CITATION:	*The King v Overs* [2024] NTSC 46
PARTIES:	THE KING
	v
	OVERS, Peter Allan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22327843
DELIVERED:	3 June 2024
HEARING DATE:	28 May 2024
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – TENDENCY EVIDENCE

Evidence of tendency to possess and supply cannabis for commercial gain – Whether evidence could rationally affect to a significant degree the assessment of the probability of a fact in issue – Evidence has significant probative value – Whether probative value outweighs prejudicial effect on accused – Risk that the jury may misuse the evidence accommodated by suitable directions – Evidence admissible for tendency purposes – Agreed facts in relation to previous offending admissible to establish the tendency alleged.

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

DAO v R (2011) 81 NSWLR 568, *DSJ v The Queen; NS v The Queen* (2012) 215 A Crim R 349, *Dupas v The Queen* (2010) 241 CLR 237, *Gilbert v The Queen* (2000) 201 CLR 414, *Hughes v R* [2015] NSWCCA 330, *Hughes v The Queen* (2017) 263 CLR 338, *IMM v The Queen* (2016) 257 CLR 300, *Mol v R* [2017] NSWCCA 76, *R v AH* (1997) 42 NSWLR 702, *R v Ford* (2009) 201 A Crim R 451, *R v Jacobs (No 5)* [2013] NSWSC 946, *R v Lock* (1997) 91 A Crim R 356, *R v Lockyer* (1996) 89 A Crim R 457, *R v Mokbel* (2009) 26 VR 618, *R v Zhang* (2005) 227 ALR 311, *Reza v Summerhill Orchards Ltd* (2013) 37 VR 204, *Sultana* (1994) 74 A Crim R 27, *The Queen v Bauer* (2018) 266 CLR 56, *The Queen v Falzon* (2018) 92 ALJR 701, *The Queen v Martin* [2018] NTSC 19, *TL v The King* [2022] HCA 35, considered.

REPRESENTATION:

Counsel:

Crown:	T Hayward
Accused:	J Bourke

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	North Australian Aboriginal Justice Agency

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

The King v *Overs* [2024] NTSC 46
No. 22327843

BETWEEN:

THE KING

AND:

PETER ALLAN OVERS

CORAM: GRANT CJ

REASONS FOR JUDGMENT
(Delivered 3 June 2024)

[1] The accused is charged by indictment dated 20 February 2024 with supplying less than a commercial quantity of cannabis contrary to s 5A(1) of the *Misuse of Drugs Act* (NT); receiving or possessing $5,280 in Australian currency knowing it was obtained directly or indirectly from the commission of a prescribed drug offence contrary to s 8(1) of the *Misuse of Drugs Act*; and, in the alternative to counts 1 and 2, possessing a trafficable quantity of cannabis contrary to s 7A(1) of the *Misuse of Drugs Act*.

The Crown case

[2] At the material times, the accused was living at 32 Noble Street, Tennant Creek. In its relevant parts, the Crown case against the

accused is that on 30 August 2023 police executed a search warrant at that property and the adjoining property at 30 Noble Street. At the time police first attended, the accused's two sons and one of his nephews were present. The accused was not present when police arrived. The accused's older son rang the accused and told him what was happening. The accused returned to the residence a short time later, was cautioned by police and then asked whether police were likely to find any illicit drugs in the house. The accused replied with words to the effect, "I don't know, just my personal stuff".

[3] Police then found loose cannabis and a smoking implement in the accused's bedroom and loose cannabis in the bedroom occupied by his older son. The drug detection dog provided a conditioned response to a cupboard in the laundry and the lower part of the oven in the kitchen. The oven was searched and a clear Tupperware box containing cannabis and unused clip seal bags was found there. Police seized a total of 203.58 grams of cannabis found in those various locations in the premises at 32 Noble Street, an electric grinder with cannabis residue, unused clip seal bags, four smoking implements, $1,500 in cash located in various places within the premises and $3,780 found in the accused's wallet.

