns the admissibility of coincidence evidence and is not relevant to the present application.

The tendency notice

[26] Annexed to the notice is a schedule containing details of four alleged incidents ('the tendency incidents') involving the accused. The Crown seeks to lead evidence of the tendency incidents as tendency evidence at the trial of the accused. I will return to those alleged incidents in a moment. By leading evidence of the tendency incidents, the Crown seeks to prove that the accused had, at the relevant time, the following tendencies to act in a particular way, namely:

(a) a tendency, when acting as a uniformed police officer, to use excessive force on a male, sufficient to either cause or have the potential to cause serious injury, in the context or course of the proposed arrest of that male (the excessive use of force tendency);

(b) a tendency, where he has used excessive force on a male, when acting as a uniformed police officer, to make a false statement or do some other act seeking to justify that excessive use of force (the false self-justification tendency).

[27] The Crown submits that the proposed tendency evidence relates to the following facts in issue in the proceeding:

(a) whether the accused was acting in self-defence or defence of another when he discharged shots 2 and 3 (‘the acts’);

(b) whether at the time of the acts the accused was acting in the course of his duty as a police officer and his conduct was reasonable in the circumstances for performing that duty;

(c) whether the acts were done in good faith in the exercise of a power or performance of a function under the PAA; and

(d) the accused’s state of mind at the time of the acts, specifically:

i. the circumstances as he perceived them;

ii. whether at the time of the acts the accused believed that the deceased was stabbing him and/or stabbing Constable Eberl.

The first incident (the Ryder incident)

[28] The notice alleges that on 11 January 2018 the accused and other police officers attended at a residence in Alice Springs in response to a domestic disturbance where a male person, CQ, had allegedly assaulted his female partner TX. The Crown alleges that while CQ was being taken into custody in a bedroom, his mother, SI, and stepfather, Malcolm Ryder, entered the bedroom. It is alleged that the accused pushed Ryder and SI out of the bedroom before pursuing them into a different room and arresting Ryder. It is alleged that the accused punched Ryder to his head, grabbed his hair and slung his head to the ground. The Crown alleges that the use of force was excessive because it was neither reasonable nor necessary. It further alleges that the accused's use of force resulted in Ryder being rendered unconscious and sustaining a laceration to his right forehead requiring 13 sutures and a laceration to his left forehead requiring three sutures.

[29] The Crown alleges that, later that day, the accused requested a detective at the Alice Springs Police Station to scratch his face so that he could blame that injury on Ryder in order to justify his use of force. The Crown further alleges the accused made a number of false statements in order to justify his use of force:

(a) in a statutory declaration dated 11 January 2018: that Ryder threw a number of punches at another police officer and continued to attempt to strike that police officer; that Ryder punched the

accused in the face; that the accused and a third police officer both tackled Ryder to the ground and that Ryder scratched the accused's face; and

(b) in a PROMIS 8391540 Use of Force Case Note titled "Use of Force – A domestic Dispute – V4" created by the accused at 18:40 on 11 January 2018: that Ryder attempted to strike one of the other police officers multiple times with closed fists; that Ryder punched the accused in the face with a closed fist; that the accused and a third police officer tackled Ryder to the ground; and that Ryder scratched the accused's face.

[30] The Crown proposes leading evidence of this incident to establish both the excessive use of force tendency and the self-justification tendency.

The second incident (the DX incident)

[31] The Crown alleges that on 1 April 2019 at about 7.15pm in Alice Springs, the accused arrested DX, a 17-year-old indigenous boy, after a chase in the dark. It is alleged that during the chase, DX stopped running and placed himself on the ground. The Crown alleges that the accused then banged DX's head into a rock several times. It alleges that this use of force was excessive because it was neither reasonable nor necessary. The Crown alleges that the excessive use of force caused a laceration to DX's head that required four sutures.

[32] The Crown further alleges that the accused made a false statement in order to justify his use of force in a statutory declaration dated 1 April 2019 by stating that he believed the cut to DX's head must have occurred when DX dived on the ground to hide from police or otherwise during the police chase.

[33] The Crown proposes leading evidence of this incident to establish both the excessive use of force tendency and the self-justification tendency.

The third incident (the Spencer incident)

[34] The Crown alleges that at about 6.00pm on 24 September 2019 in Alice Springs, the accused and another police officer questioned an indigenous male, Wayne Spencer, outside of the Todd Tavern in relation to another person, KH, who had escaped custody. Spencer was verbally evasive and subsequently ran from police. The accused gave chase for approximately 250 metres, at which point Spencer slowed down. It is alleged that the accused did not slow down and ran full force into Spencer, striking him with outstretched hands, causing Spencer to crash with force into a boundary barricade/fence outside a restaurant. The Crown alleges that the use of force was excessive because it was neither reasonable nor necessary. It is further alleged that Spencer suffered a sore shoulder.

[35] The Crown alleges that the accused made a false statement in a PROMIS 9087054 Use of Force Case Note titled "Use of Force – Subdue suspect/offender –V4" created at 22:40 on 24 September 2019 by saying that

the use of force was necessary to prevent a breach of the peace. It is further alleged that the same Case Note was misleading in that the accused said that Spencer was "still running from members", but omitted that Spencer was slowing down at the time force was used.

[36] The Crown proposes leading evidence of this incident to establish both the excessive use of force tendency and the self-justification tendency.

The fourth incident (the Bailey incident)

[37] The Crown alleges that at about 2.30am on 12 October 2019 at Alice Springs, a male, Albert Bailey, and his partner RH were having an argument outside a Council building. Bailey was standing in close proximity to RH with clenched fists and showing "pre-attack indicators". It is alleged that the accused ran with a number of colleagues across the Council lawns and pushed Bailey at full speed into the wall of the building without any warning. As a result, Bailey fell heavily onto a bench seat, striking his head. The Crown alleges that the use of force was excessive because it was neither necessary nor reasonable. It is alleged that Bailey suffered a large laceration to his forehead which required nine sutures.

[38] The Crown proposes leading evidence of this incident to establish the excessive use of force tendency.

The facts in issue

[39] The notice confines the facts in issue to which the proposed tendency evidence is said to be relevant: see [27] above. This is therefore not a case where the facts in issue extend to all "the facts which constitute the elements of the offences charged, together with such ancillary facts as are relevant to those ultimate facts": *The Queen v Hoffmann* [2021] NTSC 31 at [18]. The facts in issue identified by the Crown do not include the identity of the accused as the alleged offender or that the alleged acts occurred. The facts in issue are confined to the circumstances in which those acts occurred, and in particular to the state of mind of the accused at the time those acts occurred.

[40] The charge of murder, contrary to s 156 of the Code, is an offence referred to in Schedule 1 of the Code, with the consequence that the issue of self-defence is to be assessed by reference to the provisions of s 43BD of the Code, which relevantly provides:

> (1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
>
> (2) A person carries out conduct in self-defence only if:
>
> (a) the person believes the conduct is necessary:
>
> (i) to defend himself or herself or another person;

……

and

(b) the conduct is a reasonable response in the circumstances as he or she perceives them.

