CITATION:	*The Queen v Niehus* [2017] NTSC 82
PARTIES:	THE QUEEN
	v
	NIEHUS, Frederick Charles
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21437947
DELIVERED:	9 November 2017
DELIVERED AT:	DARWIN
HEARING DATES:	8 & 9 November 2017
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – ADMISSIBILITY – Coincidence – tendency – collaboration and concoction – joint trial – multiple complainants – s 101(2) *Evidence (National Uniform Legislation) Act* (NT) – probative value – whether probative value substantially outweighs prejudicial effect – whether necessary for Crown to exclude reasonable possibility of concoction – capability to affect assessment of facts in issue – whether any inherent implausibility – whether evidence too weak or unconvincing – evidence admitted

Evidence (National Uniform Legislation) Act (NT) s 101(2)

BD v R [2017] NTCCA 2, applied

De Jesus v R (1986) 68 ALR 1; *Hoch v The Queen* (1988) 165 CLR 292; *IMM v R* (2016) 257 CLR 300; *Lock* (1997) 91 A Crim R 365; *Murdoch v The Queen* (2013) 40 VR 451; *Pfennig v The Queen* (1995) 182 CLR 461; *R v Ellis* [2003] NSWCCA 319; 48 NSWLR 700; *R v* F (2002) 129 A Crim R 126; *R v OGD (No 2)* (2000) 50 NSWLR 433; *R v Shamouil* [2006] NSWCCA 112; 66 NSWLR 228; *R v XY* [2013] NSWCCA 121; 84 NSWLR 363; *Sutton v The Queen* (1984) 152 CLR 528, referred to

McIntosh v R [2015] NSWCCA 184; *R v Grant* [2016] NTSC 54, followed

REPRESENTATION:

Counsel:

Prosecution:	G McMaster
Accused:	J C A Tippett QC

Solicitors:

Prosecution:	Office of the Department of Public Prosecutions
Accused:	P Maley, Solicitors

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

The Queen v Niehus [2017] NTSC 82
No. (21437947)

BETWEEN:

THE QUEEN
Plaintiff

AND:

FREDERICK CHARLES NIEHUS
Defendant

CORAM: SOUTHWOOD J

RULING

(Ex tempore 9 November 2017)

Introduction

[1] This is a joint trial of allegations of sexual intercourse without consent made by two complainants, JM and MM, against the accused. The allegations are being tried together because the Crown says the allegations of the two complainants may be used as coincidence and tendency evidence. This is an exception to the well-established rule that in order to ensure a fair trial there should usually be a separate trial of allegations by multiple complainants against a single accused. Ordinarily each trial should be confined to the allegations of a single complainant.[1]

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1 *Sutton v The Queen* (1984) 152 CLR 528 at [542]; *De Jesus v R* (1986) 68 ALR 1.

[2] Some considerable time prior to the commencement of this trial, dates were allocated for a *voir dire* to determine if the evidence of the two complainants was mutually inadmissible because there was a reasonable possibility that the evidence of the two complainants was the product of collaboration and concoction. However, the *voir dire* did not proceed to argument because the defence conceded that they were unaware of any evidence of collaboration or concoction, the Crown stated there was no such evidence, and the Crown filed tendency and coincidence notices. Consequently, no order was made for separate trials.

[3] On the fifth day of this trial it emerged that there was some evidence that the complainants had communicated with each other about the allegations made by MM against the accused.

[4] On that day Senior Counsel for the defence requested that the Officer-In-Charge of the investigation, Detective Senior Constable Kellie Moir, be recalled for further cross-examination. The basis of the recall was that Senior Counsel for the defence had re-read one of the officer's statements and he wanted to clarify certain matters. Leave was granted for her to be recalled.

[5] The effect of Officer Moir's evidence was that MM was the first complainant to make allegations of sexual intercourse without consent against the accused to the police. After she complained, a child forensic interview was conducted with her in Darwin on 9 July 2014. As a result of that interview it

became apparent to police that they should speak to the second complainant, JM, who was living at Mount Druitt in Sydney and is the sister of MM. New South Wales police at Mount Druitt were then contacted and asked to contact JM and request her to telephone Officer Moir.