[4] The collective weight of the cannabis found in the property forms the basis of the first charge on the indictment. The cash seized forms the basis of the second charge on the indictment. The collective weight of

the cannabis found in the property forms the basis of the alternative charge in the third count on the indictment.

[5] When questioned by police, the accused said the cannabis found in the oven belonged to his younger son. The younger son initially agreed that the cannabis seized was his, but when pressed on where the cannabis had been hidden he was unable to respond and said that it was not his. When questioned by police, the accused eventually admitted that the money found in the house was his, after initially stating that part of the money may have belonged to one or other of his sons.

[6] The accused's phone was subsequently seized and found to contain text messages with two other people. Those messages included such matters as the accused asking one of those other people whether she wanted to sell cannabis on his behalf, and one of those other people asking the accused whether he still wanted that other person to sell cannabis on the accused's behalf.

The tendencies alleged

[7] The Crown has served notice pursuant to s 97(1) of the *Evidence (National Uniform Legislation) Act* (NT) ('*ENULA*') that it intends to adduce evidence of a tendency on the part of the accused to act in a particular way and/or to have a particular state of mind. The notice provides that the evidence relates to the question whether the accused possessed cannabis for the purpose of supplying the drug to others.

[8] The tendencies sought to be proved are that the accused had: (a) a tendency to possess cannabis, particularly packed into small clip seal bags, with the intention of supplying it to others for financial gain; (b) a desire for financial gain by supplying cannabis, and a preparedness to act on that desire; and (c) a preparedness to falsely implicate his son in order to avoid culpability. The evidence sought to be adduced in proof of those tendencies relates to three incidents which took place in September 2018, December 2019 and February 2020 respectively.

[9] On 29 September 2018, the accused drove to the Kintore community with cannabis hidden inside a coffee tin. Once there, the accused packaged the cannabis into small clip seal bags and supplied it to others in the community over the course of three days. The residence where the accused was staying was subsequently searched by police and he was found to be in possession of cannabis, unused clip seal bags and a quantity of cash. The accused subsequently pleaded guilty to and was convicted of supplying less than a commercial quantity of cannabis into an indigenous community and was sentenced to imprisonment for nine months. The Land Rover in which he had driven to the community was also forfeited to the Crown.

[10] On 2 December 2019, police searched the premises at 32 Noble Street, Tennant Creek and seized cannabis plant material, clip seal bags containing 476 grams of cannabis in various locations in the house,

digital scales, two packets of unused clip seal bags, a cannabis grinder and a quantity of cash. The accused subsequently pleaded guilty to and was convicted of possessing a trafficable quantity of cannabis and sentenced to imprisonment for 14 months.

[11] On 23 February 2020, the accused was pulled over while driving from Alice Springs to Tennant Creek. The accused was asked whether he had any illicit substances in his vehicle. He told police he did not. The vehicle was searched and four clip seal bags containing 203 grams of cannabis were found hidden in a compartment in its boot. The accused asked his older son whether he knew anything about the cannabis in the boot, and the accused's son stated that it was his cannabis. When the accused was subsequently interviewed by police he denied knowing there was cannabis in the car and implied that the cannabis belonged to his older son. The accused subsequently pleaded guilty to and was convicted of possessing a trafficable quantity of cannabis and a fine was imposed as part of a sentence which included the terms of imprisonment described above for the offences committed in 2018 and 2019.

[12] The Crown Facts which were agreed for the purposes of the guilty pleas reflected the three acts of supply and possession described above.