[41] Where self-defence is raised on the evidence at trial, the onus falls on the prosecution to prove to the standard of beyond reasonable doubt that the accused was not acting in self-defence at the time he did the acts said to constitute the offence. In order to prove that the accused was not acting in self-defence when he discharged shots 2 and 3, the Crown will therefore have to prove either that the accused did not believe that his conduct was necessary to defend himself (or to defend Constable Eberl), or that the conduct was not a reasonable response in the circumstances as the accused perceived them.

[42] Previous pre-trial proceedings in this matter have identified provisions of the PAA which will also be relevant to the accused's trial. These provisions are:

5 Northern Territory Police Force

(1) There is established by this Act the Police Force of the Northern Territory.

(2) The core functions of the Police Force are:

(a) to uphold the law and maintain social order; and

(b) to protect life and property; and

(c) to prevent, detect, investigate and prosecute offences; and

(d) to manage road safety education and enforcement measures; and

(e) to manage the provision of services in emergencies.

…

25 Function of members

Subject to this Act, a member shall perform the duties and obligations and have the powers and privileges as are, by any law in force in the Territory, conferred or imposed on him.

…

126 Power to enter and arrest under warrant

For the purpose of arresting a person, a member of the Police Force may enter a place if:

(a) the member has the power to arrest the person under a warrant; and

(b) the member believes on reasonable grounds that the person is at the place.

…

148B Protection from liability

(1) A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise of a power or performance of a function under this Act.

(2) Subsection (1) does not affect any liability the Territory would, apart from that subsection, have for the act or omission.

(3) In this section:

exercise, of a power, includes the purported exercise of the power.

performance, of a function, includes the purported performance of the function.

[43] The following provision of the Code will also be relevant:

208E Law enforcement officers

A person is not criminally responsible for an offence against this Part if:

(a) the person is, at the time of the offence, a public officer acting in the course of his or her duty as a police officer, correctional services officer or other law enforcement officer; and

(b) the conduct of the person is reasonable in the circumstances for performing that duty.

[44] The accused was a member of the Police Force for the purposes of the PAA and s 208E of the Code on 9 November 2018.

[45] By virtue of s 17 of the *Interpretation Act 1978* (NT), a law in force in the Territory includes the common law: see also *The Queen v Rolfe (No 5)*

[2021] NTSCFC 6 at [108]; *The Queen v Rolfe* [2021] HCA 38 at [22]. The High Court in *The Queen v Rolfe* [2021] HCA 38 determined that a "function" for the purposes of s 148B of the PAA did not include the functions listed in s 5(2) of that Act and went on to say, "the relevant functions to which s 148B of the *Police Administration Act 1978* (NT) applies are those of the common law, which s 25 of the Act confers, and the power of arrest in s 124 of the Act."

[46] It therefore appears likely that the jury at the accused's trial will need to address the following issues separate from the issue of self-defence:

(1) Was the accused exercising or purporting to exercise a power, or performing a function or purporting to perform a function, (including a power or function conferred by the common law) to which s 148B of the PAA applies when he discharged shots 2 and 3?

(2) If so, was he acting in good faith?

(3) Was the accused acting in the course of his duties as a police officer when he discharged shots 2 and 3?

Outline of the Crown case

[47] What follows is largely extracted from the Crown's Case Statement and may be subject to dispute at trial. The deceased was a 19-year-old male who resided in Yuendumu. Yuendumu is a remote indigenous community located

293 km from Alice Springs. As at November 2019 there were four police and Aboriginal Community police officers stationed at Yuendumu police station.

[48] On 26 June 2019 the deceased was sentenced to 16 months imprisonment, backdated to 22 February 2019, in relation to multiple offences including aggravated assault and assault police. The sentence was structured such that the deceased was released after serving eight months full-time imprisonment, with the balance of the sentence suspended for a period of 12 months from the date of his release.

[49] The deceased was released from prison on 14 October 2019 and signed an agreement with Community Corrections to abide by certain directions, including a curfew between 7.00pm and 7.00am, remaining at a designated residence in Alice Springs (the Central Australia Aboriginal Alcohol Programs Unit) and wearing an Electronic Monitoring Device ('EMD'). On or about 29 October 2019, the deceased removed his EMD and absconded from his designated residence. Police unsuccessfully attempted to locate the deceased on 29 and 30 October 2019. On 5 November 2019 a warrant was issued for the arrest of the deceased for breaching his suspended sentence order.

[50] On 6 November 2019, police attended House 577 Yuendumu in an attempt to arrest the deceased. The deceased threatened police with a small axe before fleeing the residence and escaping pursuit. The officer in charge of the

Yuendumu police station, Sergeant Frost, sought to negotiate with the deceased's family to have the deceased surrender himself after a local funeral had occurred. The deceased did not surrender himself.

[51] The accused was a member of the Northern Territory Police Force stationed at Alice Springs. He was also a member of the Immediate Response Team ('IRT') stationed in Alice Springs. On 9 November 2019, four members of the Alice Springs IRT, including the accused and Constable Eberl, were deployed from Alice Springs to Yuendumu following a request from Sergeant Frost in order to assist in the apprehension of the deceased. The accused had reviewed Body Worn Video ('BWV') of the attempt to arrest the deceased on 6 November 2019 as well as police records relating to the deceased.

[52] The accused and the other members of the IRT arrived at Yuendumu at about 6.30pm and were briefed by Sergeant Frost. The accused and the other members of the IRT were instructed to obtain intelligence as to the whereabouts of the deceased, to conduct high visibility patrols in the community and to respond to incidents throughout the night. The operational plan for the arrest of the deceased was that the IRT members and a local police officer would attend the deceased's known local address at 5.00am on 10 November 2019 and arrest him.

[53] The IRT officers all had BWV cameras activated as they performed their duties on the evening of 9 November 2019. The IRT members left the police

station at 7.06pm and arrived at House 577 at 7.11pm. The accused spoke to a male in the yard of that residence and said, “We are here to grab Arnold up okay”. The male told the accused the deceased was not present. The accused requested permission to search the house and asked the male to show him on a map of Yuendumu where the deceased might be. The accused then told the male that he was going to search the house. Before entering the house, the accused was advised by another member of the IRT, Constable Kirstenfeldt, that the deceased was residing at that house, that he had left three minutes ago and that he would be returning there to stay for the night. The accused and Constable Kirstenfeldt then entered the house.

[54] Inside the house, the accused placed his right hand on his pistol, depressed the hood button and rotated the hood closure forward, thereby disengaging two of the three holster retention devices. The accused maintained his grip on his pistol as he conducted a search of the house. The deceased was not located. At the conclusion of the search the accused returned the hood closure on his holster to the secure position and removed his hand from the pistol.

