CITATION:	*The King v MK* [2024] NTSC 56
PARTIES:	THE KING
	v
	MK
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21914537
DELIVERED:	3 July 2024
HEARING DATE:	2 July 2024
JUDGMENT OF:	Brownhill J

CATCHWORDS:

EVIDENCE – Admissibility and relevance – *Evidence (National Uniform Legislation) Act* ss 97, 97A, 101 – whether evidence of charged acts cross-admissible and evidence of an uncharged act admissible as tendency evidence – where charged and uncharged acts are child sexual offences – evidence of all charged and uncharged acts has significant probative value in relation to all charges – probative value outweighs any danger of unfair prejudice to the accused – evidence admitted as tendency evidence

BC v The Queen [2019] NSWCCA 11; *BD v The Queen* [2017] NTCCA 2; *BP v The Queen* [2010] NSWCCA 303; *Director of Public Prosecutions v Roder* (2024) 98 ALJR 644; *HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 235 CLR 334; *Hoyle v The Queen* (2018) 339 FLR 11; *Hughes v The Queen* (2017) 263 CLR 338; *IMM v The Queen* (2016) 257 CLR 300; *McPhillamy v The Queen* (2018) 92 ALJR 1045; *Saoud v The Queen* [2014] NSWCCA 136; *Taylor v The Queen* [2020] NSWCCA 355; *The Queen v AW* [2018] NTSC 29; *The Queen v Bauer* (2018) 266 CLR 56; *The Queen v Lisoff* [1999] NSWCCA 364; *The Queen v Madrill* (2013) 275 FLR 449; *The Queen v RCA* [2022] NTSC 6; *The Queen v SF* [2021] NTSC 91, referred to.

Criminal Law Consolidation Act and Ordinance (NT) ss 67, 72
Evidence (National Uniform Legislation) Act 2011 (NT) ss 55, 97, 97A, 101

S Odgers, *Uniform Evidence Law* (LawBook, 16th ed, 2021)

REPRESENTATION:

Counsel:

Crown:	T Gooley
Accused:	N Redmond

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Northern Territory Legal Aid Commission

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The King v MK [2024] NTSC 56
No. 21914537

BETWEEN:

THE KING

AND:

MK

CORAM: BROWNHILL J

REASONS FOR JUDGMENT

(Delivered 3 July 2024)

[1] The issues in this matter were whether evidence of the charged act by the accused towards one complainant should be cross-admitted as tendency evidence in relation to the charge in respect of the other complainant, and whether a single uncharged act by the accused towards one complainant should be admitted as tendency evidence in relation to both charged acts.

[2] On 2 July 2024, I ruled that the proposed tendency evidence was admissible and indicated that I would publish my reasons in due course. These are my reasons.

Charges

[3] The accused is charged by an indictment dated 24 October 2023 with two counts of indecent assault contrary to s 72 of the *Criminal Law and*

Consolidation Act and Ordinance (NT) ('the Act'), read together with s 67 of the Act, being one Count in relation to each of two complainants. Count 1 relates to complainant RO and is alleged to have been committed between 1 January 1972 and 30 December 1974. Count 2 relates to complainant WO and is alleged to have been committed between 1 and 28 February 1983.

Crown case

[4] The Crown case is that the accused is the maternal aunt of RO and WO, who are brothers.

[5] Between 1 January 1972 and 30 December 1974, when RO was approximately five to eight years old, and the accused was approximately 13 to 16 years old, RO was sent to live with his maternal grandparents at their home in Alice Springs. The accused and her two siblings, who were the children of RO's grandparents, were also living in the home. One night, RO was asleep in his bedroom with his cousin. At about 10 pm, he was awoken by the accused. She leant on the bed he was in and began touching or playing with his penis. As a result, RO got an erection. The accused got onto the bed, sat on top of RO and inserted his erect penis into her vagina. She had sexual intercourse with him for approximately five minutes. She then got up off RO and left the room. Nothing was said during this incident. No-one woke up or saw what happened. This is the subject of Count 1.

[6] RO believes this may have happened a second time on another night in a similar fashion, when the accused was either living or just staying

temporarily at RO's grandparents' home. This is not the subject of a charge, but is sought to be relied on as proposed tendency evidence.