Significant probative value

[13] Section 97 of the *ENULA* provides for the admissibility of tendency evidence subject to the requirements of notice and significant probative value. The Dictionary in the *ENULA* defines 'probative value' of evidence to mean 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'. In determining the probative value of evidence for the purposes of ss 97(1)(b) of the *ENULA*, a trial judge should assume the jury will accept the evidence and, thus, should not have regard to the credibility or reliability of the evidence.[1] The use of 'significant' as a qualifier connotes something more than mere relevance, but something less than a substantial degree of relevance.[2] This resolves to a judicial evaluation of whether the disputed evidence, together with other evidence, makes significantly more likely any facts making up the elements of the offence charged,[3] which in this case is essentially whether the accused possessed cannabis for the purpose of supplying the drug to others.

[14] The statutory words do not permit a restrictive approach, and there will be a high degree of probative value where: (a) the evidence, alone or

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1 *IMM v The Queen* (2016) 257 CLR 300 at [51]-[52], [54], [58]; *The Queen v Bauer* (2018) 266 CLR 56 at [69].

2 *R v Lockyer* (1996) 89 A Crim R 457; *R v Lock* (1997) 91 A Crim R 356 at 361; *R v AH* (1997) 42 NSWLR 702.

3 *Hughes v The Queen* (2017) 263 CLR 338 at [40], *R v Zhang* (2005) 158 A Crim R 504 at [46]; *R v Ford* (2009) 201 A Crim R 451 at [52]; *DSJ v The Queen; NS v The Queen* (2012) 215 A Crim R 349 at [67], [71], [72]; *R v Lock* (1997) 91 A Crim R 356 at 361.

together with other evidence in the Crown case, strongly supports proof of a tendency, and (b) the tendency strongly supports the proof of a fact that makes up the offence charged.[4] The tendency evidence sought to be adduced in this case has a high level of cogency, not least because it was admitted by the accused in the previous proceedings. The inference of the relevant tendencies which can be drawn from that evidence is relatively strong, as it demonstrates more than one incident over a period of little less than 18 months showing an involvement in the supply and possession of cannabis.

[15] Neither the fact that more than three years elapsed between the conclusion of that course of offending and the conduct the subject of the present charges, nor the fact that the first offence was committed almost five years before the subject conduct, displaces the inference which may be drawn concerning tendency. For four months of that period the accused was imprisoned in relation to those previous offences. The delay between the current incident and the previous offences is not of such length as to compel the conclusion that the prior conduct was too temporally remote to give rise to a relevant inference, and the fact that there were multiple previous episodes of offending tells against any suggestion that it represented an isolated aberration.

4 *Hughes v The Queen* (2017) 263 CLR 338 at [41]-[42].

[16] While the accused disputes that the evidence is admissible for tendency purposes, there is no dispute that the acts for which he previously pleaded guilty took place. Rather, the accused contends that the evidence does not have significant probative value because there are features which differentiate the episode of prior offending from the conduct with which he is presently charged. The fact that the accused pleaded guilty to the prior offending but pleads not guilty to the present charges is not a material point of differentiation. The other distinguishing features relied on by the accused are said to be that the 2018 incident involved supply in an Indigenous community, did not involve the accused's permanent residence or his sons, and involved a different form of concealment; that the 2019 incident did not involve the accused's sons, involved a different place of concealment and involved a greater quantity of cannabis; and that the 2020 incident involved the transportation of cannabis in a vehicle and no evidence of supply.

[17] While those differences may be accepted, for evidence to be admissible as tendency it is not necessary that it exhibit an 'underlying unity', 'a *modus operandi*' or a 'pattern of conduct'.[5] It is not necessary that the common features be 'striking'. What is needed is a sufficient link between the distinct events as to mean that one piece of conduct has

5 *Hughes v The Queen* (2017) 263 CLR 338 at [34] approving the approach in *R v Ford* [2009] NSWCCA 306, *R v PWD* [2010] NSWCCA 209, *Saoud v R* (2014) 87 NSWLR 481 and disapproving *Velkoski v R* (2014) 45 VR 680 at 682.

significant probative value as regards another. That link need not be peculiar,[6] and there is no general rule requiring close similarity between the tendency evidence and the offence.[7] Although there may often be a similarity between the tendency asserted and the offence or offences charged, a close similarity between the tendency evidence and the charged offence will only ordinarily be required where the evidence is adduced to prove the identity of an offender.[8] Depending upon the issues in the trial, a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it.[9] Section 97(1) of the *ENULA* does not condition the admissibility of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue.

