

CITATION: *The King v Cowen* [2024] NTSC 44

PARTIES: THE KING

v

COWEN, Graham Michael

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 22210117

DELIVERED: 28 May 2024

HEARING DATE: 30 April 2024

JUDGMENT OF: Huntingford AJ

CATCHWORDS:

EVIDENCE – Admissibility and relevance – *Evidence (National Uniform Legislation) Act 2011* (NT) s 97 and s 101 - Tendency evidence – Whether tendency evidence has significant probative value – tendency notice expressed at high level of generality - whether probative value of the evidence outweighs the danger of unfair prejudice to the accused – application refused

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

HML v The Queen; *SB v The Queen*; *OAE v The Queen* (2008) 235 CLR 334; *Hughes v The Queen* [2017] HCA 20; *IMM v The Queen* (2016) 257 CLR 300; *R v Grant* [2016] NTSC 54; *McPhillamy v The Queen* (2018) 361 ALR 13; *R v Lisoff* [1999] NSWCCA 364; *Sokolowskyj v The Queen* [2014] 239 A

Crim R 528; *The Queen v AW* [2018] NTSC 29; *TL v The Queen* [2022] HCA 35, *R v Hoeksema* [2018] NTSC 59 applied

REPRESENTATION:

Counsel:

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Accused:	P Crean

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Crown:	Office of the Director of Public Prosecutions
Accused:	Bryson Kelly Barristers & Solicitors

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

The King v Cowen [2024] NTSC 44
No. 22210117

BETWEEN:

THE KING

AND:

GRAHAM MICHAEL COWEN

CORAM: HUNTINGFORD AJ

REASONS FOR JUDGMENT

(Delivered 28 May 2024)

- [1] The accused is charged with six offences contrary to the *Misuse of Drugs Act 1990* (NT). The first charge is that between 1 March 2021 and 31 March 2022 at Katherine, the accused intentionally supplied cannabis plant material (count 1). The second and third charges are that on 30 March 2022 at Katherine, the accused possessed \$143,975 (count 2) and \$1,610.25 (count 3) in cash which in each case was obtained from the sale of dangerous drugs. The fourth and fifth charges are that between 1 March 2021 and 31 March 2022 at Katherine, the accused received \$4,025 (count 4) and \$12,210 (count 5) in cash, knowing that property was obtained from the supply of dangerous drugs. The final charge is that on 30 March 2022 at Katherine, the accused possessed a trafficable quantity of

methylenedioxymethamphetamine (MDMA) (count 6). Count 6 is not relevant to this decision as the Crown does not dispute that the tendency evidence is admissible in relation to that count.

- [2] The accused was the target of a police investigation from August 2020 until 30 March 2022. The Crown case is that during that time the accused came into possession of between 25 and 50 pounds of cannabis plant material (cannabis) which he stored in a shipping container at a self-storage warehouse facility in Katherine. Also stored in the shipping container were two firearms, some cash and a variety of other items.
- [3] The Crown alleges that the accused visited the shipping container at least three times per week to collect cannabis and that over a period of 18 months, he sold at least 25 pounds of cannabis in various quantities to unknown persons. There is CCTV footage of the accused attending the shipping container on 10 occasions during March 2022.
- [4] During the relevant period the accused and his partner, KB, were each in receipt of unemployment benefits. In November 2020 the accused and KB purchased a house in Katherine for \$275,000.
- [5] A search warrant was executed at the shipping container on 30 March 2022. Police located and seized items including a number of vacuum bags, discarded packaging, unused cryovac bags, a sealed cryovac bag with 443 grams of cannabis, empty clip seal and cryovac bags, three mobile phones, small digital scales, a glass ice smoking pipe, 1.39g of MDMA, two

firearms, a locked tool box, a trace amount of cannabis in a yellow envelope on the floor, an empty box for a cryovac machine and \$143,975 in cash. The accused's middle fingerprint was found on an empty vacuum bag inside a locked tool box in which some of the items were found.