[55] Upon leaving House 577 the accused again spoke to the male in the yard who told him that the deceased’s mother lived on the other side of the oval, in either House 511 or 518. The IRT members then drove to that location. The accused and Constable Eberl went to House 511. At the boundary between Houses 511 and 518 the accused spoke to a woman and said “We’re

here to grab up Arnold hey". The accused showed the woman a photograph of the deceased and the woman said that she did not know him.

[56] The accused was then approached by Constable Eberl who asked which house they were looking at. The accused stated, "It could be either of them but I think 511." The accused and Constable Eberl then walked across the front yard of House 511 and Constable Eberl said to the accused, "Someone just went in the back", pointing at House 511. The accused then spoke with Leanne Oldfield and Elizabeth Snape, who were in the front yard of House 511, and asked them where the deceased and the deceased's girlfriend were. They stated that they did not know. In fact, Leanne Oldfield had just seen the deceased enter House 511. The accused asked if he could check inside the house and Leanne Oldfield stated, "Go, go (inaudible)." The accused asked, "Go check inside?" He then proceeded to walk behind Constable Eberl to the entrance door of House 511. The accused stated on police radio, "Me and Adam are just gonna clear this red house".

[57] At about 7.20pm, Constable Eberl was in front of the accused as they entered the front door. Constable Eberl produced his torch and illuminated the deceased who was standing at the opposite end of the room. The accused and Constable Eberl asked the deceased what his name was. The deceased replied, "Vernon Dixon" and repeated this name several times as he walked forward towards the police officers. Constable Eberl stopped the deceased from walking forward using his arm and told him to stop walking. The accused told the deceased, "Just come over here for a sec". The accused

guided the deceased to a position where he stood with his back against the wall and held the deceased there with his right hand.

[58] The accused told the deceased to be calm and advised him that he was going to put a phone next to his face, before he removed the deceased's cap from his head with his right hand. The accused had a photograph of the deceased on his mobile phone. The deceased took hold of his cap and returned it to his head. The accused placed his hand on the deceased's chest and told him, "I need this hat off", and again removed the cap from the deceased's head and dropped it to the ground. The deceased bent over to pick up his cap, retrieved it from the ground and again placed it on his head. The accused again held his right hand against the deceased's chest and placed his mobile phone next to the deceased's head to identify him and told the deceased to look straight ahead. The deceased said. "That's not me" and "My name is Vernon Dixon".

[59] At about 7.21pm, the accused removed his mobile phone from next to the head of the deceased and said to the deceased, "Easy mate, easy, just put your hands behind your back." After putting his phone away, the accused used his left hand to push on the right wrist of the deceased. The deceased pushed the accused's left arm away and a struggle ensued as the accused and Constable Eberl attempted to restrain the deceased. During the struggle, the deceased produced a pair of small medical scissors from his right side and, using his right hand, stabbed the accused once to the accused's left shoulder, inflicting a wound which subsequently required medical attention. The

accused stepped back, drew his firearm and, as Constable Eberl and the deceased continued to struggle, fired one shot at 7:22:01pm which struck the deceased in the middle right region of his back.

[60] Constable Eberl and the deceased fell to the ground on top of the mattress on the opposite side of the bedroom. As the deceased lay on his right side with his right arm holding the scissors beneath him, Constable Eberl was partially on top of him. Constable Eberl had pinned the deceased's left leg and had his right arm around the deceased's neck to control the deceased. The accused moved forward towards Constable Eberl and the deceased and placed his left hand on Constable Eberl's back as Constable Eberl remained on top of the deceased. The accused then fired a second shot 2.6 seconds after the first shot, followed by a third shot 0.53 seconds after the second shot. Both of the shots were at point blank range, with the bullets entering the deceased's left chest area. One of the second and third shots was the fatal shot. The accused then holstered his firearm and assisted Constable Eberl in attempting to handcuff the deceased, who continued to struggle. The accused stated, "It's all good. He was stabbing me, he was stabbing me. It's all good. He's got scissors in his hand, he was stabbing me, he was stabbing you".

[61] Despite having been shot three times, the deceased continued to struggle and the accused and Constable Eberl had to force the right arm of the deceased out from beneath him to place it behind his back for handcuffing. The deceased continued to grip the scissors in his right hand during this process

and police had to prise the scissors from his grasp. The deceased was restrained with handcuffs and immediately transferred to a police vehicle outside House 511. Constable Kirstenfeldt asked, “What have we got? Are we going to the station?” The accused replied, “Three gunshot wounds”.

[62] The deceased was transported to Yuendumu Police Station where police administered first aid. Due to the evacuation of medical staff from Yuendumu earlier that day, no clinic staff were available to assist. Medical staff were dispatched from Yuelamu Community to assist, but the deceased was declared dead at 9.28pm.

[63] On 12 November 2019 a post-mortem examination of the body of the deceased was conducted. The deceased had suffered one gunshot wound to the back which had not injured any vital organs. He had also suffered two gunshot wounds to the left side of his chest, one of which was fatal. The cause of death was ascertained as a gunshot injury to the chest and abdomen.

[64] It is the Crown’s case that the accused deviated from the operational plan communicated to him by Sergeant Frost, thereby increasing the risk of the need to use deadly force. It also asserts that the accused and the other IRT officers did not discuss any plan of what they would do if they located the deceased before entering Houses 577 or 511, or what they would do if the deceased was armed. The Crown asserts that the accused did not have a belief on reasonable grounds sufficient to lawfully justify his entry to either House 577 or House 511. It further asserts that the actions of the accused in

entering House 577 in silence, releasing two retention devices from his holster and gripping his police firearm were inconsistent with the Northern Territory Police use of force philosophy, relevant safety principles and defensive tactics training. The Crown alleges the accused did this in disregard of critical information that he knew about the deceased and the level of risk the deceased posed to police if confronted. The Crown submits that these actions demonstrated that, in spite of having a range of alternative, less than lethal tactical options available to him, the accused intended to use his firearm as his first option if confronted by the deceased.

[65] The Crown further alleges that the accused's entry to House 511 was contrary to the operational plan and, given the deceased's immediate prior history, placed the accused and Constable Eberl in a potentially dangerous situation. It is alleged that the accused's approach to the deceased and his attempts to compare the deceased's face to a photo on the accused's phone, without obtaining any sort of control over the deceased, was contrary to his training and put himself in a potential position of danger. The Crown asserts that at the time the accused fired the first shot, he intended to use his firearm as his first option if confronted by the deceased.

[66] The Crown alleges that at the time the accused fired the second and third shots, the deceased was laying on the ground and was controlled by Constable Eberl. The Crown says that the deceased's right hand holding the scissors was trapped beneath him. The Case Statement alleges that the deceased "did not have the intent, ability, means or opportunity to assault

the accused or Constable Eberl". The basis upon which the Crown asserts that the deceased did not have a continuing *intent* to assault the accused or Constable Eberl is unclear from the Case Statement.

[67] The Crown's case is that against the above background, shots 2 and 3 were unjustified as unreasonable, unnecessary and disproportionate to the circumstances that existed. Further, the Crown submits that the accused had a range of alternative, less than lethal tactical options available to him.