[18] The accused submits on the basis of the decision in *TL v The King*[10] that this is a case in which identity remains 'at large', such that there must be a high degree of similarity between the evidence sought to be adduced for tendency purposes and the charged acts. That contention is made on the basis that the accused and his two sons shared residency of the house and there is some question as to which of those three

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6 *The Queen v Bauer* (2018) 266 CLR 56 at [57].

7 *TL v The King* [2022] HCA 35 at [29].

8 *Hughes v The Queen* (2017) 263 CLR 338 at [39].

9 *Hughes v The Queen* (2017) 263 CLR 338 at [37].

10 *TL v The King* [2022] HCA 35.

people was the owner or relevant possessor of the cannabis seized. That submission misconceives the basis and effect of the decision in *TL v The King*. In that case, the High Court effectively affirmed the reasoning of the Court of Criminal Appeal below that the requirement for close similarity only arises when the tendency evidence is the sole or predominant evidence that goes to the identity of the offender, and that requirement does not have application where there is evidence that only limited persons had the opportunity to commit the offence. The identity of a perpetrator will only be 'at large' in the relevant sense where there is little or no other evidence of identity. The High Court determined that the threshold of significant probative value was capable of being met in that case without any close similarity because there was important evidence of identity, including that the accused was one of only three people with the requisite opportunity to commit the offence. The same may be said of the present case.

[19] The acts relied upon by the Crown to establish the tendency show a relatively high degree of specificity of conduct and significant similarities between the different occasions. It is certainly the case that the offences committed in 2018 and 2019 share features of commonality with the subject conduct which are significant enough logically to imply that because the accused committed those previous offences he is likely to have committed the offences currently charged. Although many features of the 2018 and 2019 offences might be

present in most incidents involving the supply and/or possession of cannabis, there are matters of more peculiar commonality. In both incidents the cannabis was secreted in the accused's place of temporary or permanent residence, and the 2019 incident involved the very same *locus* as the subject charges. In both incidents the accused was found to be in possession of small clip seal bags, the obvious purpose of which were to package cannabis for sale. In both incidents, the drug involved was cannabis, rather than different species of unlawful drug, and that cannabis was possessed for supply or intended supply.

[20] In its objection to the admissibility of the evidence for tendency purposes, the defence draws attention to the fact that the 2019 incident involved a plea of guilty to, and conviction for, possession of cannabis, rather than supply. The defence says that the statutory presumption created by s 37(6)(a) of the *Misuse of Drugs Act*, that a person guilty of possessing a trafficable quantity of dangerous drugs intended to supply those drugs, first, only applies when sentencing an accused and, secondly, does not extend to a presumption of supply for commercial gain. Those matters may be so, but they have no bearing on the admissibility of evidence for tendency purposes, and the requisite standard of proof for that purpose.

[21] The significance of evidence of previous offending sought to be relied upon for tendency purposes is not limited to the bare conviction, or the essential elements of the offence to which that conviction relates. As

the defence appears to accept in its written outline of submissions, s 91 of the *ENULA* does not preclude the admissibility of facts which were agreed for the purpose of a prior curial determination, and therefore not 'in issue' in the relevant sense.[11] Moreover, to the extent that there is any contested issue of fact, tendency evidence is a type of circumstantial evidence and the facts relied upon in order to establish the relevant tendency need only be proved on the balance of probabilities. Accordingly, neither a previous conviction nor proof beyond reasonable doubt in the subject proceedings is required unless the evidence is also adduced as an element or essential fact of the charge in question.