- [6] The mobile phones were not registered. The firearms were unsecured and unregistered and one was a prohibited weapon; a pump action shotgun. A fingerprint of the accused's left index finger was found on the scope of the other firearm, a .22 calibre rifle.
- [7] The accused was arrested when he attended Katherine Police Station on request the same day. Various items were located and seized from the accused on arrest, namely a mobile phone, keys to the shipping container and tool box, and \$1,610.25 in cash.
- [8] Police also located and seized a Honda motorcycle and its key, and \$50 cash found in the rear tool box of the motorcycle.
- [9] Search warrants were executed at the accused's home address and the home address of his mother. The offender's partner, KB, told police that she had some cannabis in a window sill and approximately \$5,000 to \$6,000 in her handbag which she had saved for dental work.
- [10] At the accused's home police seized unused cryovac bags, 7.23g of cannabis in two locations, two vials of an unknown substance, two mobile phones and \$4,025 in cash located in KB's handbag. After the search, KB told police

that she had used some of the cash, which she said explained why her estimate in her initial conversation with police was wrong. KB admitted that the cash was tainted property from the accused's drug operation.

- [11] Police observed that there were 10 motorcycles at the accused's property as well as two boats with trailers. Police also observed that the furniture and appliances in the house appeared to be new, as did the tools in the shed.
- [12] At the home of the accused's mother, TH, police located and seized a small digital scale, a total of 36.35g of cannabis from various locations around the house, 0.72g of cannabis seeds, two mobile phones, three grinders, 17 .22 Winchester rounds, \$12,210 in cash and a smoking pipe. TH admitted that the cash was money she should reasonably have expected was the proceeds of the accused's drug supply operation.
- [13] The accused was not the person who entered into the rental agreement for the shipping container. The rental agreement was in the name of the accused's stepfather, GS, who is now deceased. GS was charged as a co-offender as was the accused's mother, TH. TH and KB each entered guilty pleas in relation to charges for possession of the cash found in their respective possession.
- [14] 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.

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

(a) to act in a particular way, namely:

- (i) to engage in the supply of cannabis in the Katherine area; and/or
- (ii) to receive and/or possess monies from the supply of cannabis in the Katherine area.

(b) to have a particular state of mind, namely:

- (i) a willingness to engage in the supply of cannabis in the Katherine area; and
- (ii) preparedness to receive and/or possess monies from the supply of cannabis.

[16] The evidence of the conduct and circumstances said to support the tendencies is the evidence to be adduced in relation to the charges on the indictment, together with evidence of previous conduct summarised as follows:

- (a) On 1 August 2012 the accused supplied a bag of cannabis with a value of \$50 to a child;
- (b) On 9 August 2012 the accused supplied 28g of cannabis to a male for \$500;

- (c) On 10 August 2012 the accused was arrested by police who found a small clip seal bag containing cannabis in the console of his vehicle and \$3,045 in cash, \$2,500 of which he admitted was from the sale of drugs;
- (d) Also on 10 August 2012 police located more than 126g of cannabis at the accused's residence which he admitted he intended to supply;
- (e) On 27 May 2013 the accused was found in possession of 11g of cannabis in his backpack, together with methamphetamine in his wallet; and
- (f) On 4 August 2021 the accused drove away from police who had attempted to stop his vehicle. The following day police located the accused's vehicle in which they found a packet of unused clip seal bags. Police noted that the vehicle smelt of cannabis.

[17] Following the conduct of 1 August 2012, the accused was charged with the offences of having sexual intercourse with a child under the age of 16, and supplying cannabis to a child. The first charge, the sexual offending, went to trial and the accused was found guilty. The accused entered a plea of guilty to the second charge of supplying cannabis to a child. The facts of that offending were that the accused gave a bag of cannabis worth \$50 to the child on the same night as the sexual offending, as part of the context or lead-up to that offending. The child did not pay the accused for the cannabis. The accused was sentenced to imprisonment for three years and

six months on the sexual offence and 14 months for the cannabis supply offence. The total effective sentence was three years and eight months.

