CITATION:	*The Queen v Rolfe (No 8)* [2022] NTSC 11
PARTIES:	THE QUEEN v ROLFE, Zachary
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21942050
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JUDGMENT OF:	Burns J

REPRESENTATION:

Counsel:

Crown:	P M Strickland SC with S Callan SC and 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 8) [2022] NTSC 11
No. 21942050

BETWEEN:

THE QUEEN

AND:

ZACHARY ROLFE

CORAM: BURNS J

REASONS FOR JUDGMENT

(Delivered on 22 February 2022)

Introduction

[1] On 7 February 2022 I ruled inadmissible two text messages which the Crown proposed leading as part of the evidence at the trial of the accused. These are my reasons for that ruling. The Crown proposed leading evidence of the following text messages found on the mobile telephone of the accused after he was arrested:

(a) On 28 February 2019: "Alice Springs sucks haha The Good thing is it's like the Wild West and fuck all rules in the job really…but it's a shit hole. Good to start here coz of the volume of work but will be good to leave."

(b) On 30 July 2019: “We have this small team in Alice, IRT, immediate response team. We’re not full-time, just get called up from Gd’s for high risk jobs, it’s a sweet gig, just get to do cowboy stuff with no rules…”.

[2] On 20 January 2022 I rejected a submission by the accused that these text messages were inadmissible as having been obtained by illegality or impropriety: see *The Queen v Rolfe (No 7) [2022] NTSC 1* (‘*Rolfe No 7*’). In doing so, I observed that the reasoning process in which the jury would need to engage in order to utilise the contents of those messages as evidence against the accused appeared to be tendency reasoning. Subsequently, on 29 January 2022 the accused renewed his objection to the material on the basis that it is tendency evidence for the purposes of s 97 (1) of the *Evidence (National Uniform Legislation) Act 2011* (NT) (‘the ENULA’) and it does not possess significant probative value.

[3] The Crown submitted that it did not propose leading evidence of the contents of the text messages as tendency evidence, and as such the tendency provisions of the ENULA do not apply. The Crown submitted that the evidence would be led to prove the state of mind of the accused at the time that the messages were sent and that the jury would be entitled to infer from the fact that the accused had a particular state of mind at the time he sent those text messages, that he had the same state of mind at the time of the alleged offence on 9 November 2019: see, for example, *Elomar v The Queen* [2014] NSWCCA 303 (‘*Elomar*’). In other words, the Crown

submitted that the jury could infer that a state of mind held by the accused at the time he sent the text messages continued to the time of the alleged offence.

[4] In its written submissions, the Crown stated:

> The text messages are circumstantial evidence which, taken with other evidence against the accused (in particular, Barram's evidence) are relevant to proving a fact in issue – namely, the accused believed that when operating as part of the IRT [Immediate Response Team], the "rules" (for instance, as to the use of force) developed by the NT Police Force and taught to the Accused in training do not apply to him.

[5] The reference to "Barram's evidence" in the above extract is a reference to opinions expressed by an expert that the Crown proposes calling at the trial of the accused to establish that a number of the accused's actions on or before 9 November 2019 were not consistent with his training and that the firing of the second and third shots by the accused was unreasonable.

[6] The Crown referred me to the decision of the New South Wales Court of Criminal Appeal in *Elomar*. In that case the accused, Elomar, was jointly charged with one Moustafa Cheikho and others with conspiracy to do acts in preparation for a terrorist act or acts. The events giving rise to the charges occurred in 2005. At the trial, evidence was led, over objection, that in 2001 Cheikho travelled from Australia to Pakistan and participated in an Islamic military training camp. The evidence was the subject of an objection that it was tendency evidence, as the only way in which the jury could use it was by tendency reasoning. The Crown disavowed any reliance on the evidence

as tendency evidence. The Crown (unhelpfully) argued that the evidence threw light on the "nature and scope" of the conspiracy. Cheikho was convicted.

[7] On appeal, Cheiko reiterated his submission that the impugned evidence was tendency evidence. The Court (Bathurst CJ, Hoeben CJ at CL and Simpson J) said, at [361], that evidence of Cheikho's attendance at the camp was not evidence of conduct such that any conclusions or inferences could be drawn that he had a tendency to act in any particular way, but it was evidence that could found an inference that at the time he attended the camp he in fact had a particular state of mind, being support for violent Islamic Jihad. The Court went on to say, at [366]:

> A state of mind, unlike conduct, is not necessarily a series of intermittent events, feelings or ideas. Commonly, a state of mind is continuous. Belief in a deity, opposition to capital punishment, support for a political philosophy are all states of mind. It would not be in accord with ordinary human experience or language to describe a person who held such beliefs as having a "tendency" to have the relevant state of mind. Rather, the person is said to have that state of mind. Proof of a state of mind may be direct, not indirect. In appropriate circumstances, it does not depend upon tendency reasoning.