[22] So far as the 2018 incident is concerned, the conviction was for the offence of supplying cannabis in an Indigenous community, and the agreed facts included that the offender sold cannabis to various members of that Indigenous community for commercial gain, and that the $619 found in his possession constituted some of the proceeds of the sale of that cannabis. So far as the 2019 incident is concerned, although the conviction was for the possession of cannabis, the agreed facts included:

(a) when police arrived at 32 Noble Street for the purpose of executing a warrant, the accused locked himself in the bathroom

11 See *R v Jacobs (No 5)* [2013] NSWSC 946 at [22]-[23]; *R v Martin* [2018] NTSC 19 at [17].

and flushed the toilet, and when police were able to enter the toilet room they saw loose cannabis plant material floating in the toilet bowl;

(b) police found a shopping bag containing 440 grams of cannabis and clip seal bags buried in a hole under the accused's house;

(c) police found a large tin containing 38 small clip seal bags which had already been packed with cannabis;

(d) police found digital scales with trace amounts of cannabis on top of the kitchen pantry cupboard;

(e) police found two packets of clip seal bags on top of the fridge;

(f) police found a mullamatic grinder commonly used to grind cannabis; and

(g) police found $525 in cash in a drawer in the accused's bedroom.

[23] A number of observations may be made about those agreed facts and the inferences which might logically and reasonably be drawn from them. First, the offences of supplying less than a commercial quantity of cannabis and possessing a trafficable quantity of cannabis attract the same maximum penalty, and one does not necessarily attract a heavier penalty than the other in the sentencing process. For that reason, the Crown does not prefer one charge over another when both might be available. Second, the scales, clip seal bags, already packaged 'deals' of cannabis and the cash are indicia of supply. It is well recognised that evidence of the possession of 'the accoutrements of a drug

trafficking business, such as scales, re-sealable plastic bags, firearms, a multiplicity of mobile telephones or significant quantities of cash' is admissible in proof of a charge of drug supply.[12] Possession of such items is circumstantial evidence which, in conjunction with the fact of possession of drugs, may found an inference beyond reasonable doubt that the accused was engaged in the business of selling drugs.[13] The accused could well have been charged and found guilty to the criminal standard of a supply offence in relation to the 2019 incident had the Crown determined to proceed down that path. It follows *a fortiori* that a jury could permissibly infer that the 2019 incident constituted supply activity in finding, together with evidence of similar incidents, that the accused had a tendency to possess cannabis for the purpose of supply.

[24] In the present case, there is no doubt that the evidence concerning the incidents in 2018 and 2019 would support the tendencies alleged by the Crown. The incident in 2020, although it involved a conviction for the possession of cannabis, does not bear the same degree of similarity with either the 2018 and 2019 incidents, or the facts alleged in the subject charges. In particular, the cannabis in that incident was secreted in a motor vehicle rather than in a residence, and the clip seal

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12 *The Queen v Falzon* (2018) 92 ALJR 701 at [1], citing *Sultana* (1994) 74 A Crim R 27 at 28-29, 36-37; *Blackwell* (1996) 87 A Crim R 289 at 290, 294; *R v Edwards* [1998] 2 VR 354 at 367-370; *Evans v The Queen* [1999] WASCA 252 at [31], [38], [65], [66]; *Radi v The Queen* [2010] NSWCCA 265 at [39]; *Tasmania v Roland* (2015) 252 A Crim R 399 at 401-402, *R v McGhee* (1993) 61 SASR 208 at 210-211. To the extent that the reasons of the majority of this Court in *Lewis* (1989) 46 A Crim R 365 are to different effect, the reasoning of Rice J in dissent has ultimately prevailed in subsequent authority.