[18] In relation to the matters from 9 and 10 August 2012, the accused was charged with one count of supplying cannabis on 9 August 2012. He was also charged with one count of possession of cannabis in a public place and one count of possession of a trafficable quantity of cannabis, both from 10 August 2012. The accused entered pleas of guilty to each of those offences on agreed facts. On 9 October 2013 the accused was sentenced to two months imprisonment for the supply charge from 9 August 2012, 1 month (served concurrently) for the possession of a trafficable quantity of cannabis on 10 August 2012, and on the count of possession in a public place the offence was proven but no action taken.

[19] The fifth incident relied upon by the Crown was the offending from 27 May 2013. The facts of that incident were that, at a property in Katherine where the accused was located, police executed a search warrant looking for stolen goods. The search located stolen goods, together with 11g of cannabis and 6.12g of methamphetamine. The accused entered pleas of guilty to charges of possession of a trafficable quantity of methamphetamine (6.2g) and possession of cannabis (11g) on agreed facts, which included that the accused stated that the 11g of cannabis was for personal use. The Crown does not rely upon the evidence relating to the possession of methamphetamine in relation to the alleged tendency in this proceeding.

When the accused was sentenced, the offence of possession of cannabis was found proven but no action was taken.

[20] The final incident, from 4 and 5 August 2021, occurred when the accused was driving in Katherine and was approached by police but sped away. He was pursued, but police ultimately abandoned the chase. The accused's vehicle was located the next day and seized for hooning. Police searched the vehicle. No drugs were found. The accused surrendered to police on 7 August 2021 and was charged. He later pled guilty to offending which did not include any drug-related charges. The agreed facts on the plea included a statement that police detected that the vehicle had "a strong odour of cannabis emanating from it" and that there was "a packet of un-used clip seal 'deal' bags" located in the centre console. I note that this incident occurred within the period of the offending which is charged as count 1 and is therefore potentially relevant for a non-tendency purpose.

[21] It is not in dispute that the accused is a long term resident of Katherine and that is where he normally resides. There is a significant temporal gap between the evidence relied on relating to the events of 2012-2013 and 2021-2022. It is not disputed that the accused was in prison between 2013 and 2020. The Crown proposes to explain the gap to the jury, should it be required, by an agreed fact that the accused was not in Katherine during the gap period.

[22] The tendency evidence is said to be relevant to proof of the central facts in each of counts 1-5, namely that the accused was engaged in the supply of cannabis in Katherine between 1 March 2021 and 31 March 2022, that he was in possession of monies received from the supply of cannabis on 30 March 2022 and that he received monies from the supply of cannabis between 1 March 2021 and 31 March 2022.

[23] The evidence is also said to be relevant to rebut any explanation consistent with innocence which the defence seeks to rely upon. This is a live issue in this case because NE, an associate of the accused, has made a statement to police to the effect that he placed \$150,000 in the shipping container in August 2021. He says that was money that he was given by an associate, TB, who asked him to take it to Darwin for a fee of \$5,000. TB is now deceased.

[24] Relating the facts to be proved to the elements of the various charges, the facts in issue potentially sought to be proven by use of the tendency notice are:

- a) That the accused (and not someone else) intentionally supplied cannabis to other people in Katherine;
- b) That the amount of cannabis supplied was a commercial quantity;
- c) That the accused received cash for the sale of cannabis;

- d) That the accused received or possessed (counts 2 and 3) or received (counts 4 and 5) the cash found in the storage container, on his person, in his residence and at his mother's residence;
- e) That the accused received or possessed (counts 2 and 3) or received (counts 4 and 5) the cash found in each location as a result of the sale of cannabis; and
- f) That the accused knew that the cash found in each location came (directly or indirectly) from the sale of cannabis.

[25] The defence objects to the evidence being adduced as tendency evidence.

Legal principles

[26] 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.

[27] 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 issues set out above. Significance means something in between mere relevance, and a substantial degree of relevance.