[7] Between 1 and 28 February 1983, when WO was approximately 13 years old, and the accused was approximately 24 years old, as a result of the birth of RO's and WO's younger sister, WO was sent to stay with their maternal grandparents at their home in Alice Springs. The accused was also staying at the home. One night, WO was asleep in his grandparents' bedroom alone. During the night, he was awoken by the accused who began touching or stroking his penis. She took his trousers off and said 'come here'. She laid down and pulled him on top of her and tried to make him have sex with her by inserting his penis into her vagina. He was frightened, and as a result there was no penetration. This lasted for a short amount of time. The accused then left the room. This is the subject of Count 2.

[8] Neither complainant told anyone about the offending against them for a very long time. Various complaint evidence and admissions by the accused will be relied on by the Crown.

[9] The accused denies any sexual activity with the complainants.

[10] The trial is listed for seven days commencing on 22 July 2024.

[11] Section 55 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('ENULA') defines evidence as 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'.

Tendency evidence

[12] The Crown gave notice under s 97(1) of the ENULA of its intention to adduce tendency evidence. In broad terms, the proposed tendency evidence comprised, firstly, evidence to be led in support of each of the two charged acts and, secondly, evidence of the single uncharged act against RO referred to above.

Proposed tendency evidence

[13] The Crown contended that the proposed tendency evidence relates to the central facts in issue in the proceeding, namely, whether the accused sexually offended against each complainant as alleged.

[14] The tendency notice stated that the tendencies sought to be proved are the tendency of the accused: (a) to have a sexual interest in young male relatives aged between five and 13 years, namely her nephews, and a preparedness to act on that interest; and (b) to act in a particular way, namely to engage in sexual activity with her nephews in circumstances that it was at night, they were at her parents' home, they were asleep, she woke them up by touching their penis and she had or tried to have penile/vaginal intercourse.

Legal principles

[15] Under s 97 of the ENULA, evidence of the conduct of a person is not admissible to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind, unless the appropriate notice has been given and the Court thinks that the evidence will (either by itself or having regard to other evidence to be adduced) have significant probative value. 'Probative value' means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.[1]

[16] With effect from 1 April 2021, s 97A was introduced into the ENULA. By s 222 of the ENULA, s 97A applies in relation to a proceeding in which the hearing commenced after 1 April 2021, when the *Evidence (National Uniform Legislation) Amendment Act 2021* (NT) commenced. There is no definition in the ENULA of when the hearing in a proceeding is taken to have commenced. For the purposes of ss 97A and 222, the hearing of a criminal proceeding in this Court may be taken to have commenced when the accused is first arraigned by the Court on the indictment with which he or she is charged.[2] In the present case, the accused had not been arraigned before 1 April 2021. Section 97A therefore applies.

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1 ENULA, s 3, Dictionary, Part 1.

2 The trial of an accused is deemed to have begun when they are called upon to plead to the indictment and say whether they are guilty or not guilty of the charges. The deeming is the combined effect of s 336(1) and (2) of the *Criminal Code*. Under s 336(1), 'an accused person is to be informed in open court of the offence with which he is charged as set forth in the indictment and may be called upon to plead to the indictment and to say whether he is guilty or not guilty of the charge'. Section 336(2) then provides: 'The trial is deemed to begin and the

[17] Under s 97A of the ENULA, in a criminal proceeding in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence is a fact in issue, evidence that the defendant had a sexual interest in a child or children (including the complainant), and evidence that the defendant was prepared to act on a sexual interest in children, is presumed to have significant probative value for the purposes of ss 97(1) and 101(2) (s 97A(1)-(3)).

[18] The charges on the indictment are child sexual offences within the meaning of s 97A (s 97A(6)).

[19] The presumption of significant probative value in s 97A(2) will apply unless the Court is satisfied that there are sufficient grounds to determine that the tendency evidence does not have significant probative value (s 97A(4)), which is to be determined by *not* taking into account the matters listed in s 97A(5), unless the Court considers there are exceptional circumstances which warrant taking one or more of those matters into account (s 97A(5)).

[20] The potential probative value of tendency evidence was explained by the High Court in *Hughes v The Queen*, as follows:[3]

> The probative value of evidence is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue. Tendency evidence will have significant probative

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accused person is deemed to be brought to trial when he is so called upon.' See *The Queen v SF* [2021] NTSC 91 at [3] per Barr J, citing *The Queen v Madrill* (2013) 275 FLR 449 at [10]-[11] per Barr J. See also *The Queen v RCA* [2022] NTSC 6 at [25] per Brownhill J.