[6] On 26 September 2014, JM contacted Officer Moir by telephone. At the outset of the telephone call Officer Moir advised JM that she wished to speak to her about an incident that MM had complained about. JM was told that the incident occurred at Mataranka while she and her sister were in the care of the accused and his wife, Ms Teresa Niehus, who is now deceased. However, both the New South Wales police and Officer Moir were scrupulous to ensure that at no stage did they inform JM about the contents of MM's complaint. So unless JM had spoken to her sister, she could not have known that the complaint of MM involved allegations of sexual assault against the accused.

[7] Officer Moir asked JM if her sister MM had said anything to her, and she stated that he, the accused that is, did the same thing to her. She then went on to give some details of sexual assaults that she alleged the accused committed against her. There are many similarities between the allegations made by JM and the allegations by MM against the accused. There are also some significant differences.

[8] On its face, JM's response does not suggest collusion or concoction. It is perfectly normal for sisters to speak to each other about such matters.

However, JM's telephone statements to Officer Moir are potentially tainted by the fact that she and MM may well have made false denials to the court during the trial to the effect that they have never spoken to each other about MM's allegations. The question then arises as to why the sisters would persistently deny any communication if the communications did not involve collusion or concoction.

[9] There is arguably further evidence which is capable of suggesting communication between the complainants at page 13 of the transcript of the pre-recording of the evidence of JM.

[10] There was the following exchange between Crown counsel and JM.

Counsel:	You said earlier that you had been locked in your room. Did that occur when MM was there?
JM:	Yep.
Counsel:	Were you both locked in the same room together?
JM:	Yep.
Counsel:	Once MM had arrived did Fred sexually touch you again?
JM:	No.
Counsel:	Did he talk to you about sex?
JM:	No.

Counsel: So when was the last time that he touched you that you can remember?

JM: It was in him and Teresa's bedroom.

Counsel: So that was the third time you spoke about, is that right?

JM: Yes.

Counsel: Now you said earlier that you told your case worker what was happening. Is that right?

JM: Yeh, also my counsellor.

Counsel: How much longer did you stay or do you remember how long you stayed at Fred and Teresa's after the last time you were touched?

JM: Well, I was only there for a little while and then I ran away and that's when they sent me down to New South Wales to see my mother.

Counsel: Did MM come with you or did she stay?

JM: She stayed.

Counsel: Did you ever go to the dump with Fred in his ute?

JM: Only once to drop rubbish off but it was only a five minute trip.

Counsel: Sorry, a five minute trip did you say?

JM: Yeh. *He didn't do nothing to me out there*.

Counsel: In relation to your sister, did you ever see her go with Fred in his ute?

JM: We were always in that ute with him wherever we went because he was the only carer at home at the time.

Counsel: But did you see her in that ute with him alone?

JM: No. I would have been gone by then. I would have left by then.

[11] An allegation made by MM is that the accused had sexual intercourse with her at the rubbish dump. In the context in which JM's answer to the eleventh question above is given, it is open to interpretation that she is saying, unlike the incident at the rubbish dump involving MM, the accused did not have sex with her at the rubbish dump.

[12] As a result of preparing my directions to the jury about coincidence and tendency evidence, it occurred to me that, as there was now some evidence of communication between the complainants which they had arguably falsely denied, their allegations may have ceased to be cross-admissible in accordance with s 101(2) of the *Evidence (National Uniform Legislation) Act* (NT). Consequently, I raised this possibility with counsel for the parties.

The law

[13] Section 101(2) of the *Evidence (National Uniform Legislation) Act* (NT) states the following:

> Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

[14] The subsection creates a bar to the use of evidence as tendency evidence or coincidence evidence if the probative value of the evidence does not substantially outweigh any prejudicial effect. Such evidence is notoriously prejudicial. The courts have recognised for many years that there is a high degree of risk of its misuse by juries.