[28] The potential probative value of tendency evidence was explained by the High Court in *Hughes v The Queen*:¹

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 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*)

[29] Assessing the probative value of proposed tendency evidence is therefore a two stage process. As the plurality said in *Hughes*:²

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.

[30] 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

¹ [2017] HCA 20 at [16] per Kiefel CJ, Bell, Keane and Edelman JJ.

² Ibid at [41].

asserted in the notice. The assessment of the probative value of the evidence is to be determined by a trial judge on the assumption that a jury will accept the evidence. This does not involve any assessment of the credibility or reliability of the evidence except in an extreme case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury and therefore does not meet the criterion of relevance.³ Nor is it permissible to have regard to the possibility that the evidence may be the result of collusion, concoction or contamination.⁴

[31] In assessing the probative value of the evidence said to prove the tendency, individual items of evidence should not be considered in isolation. It is necessary to have regard to all of the evidence sought to be adduced by the Crown. So much is clear from the wording of UEA s 97 which requires that the court have regard to “other evidence adduced or to be adduced”.

[32] The Crown contends that the evidence is capable of proving the tendencies alleged because the evidence set out in the tendency notice shows that the accused was dealing in a specific drug (cannabis), in a specific place (Katherine) over a period of time (2012–2013 and 2021-2022), and because it shows that the accused is prepared to, and does, supply drugs, in exchange for cash (as opposed to other forms of payment such as credit or in kind). While acknowledging the gap in the evidence between 2013 and 2021, the

3 *IMM v The Queen* (2016) 257 CLR 300 at [38], [39] and [41].

4 UEA s 94(4). See also *IMM v The Queen* (2016) 257 CLR 300 at [59].

Crown submitted that when the reason for the gap is taken into account, the evidence shows that when the accused is at liberty he acts on his underlying tendencies, including on the occasions the subject of the charges.

[33] The Crown further contends that the tendencies established by the evidence strongly support the proof of the facts in issue because the establishment of the tendency will make it more likely that the accused, and not someone else, was in possession of the cannabis in the shipping container for the purpose of supply. A tendency to receive monies from the supply of cannabis also makes it more likely that the cash seized by police at the various locations on 30 March 2022 was received or possessed as a result of the sale of that drug.

[34] The defence argue that the main issue in the case is the identity of the person who carried out the alleged offending, that is the drug supply operation. Involvement in the drug supply operation is then determinative of whether any tainted monies were received by the accused. The defence submits that the evidence alleged to support the tendencies is conduct common to drug offending. The defence also submits that the alleged tendencies are formulated at too high a level of generality, and therefore lack any features or specificity necessary to show that the evidence has significant probative value. The fact that the evidence is of previous drug supply (supply of cannabis and receipt of cash) is said by the defence to rely on nothing more than generic drug supply activity.

- [35] The fact that the conduct occurred in Katherine is said by the defence to be reflective simply of the fact that the accused lives there and is a general qualifier which adds nothing of substance to the evidential value of the alleged tendency. The defence submission is, essentially, that the alleged tendency is nothing more than an assertion that because the accused has been found guilty of drug offending involving cannabis in the past, he must also be guilty on this occasion.
- [36] The defence also submits that the gap between the 2012-2013 offending and the evidence of conduct in 2021 means that the probative value of evidence of past offending is significantly reduced.
- [37] The High Court has said that there need not be any striking similarities or a distinct *modus operandi* for tendency evidence to be significantly probative of a fact in issue.⁵ At the same time, a degree of specificity or similarity, both between the acts relied upon and between those acts and the facts relied upon in relation to the current charges, increases the probative value of the evidence. The extent to which that is important depends upon the circumstances of the case. As Grant CJ said in *R v Grant*:⁶

“ ...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.”

⁵ *Hughes v The Queen* [2017] HCA 20 at [34], [39] – [41].

⁶ *R v Grant* [2016] NTSC 54 at [26].