13 *Sultana* (1994) 74 A Crim R 27 at 28-29.

bags which were found during the course of that incident were larger and receptacles for conveyance rather than sale. In addition, it is unclear on the materials whether that conviction was recorded on the basis that the accused subsequently admitted to ownership of the cannabis, or on the basis of the deeming provision in s 40 of the *Misuse of Drugs Act*. When read together with the facts, the guilty plea may reflect only that the accused had reason to suspect that the cannabis was in the vehicle, and is incapable of supporting a tendency that the accused supplied and/or possessed the cannabis as alleged in the subject charges. In those circumstances, the fact that the accused suggested that one of his sons might have owned the cannabis is also incapable of supporting a relevant tendency.

[25] The second question is whether the tendency which might be found established on the basis of the evidence concerning the incidents in 2018 and 2019 makes more probable the existence of a fact in issue concerning the offence with which the accused is presently charged.[14] In this case, the tendency, if proved, would strongly support the proof of the ultimate facts which make up the offences charged. That is, that the accused possessed cannabis for the purpose of supplying the drugs to others, and that the cash found in his possession was the product of that supply activity. Although it is not necessary for the Crown to establish a pattern of conduct or *modus operandi*, the degree of

14 *Hughes v The Queen* (2017) 263 CLR 338 at [40]-[41].

similarity between the acts of supply and possession involved in the 2018 and 2019 incidents, and the facts alleged in the present charges, heightens the probative value of the evidence in making more probable the existence of the facts in issue.

[26] If accepted by the jury, this evidence demonstrates that the accused was previously engaged in the possession and supply of cannabis in the manner described in the Crown Facts, making it substantially more likely that he was engaged in the supply and/or possession of the cannabis found at 32 Noble Street on 30 August 2023 (in conjunction with the other evidence to be led in the Crown case); substantially less likely that there was an alternative explanation for the cannabis and money located and seized at that time; and substantially less likely that the cannabis belonged to one or other of his sons.[15] Although that process involves a specific type of propensity reasoning, that is the legitimate purpose of tendency evidence.

[27] For these reasons, the tendency evidence sought to be adduced by the Crown in relation to the incidents occurring on 29 September 2018 and 2 December 2019 identified in the Crown's tendency notice dated 8 May 2024 has significant probative value for the purpose of establishing: (a) a tendency on the part of the accused to possess cannabis, particularly packed into small clip seal bags, with the

15 See, for example, *R v Perner* [2017] NTSC 23 at [23]-[27].

intention of supplying it to others for financial gain; and (b) a desire on the part of the accused for financial gain by supplying cannabis, and a preparedness to act on that desire.

Prejudicial effect

[28] If the evidence is admissible under s 97 of the *ENULA*, it must then satisfy s 101, which is concerned with balancing its probative value against its prejudicial effect. Since 1 April 2021, the test in s 101(2) of the *ENULA* is whether the probative value of the evidence outweighs the danger of unfair prejudice. The word 'substantially' was removed by an amendment to the legislation which commenced on that date. Under the transitional provisions, s 101 as amended applies in relation to a proceeding in which the hearing commenced after that commencement date. In *The Queen v Bauer*, the High Court described prejudice as conveying the idea of harm to an accused's interests by reason of a risk the jury would use the evidence improperly in some unfair way.[16] In *Hughes v The Queen*, the High Court described the types of potential prejudice in the following terms:

> 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

16 *The Queen v Bauer* (2018) 266 CLR 56 at [73]. See also *Hughes v R* [2015] NSWCCA 330 at [189]–[193].

> 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. [17]

[29] What follows from those observations is that tendency evidence will have prejudicial effect in the relevant sense if its admission would deprive the accused of a fair trial; but evidence is not unfairly prejudicial merely because it makes it more likely that the accused will be convicted. The accused will be deprived of a fair trial if there is a real risk that the evidence will be misused by the jury in some unfair way.[18] A mere possibility is not enough; there must be a real risk of unfair prejudice by reason of the admission of the evidence.[19] In addition, the risk of prejudice must be referable to the use of the material for tendency purposes.