[15] For many years after the first enactment of the *Uniform Evidence Act*, intermediate appellate courts took the view that when it came to coincidence and tendency evidence, which may have been the product of collaboration and concoction, s 101(2) of the Act imported into the assessment of the probative value of the evidence a similar test to that enunciated in *Hoch v The Queen*,[2] and in some cases in *Pfennig v The Queen*.[3]

[16] Under those tests it was necessary for the Crown to exclude the reasonable possibility of concoction on the part of the proposed witnesses, otherwise the evidence must be excluded by the trial judge.[4] From time to time this involved the trial judge considering the reliability and credibility of the evidence, a task commonly left to the jury. The test involved judges performing a similar role to the jury.

[17] However, in *McIntosh v R*[5] the Court of Criminal Appeal in New South Wales took a different view of the assessment of the probative value of coincidence or tendency evidence under s 101(2) of the Act. The Court of

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2 (1988) 165 CLR 292.
3 (1995) 182 CLR 461.
4 See for example *Lock* (1997) 91 A Crim R 365; *R v OGD* (No 2) (2000) 50 NSWLR 433; *R v F* (2002) 129 A Crim R 126 at [138]; and *Murdoch v The Queen* (2013) 40 VR 451.
5 [2015] NSWCCA 184.

Criminal Appeal applied *R v Shamouil*[6] and *R v XY*[7] and looked at the capability of the coincidence and tendency evidence to affect the assessment of the facts in issue.

[18] In the present case, the primary fact in issue is whether the accused committed the acts alleged against him. This assessment must be made by having regard to the other evidence which has been introduced. This is because tendency and coincidence evidence cannot have probative value, except in a context where, for example, both the conduct of the accused and the relevant tendency to act have been identified.

[19] In determining probative value as a question of capability to affect the assessment of fact in issue, the court is not required to disregard inherent implausibility. On the other hand, contestable questions of credibility and reliability are not for the trial judge, but for the jury, in accordance with the approach adopted by the Court of Criminal Appeal of New South Wales in *McIntosh v R.*[8]

[20] In the present case, it is contestable whether the complainants have told deliberate lies when they have denied speaking to each other about the allegations made by MM. The motive for any such lies is also contestable. The determination of these issues is made more difficult because even when the complainants were recalled, Senior Counsel for the defence did not put

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6 [2006] NSWCCA 112; 66 NSWLR 228.
7 [2013] NSWCCA 121; 84 NSWLR 363.
8 [2015] NSWCCA 184.

to them that they had colluded and concocted their stories; and Crown counsel did not ask JM how she was able to say to Officer Moir that the accused did *the same thing* to her when Officer Moir did not tell her any details whatsoever about MM's allegations.

[21] In *IMM v R*[9] the plurality of the High Court determined that the significance of the risk of joint concoction to the application of s 101(2) of the *Evidence (National Uniform Legislation) Act* (NT) should be left to an occasion when it is raised in a concrete factual setting. However, their Honours did state that the restriction on the admissibility of evidence created by s 101(2) does not import the rational view inconsistent with the guilt of the accused test found in *Hoch v The Queen.*[10]

[22] The test in *Hoch v The Queen* required the trial judge to apply the same test as the jury. To the extent that the decision of the plurality in *IMM v R* determines that s 101(2) does not import the test in *Hoch v R*, it supports the approach taken by the New South Wales Court of Criminal Appeal in *McIntosh v R*, where no such test, nor any derivative of such a test was applied.[11] However, the approach taken in *McIntosh v R* does not preclude the trial judge from determining if the circumstances surrounding the tendency and coincidence evidence render it too weak to have any probative force.

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9 (2016) 257 CLR 300 at [59].
10 (1988) 165 CLR 292.
11 See also *R v Ellis* [2003] NSWCCA 319; 58 NSWLR 700.