That is so because previous conduct of the sort likely to be carried out by anyone committing an offence of the type charged can do very little to make it more likely that a particular accused was the offender.

[38] Evidence of a tendency expressed with a high degree of generality is less likely to have significant probative value. The High Court in *McPhillamy v The Queen*⁷ considered a tendency notice which was expressed in general terms, and relied upon evidence of two witnesses as to sexual offending by the accused against each of them a decade before the events (involving a different complainant) in relation to which he was charged.⁸ The plurality said that proof of the earlier offending, while relevant, was not capable of affecting the assessment of whether the appellant had offended against the complainant to a significant extent.⁹ In a separate judgment, Edelman J also found that the evidence did not have significant probative value, and referred to the high degree of generality in which the tendency was expressed as a relevant factor.¹⁰

[39] In *TL v The King*¹¹, the appellant, who was convicted of the murder of a child, appealed on the ground that tendency evidence about his previous assaults on the child should not have been admitted at his trial. The identity of the person who caused the child's death was the main issue in the trial. In

⁷ *McPhillamy v The Queen* [2018] HCA 52.

⁸ Expressed as a tendency on the part of the accused to have a sexual interest in young teenage boys under his supervision and to act on that tendency.

⁹ *McPhillamy v The Queen* [2018] HCA 52 at [32].

¹⁰ Ibid [36] – [38].

¹¹ *TL v R* (2022) 405 ALR 578 at [30] – [31].

a joint judgment, the High Court was highly critical of the general way in which the tendency notice was originally expressed because it referred to a tendency to deliberately inflict physical harm upon the child, without the further specification that the tendency involved violence and the infliction of serious harm.¹² The Court commented that:

Without the additional elements of violent conduct inflicting serious physical harm, it is doubtful that the tendency evidence could have met the threshold of significant probative value.¹³

[40] In *TL* the High Court found that the re-written and more specific tendency ultimately relied upon¹⁴ did have significant probative value because of the close proximity in time of the earlier events to the crime, the fact that the evidence of prior conduct involved attacks upon one person (the deceased), and that the attacks were of an abnormal nature (directed to a very young child).¹⁵

The tendency evidence in this case

[41] As to the evidence of supply of cannabis to a child on 1 August 2012, although it was an instance of supply, the offending was of an entirely different character to the allegations which the Crown seeks to prove in this

12 Ibid [32]. This was not ultimately an issue in the proceeding. The appellant had not objected to the generality in which the tendency notice was originally expressed however the matter had proceeded both at trial and at intermediate appellate level on the basis that the required specificity, as to violence inflicting serious harm, was present as discussed at [33] and [37].

13 Ibid [37].

14 The Court in *TL v R* (2022) 405 ALR 578 at [33] was critical of the process which involved a “reformulation” of the tendency notice during the trial.

15 Ibid [37].

proceeding. Even if the inference that the accused had a tendency to supply cannabis were available from that evidence, which I do not accept, the evidence does not make it more likely that the accused would have done so on this occasion.

[42] The fact that the accused supplied an amount of cannabis to a child in the context of other unrelated offending cannot, as a matter of logic, lead to a conclusion that the accused had the tendencies alleged¹⁶ when considered alone or in combination with the other evidence to be led in the trial.

[43] The evidence of the incident on 27 May 2013 does not contribute to the proof of the tendency alleged. All it establishes is that the accused had a small amount of cannabis, and a larger amount of methamphetamine, in his possession 11 years ago. The probative value of the evidence in relation to the facts in issue in this proceeding, which involve the supply of a commercial quantity of cannabis and receipt of significant amounts of cash is very low, including when considered in light of the other evidence to be adduced by the Crown. Again, the facts reveal offending of a different character. The fact that the offending occurred in Katherine does not alter that assessment.

[44] The more detailed facts of the offending of 9 August 2012¹⁷ are that the accused was working on his car on the footpath in front of his house in

16 Refer to paragraph [5] above.

17 As set out in the *The Queen v Graham Michael Cowen*, Sentencing Remarks, Kelly J, 9 October 2013, referred to in the Tendency Notice.