The Crown's submissions on tendency

[68] The Crown submitted that s 55(1) of the ENULA focuses the assessment of relevance on the *capacity* of the evidence to affect the assessment of the probability of the existence of a fact in issue: *IMM v The Queen* [2016] HCA 14 ('*IMM*'). The proposed tendency evidence has such a capacity, the Crown submitted, because, if the evidence was accepted by the jury, it would allow the jury to conclude that the accused had the asserted tendencies which, in turn, would allow the jury to infer that the accused used excessive force in arresting the deceased by discharging shots 2 and 3 and then attempted to falsely justify that use of force. Presumably, the Crown's submission extends to the jury drawing an inference that the discharge of shots 2 and 3 was intentionally in excess of what the accused believed was necessary for him to do in defence of himself or Constable Eberl. In support of that submission, the Crown referred me to the decision of the New South Wales Court of Criminal Appeal in *Elomar v The Queen* [2014] NSWCCA 303,

where the Court (Bathurst CJ, Hoeben CJ at CL and Simpson J) said, at [359] to [360]:

> Tendency evidence is evidence that provides the foundation for an inference. The inference is that, because the person had the relevant tendency, it is more likely that he or she acted in the way asserted by the tendering party, or had the state of mind asserted by the tendering party on an occasion the subject of the proceedings. Tendency evidence is a stepping stone. It is indirect evidence. It allows for a form of syllogistic reasoning.
>
> ……..
>
> Tendency evidence is a means of proving, by a process of deduction, that a person acted in a particular way, or had a particular state of mind, on a relevant occasion, when there is no, or inadequate, direct evidence of that conduct or that state of mind on that occasion.

[69] The Crown submitted that it is unnecessary for proposed tendency evidence to be strikingly similar to the charged conduct in order to give the proposed tendency evidence significant probative value. It cited the judgement of Bell P in *Taylor v The Queen* [2020] NSWCCA 355, where, at [122], his Honour said:

> (vi) it is not necessary in order for the evidence to have significant probative value that it be strikingly similar or even closely similar conduct: see, for example, [*Hughes v The Queen* [2017] HCA 20] at [38] – [39]; [*R v Ford* [2009] NSWCCA 306] at [38]; [*R v PWD* [2010] NSWCCA 209] at [79]; or that it have an underlying unity with the charges: [*Saoud* v R [2014] NSWCCA 136] at [39];
>
> (vii) whilst in order to qualify as tendency evidence, the conduct sought to be adduced does not necessarily need to bear a striking or even close similarity with the offences charged…the closer the degree of similarity, the more significant and more probative the evidence is likely to be: [*BP v R*; *R v BP* [2010] NSWCCA 303] at [108]; [*DAO v The Queen* [2011] NSWCCA 63] [180]; *AC v R* [2016] NSWCCA 21 at [58]; *O'Keefe v R* [2009] NSWCCA 121 at [60]… This is because the specificity of the tendency directly informs the strength of the inferential mode of reasoning: *El-Haddad v R* (2015) 88 NSWLR 93; [2015] NSWCCA 10 at [72]…; *Hughes* at [93] – [94];

(viii) nevertheless, any degree of similarity need not reach the level required for coincidence evidence: *KJR v R* (2007) 173 A Crim R 226; [2007] NSWCCA 165 at [51] – [54];

(ix) similarity may be supplied as much by the circumstances in which particular conduct occurred as by the similarity of the conduct itself such that, even if the conduct itself is not necessarily similar or particularly so, a close similarity of circumstances in which the relevant conduct occurred may render the tendency evidence of "significant probative value": *RH v R* (2014) 241 A Crim R 1; [2014] NSWCCA 71 at [141] – [143]…;

(x) firstly, the level of generality of the evidence may affect the significance of its probative value: *Townsend v Townsend* [2001] NSWCA 136 at [78]; *Ibrahim v Pham* [2007] NSWCA 215 at [264]; *El-Haddad* at [70]; *Ford* at [53]; *DAO* at [179]; *Aravena v R* (2015) 91 NSWLR 258; [2015] NSWCCA 288 at [85]…; *O'Keefe* at [60]; *Sokolowskyj v R* [2014] NSWCCA 55 at [40]…; *SSN v R* [2012] NSWCCA 163 at [38]…

(Footnotes omitted)

[70] The Crown also referred me to the Victorian Court of Appeal decision in *Middendorp v The Queen* [2012] VSCA 47 ('*Middendorp*') as authority for the proposition that prior violent conduct on the part of an accused may be admitted as tendency evidence to rebut a self-defence argument, and in particular to establish that the accused had no reasonable grounds for holding a belief that it was necessary to do what he did to protect himself. In that decision, Redlich JA, with whom Mandie JA and Whelan AJA agreed, said at [21]:

> The Crown rightly submitted that it is reasonable to contend that the evidence indicating that the applicant had a tendency to attack the deceased in circumstances where the deceased posed no threat to him would affect, to a significant extent, the probability that there were, in the present case, no reasonable grounds to support the applicant's belief.

[71] The Crown submitted that taking the proposed evidence at its highest, as required by *IMM*, the circumstances of the four tendency incidents and the circumstances of the present charges share the following similarities:

(a) the accused was acting as a uniformed police officer;

(b) the incident involved a male (subject);

(c) the incident took place in the context or course of the accused's proposed arrest of the subject;

(d) except for the DX incident, the accused had not previously met the subject;

(e) the accused was larger, stronger and/or fitter than the subject;

(f) except for the Bailey incident, prior to the use of excessive force, the subject had challenged the accused's authority in some way;

(g) the force was excessive because it was neither necessary nor reasonable;

(h) the accused was not acting in self-defence;

(i) the excessive force was sufficient to either cause or have the potential to cause serious injury;

(j) the subject suffered an injury – in some instances serious or in the present case, fatal; and

(k) except for the Bailey incident, the accused sought to justify his use of excessive force with a false act or statement.

[72] Other circumstances said to enhance the probative value of the proposed tendency evidence were that each of the four tendency incidents occurred within two years of the charged events, there is no risk of concoction between those involved in the various incidents, and proposed expert evidence will be called at the accused's trial to the effect that the accused had used excessive force in each of the incidents.

[73] It was accepted by the Crown that the "degree of resistance" offered by the subjects in the four tendency incidents and the degree of excessive force employed by the accused towards them differed from those in the charged event. It was submitted that the proposed tendency evidence nevertheless has significant probative value because of the context in which the incidents occurred, and the strong similarities between each incident and the charged event. The Crown submitted that for a uniformed police officer to act with excessive force on repeated occasions and then on several occasions seek to justify falsely that use of excessive force is out of the ordinary. The Crown cited the observations of Nettle J in *Hughes*, at [155], "…where a previous offence was committed by the accused in circumstances which are unusual or distinctive for that kind of offence, and the subsequent offence is committed in similar circumstances, the circumstances in which the previous offence was committed might, as a matter of common sense and experience,

be seen significantly to increase the probability that the accused committed the subsequent offence".