[8] The Court further stated, at [368] – [369]:

> Proof that a person held a particular belief on one occasion does not prove that he had a tendency to have that belief. It proves that, on that occasion, he did have that belief. There is no reason to think that, if Moustaffa Cheikho had a state of mind that supported violent Islamic Jihad in 2001 – 2002, he did not continue to have that state of mind up to and including the time of the alleged conspiracy.
>
> If it could reasonably be inferred from the evidence of his attendance at the camp, and the nature of the camp, that he had a state of mind that favoured militant Islamic Jihad, it may equally be reasonably inferred

> that he continued to have that state of mind up to and beyond 2004. That is not tendency evidence and does not give rise to tendency reasoning.

[9] Another case relied upon by the Crown was *Davies v The Queen* [2019] VSCA 66 ('*Davies*'). The offender in *Davies* had been convicted of offences of arson. As part of the Crown case, YouTube videos in which Davies expressed opinions justifying arson were tendered. In those videos he suggested that arsonists are "simply the victims of society… of extreme child abuse, bullying, subjugation and victimisation by their society." He described arsonists as tortured victims of society and proclaimed that they had every right to engage in arson. In the videos he also gave instructions and advice regarding committing the offence of arson. On appeal, the submission that this evidence was tendency evidence was rejected by the Victorian Court of Appeal (Kaye, McLeish and Forrest JJA), which held that the evidence was rightly admitted as direct evidence of the state of mind of the offender and not as tendency evidence.

[10] There can be no doubt, as was acknowledged by Mildren AJ in *The Queen v Rolfe* (No 4) [2021] NTSC 58, that the Crown is entitled to put a case to the jury that the accused, and the other members of the IRT did not act in accordance with their training on 9 November 2019, and that the accused had decided before entering House 511 to fire his weapon if the deceased threatened him or Constable Eberl. The Crown is also entitled to submit to the jury that they may draw these inferences from the evidence led at trial. As I understand it, the Crown intends leading expert testimony to the effect

that the accused did not follow his training in a number of respects in what he did on 9 November 2019. If that evidence is led, the jury may be asked to draw inferences relating to the state of mind of the accused at the time that he fired the second and third shots, one of which was the fatal shot, and to take any failure of the accused to comply with his training into account when considering whether the Crown has proven that the actions of the accused were not a reasonable response in the circumstances as the accused perceived them to be. The question is not whether the Crown may advance such a case, but whether it is open to the Crown to lead evidence of the text messages in support of such a case.

[11] Assuming, for present purposes, that the text messages are capable of establishing that the accused had a particular state of mind at the time that he sent the messages, the questions which must be answered are: firstly, what state of mind on the part of the accused could the jury reasonably infer from the messages; and, secondly, could a jury reasonably draw an inference that any such state of mind held by the accused at the time that he sent the messages was a continuing state of mind such that he held the same state of mind on 9 November 2019? In *Rolfe No 7* it was unnecessary for me to consider these issues. The issues which I needed to consider at that time were whether the evidence was obtained by illegality or impropriety and, if so, whether I should exercise my discretion under s 138 of the ENULA to nevertheless admit the evidence. For the purpose of indicating what I would have done in exercising my discretion under s 138 if I had found that the

evidence was obtained by illegality or impropriety, I proceeded on the basis that the messages were capable of bearing the interpretation urged by the Crown, being that the accused had an attitude that the "rules" did not apply to him in his activities as a police officer. In conducting that limited exercise I was not required to closely consider the terms of the texts to determine whether any state of mind on the part of the accused evidenced by those text messages could reasonably be inferred to be a continuing state of mind.

[12] Interpretation of the content of the first text is problematic. In the text of 28 February 2019 the accused stated that there are "fuck all rules in the job". On its face, this appears to be an expression of the accused's assessment of the extent of the rules applying to his employment as a police officer, rather than an expression of his attitude to complying with those rules. The second text clearly relates to the accused's work with the IRT. He states, in relation to that work, "it's a sweet gig, just get to do cowboy stuff with no rules…". Clearly enough, the reference to "cowboy" in the text could be interpreted as a reference to the idiomatic use of that word as meaning someone who is careless or ignores rules that most people obey.