[30] The accused says that the risk of unfair or improper use of the evidence for tendency purposes in this matter is that the jury would be so affected by the evidence of prior criminal history that it would be led into prejudgement of the matter before all the evidence is received, or that the evidence will be given disproportionate weight by reason of its prejudicial nature. The accused submits that this prejudicial effect

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17 *Hughes v The Queen* (2017) 263 CLR 338 at [17].

18 *R v BD* (1997) 94 A Crim R 131 at 139; *Papakosmas v The Queen* (1999) 196 CLR 297 at [91]–[92]; *Ainsworth v Burden* [2005] NSWCA 174 at [99]; *Gonzales v The Queen* (2007) 178 A Crim R 232 at [70]; *R v Ford* (2009) 201 A Crim R 451 at [56]; *Doklu v The Queen* (2010) 208 A Crim R 333 at [45].

19 *R v Lisoff* [1999] NSWCCA 364 at [60].

cannot be addressed by appropriate directions, and outweighs the probative value of the evidence; or, in the alternative, leads to the conclusion that the probative value of the evidence does not outweigh its prejudicial effect. The defence also submitted that the prejudice to the accused would include an emotional response on the part of the jury on hearing any evidence of a tendency to inculpate his children, and the risk of a 'trial within a trial' concerning who did in fact possess and own the cannabis involved in the incident on 23 February 2020. That potential prejudice only presents if evidence of the incident on 23 February 2020 is admitted for tendency purposes, and falls away if it is not.

[31] It is well accepted that the risk a jury may use the evidence improperly can be accommodated by suitable directions.[20] The relevant directions in relation to tendency evidence would include the caution that the evidence cannot be used to conclude simply that the accused is the sort of person who is more likely to commit this kind of offence; and that the tendency evidence may only be taken into account if the Crown has proved that it may be inferred or concluded from those acts that the accused did in fact have the tendency asserted by the Crown. It is only if those matters are satisfied that the jury may use the tendency

20 See, for example, *Gilbert v The Queen* (2000) 201 CLR 414 at 425; *Reza v Summerhill Orchards Ltd* (2013) 37 VR 204 at [50]; *R v Mokbel* (2009) 26 VR 618 at [90]; *Dupas v The Queen* (2010) 241 CLR 237 at [22], [26], [29], [38]; *Mol v R* [2017] NSWCCA 76 at [36]; *DAO v R* (2011) 81 NSWLR 568 at [171].

evidence in assessing whether the charge contained in the indictment has been proved beyond reasonable doubt.

[32] Ranged against that, the probative force of the tendency evidence in the Crown case would be to provide, in the context of a charge of similar character, evidence to address any submission put on behalf of the accused that there was insufficient evidence to establish that he owned or had possession of the cannabis, or that he was involved in the supply of the cannabis, or that there is an innocent explanation, so far as the accused's culpability is concerned, for the presence of cannabis in his residence. It would also constitute evidence to address any assertion put by or on behalf of the accused that the cannabis belonged to one or other of his sons. That evidentiary value is significant. For that reason, the probative value of the tendency evidence outweighs any prejudicial effect within the meaning of s 101 of the *ENULA*.

Rulings

[33] I make the following rulings:

1. The evidence in relation to the incidents occurring on 29 September 2018 and 2 December 2019 identified in the Crown's tendency notice dated 8 May 2024 is admissible for the purpose of seeking to establish: (a) a tendency on the part of the accused to possess cannabis, particularly packed into small clip seal bags, with the intention of supplying it to others for financial gain; and

(b) a desire on the part of the accused for financial gain by supplying cannabis, and a preparedness to act on that desire.

2. The Crown Facts tendered for the purpose of the guilty pleas entered in relation to the incidents occurring on 29 September 2018 and 2 December 2019 are admissible in the current proceedings, without need to call witnesses to give evidence concerning those facts, in order to prove the matters said by the Crown to establish the tendencies alleged.