[23] The regime for the admission of tendency evidence was considered by the Northern Territory Court of Criminal Appeal in *BD v R.*[12] The Court of Criminal Appeal appears to have adopted the following statements made in *R v Grant*:[13]

> The regime for the admission of tendency evidence under the ENULA replaces the common law rules in relation to "propensity" or "similar fact" evidence. The common law rules in relation to this type of evidence no longer govern (but may inform) the assessment of the probative value and admissibility of tendency evidence under the ENULA. A number of matters warrant some preliminary comment in this context.
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> First, the common law generally required a "striking similarity" or "underlying unity" between the similar facts in order for them to qualify as admissible. The ENULA creates its own regime for the admission of tendency evidence. The existence of "similarity" is not a necessary requirement for tendency evidence. That said, the consideration of similarity remains a guide in determining in some circumstances whether tendency evidence has sufficient probative value to pass the test for admissibility under the statutory regime. It may also be noted that the requirement for striking similarity or underlying unity remains important to the question of admissibility in cases where the identity of the offender is in issue, but is less significant in cases where the accused is known to the complainant and no issue of identity arises.
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> Secondly, propensity and similar fact evidence is excluded under the common law where there is "a rational view of the evidence that is inconsistent with the guilt of the accused". In making that determination the trial judge was required to apply the same test as a jury. Where there was a rational view of the evidence consistent with the accused's innocence, the probative force of the evidence was considered to be automatically outweighed by its prejudicial effect. The ENULA introduces a legislative formulation for balancing probative value against prejudicial effect which displaces the "no rational view" test. Under that formulation, the probative value is to be assessed by the trial judge on the assumption that the jury will accept the evidence, thus precluding any consideration of whether the

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12 [2017] NTCCA 2.
13 [2016] NTSC 54 at [25] to [28].

> evidence is credible or reliable for that purpose. It should be noted in this context that proceeding on the assumption the jury will accept the evidence does not preclude the trial judge from determining that the circumstances surrounding the evidence render it too weak to have any probative force.
>
> Thirdly, under the common law it was necessary to exclude the possibility of contamination, collusion, concoction or other influence before propensity and similar fact evidence is admitted. Under the ENULA the possibility of concoction will not automatically or necessarily deprive propensity evidence of the requisite level of probative value to qualify it for admission. That notion notwithstanding, there may be objective facts and circumstances surrounding a particular piece of propensity evidence which renders it too weak or unconvincing to have any real probative force.

[24] Having reviewed the authorities and considered the text of s 101(2) of the *Evidence (National Uniform Legislation) Act* (NT), I have determined to follow *McIntosh v R.*

Consideration of the evidence

[25] After noting that coincidence and tendency evidence is inherently prejudicial, it seems to me, that the first question to ask in assessing the probative value of the coincidence and tendency evidence in this case is, what is the capacity or capability of the evidence to affect the assessment of the fact in issue namely, in the present case, whether the accused committed the acts alleged against him. This assessment must be made by having regard to the other evidence which has been introduced during the trial. The second question to ask is whether there is anything inherently implausible in the coincidence or tendency evidence. The third question to ask is whether there is anything in the objective facts and surrounding circumstances which

renders evidence too weak or unconvincing, such that its probative value does not substantially outweigh the prejudicial effect of the evidence.

[26] In my opinion, taken at face value, the coincidence and tendency evidence has substantial capacity to affect the assessment of whether the accused committed the acts alleged against him. The evidence has striking similarities and reveals similar patterns of behaviour. The complaints of MM emerged while she was in Darwin and her sister was in Sydney, and after they had been separated for a number of years. There is nothing inherently improbable in the evidence.

[27] The only objective fact to emerge in the surrounding circumstances which is of relevance is that the sisters have spoken to each other about the allegations made by MM. That, of itself, does not render the evidence weak or unconvincing. It is ordinarily to be expected that sisters would speak to each other about such matters. Mere communication does not amount to concoction or collaboration.

[28] The assessment of the risk of collaboration or concoction in this case importantly is very largely contingent on whether there is a real possibility that the complainants' denials of any communication amount to deliberate lies told for the purpose of covering up their collaboration. The question of whether the complainants' denials of their communications amounts to deliberate lies, and the motive for telling such lies, is quintessentially a jury question.

[29] The jury will be directed that before they can use the evidence in the manner contended by the Crown, they must be satisfied that the evidence excludes the possibility of concoction and collaboration beyond reasonable doubt. Counsel for the defence will have an opportunity to address them about why, on the defence case, that cannot be done.

Conclusion

[30] In my judgment the probative value of the coincidence and tendency evidence substantially outweighs any prejudicial effect it may have on the defendant. The evidence is admissible.