Katherine when a man approached and asked for cannabis. The accused told the man to come back later. When the man returned the same evening, the accused retrieved 28g of cannabis from his car and supplied it to the man who paid him \$500 in cash.

[45] On 10 August 2012, the next day, the police stopped the accused, searched his car and found a clip seal bag with a small amount of cannabis in the centre console together with \$3,045 cash in his wallet, \$2,500 of which he admitted was from the sale of cannabis. Police then searched the accused's house where a trafficable quantity of cannabis was found together with indicia of the use and supply of cannabis. Taken together, those two incidents establish that the accused was supplying drugs for cash in August 2012.

[46] The events of 4 and 5 August 2021 are set out above. The fact that the accused ran from police, the smell of cannabis was detected in his car and the presence of a clip seal bag, is some, but not particularly strong, circumstantial evidence that the accused was involved in drug supply. There may have been many reasons why the accused ran from the police. The smell of cannabis in the accused's car may have been consistent with personal use. Possession of clip seal bags is often an indicator of drug supply, but the single bag was unused and no additional indicia of drug supply was alleged in the agreed facts.

[47] There is little real commonality between the established incidents of supply, possession of cannabis for supply, and receipt of money from the sale of cannabis in 2012 and the evidence relating to the charges on the indictment, beyond what is common to all drug offending.

[48] The incidents of 9 and 10 August 2012 are the strongest evidence involving actual incidents of supply of cannabis for cash. However, the tendency is expressed in a general way, as “supply of cannabis in the Katherine area” and the evidence has no features which would indicate that there is any degree of specificity in the conduct, beyond the fact that it happened in the Katherine area which is, in itself, general. For example, the evidence from 2012 does not involve anybody said to be involved in the present matter, nor is there evidence of supply of drugs in any particular way or to a particular group of people. There is no evidence as to how the supply in 2012 was undertaken beyond conduct which is common to most drug supply. The amount of drugs involved in the previous charges was comparatively small. The amount of money involved was also much lower than alleged in the current charges. The storage of drugs other than in the accused’s house (i.e. in the shipping container), which is alleged as a feature of the current charges, was not part of any of the other incidents.

[49] In addition, the 2012 offending occurred a long time ago, notwithstanding that the gap is explained by the fact that the accused was in gaol. The length of time between events said to constitute the tendency is relevant.¹⁸

[50] The probative value of the evidence depends not only upon its strength in establishing the tendency but also upon the extent to which the tendency makes more likely the elements of the offence charged.¹⁹ The focus of that enquiry must be upon the logical relationship between the tendency evidence and the facts in issue which make up the elements of the offence.²⁰

[51] The tendencies relied upon, “to engage in the supply of cannabis in the Katherine area”, and “to receive and/or possess monies from the supply of cannabis in the Katherine area”, and to have the state of mind of willingness to engage in those acts, each operate at a very high level of generality. That is particularly relevant where, as here, the identity of the person dealing drugs from the shipping container and receiving cash as a result, is in issue.

[52] In assessing the significance of the probative value of the evidence I take into account that:

- a. The previous events took place in the Katherine area and it is alleged that this offending also occurred there. This is itself a qualifying general fact. There is nothing about the Katherine area, which is relatively large

18 *TL v R* (2022) 405 ALR 578 at [37].

19 *Hughes v The Queen* [2017] HCA 20 at [64].