[13] To prove that the accused had a state of mind that unspecified "rules" did not apply to him at the time he sent the text messages proves nothing of relevance in the trial. The particular "rules" of significance to the Crown case are those governing the use of force by police officers including members of the IRT. In particular, the Crown's case, as noted above, is to

the effect that the accused disregarded the rules relating to the use of force to the extreme extent that he had determined before he entered House 511 to use his weapon against the deceased if the deceased threatened the accused or Constable Eberl. In my opinion, the text messages are incapable of supporting such a proposition. The only way in which such an interpretation could be given to the texts is by the jury finding that the accused had the state of mind alleged by the Crown at the time that he fired the second and third shots based on the evidence of the events of 9 November 2019 and viewing the earlier texts in the light of that finding.

[14] Turning to the second question posed at [11] above, *Cross on Evidence*, Australian Edition, at paragraph [1125] states that "The law presumes the state of a person's mind to continue until the contrary is shown". Two cases are cited in support of that proposition. The first is *Owners of Strata Plan No 23007 v Cross* (2006) 153 FCR 398 at [66] – [68] ('the Owners case'). The second is *Giuseppe v Registrar of Aboriginal Corporations* (2007) 160 FCR 465 at [45] ('*Giuseppe*').

[15] In the Owners case, an application was made by the Protective Commissioner of New South Wales seeking that a sequestration order against Ms Cross be set aside on the grounds that she was incapable of managing her affairs in respect of the bankruptcy proceedings. There was evidence that Ms Cross suffered from a psychotic illness and had been hospitalised in July 2004 before the sequestration order was made when she failed to appear in court in August 2004. On the issue of whether there was

sufficient evidence to establish that Ms Cross was, at the time that the sequestration order was made, incapable of managing her affairs, Edmonds J said, at [66] to [68]:

> It is a principle of long-standing that the law presumes every person to be sane and, in modern times, the principle has been expressed as a presumption that a person of full age is capable of managing his or her affairs: *Murphy v Doman* (2003) 58 NSWLR 51; [2003] NSWCA 249 at [36] per Handley JA. It follows the person who asserts incapacity must prove.
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> In his text, *A Practical Treatise of the Law Concerning Lunatics, Idiots, and Persons of Unsound Mind*, 2nd ed, S Sweet, London, 1847, Leonard Shelford set out the way in which the law has approached the proof of insanity (at p 56):
>
> > The burthen of proof of insanity lies on those asserting its existence. The presumption of law is in favour of sanity: and, therefore, if a person has never been subject to a commission of lunacy, nor has had an unsound state of mind imputed to him by his friends or relations, or even by common fame…the burthen of proof is cast upon those who impeach his understanding. And where a particular transaction is sought to be avoided on the ground of insanity, the evidence of it ought to apply to that particular period; and the question in such a case is, not whether the party had ever been insane before, but whether he was of sufficient sound mind on the day of the contract in question. On the other hand, as the law presumes the state of a man's mind to continue unchanged until the contrary be made manifest; if a person has ever been subject to a commission, or to any restraint permitted by law even a domestic restraint, clearly and plainly imposed upon him in consequence of undisputed insanity, the burthen of proof shewing sanity is thrown upon those who seek to establish a lucid interval, or the soundness of his understanding…
>
> In the present case it is important to have regard to the second "presumption" mentioned above, namely that the law presumes a person's state of mind to continue unchanged. Such a presumption is one application of the more general "presumption of continuance" which Kirby P discussed in *Mason v Tritton* (1994) 34 NSWLR 572 at 587 – 8. In its application to mental illness, Wigmore explained the role of the principal in the following way:
>
> > A condition of mental disease is always a more or less continuous one, either in latent tendency or in manifest operation. It is

> therefore proper, in order to ascertain the fact of its existence at a certain time, to consider its existence at a prior or subsequent time. The degree of continuity varies infinitely in various cases, and hence there can be little certainty in the inference from one period to another. Nevertheless, since it can never be known beforehand to what variety the case in question belongs in this respect, the facts of prior and subsequent existence cannot be absolutely known beforehand to be relevant….