3 *Hughes v The Queen* (2017) 263 CLR 338 ('*Hughes*') at [16] per Kiefel CJ, Bell, Keane and Edelman JJ (citations omitted).

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

[21] Assessing the probative value of proposed tendency evidence is therefore a two stage process. As the plurality said in *Hughes*:[4]

> The assessment of whether evidence has significant probative value in relation to each count involves consideration of two interrelated but separate matters. The first matter is the extent to which the evidence supports the tendency. The second matter is the extent to which the tendency makes more likely the facts making up the charged offence. Where the question is not one of the identity of a known offender but is instead a question concerning whether the offence was committed, it is important to consider both matters. By seeing that there are two matters involved it is easier to appreciate the dangers in focusing on single labels such as "underlying unity", "pattern of conduct" or "modus operandi". In summary, there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged.

[22] Tendency evidence will have significant probative value if it could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent.[5] A 'significant' probative value is a probative value which is important or of consequence.[6] The term 'significant' connotes something more than mere relevance but less than a substantial degree of relevance, and requires a judicial evaluation of whether

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4 Ibid at [41].

5 Ibid at [16].

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

the hypothetical jury would rationally think it likely that the evidence is important in relation to the determination of the fact(s) in issue.[7] The assessment of the probative value of the evidence is to be determined by a trial judge on the assumption that the jury will accept the evidence.[8] This does not involve any assessment of the credibility or reliability of the evidence except in an extreme case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury and so does not meet the criterion of relevance.[9] Nor does it involve assessing the significance of the possibility of collusion or concoction which 'should be left to an occasion when it is raised in a concrete factual setting'.[10]

Significant probative value

[23] The conduct comprising each charged and uncharged act is evidence about the accused having and acting on a sexual interest in the complainants, her male relatives aged five to eight and 13 years old (ie, children), and so is caught by the presumption in s 97A. The proposed tendency evidence therefore is presumed to have significant probative value.

[24] The Defence argued however that the presumption of significant probative value could be and was rebutted. Essentially, the Defence's arguments were

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7 *BD v The Queen* [2017] NTCCA 2 at [84] per Grant CJ, Kelly and Barr JJ.

8 *IMM* at [51]-[52], [54]; *The Queen v Bauer* (2018) 266 CLR 56 ('*The Queen v Bauer*') at [69] per the Court.

9 *IMM* at [38]-[39], [41], [58].

10 Ibid at [59].

focussed upon the capacity of the proposed tendency evidence to establish the alleged tendencies.

[25] Firstly, the Defence argued that the difference between the ages of the accused at the times of the alleged offending meant the proposed tendency evidence did not have significant probative value. The age of the accused at the time of the conduct sought to be relied on as tendency evidence is not a matter referred to in s 97A(5) of the ENULA, with the consequence that the Court can take that into account in determining that the proposed tendency evidence does not have significant probative value under s 97A(4), without being satisfied there are exceptional circumstances.

[26] The Defence argued that, at age 13 to 16, the accused was a child, pubescent and sexually immature, whereas at age 24 she was an adult and sexually much more mature, with the consequence that a sexual attraction to a complainant and a tendency to act on it at age 13 to 16 could not have a significant capacity to establish a tendency to have a sexual attraction to a complainant and a tendency to act on it at age 24.

[27] I do not accept this submission. It requires the drawing of an inference about the accused founded only upon her age and generalisations about the sexual maturity of children and adults. Such an inference is inconsistent with the accused's alleged conduct at both ages, which essentially comprised touching or fondling the complainant's penis, causing an erection, followed by placement or attempted placement of his penis into her vagina. That

conduct indicates a degree of sexual maturity sufficient to explain the alleged conduct as deliberately undertaken with an understanding of the physical mechanics involved in penile/vaginal sexual intercourse. The difference in age of the accused at each time does not materially bear on the physical or mental aspects of the conduct.