[74] With specific regard to the defence of self-defence under s 43BD of the Code, it was submitted that the proposed tendency evidence could rationally affect the jury's assessment as to whether the accused honestly believed that his conduct in firing the second and third shots was necessary to defend either himself or Constable Eberl from the threat which the deceased presented. It was submitted that the proposed tendency evidence was capable of demonstrating a likelihood that the accused was prepared to use unnecessary and unreasonable force when his authority was challenged and/or in the course of an arrest. It was further suggested that the proposed tendency evidence could rationally affect the jury's assessment of whether the accused's acts were a reasonable response in the circumstances as he perceived them.

[75] The Crown submitted that, for similar reasons, the proposed tendency evidence also had significant probative value in relation to a defence under s 208E of the Code.

[76] Turning to the defence under s 148B of the PAA, the Crown submitted that the accused would be entitled to succeed on this defence if the jury accepted as a reasonable possibility that the accused honestly believed that he fired shots 2 and/or 3 in order to arrest the deceased and that the use of such force was reasonable to effect such an arrest. The proposed tendency evidence, the

Crown said, could rationally affect the jury's assessment of whether the accused honestly held either belief. It was submitted that the proposed tendency evidence had the capacity to demonstrate that the accused was prepared to use unnecessary and unreasonable force when his authority was challenged and/or in the context or course of making an arrest.

[77] It was also submitted that the proposed tendency evidence was relevant to evaluating the statement made by the accused immediately after the shooting ("He was stabbing me. He was stabbing you"). The proposed tendency evidence, the Crown submitted, could put what might appear to be a spontaneous and credible utterance into the context of the accused having made false statements in the past to justify his use of excessive force.

[78] Section 101 of the ENULA requires a balancing of the probative value of the tendency evidence and the danger of unfair prejudice to the accused if the evidence is admitted. In *Taylor*, Bell P, at [122], drew together the following principles regarding section 101 from previous decisions:

> (xix) the assessment made under s 101(2) involves the trial judge making an evaluative judgment; it is not a discretionary exercise: see, for example, ***R v Cook*** [2004] NSWCCA 52 at [38]; and *Ford* at [63];
>
> (xx) the nature of tendency evidence is inherently prejudicial…and may have a powerful subconscious effect on the jury: *Hughes* at [71]-[74];
>
> (xxi) there is an inevitability that prior illegal acts…will be prejudicial in terms of their impact: see, for example, *Qualiteri v R* (2006) 171 A Crim R 463; [2006] NSWCCA 95 at [80];
>
> (xxii) "unfair prejudice" in s 101(2) as amended refers to harm to the interests of the accused that is unfair, because there is a real risk that the evidence will be misused by the jury in some unfair way, for example, by providing some irrational, emotional or illogical response

or by giving the evidence more weight than it truly deserves: *Ford* at [56]; *R v BD* (1997) 94 A Crim R 131 at 139; *Papakosmas v R* (1999) 196 CLR 297 at 325; [1999] HCA 37 at [91]; *R v Suteski* (2002) 56 NSWLR 182 at 199; [2002] NSWCCA 509 at [116]; *SSN* at [37]; and *R v MM* [2014] NSWCCA 144 at [43];

(xxiii) unfair prejudice might arise from:

(a) the nature or quality of the conduct the subject of the tendency evidence;

(b) whether or not it has been established or the subject of admissions;

(c) where it involves a plethora of factors that might give rise to a confusion or distraction;

(d) whether it is corroborated;

(e) an underestimation by the jury of the number of persons who share the tendency: *Hughes* at [17];

(f) where there has been no past conviction or admission as to the past conduct, the need for an accused to answer uncharged conduct potentially stretching back over many years: *Hughes* at [17]; and

(g) a jury's emotional or irrational response to particular tendency evidence; or

(h) any combination of the above (non-exhaustive) factors;

(xxiv) when considering whether the probative value of tendency evidence outweighs its prejudicial effect, the court is entitled to take into account that juries are to be properly directed as to the use to which such evidence is to be put: *PWD* at [90]; *RH* at [176]; and *Armstrong v R* [2017] NSWCCA 323 at [24];

(xxv) acceptance of the proposition that juries generally follow directions given to them by trial judges, and that that obedience will often solve problems of prejudice against an accused person, has its limits, and judicial directions to juries are not to be thought of as an unfailing panacea for all forms of prejudice: see, for example, *R v Allen* [2020] NSWCCA 173 at [111], [115] and [152]-[160];

(xxvi) there will be cases…where directions to a jury, even coupled with an assumption that they will be conscientiously followed, will be incapable of overcoming or ameliorating prejudice: see, for example, *Patel v R* (2012) 247 CLR 531; [2012] HCA 29 at [113], [128] and

[129]; *R v GAC* (2007) 178 A Crim R 408; [2007] NSWCCA 315 at [83]; and at [48];

(xxvii) an assumption that a judicial direction to the jury designed to minimise the risk of unfair prejudice will be completely effective would effectively prevent s 101 (2) operating as a safeguard against the potential risk miscarriages of justice arising from the admission of tendency evidence: *Sokolowskyj* at [56]; see also *Allen* at [154]. This may, for example, be because of the nature or extent of the prejudice which the evidence carries or the subconscious effect on the jury, notwithstanding directions;

(xxviii) the corollary of the proposition confirmed in *IMM*, namely that the probative value of the tendency evidence is to be assessed on the basis that the jury will accept it at its highest, is that, to the extent that that evidence carried prejudice to the accused, that prejudice is to be assessed on the same basis, namely that the jury will accept the evidence at its highest. In other words, the impact of any prejudice is not to be reduced by reason of the fact that the jury might not accept the evidence as credible or reliable.

(Footnotes omitted)

[79] The Crown acknowledged that the accused has not admitted the use of excessive force in the tendency incidents and that he has not been convicted of any offence. The Crown estimated that proof of the alleged tendencies would add five days to the length of the trial. It also accepted that in the Cleveland Walker incident the evidence of the complainant was not corroborated.

The accused's submissions on tendency

[80] The accused took what he described as a "layered" approach to the application. He submitted:

(a) firstly, that the proposed tendency evidence is not relevant;

(b) secondly, if the evidence is relevant, it lacks significant probative value;

(c) thirdly, if the evidence has significant probative value, that value does not outweigh the danger of unfair prejudice to the accused; and

(d) fourthly, if all of the above submissions were to be rejected, the Court should exercise its discretion under s 135 or s 137 of the ENULA to refuse to admit the evidence.

[81] With regard to relevance, the accused submitted that the facts in issue at his trial would be those which could rationally affect the availability to him of:

(a) the self-defence defence under s 43BD of the Code;

(b) the defence available to police officers under s 208E of the Code; and

(c) the "good faith" defence pursuant to s 148B of the PAA.

