The Queen v Wicks [2018] NTSC 4

PARTIES:	THE QUEEN v WICKS, Ryan Alexander
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21732761
DELIVERED:	18 January 2018
HEARING DATE:	15 January 2018
JUDGMENT OF:	KELLY J

CATCHWORDS:

EVIDENCE – Admissibility and relevance – Tendency –Whether evidence tends to establish that the accused had a tendency to act in the way asserted – Whether tendency evidence has significant probative value – Evidence inadmissible – *Evidence (National Uniform Legislation) Act 2011* (NT) s 97

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

Hughes v The Queen [2017] HCA 20, *Reeves v The Queen* (2013) A Crim R 448, referred to

REPRESENTATION:

Counsel:

Crown:	C Dixon
Accused:	P Maley

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Maleys Barristers and Solicitors

Judgment category classification:	B
Judgment ID Number:	KEL1802
Number of pages:	9

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

The Queen v Wicks [2018] NTSC 4
No. 21732761

BETWEEN:

THE QUEEN

AND:

RYAN ALEXANDER WICKS

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 18 January 2018)

[1] The accused is charged with one count of unlawfully causing serious harm to Jarrod Rogers-McIntosh.

[2] In summary, the Crown case is that the accused and some friends had been drinking at Monsoons in Mitchell Street until the early hours of the morning of 26 May 2017. At about 4.00 am, the accused and his friends went to McDonalds in Smith Street. The complainant was there with some friends. He was standing outside McDonalds eating some food from a McDonalds' container. The accused walked up to him, knocked the McDonalds' container from the complainant's hands, and sent it flying through the air. Then he punched the complainant in the head, once, causing the complainant to fall backwards and hit his head

on the concrete footpath, there being nothing to break his fall. The accused and his friends then left. The complainant suffered serious head injuries as a result of the assault. The accused and the complainant were not known to each other.

[3] The parties have agreed certain facts including that the accused was the person who punched the complainant that night. As a result, the only live issue at the trial will be whether the accused was acting in self-defence.

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

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

(a) to act in a particular way, namely "to initiate physical violence, by punching to the head a previously unknown person, in the early hours of a morning, in a public place shortly after exiting licensed premises"; and

(b) to have a particular state of mind, namely "to behave aggressively with previously unknown persons in a public place in the early hours of a morning shortly after exiting licensed premises".[1]

[6] The evidence by which this tendency is sought to be established consists of the agreed facts from a file in which the accused pleaded guilty to an aggravated assault committed on 14 February 2015 along with a certificate of conviction and evidence from a number of witnesses to that assault.

[7] In summary, the facts of the earlier aggravated assault were these. The accused and some friends had been drinking at Throb Nightclub on Mitchell Street till the early hours of the morning. They left at about 3.30 am. They saw an intoxicated Aboriginal man asleep on the footpath and took photos of him. Another group of people approached and remonstrated with them about their behaviour towards the sleeping man. There was a verbal argument which escalated to some pushing and shoving between the accused and one of the women from the other group. The victim took photos of the accused and his friends and the accused demanded that he delete the photos. The victim walked away and started to cross the road and the accused ran after him. Several people called out to the victim to warn him; he turned, and the accused hit him once to the right eye. The blow knocked the victim to the

[1] I am not sure this qualifies as a state of mind. It describes behaviour. It seems to me that it simply restates the tendency to act in a certain way in more general terms. Nothing turns on this.

ground. The accused then stood over the victim and the victim fended him off with his feet. The accused left the area and was arrested a short time later.

[8] The tendency evidence is said to be relevant to the question of whether the accused was acting in self-defence when he punched the complainant outside McDonalds on 26 May 2017.

[9] Under UEA s 97 evidence of the conduct of a person is not admissible to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind unless the appropriate notice has been given and the court thinks that the evidence will (either by itself or having regard to other evidence to be adduced) have significant probative value.

[10] There is no dispute about the adequacy of the notice. The question, therefore, is whether the evidence has significant probative value in relation to the issue of whether the accused was acting in self-defence at the time.

[11] The potential probative value of tendency evidence was explained by the High Court in *Hughes v The Queen*:[2]

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

[2] [2017] HCA 20 at [16] per Kiefel CJ, Bell, Keane and Edelman JJ

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

[12] Assessing the probative value of proposed tendency evidence is therefore a two stage process. As the plurality said in *Hughes*:[3]

> 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.

