The Queen v Smiler (No 2) [2017] NTSC 31

PARTIES:	THE QUEEN v SMILER, Robert
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	KELLY J

CATCHWORDS:

EVIDENCE – Admissibility and relevance – Tendency evidence – Tendency of complainant to resort to acts of serious violence to resolve disputes – Whether evidence is capable of proving alleged tendency – Whether tendency evidence has significant probative value – Relevance to a fact in issue – Degree of violence used by complainant relevant to whether accused acting in self-defence – Whether discretion to exclude should be exercised – Unfairly prejudicial to the Crown – Undue waste of time – Evidence admissible – *Evidence (National Uniform Legislation) Act 2011* (NT) ss 55, 97, 135

EVIDENCE – Admissibility and relevance – Character or disposition – Disposition of complainant – Evidence admissible

Evidence (National Uniform Legislation) Act 2011 (NT) ss 3(1), 55, 97, 101, 135

R v Cakovski (2004) 149 A Crim R 21, *R v Lockyer* (1996) 89 A Crim R 457, followed

REPRESENTATION:

Counsel:

Crown:	D Dalrymple
Accused:	J Murphy and P Coleridge

Solicitors:

Crown:	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 DARWIN

The Queen v Smiler (No 2) [2017] NTSC 31
No. 21628678

BETWEEN:

THE QUEEN

AND:

ROBERT SMILER

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 18 April 2017)

[1] The accused, Robert Smiler, has been charged with one count of aggravated assault on Peter Doucas and one count of unlawfully causing serious harm to Edward Aden. The alleged victim in Count 2, Mr Aden, was convicted of assaulting one man and causing grievous harm to another in January 2006. He is also said to have assaulted a man with the use of a weapon in 2016. The accused seeks to adduce evidence of these matters both as tendency evidence and as evidence of Mr Aden's character or disposition. The Crown objects to this evidence.

The facts sought to be proved

[2] In summary, the facts of the 2006 offending are that Mr Aden was a resident of the Ross Smith Guest House. One night he was in a neighbour's room with the neighbour and another man. They were drinking beer and watching television. Mr Aden made some disparaging remarks about Asian girls and the other two made racial slurs about Aboriginal people. (Mr Aden is of Aboriginal descent.) Mr Aden left the room and the neighbour shut the door. About two minutes later Mr Aden forced open the door and went into the room armed with two knives – one in each hand, held blade upward. He raised one knife and slashed one of the victims cutting through his left ear and down to the jaw severing an artery. That victim ran out to call police. In the meantime Mr Aden slashed at the other victim with a knife hitting him once on the left thigh and twice on the left shin. Then he backed away and went back to his own room. Mr Aden was later convicted of one count of unlawfully causing grievous harm and one count of aggravated assault and sentenced to an aggregate term of imprisonment of four years.

[3] Mr Aden has not (or not yet) been convicted of any offence as a result of the alleged assault in 2016. The allegation made against him is that while he was at Malabar Lodge he was having a verbal argument with another man who was "winding him up" and swearing at him. Mr Aden went to his room and came back with a stick about one metre long and

two to three inches thick. He ran up the stairs and swung the stick at the other man hitting him in the back just above the kidneys. The man tried to get the stick away from him, Mr Aden tried to hit the man again with the stick, the other man pushed Mr Aden and Mr Aden fell backwards down the stairs.

The tendency notice

[4] The accused has served a notice of intention to adduce tendency evidence in relation to Mr Aden.

[5] The tendency which the defence seeks to prove is "a tendency on the part of [Mr Aden] to resort to acts of serious violence, involving weapons, to resolve disputes with other men in or around residential accommodation".

[6] The evidence by which the accused seeks to prove this tendency is:

(a) evidence in cross-examination of Mr Aden about the facts of each of the above incidents;

(b) the agreed facts tendered on Mr Aden's guilty plea on the 2006 matter; and

(c) evidence from the night manager who witnessed the alleged assault in 2016.

[7] The Crown case against the accused in this matter is set out in more detail in *The Queen v Smiler (No 1)*. Essentially it is that on the night of 11 April 2016, the accused went with his wife to Malabar Lodge in Smith Street, Darwin. While there he took umbrage at something he believed Mr Doucas had done and assaulted him by pushing him down the stairs and then kicking him a number of times in the head. A resident of Malabar Lodge, Mr Aden, intervened, first telling the accused to stop and then hitting him on the legs (or the back and legs) with a heavy stick to try to get him to stop assaulting Mr Doucas. It is alleged that Mr Aden then fell over and the accused assaulted Mr Aden with the same stick, causing him injuries which amounted to serious harm.

[8] There are a number of witness statements that give differing accounts of the degree of violence used by Mr Aden against the accused before the accused hit Mr Aden. The accused contends that the tendency he wishes to prove is relevant in this way. The degree of violence used against the accused by Mr Aden is a fact in issue in the proceeding, because it may affect the jury's determination of the question of whether the accused was acting in self-defence. If the jury accepts that Mr Aden had the tendency to resort to acts of serious violence involving weapons to resolve disputes with other men in or around his

residential accommodation,[1] that could rationally affect their assessment of the probability[2] that Mr Aden used serious violence against the accused on this occasion and hence their assessment of the probability that the accused was acting in self-defence. As defence counsel put it in written submissions, "the evidence positively increases the probability that [Mr Aden] intervened in the altercation aggressively, excessively and without lawful purpose, such as genuine concern for the safety of [Mr Doucas]."