[82] The accused submitted that s 55(1) of the ENULA sets an objective test grounded in human experience. I was referred to the statement made by Gleeson CJ, Heydon and Crennan JJ in *Washer v Western Australia* (2007) 234 CLR 492 at [5]:

> In order to establish relevance, it is necessary to point to a process of reasoning by which the information in question could affect the jury's assessment of the probability of the existence of a fact in issue at the trial.

[83] I was also referred to the following observations of Gleeson CJ in *HML v The Queen* (2008) 235 CLR 334 at [6]:

> Information may be relevant, and therefore potentially admissible as evidence, where it bears upon assessment of the probability of the existence of a fact in issue by assisting in the evaluation of other evidence. It may explain a statement or event that would otherwise appear curious or unlikely. It may cut down, or reinforce, the plausibility of something that a witness has said. It may provide a context helpful or even necessary for an understanding of a narrative.

[84] In *IMM*, Gageler J, in a separate judgment, discussed relevance in the context of tendency evidence at [104]:

> The nature of tendency evidence adduced by the prosecution in a criminal trial is that it is evidence of another occasion or occasions on which the accused acted in a particular way. The evidence is adduced in order to provide a foundation for an inference that the accused has or had a tendency to act in that way or to have a particular state of mind at the time or in the circumstances of the alleged offence.

[85] The accused submitted that the circumstances surrounding the alleged excessive use of force in the four tendency incidents were so different to those alleged in the present charges that the proposed tendency evidence, even taken at its highest, could not rationally affect, either directly or indirectly, the assessment of the probability of the facts in issue at his trial on the present charges. The accused submitted:

> The proposed tendency evidence lacks the capacity to demonstrate a tendency by Rolfe to think or act in a relatively distinct or particular way. The four occasions relied upon by the prosecution are no more than a random collection of incidents that say no more about [the

accused's] thoughts or behaviour at the time of the charged offending. There is no similarity between those four tendency occasions and the charged offending that are of any moment.

[86] Turning to the second matter referred to by the accused, whether the proposed tendency evidence has significant probative value, the accused submitted that many of the similarities between the proposed tendency evidence and the events that are the subject of the present proceedings are simply a recitation of the alleged tendencies themselves and a number of others are tenuous. The accused submitted that there were marked differences between the tendency incidents and the events of the present charges, including:

(a) the subjects of the accused's force in the tendency incidents (the subjects) did not use or threaten to use a weapon;

(b) the accused was not injured by the subjects prior to using force;

(c) the entirety of the force used by the accused against the subjects is alleged to be unjustified and excessive;

(d) the accused was not acting as a member of the IRT during the tendency incidents;

(e) the accused had not been briefed regarding the violent tendencies of the subjects;

(f) except for the Ryder incident, there is no suggestion that the accused was acting in self-defence or defence of another police officer at the time that he used force against the subjects;

(g) except for the Ryder incident, the tendency incidents occurred outdoors and involved on-foot pursuit by the accused;

(h) except for the Ryder incident, the accused's self-justification did not allege violence by the subjects directed towards him; and

(i) except for the Ryder incident, the accused's self-justifications were not immediate or spontaneous.

[87] Should the evidence be found to have significant probative value, the accused submitted that any such value does not outweigh the prejudicial effect it may have. The accused referred to the judgment of McHugh J in *Festa v The Queen* (2001) 208 CLR 593 at [51]:

> But the weakness of relevant evidence is not a ground for its exclusion. It is only when the probative value of the evidence is outweighed by its prejudicial effect that the Crown can be deprived of the use of relevant but weak evidence. And evidence is not prejudicial merely because it strengthens the prosecution case. It is prejudicial only when the jury are likely to give the evidence more weight than it deserves or when the nature or content of the evidence may inflame the jury or divert the jurors from their task.

[88] In *Hughes* the majority of the High Court (Kiefel CJ, Bell, Keane and Edelman JJ) observed, at [17], that prejudice to an accused may also be occasioned by requiring the accused to answer a raft of uncharged conduct.

[89] The accused drew my attention to the judgment of Howie J (with whom McColl JA and Grove J agreed) in *O'Keefe v R* [2009] NSWCCA 121 where his Honour stated, at [60]:

> The more general the tendency relied upon, the less likely it is to have sufficient probative value to outweigh the prejudicial effect arising from propensity evidence generally.

[90] The accused submitted that the proposed tendency evidence is highly prejudicial because there is a real risk that it will:

(a) serve as a distraction and divert the jurors from their primary task;

(b) have a powerful subconscious effect on the jury;

(c) lead to an irrational, emotional or illogical response; and

(d) be given disproportionate weight.

[91] The accused also submitted that the Crown's estimate that proof of the tendencies would only add a further five days to the estimated length of the trial was overly optimistic and that it would probably take considerably longer.

Consideration

[92] In *Hughes*, at [40], the majority of the High Court (Kiefel CJ, Bell, Keane and Edelman JJ), after discussing conflicting authorities from intermediate appeal courts in Victoria and New South Wales, stated that proposed tendency evidence will have significant probative value if, by itself or in

combination with other evidence, it makes more likely, to a significant extent, the facts that make up the elements of the offence charged. Later, at [41], the majority said:

> The assessment of whether evidence has a 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 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 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 the tendency, and (ii) the tendency strongly supports the proof of the fact that makes up the offence charged.

[93] The majority in *Hughes* accepted that proposed tendency evidence does not have to bear similarity to the conduct with which an accused is charged, but nevertheless opined that in undertaking the second part of the exercise referred to in the extract above, a comparison between the proposed tendency evidence and the facts in issue in the proceeding will be required. At [64], they said:

> The assessment of the significant probative value of the proposed evidence does not conclude by assessing its strength in establishing a tendency. The second matter to consider is that the probative value of the evidence will also depend on the extent to which the tendency makes more likely the elements of the offence charged. This will necessarily involve a comparison between the tendency and the facts in issue. A tendency expressed at a high level of generality might mean that all the tendency evidence provides significant support for the tendency. But it will also mean that the tendency cannot establish anything more than relevance. In contrast, a tendency expressed at a level of particularity will be more likely to be significant.

[94] In assessing the probative value of proposed tendency evidence, the evidence must be taken at its highest and no question as to the credibility or reliability of the evidence should, for that purpose, be entertained: *IMM* at [52]. The phrase "significant probative value" is not defined in the ENULA. In *IMM* the plurality, at [46], referred with apparent approval to Cross on Evidence which suggested that a significant probative value is a probative value which is "important" or "of consequence". In *BD v The Queen* [2017] NTCCA 2 the Court of Criminal Appeal (Grant CJ, Kelly and Barr JJ) said, at [84]:

> The test of "significant probative value" in the tendency rule is higher than that required to establish relevance under section 55 of [the ENULA]. The use of "significant" as a qualifier in this context connotes something more than mere relevance, but something less than a substantial degree of relevance. This resolves to a judicial evaluation of whether the hypothetical jury would rationally think it likely that the evidence is important in relation to the determination of the fact(s) in issue."