20 *Sokolowskyj v The Queen* [2014] 239 A Crim R 528 at [44].

and where a considerable number of people live, which adds to the specificity of the tendency alleged. Katherine is where the accused lives and, if he were to offend, that is where it would be likely to happen;

- b. To the extent that it was suggested that there was similarity between the offending because each instance involved the sale of drugs for cash, I am of the view that that is such a common feature of drug supply that it is ubiquitous, notwithstanding that drugs can be supplied for other kinds of reward;
- c. The number of times which the tendency could be said to have manifested itself in the evidence is relevant. As to the evidence of supply there are two main incidents August 2012 (consecutive days) and the circumstantial evidence from 2021-2022 (the incident of 4 and 5 August 2021 and the facts of the offending charged). Although it is possible to infer from that conduct that a tendency to sell drugs has continued to manifest, the inference is not a strong one;
- d. The weakness of the 2021 evidence, which is not direct evidence of supply and does not lead inexorably to that conclusion (because there are other potential explanations for the conduct) means that it does not add significantly to the calculus;
- e. The distance in time between the events of 2012 and the current charges, reduces the strength of the inference that the accused would have acted

on a tendency on this occasion, notwithstanding that the gap is explained by the fact that the accused was in gaol between 2013 and 2022; and

- f. The offences for which the accused was convicted in 2012 were at a much lower level than the current charges with very little similarity to the current offending beyond selling cannabis for cash in Katherine. The evidence from 2012 suggested that the accused was “...not a major player in the drug game ...”²¹ which is quite different to supplying cannabis in a commercial quantity for significant profits, as alleged in the charges on the indictment.

[53] In my view, the tendency evidence proposed to be relied upon by the Crown in relation to the previous convictions from 2012, while relevant, was not of significant probative value. Although there is evidence that the accused has supplied cannabis for cash, at the level of generality at which the tendency was formulated in this case, it does no more than show that the accused is the sort of person who is more likely to commit this type of offence.

[54] The Crown also rely, in support of the tendency, on the evidence I have summarised above relating to counts 1–5. That evidence is assumed to be admissible as part of the Crown’s evidence by which they seek to prove the charge. However, s 95 of the UEA prohibits the use of evidence for a tendency purpose, even where it is admissible for another purpose. In order

21 *The Queen v Graham Michael Cowen*, Sentencing Remarks, Kelly J, 9 October 2013.

to support a submission based upon tendency reasoning, the provisions of, in particular, sections 94, 97 and 101, must be complied with.

[55] The evidence relied upon to prove the tendency is the fact that the accused was coming and going to a shipping container for 12 months prior to police searches in which cannabis plant material, cash and indicia of drug supply were found, coupled with the cash and other items located at his and his mother's residences. In addition is the evidence of the 2021 event. This evidence, taken together, is capable of supporting the inference that the accused had a tendency to be involved in the supply of cannabis during the relevant period.

[56] The alleged state of mind is said to be a willingness to engage in the sale of cannabis in the Katherine area and a preparedness to receive and/or possess monies from the supply of cannabis. However, that tendency is also expressed very generally and is not significantly probative as tendency evidence for the reasons given above. The tendency evidence does little more than to suggest a disposition to commit crimes of the kind in question.

[57] I am not satisfied that the threshold test in s 97 UEA has been met. The evidence sought to be adduced as tendency evidence does not have significant probative value. The evidence is therefore inadmissible as tendency evidence.

Unfair Prejudice - section 101 of the UEA

- [58] In case I am wrong as to my conclusion above, I will briefly consider whether the evidence satisfies the requirements of UEA s 101. In a criminal trial, tendency evidence is not admissible unless the probative value of the evidence outweighs the danger of unfair prejudice to the accused. This involves a balancing exercise assessing and weighing the probative value of the evidence against any potential prejudicial effect it may have on the accused.
- [59] The dominant consideration is to ensure that the accused is not deprived by prejudice of a fair trial.²² The notion of prejudice in this general context “... means the danger of improper use of the evidence. It does not mean its legitimate tendency to inculcate.”²³ Something more is required, such as the possibility that the evidence may be misused by a jury in some respect.
- [60] The plurality in *Hughes* explained the kinds of potential prejudice that can arise in a criminal trial such as this:²⁴

In criminal proceedings in which the prosecution seeks to adduce tendency evidence about the accused, s 101(2) of the Evidence Act imposes a further restriction on admissibility: the evidence cannot be used against the accused unless its probative value substantially outweighs any prejudicial effect that it may have on the accused. The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a

²² *The Queen v AW* [2018] NTSC 29 at [30].