[28] Secondly, the Defence argued that the difference in the ages of the complainants and their developmental stages at the relevant times rebutted the presumption of significant probative value because it disclosed 'a different form of paraphilia'. This is a matter falling within s 97A(5) that the Court may not take into account unless there are exceptional circumstances. I need not determine whether there are exceptional circumstances because, even if I were so satisfied, I do not accept the Defence's submission. Again, this submission requires the drawing of an inference about the complainants based only upon their ages and generalisations about developmental milestones in children. While it is reasonable to infer that a boy aged five to eight years old is both physically and mentally at a different developmental stage than a boy aged 13 years old, in the absence of expert evidence about forms of paraphilia, I do not accept that this difference necessarily or significantly impacts the capacity of the alleged conduct to establish the alleged tendencies, particularly given that the complainants were both the accused's nephews (ie in the same familial relationship to the accused) and were brothers (ie males closely related to each other).

[29] Thirdly, the Defence argued that the isolated nature of the accused's conduct rebutted the presumption of significant probative value. That is, there was no evidence of grooming, build-up or other sexual conduct towards either complainant, or of any inappropriate behaviour by the complainant towards other children. Rather, the alleged conduct comes 'out of the blue' and there has been no similar conduct since.

[30] Fourthly, the Defence argued that the passage of time between the conduct towards each complainant, particularly coupled with the isolated nature, rebutted the presumption of significant probative value.

[31] The passage of time is a matter the Court is not permitted to take into account by s 97A(5), unless there are exceptional circumstances. The isolated nature of the conduct is not specifically referred to in s 97A(5), but Defence conceded that there is some significant overlap between that factor and the passage of time. Again, I need not determine whether there are exceptional circumstances because, even if I were so satisfied, I do not accept the Defence's submission.

[32] The argument relied on the observation of the High Court in *McPhillamy v The Queen*[11] (at [30]) that, in the absence of evidence that the appellant in that case had acted on his sexual interest in young teenage boys under his supervision in the decade following the sexual offending conduct relied on as tendency evidence, the inference that at the date of the offences he

11 *McPhillamy v The Queen* (2018) 92 ALJR 1045 per Kiefel CJ, Bell, Keane and Nettle JJ.

possessed the tendency is weak. However, that case was different to the present case because there, as the High Court went on to observe (at [31]-[32]), it was necessary to identify some feature of the other sexual conduct proposed as tendency evidence and the alleged offending which serves to link the two together, and there was no such link in that case.

[33] I have considered each of the matters raised by the Defence individually. I have also considered them together. I do not consider that they, either individually or together, rebut the presumption that the proposed tendency evidence has significant probative value.

[34] It is not necessary that the conduct relied on as tendency evidence be strikingly or even closely similar conduct to, or that it have an underlying unity with, the charged conduct.[12] However, the closer the degree of similarity, the more significant and more probative the evidence is likely to be, because the specificity of the tendency directly informs the strength of the inferential mode of reasoning.[13] 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 is not necessarily similar or particularly so, a close similarity of circumstances in which the relevant

12 *Hughes* at [38]-[39]; *Saoud v The Queen* [2014] NSWCCA 136 at [39] per Basten JA (Fullerton and R A Hulme JJ agreeing).

13 *Taylor v The Queen* [2020] NSWCCA 355 at [122(vii)] per Bell P and the authorities there referred to.

conduct occurred may render the tendency evidence of 'significant probative value'.[14]

[35] In this case, the essential nature of the conduct against each complainant was very similar, as I have already identified. Further, the circumstances in which the conduct occurred were also very similar; the conduct occurring against the accused's nephews, who were brothers, in the complainants' grandparents' home, at night, when the accused had entered the room the complainant was sleeping in, and woken him up by touching his penis.

[36] These matters distinguish this case from *McPhillamy*, such that the evidence shows more than a mere disposition to commit crimes of the kind in question.[15]

[37] In *The Queen v Bauer*,[16] the High Court observed (at [55]) that a high probative value is ordinarily to be attributed to a complainant's evidence of uncharged sexual acts. In *BP v The Queen*,[17] Hodgson JA (Price and Fullerton JJ agreeing) observed that it is unusual for a parent or grandparent to commit sexual acts against their children or grandchildren, and such acts would, to a very significant extent, rationally affect the assessment of the probability of the appellant having an unusual sexual interest in his daughter and granddaughters and having a tendency to give effect to that interest by

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14 Ibid at [122(ix)] per Bell P and the authorities there referred to.

15 S Odgers, *Uniform Evidence Law* (LawBook, 16th ed, 2021) at [EA.97A.120], citing *BC v The Queen* [2019] NSWCCA 11 at [82].

16 *The Queen v Bauer* per the Court.