[95] The justification for adducing tendency evidence in cases such as the present is that the evidence tells the tribunal of fact something important about the accused, in particular the way in which the accused can be expected to think or act in particular circumstances. What is revealed about the accused by the tendency evidence must be of importance in determining a fact in issue. The fact in issue need not be the ultimate fact in issue, but may be a subsidiary or collateral fact which is nevertheless important in reasoning that an ultimate fact in issue exists.

[96] The word “tendency” is not defined in the ENULA and must be taken to have its ordinary meaning of an *inclination* towards a particular behaviour or way of thinking. Proposed tendency evidence need not, therefore, establish that a person has a fixed pattern of behaviour or thought. What is anticipated by s 97 of the ENULA is that the proposed tendency evidence will allow the tribunal of fact to draw an inference that, when presented with particular circumstances, the accused will tend to act or think in a particular way. The purpose of the Crown asking the tribunal of fact to draw this initial inference is so that the Crown may then ask the tribunal of fact to draw a second inference from the initial inference, being that when confronted with the same or similar circumstances, the accused will act or think in the same way as he has acted or thought in the past when confronted with those circumstances.

[97] That is not to say proposed tendency evidence must be the same as, or strikingly similar to the conduct alleged by the Crown in charged offences before it may have probative value. Thus in *Hughes* the majority said at [39]:

> Commonly, evidence of a person’s conduct adduced to prove a tendency to act in a particular way will bear similarity to the conduct in issue. Section 97 (1) does not, however, condition the admission of tendency evidence on the courts assessment of operative features of similarity with the conduct in issue. The probative value of tendency evidence will vary according to the issue that it is adduced to prove. In criminal proceedings where it is adduced to prove the identity of the offender for a known offence, the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence. Different considerations may

> inform the probative value of the tendency evidence where the fact in issue is the occurrence of the offence.

[98] In assessing whether proposed tendency evidence strongly supports, either by itself or in conjunction with other evidence, proof of an alleged tendency, some differences between the circumstances of the events in the proposed tendency evidence and the charged events may not affect the assessment of probative value. In *Hughes*, the offender engaged in various forms of sexual activity with female children of various ages. It was submitted that the differences between the circumstances of the various individual offences deprived the evidence of significant probative value. In rejecting that submission, the majority of the High Court reinforced the need to consider what the proposed tendency evidence was being led to establish. The majority said, at [62], that, when considered together, "all the tendency evidence provided strong support to show the appellant's tendency to engage opportunistically in sexual activity with underage girls despite a high risk of detection". This tendency was clearly relevant to rebutting any suggestion that the individual alleged offences with which the appellant was charged were unlikely to have occurred because of the significant risk of the appellant being detected in the commission of those offences.

[99] Moving to the second matter to be considered, being the extent to which proof of the tendency makes more likely the elements of an offence charged (see [92] above), the majority in *Hughes* said, at [64]:

> The second matter to consider is that the probative value of the evidence will also depend on the extent to which the tendency makes more likely the elements of the offence charged. This will necessarily involve a comparison between the tendency and the facts in issue. A tendency expressed at a high level of generality might mean that all the tendency evidence provides significant support for the tendency. But it will also mean that the tendency cannot establish anything more than relevance. In contrast, a tendency expressed at a level of particularity will be more likely to be significant.

[100] Drafting a proposed tendency so that it has a level of particularity sufficient to possess significant probative value in proving an element of a charged offence will ordinarily involve reference in the proposed tendency to particular circumstances said to exist in the evidence adduced to prove the tendency. As I have said, in a case such as the present, the purpose for which the proposed tendency evidence is led is to establish that the accused has or had a tendency to act in a particular way or to hold a particular state of mind in certain circumstances. As *Hughes* demonstrates, in some cases differences between the circumstances of the tendency evidence and the charged offences may not deprive an established tendency of significant probative value. Much depends upon the circumstances of each case.

[101] Taken at their highest for the Crown, and distilling their essential elements at a high level of generality, each of the four tendency incidents are capable of establishing that the accused had a tendency to use excessive force as a police officer in arresting males, resulting in injury to those males.

[102] Those who drafted the present proposed tendencies were clearly alive to the need to express the tendencies at a level of particularity sufficient to possess

significant probative value in proving the charges against the accused. Stripped to its essentials, the first tendency alleged by the Crown is that the accused has or had a tendency to use excessive force in making arrests. The added particulars alleged by the Crown are:

(a) this tendency manifested when the accused was acting as a uniformed police officer; and

(b) the force used by the accused was sufficient to cause or have the potential to cause serious injury.

[103] It is apparent that the alleged tendencies have been drafted to allow for differences between the circumstances attending the four tendency incidents. A degree of imprecision has been imported by the use of inexact language in the first alleged tendency; for example, the allegation that the force used was *excessive*. Another example is that the Crown alleges that the force was sufficient to either *cause* or have *the potential to cause* serious injury. The drafter of the alleged tendency chose to use the term “serious injury”, which is a term incapable of exact definition, whose meaning may greatly differ in different minds and which could cover a wide range of injuries or potential injuries. Undoubtedly, this imprecision arises from the significant differences in the injuries suffered by the complainants in the four tendency incidents. In the Ryder incident the complainant suffered two lacerations to his head requiring 13 sutures and three sutures respectively. In the DX incident the complainant suffered a laceration requiring four sutures. In the

Bailey incident the complainant suffered a laceration requiring nine sutures. In the Spencer incident the complainant only complained of a sore shoulder. To the extent that the alleged tendency incidents support that part of the first tendency regarding the infliction or potential infliction of serious injury by the accused, they do so only because of the generality with which the tendency is expressed.

[104] The four tendency incidents support the first tendency alleged by the Crown. They strongly support a tendency to use excessive force as a police officer in making an arrest. They support a tendency to use force sufficient to cause, or to have potential to cause injury, but not strongly. They only weakly support a tendency to use force sufficient to cause serious injury.

[105] Regarding the second alleged tendency, the Ryder and DX incidents, taken at their highest, strongly support a tendency on the part of the accused to make a false statement or do some other act seeking to justify the use of excessive force. Having seen the BWV of the Spencer incident, I am satisfied that it is capable of supporting such a tendency, but weakly. The Bailey incident provides no support for this asserted tendency.