[16] It will be seen from the above that the issue in the Owners case was not whether opinions or beliefs expressed by Ms Cross at an earlier time continued, or were presumed to be continuing, at a later point in time. The decision focuses on the effect of the presumption of sanity and its continuation until other evidence displaces the presumption. The state of mind referred to was not one of opinion or belief, but of sanity.

[17] In *Giuseppe*, the relevant issue was whether Ministerial approval for the appointment of an administrator to an Aboriginal Corporation continued from the time the Minister signed a minute approving the appointment of the administrator until such time as the administrator was appointed. The plurality (Gyles and Edmonds JJ) said, at [45]:

> The inference that the approval by Minister Andrews continued at all times from the signing of the minute to the appointment of the administrator is assisted by both the presumption of continuance (*Mason v Tritton* (1994) 34 NSWLR 572 at 587 – 8 per Kirby P; *Owners – Strata Plan No 23007 v Cross* (2006) 153 FCR 398; 233 ALR 296; [2006] FCA 900 at [68]) and the presumption of regularity (*Minister for Natural Resources v NSW Aboriginal Land Council* (1987) 9 NSWLR 154 at 164 per McHugh J and at 169 – 70 per Clarke A-JA; *McLean Bros and Riggs Ltd v Grice* (1906) 4 CLR 835; [1906] HCA 1).

[18] It has been doubted whether there is a presumption of continuance, in the sense that the concept of a presumption is generally understood in the law.

In *Mason v Tritton* the appellant sought to rely upon the presumption of continuance in establishing a claim to a right to take abalone under the principles in *Mabo v State of Queensland [No 2]* (1992) 175 CLR 1. Kirby P said, at 587:

> What the appellant contends for is not, in my opinion, properly described as a presumption. It is more properly described as a process of inference. This is clear from the analysis provided by Wigmore on Evidence, vol 2, 3rd ed, Wigmore says (at 437):
>
> > "When the existence of an object, condition, quality, or tendency at a given time is in issue, the prior existence of it is in human experience some indication of its probable persistence or continuance at a later period.
> >
> > The degree of probability of this continuance depends on the chances of intervening circumstances have incurred to bring the existence to an end. The possibility of such circumstances will depend almost entirely on the nature of the specific thing whose existence is in issue and the particular circumstances affecting in the case in hand.

[19] In *Director of Public Prosecutions v Alexander* (1993) 33 NSWLR 482, certain witnesses in proceedings against Alexander were resident in the USA. They declined to attend Australia to give evidence in the proceedings. About 12 months after the witnesses declined to travel to Australia, the DPP sought orders that a letter of request issue to the judicial authorities of the USA to have the evidence of those witnesses taken in that country. In opposition to that application it was submitted that there was no evidence which demonstrated that the unwillingness of the witnesses to attend Australia for the trial, which had been expressed some 12 months earlier, was still the case. Hunt CJ at CL said, at 495:

> The accused argued that there is no presumption of continuance. Such an argument is debatable, but is of no assistance here. What does exist is inference, based upon the common experience of mankind in relation to various matters, that certain facts which exist at one time will still be in existence at some subsequent time: *Donahue v St Luke's Hospital Pty Ltd* [1969] 2 NSWR 647 at 657. It all depends upon the nature of the particular fact and the distance between the two times as to whether such an inference should be drawn. What is in issue here is a state of mind, and it is easy to imagine that such could be changed easily by subsequent events.

[20] By reference to these and other cases the authors of *Cross on Evidence* state at [1125]:

> Thus the presumption of continuance is no more than a convenient way of describing a process of logic or reasoning involving the drawing of inferences from established facts.

[21] I agree with that analysis. In considering whether a jury could reasonably draw from evidence that a person has at a particular time a particular state of mind, the inference that he or she continues to have that state of mind at a later date requires consideration of all of the circumstances involved. These would include the nature of the state of mind, and the period of time which passes between the point at which the person is demonstrated to have the state of mind and the date at which the continuing state of mind is to be inferred. It is common experience that some states of mind, or some beliefs, are more likely to be enduring than others.

[22] In *Parachoniak v The Queen* [2017] VSCA 347 the appellant was convicted of a number of offences arising out of a motor vehicle accident. At the appellant's trial the Crown led evidence from a witness who was not present when the accident occurred but had been in the car while the appellant was

driving some hours earlier. The effect of the evidence was that the appellant, a young unlicensed driver, had been driving erratically and somewhat fast in circumstances where her vision was adversely affected by the absence of prescription glasses. Initially the prosecution sought to rely on the evidence as tendency evidence, but the Crown abandoned this position at the close of its case. Ultimately, the evidence was left to the jury on the basis that it was relevant as to the appellant's state of mind at the time of the driving which was the basis of the charges.