²³ *HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 235 CLR 334 at [12] per Gleeson CJ.

²⁴ *Ibid* [17].

particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way. In either case the tendency evidence may be given disproportionate weight. In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury's emotional response to the tendency evidence. And prejudice may be occasioned by requiring an accused to answer a raft of uncharged conduct stretching back, perhaps, over many years.

[61] The test of danger of unfair prejudice is not satisfied by the mere possibility of such prejudice. There must be a real risk of prejudice by reason of the admission of the evidence.²⁵

[62] In relation to the evidence of supply of cannabis to a child on 1 August 2012, there is a clear danger of unfair prejudice. The danger is that the supply of drugs to a child is likely to provoke an emotional response in a jury, even if the full circumstances are not disclosed. A jury may then give such evidence more weight than it deserves in deliberations. Disclosure of the full circumstances, which would reveal the accused to have been involved in an offence which is repugnant to most people, would almost certainly provoke an emotional response in a jury which would be impossible to properly address with directions. Conversely, a failure to disclose the full circumstances would deprive the accused of the ability to properly argue that the circumstances of that offending do not support the tendency.

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

[63] As to the evidence of the possession of the small amount of cannabis on 27 May 2013, the probative value of that evidence is so low that it is barely relevant. The danger of unfair prejudice in that case is that the jury will give the evidence much more weight than it deserves if it is presented as tendency evidence.

[64] In relation to the balance of the proposed tendency evidence, the difficulty is that there is a real risk that a jury will reason that the accused was the person who committed the offences charged because he had committed offences in 2012, despite the fact that there is not a strong basis for drawing that inference as tendency reasoning. As explained by Grant CJ in *R v Hoeksema*²⁶ when the evidence only allows the conclusion that the accused is the sort of person more likely to commit an offence of the sort charged, there is no direction which can properly ameliorate that risk.

[65] I therefore consider that the probative value of this evidence does not outweigh the danger of unfair prejudice to the accused. The evidence is therefore inadmissible as tendency evidence.

Crown application to cross-examine NE

[66] The Crown have also sought an advance ruling for leave to cross-examine a crown witness, NE pursuant to s 38 of the UEA. The import of NE's

26 [2018] NTSC 59 at [16].

anticipated evidence is set out above.²⁷ There is no doubt that NE's evidence will be unfavourable to the Crown case and the defence did not raise any objection to cross-examination on that basis. Taking that into account, and having considered the matters in s 192 of the UEA, the Crown should have leave to cross-examine NE as to the evidence contained in his statutory declaration of 13 May 2022 and his recorded interview with police of 14 April 2023.

[67] The Crown also seek to cross-examine NE as to matters relevant only to his credibility. A transcript of evidence which NE gave in this Court on 30 March 2023²⁸ was tendered on the voir dire. When giving that evidence, NE agreed that he had lied to police on a previous occasion.

[68] The credibility of NE is likely to be a significant issue in this trial. Evidence relating to NE's credibility has the potential to affect the probability of whether his evidence about the ownership of the cash and the placing of it in the shipping container is accepted, and therefore whether there is an explanation other than the guilt of the accused for its presence when the police conducted the search. It is very unlikely that such questioning will be unfair or will add unduly to the length of the trial.

²⁷ See paragraph [23] above.

²⁸ Tendered on the voir dire.

[69] Therefore, noting that admissibility of such evidence will be subject to the requirements in Part 3.7 of the UEA, in particular s 103, the Crown should also have leave to cross-examine on matters relevant only to NE's credibility.

Orders

[70] I make the following orders:

1. The evidence as set out in the Crown tendency notice of 27 March 2024 is not admissible as tendency evidence to prove the tendencies alleged in the notice.
2. The Crown has leave to cross-examine NE pursuant to section 38 of the UEA as to the evidence contained in his statutory declaration of 13 May 2022 and his recorded interview with police of 14 April 2023, and about matters relevant only to NE's credibility.