[106] In order to advance its submission that the alleged tendencies have significant probative value in proving a fact in issue, the Crown provided me with a list of suggested similarities between the events in the four tendency incidents and the events that are the subject of the present charges (see [71]

above). The following comments are relevant to those matters listed by the Crown:

(a) the fact that the accused was acting as a *uniformed* police officer at the time of the alleged tendency incidents does not add significantly to the particularity of the alleged tendency. The accused was a uniformed police officer and his interactions with the subjects was as a uniformed police officer;

(b) The fact that each subject of excessive force was male is not a significant similarity. The vast majority of persons arrested in the Northern Territory are male;

(c) The fact that the use of excessive force occurred in the course or context of an arrest is a matter of similarity which is capable of being significant;

(d) The fact that the accused had not met the subject previously (except in the DX incident) is not a significant similarity;

(e) There is little evidence of the relative stature, strength or levels of fitness of the subjects compared to the accused;

(f) The Crown accepted that the Bailey incident did not support a similarity that before the use of excessive force, the subject had challenged the accused's authority in some way. The remaining incidents share with the charged events the feature that the subject

either did not comply with the accused's directions or ran away from him. The tendency incidents and the charged events share this general similarity;

(g) In the submission that the four tendency incidents and the charged events share the similarity that "the force was excessive because it was neither reasonable nor necessary", the Crown has made the error of assuming a matter which the jury will have to determine, being whether the force used by the accused in causing the death of the deceased was neither reasonable nor necessary. They propose using this similarity to prove that the accused's state of mind at the time he did the act which caused the death of the deceased was such that the use of that force was neither reasonable nor necessary. This invites clear circular reasoning;

(h) The submission that the four tendency incidents and the charged events share the similarity that the accused was not acting in self-defence also clearly invites circular reasoning as it assumes that which is to be determined by the jury in the accused's trial, being whether he was acting in self-defence at the time that he discharged the fatal shot;

(i) The submission that the four tendency incidents and the charged events share the similarity that the excessive force used was

sufficient to either cause or have the potential to cause serious injury is correct at a high level of generality;

(j) The submission that the four tendency incidents and the charged events share the similarity that in each case the subject suffered an injury is correct at a high level of generality; and

(k) The submission that, except for the Bailey incident, the accused sought to justify his use of excessive force with a false act or statement is correct at a high level of generality and assuming that the jury are satisfied that the accused used excessive force in one or more of the tendency incidents and in the charged events.

[107] What gives a tendency significant probative value depends on what the tendency is adduced to prove. In *Middendorp*, the accused was charged with the murder of his partner. He defended the charge on the basis that he was defending himself from her attack. There were no witnesses to the events leading to the death of his partner. The evidence of the accused's tendency to attack the deceased without provocation derived its probative value from not only the prior acts of the accused, but also the fact that they occurred in that relationship. One cannot draw from that decision a general principle that evidence of a tendency to engage in violence will be admissible to meet a defence of self-defence in every case. There is no suggestion of any relevant prior relationship between the accused and the subjects of the tendency incidents or the deceased.

[108] The tendencies alleged by the Crown may meet the basal requirement of relevance, but they do not have significant probative value. The drafting of the first proposed tendency is unfortunate, in that it does not allege a tendency to *intentionally* use excessive force when making an arrest. It is difficult to perceive how the tendency as presently framed can be said to have significant probative value in meeting any of the defences foreshadowed on behalf of the accused if it is not alleged that the tendency is to intentionally use excessive force when making an arrest. The defences foreshadowed by the accused principally focus on the state of mind of the accused.

[109] Even if I assume that the Crown intended to allege that the accused's excessive use of force in making arrests was intentional, it still lacks significant probative value. As I have previously noted, differences between the events relied upon to establish a tendency and the charged events may not be such as to deprive the proposed tendency of significant probative value. Conversely, however, there will be cases in which the differences are such that the proposed tendency or tendencies do not have significant probative value. To my mind, this is such a case. At a high level of generality there is a similarity between the events in the tendency incidents and the charged events, but there are very significant differences. This is particularly important in a case where the Crown says that it may be inferred that the accused had a particular state of mind or acted in a particular way in certain circumstances because he had a particular state of mind or had acted

in a particular way at an earlier time when confronted by similar circumstances. Looked at in this way, the importance of the similarity in circumstances between the tendency incidents and these becomes obvious.

[110] The decision by the accused to fire the second and third shots was made, on the Crown case, within a period of two seconds. The deceased had produced a weapon and used that weapon to wound the accused and had then continued to struggle with Constable Eberl while still in possession of that weapon. It is accepted by the Crown that the first shot discharged by the accused was fired in self-defence, such that the decision by the accused to discharge the second and third shots came after the legitimate use by him of his firearm in self-defence against the deceased. In addition, the accused had been briefed about the violent tendencies of the deceased. Nothing in the evidence of the tendency incidents could, by reference to the alleged tendencies, assist the jury in understanding or inferring the accused's state of mind at the time of the charged events. The differences between the circumstances of the tendency incidents and the charged events are such that no inference such as the Crown would ask the jury to draw can be drawn.

[111] For these reasons I am not satisfied that the proposed tendency evidence has significant probative value.

[112] If I were to be proven wrong with regard to the above finding, I make it clear that the probative value of the proposed tendency evidence does not outweigh the danger of unfair prejudice to the accused. No admissions have

been made by the accused with regard to the allegations against him regarding the tendency incidents. No charges have been proven against him in that regard. For the Crown to prove the facts in those tendency incidents will effectively require it to conduct five separate trials, all within one proceeding. The estimate given by the Crown that proof of the tendency incidents will add five days to the length of the trial is, in my view, extremely optimistic. In addition, the leading of the proposed tendency evidence by the Crown would leave open the opportunity for the accused to call evidence rebutting the proposition that he has the tendency alleged by the Crown. It is for the Crown to prove that the accused has such a tendency. It does so by asking the jury to draw an inference from the tendency evidence. I see no reason why an accused person may not lead evidence tending to rebut the inference which the Crown asks the jury to draw or directed to the weight which the jury may attribute to a proven tendency. It is unclear how many arrests the accused has been involved in over the period that he has been a member of the Northern Territory Police Force, but it is reasonable to infer that it is many more than the four arrests referred to in the tendency incidents. I see no reason why the accused would not be entitled to lead evidence of other, and potentially many other arrests in which he has been involved and which may bear similarities to the arrests in the tendency incidents, but which have not involved allegations of excessive force, in order to rebut the Crown's submission that the jury should infer the alleged tendency from the four incidents it has selected, or to assist the jury

in determining the weight to be attributed to any proven tendency. This could consume a great deal of time in the trial.

[113] Not only would the leading of the proposed tendency evidence be time-consuming, and potentially considerably so, but the leading of the tendency evidence also has the real danger of diverting the jury from its main function, being a consideration of the events of 9 November 2019 and the accused's state of mind at the time that he fired the second and third shots. The leading of this evidence is also likely to be confusing to the jury because they will need to consider many of the same defences raised by the accused with regard to the charged events in determining whether they are satisfied that the Crown has proved that the accused possessed the alleged tendencies. It would not, of course, be necessary for the jury to return verdicts with regard to the events of the tendency incidents, but it would be necessary for me to give them at least some directions with regard to the foreshadowed defences relevant to each of the tendency incidents. It would then be necessary to repeat those directions with regard to the charged events. There is a very real risk of confusion on the part of the jury if this were to occur. This is not a danger which could be alleviated by careful judicial directions.

[114] For these reasons, the application to lead tendency evidence is refused. In light of the proximity of the accused's trial, I order that this judgement not be published until further order of the Court.