17 *BP v The Queen* [2010] NSWCCA 303 at [112] per Hodgson JA (Price and Fullerton JJ agreeing).

assaulting them, and the existence of those tendencies in turn would to a very significant extent rationally affect the assessment of the probability of the commission of the offences charged. I consider the same observation applies to an aunt in relation to her nephews.

[38] Overall, I consider that: (a) the proposed tendency evidence is highly probative of proof of the alleged tendencies; and (b) the alleged tendencies are highly probative of the facts that the accused committed the alleged offending. Consequently, the proposed tendency evidence has high probative value.[18]

Danger of unfair prejudice to the accused

[39] Section 101(2) of the ENULA restricts the admissibility of tendency evidence unless the probative value of it outweighs the danger of unfair prejudice to the accused. This involves a balancing exercise, assessing and weighing the probative value of the evidence against any potential prejudicial effect it may have on the accused. Recent amendments to the ENULA have changed the test under s 101(2): no longer is the requirement for admissibility that the probative value of the evidence *substantially outweighs* its prejudicial effect; it need only *outweigh* the danger of unfair prejudice to the defendant.

18 *Hughes* at [56]-[60]; *Hoyle v The Queen* (2018) 339 FLR 11 at [120] per the Court.

[40] When undertaking this balancing exercise, the dominant consideration is to ensure that the accused is not deprived, by prejudice, of a fair trial.[19] The notion of prejudice in this general context '… means the danger of improper use of the evidence. It does not mean its legitimate tendency to inculpate.'[20] Something more is required, such as the possibility that the evidence may be misused by the jury in some respect.

[41] The plurality in *Hughes* explained the kinds of potential prejudice that can arise in a criminal trial such as this:[21]

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

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19 *The Queen v AW* [2018] NTSC 29 at [30] per Grant CJ.

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

21 *Hughes* at [17].

[42] The test of danger of unfair prejudice is not satisfied by the mere possibility of such prejudice. There must be a real risk of prejudice by reason of the admission of the evidence.[22]

[43] The Defence argued that there is a real risk that the jury will engage in circular reasoning, namely that the jury will rely on proof of Count 1 to a standard below beyond a reasonable doubt in aid of proof of Count 2, and will then use a finding below the standard of beyond a reasonable doubt in relation to Count 2 in support of Count 1, which will then bolster their finding in relation to Count 1, which in turn bolsters their finding in relation to Count 2.

[44] In *Director of Public Prosecutions v Roder*,[23] the High Court held (at [27]) that for a jury to find that an alleged tendency has been proved to a lesser standard by relying on direct evidence of charged acts, and then deploying that tendency in determining whether the charged acts have been proved beyond reasonable doubt, does not involve circular or incoherent reasoning. Instead, it simply means that the jury may consider the same evidence at different stages of its deliberations with a different onus of proof and for a different purpose.

[45] In the face of that decision, the Defence argued that there is nevertheless a danger of circular reasoning, but accepted that a proper direction to the jury

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22 *The Queen v Lisoff* [1999] NSWCCA 364 at [60] per the Court.

23 *Director of Public Prosecutions v Roder* (2024) 98 ALJR 644 (‘*DPP v Roder*’) per the Court.

about the use of tendency evidence can alleviate the danger of unfair prejudice to the accused.

[46] The Defence also argued that, in addition to the danger of circular reasoning, there is the inherent prejudice to the accused from the two charges being heard together. The Defence nevertheless accepted that there is no sufficient basis for an application for separate trials of the two charges. This is an acceptance that the prejudice is *inherent* in what the law considers to be the fair trial of the two charges on the indictment. I do not see how such inherent prejudice can properly be taken into account in the balancing exercise required by s 101 of the ENULA.

[47] I consider that the danger of circular reasoning can be adequately addressed by a direction which makes clear to the jury that it is *the alleged tendency* that may be proved to a standard below beyond reasonable doubt by evidence about the charged and uncharged acts, which may then be relied on as circumstantial evidence in proof beyond reasonable doubt of the charge on the indictment.[24]

[48] Given the high probative value of the tendency evidence, I do not accept that the probative value of the proposed tendency evidence is outweighed by the danger of unfair prejudice to the accused.

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24 See *DPP v Roder* at [26].

Disposition

[49] For the above reasons, I made the ruling set out at paragraph [2] above.