[13] The first question is the extent to which the evidence sought to be adduced tends to establish that the accused had the tendency to act in the way asserted in the notice. In my view the evidence is capable of supporting proof of a tendency in the accused to behave aggressively towards a stranger in a public place in the early hours of a morning

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[3] Ibid at [41]

shortly after leaving licensed premises, although I do not think it is strongly probative in establishing such a tendency.

[14] There is only one prior instance of such aggression relied upon. In *Reeves v The Queen,*[4] the Victorian Court of Appeal held that the fact proof of the alleged tendency relied on only one other instance of the conduct did not necessarily prevent its constituting tendency evidence. However, that case involved the cross admissibility of evidence that the accused had sexually interfered with both his pre-pubescent daughter and his pre-pubescent step-daughter in a similar way and in similar circumstances. The court noted that it is unusual for a father (or stepfather) to interfere sexually with his daughter (or stepdaughter) and that the similarities made the conduct "all the more unusual, or remarkable".[5]

[15] The Crown submitted that the facts of the earlier offending by the accused were sufficiently similar to the alleged facts in the present charge and sufficiently out of the ordinary to establish that the accused had the tendency alleged. The Crown prosecutor relied on the fact that the earlier incident occurred in the same general vicinity as the one at issue in the present proceeding, at a similar time in the early hours of the morning just after the accused had left licensed premises with

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4 (2013) A Crim R 448 at 463 at [56]; [2013] VSCA 311 at [56]

5 Ibid at [54]

friends. She also relied on the fact that in the earlier incident there was little or no provocation, the accused delivered one forceful blow to the head of the victim and then walked away before there could be any retaliation and the same is alleged to be the case on the present charge. The prosecutor submitted that the evidence of the earlier assault established a very similar *modus operandi* to the present alleged offending, one that is sufficiently unusual to establish the tendency in question. She pointed out that the conduct which the accused was guilty of in the earlier offence (and has been charged with in the present case) was different from what she described as "pub fights" which may be preceded by some kind of argument or provocative behaviour and may involve the exchange of multiple hits.

[16] I accept that the evidence sought to be led does at least tend to establish that the accused had a tendency to act in the way asserted in the notice.

[17] The next question for consideration is whether, if the jury accepts, on the basis of the evidence of the one prior incident, that the accused had a tendency to act aggressively towards strangers in a public place in the early hours of the morning after leaving licensed premises, in a way which is similar to the way he is alleged to have acted on this occasion, that "strongly supports proof of a fact that makes up the offence charged". Again, I accept the prosecution's submission that if the Crown can establish that the accused had the tendency asserted in the

notice that would have some probative value on the question of self-defence. As Ms Dixon for the Crown submitted, it might affect the assessment of the probability of whether the accused was acting defensively because, without evidence that the accused had that tendency, the jury might be inclined to reject as improbable the evidence of the various Crown witnesses that the accused suddenly threw a punch at the complainant, out of the blue, and for no apparent reason.

[18] However, I do not think that the evidence sought to be led has "significant" probative value on that issue as required by s 97 chiefly because the question of whether the accused was acting in self-defence (or rather whether the Crown has proved that he was not acting in self-defence) is so heavily dependent on the circumstances of the actual incident, which will include evidence about what the complainant may have done or threatened to do.

[19] The fact that a person was the aggressor in one incident, does not make it more likely that he was not a victim in a subsequent incident: it all depends on the particular facts. So, the fact that in 2015 the accused was the aggressor in an incident outside Throb after a verbal altercation with a group of people does not make it significantly more probable that he was not acting defensively when he punched the complainant in the present case at McDonalds in 2017. For these

reasons, I do not think that the proposed tendency evidence satisfies the criteria for admission under s 97 and I decline to admit it.

[20] There is no need for me to consider whether the evidence would satisfy the requirements of UEA s 101. I do not accept the submissions on behalf of the accused that there is a strong likelihood that the jury might be influenced by the knowledge of the prior conviction to be repulsed by the accused's actions in the earlier case and to be governed by their emotions rather than approach the evidence in the case rationally. However, it follows from the fact that I consider the evidence to have very little probative value, and that knowledge by the jury that the accused has a prior conviction for a violent offence carries with it some obvious prejudice, that I would not consider that the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant were it necessary for me to decide.