[23] On appeal, the Crown submitted that the evidence of the appellant's driving hours before the driving which caused the accident was properly admitted as evidence that the appellant had, at the earlier time, a state of mind "to drive in a way that one might call wayward", which could then allow the jury to determine that she had the same state of mind when she drove causing the accident. One of the decisions advanced by the Crown in support of that proposition was *Elomar*. In his judgement, Priest JA said in relation to this submission, at [65]:

> A fundamental difficulty for the respondent is that the state of mind sought to be attributed to the appellant is a far cry from those acknowledged in the cases upon which the respondent relied. For example, in *Elomar* – a case upon which the respondent heavily relied – a number of individuals were charged with terrorism -related offences. Each was alleged to be part of the conspiracy in 2005 to do acts in preparation for a terrorist act (or acts). One of the accused, Moustafa Cheikho, had in 2001 or 2002 attended a camp in Pakistan run by a militant Islamic organisation, LeT, devoted to global jihad. Cheikho's state of mind was relevant to 2 elements of the charge he faced: whether he intentionally entered into an agreement with another alleged conspirator, and whether he and another conspirator intended that a terrorist act would be committed.

[24] After referring at length to the decision of the Court in *Elomar*, Priest JA continued, at [67]:

> In other words, evidence of Cheikho's attendance at the camp was evidence that he actually held a belief favouring violent Islamic Jihad, not that he had a tendency to have that belief. Assuming – solely for the sake of argument – that the New South Wales Court of Criminal Appeal was correct to conclude in *Elomar* that the fact that an accused person holds particular beliefs is not tendency evidence, the state of mind relied upon by the respondent in the instant case is very different from a state of mind akin to a religious or political belief. Inferential reasoning which revolves around the holding of particular political or religious beliefs does not readily translate to the facts of the present case…

[25] At [70], Priest JA continued:

> Given its peculiar facts, the reasoning in *Elomar* will be only of limited application to cases where the accused person's holding of particular beliefs is not relevant. As the Court in *Elomar* itself recognised, only in "appropriate circumstances" would direct proof of a continuous state of mind not depend upon tendency reasoning. In my view, if the reasoning in *Elomar* is to be applied in other cases, it should be confined to those cases where states of mind in the nature of religious or political (or similar) kinds of belief are important.

[26] Maxwell P, with whom Kyrou JA agreed on this point, did not entirely agree with the above observations made by Priest JA. At [9], Maxwell P said:

> With respect to Priest JA, I do not agree that such reasoning is confined to states of mind of particular religious or political kinds. The question in each case is simply whether it is (or was) reasonably open to the tribunal of fact to draw the inference of continuance. Everything depends on the facts of the case, including the particular state of mind (or state of affairs) in respect of which the inference of continuance is sought to be drawn.

[27] In my view, what is apparent from the decision in *Elomar* is that it does not purport to lay down a general rule that it is open to a tribunal of fact *in all*

cases to infer from the fact that an accused person held a particular state of mind at one point in time, that he or she had the same state of mind at a later point in time. What the judgements of Maxwell P and Priest JA had in common on this point is an acknowledgement that much depends upon the nature of the alleged state of mind said to have been held by the accused and from which the inference of continuance is sought to be drawn.

[28] It follows from the above that the question of whether a jury can reasonably draw an inference of continuance of a state of mind on the part of an accused will depend, in part, on the extent to which the evidence permits the jury to make a clear finding of the state of mind of the accused from which the inference is sought to be drawn and the nature of the state of mind. I refused the Crown's application to lead the text message evidence because:

(a) I was satisfied that the jury could not reasonably draw an inference from those messages and any other evidence which would be available to them that the accused held a state of mind at the time of sending the texts that the Northern Territory Police Force rules relating to use of force, and particularly lethal force, did not apply to him; and

(b) Whatever state of mind on the part of the accused may have been revealed by the texts was not one which the jury could reasonably infer continued from the making of the texts until 9 November 2019.

[29] For these reasons I determined that the evidence was inadmissible. These reasons are published to the parties and their legal adviser only and may not be published elsewhere until further order of the Court.