Is the evidence capable of proving the alleged tendency?

[9] The first question is whether the evidence which the accused seeks to adduce is capable of proving the tendency alleged. The sentencing remarks from 2006 reveal that Mr Aden was then 45 years old, so he is now 55 or 56. At that time he had no prior convictions for crimes of violence and his last conviction for offending of any kind was in 1992 (14 years before). The sentencing judge said, "By way of mitigation, I take into account that the offending was out of character."

[10] The alleged assault in 2016 took place ten years after the 2006 offence. Mr Aden has not been charged with any offence over that conduct, and it is not suggested he has committed any other violent assaults in the intervening ten years. It might be thought that evidence that Mr Aden

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1 Mr Aden was a resident of Malabar Lodge at the time and both the earlier incidents took place in or around the places where he lived.

2 *Evidence (National Uniform Legislation) Act 2011* (NT) s 55

had committed two acts of violence, ten years apart, in a lifetime of 55 years (say 40 years as a youth and adult) was rather weak evidence to establish the tendency alleged by the Crown, particularly given the circumstances in which he lives. (The statement of the night manager the defence wants to call states, "Malabar is a pretty rough place. There are lots of arguments and people coming and going all the time.")

[11] However, I do not have to decide whether the evidence sought to be led does prove the alleged tendency, merely whether it is capable of doing so. If the evidence is capable of proving that Mr Aden had the tendency alleged, it should be allowed in (subject to satisfaction of the conditions in s 97). It will be a matter for the jury whether they accept the evidence and whether they are satisfied that it proves that Mr Aden had the tendency alleged by the defence. With some hesitation, I conclude that it would be open to the jury to conclude, on the basis of the evidence of these two episodes, that Mr Aden had a tendency to resort to acts of serious violence, involving weapons, to resolve disputes with other men in or around residential accommodation.

Section 97 – "significant probative value"

[12] I turn to consider the question whether the evidence has significant probative value to an issue in the proceeding. Under the *Evidence (National Uniform Legislation) Act 2011* (NT) ("UEA") s 97, evidence 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 court thinks that the evidence will, either by itself or having regard to other evidence to be adduced by that party, have significant probative value. (There is also a requirement for reasonable notice. It is common ground that the notice requirement has been satisfied.)

[13] The first step is to consider whether the evidence is relevant to an issue in the proceeding. In my view it is. The Crown initially argued that the tendency evidence could not be relevant because there was no issue in the case about whether Mr Aden hit the accused with a stick before the accused hit Mr Aden – it is part of the Crown case that he did. Further there is no suggestion that the accused knew of these past acts of violence on the part of Mr Aden or that such knowledge might have had a bearing on the accused's perception of the dangerousness of the situation he was in. However, the defence does not suggest that the evidence is relevant on either of these two bases, but rather on the basis set out at [8] above.

[14] In relation to the basis for relevance set out in [8], Mr Dalrymple for the Crown submitted that on no view of the evidence in the existing statements could the accused's conduct be said to amount to self-defence. However, he conceded that there was sufficient evidence for that issue to be put to the jury, and it seems to me that if self-defence is to go to the jury, then the tendency evidence is relevant to the jury's consideration of that issue on the reasoning set out in [8] above.

[15] The next question is whether the evidence has "significant" probative value. The Crown contended that, even if relevance could be established, the probative value of the evidence is so slight that it cannot be regarded as "significant". The probative value of evidence is defined as the extent to which the evidence could rationally affect the assessment of the probability of the existence of a particular fact in issue.[3] "Significant" probative value must mean something more than bare relevance, but it does not need to rise as high as "substantial" probative value. It has been said to mean evidence that is "important" or "of consequence".[4]

[16] It needs to be borne in mind that the Crown bears the legal onus of proof on all issues including negating self-defence. The accused need only point to a reasonable possibility that he was acting in self-defence and submit that the Crown has not eliminated that possibility. Very little may be required for evidence to be "significant" or "of consequence" in pointing only to a reasonable possibility that the accused may have been acting in self-defence.[5]

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3 UEA s 3(1) (in the Dictionary)

4 *R v Lockyer* (1996) 89 A Crim R 457 at 459

5 *ibid* at 459-460

Evidence of disposition

[17] Defence counsel has also argued that the evidence is relevant, and need not satisfy the criteria for tendency evidence in s 97, because it amounts to evidence of Mr Aden's character or disposition – that is, to suggest that he was a person who was not subject to very strong inhibitions against extreme acts of violence in the way most people are.[6] Defence counsel submits that evidence that Mr Aden had this disposition "tends to diminish what might ordinarily be thought to be the inherent improbability that a man in his fifties of short stature and slight build would intervene in a fight between two other men with anything but a lawful purpose and in any way but proportionately".

[18] I agree that the evidence is admissible for this purpose. In fact, I consider that the case for its admissibility as evidence of disposition is slightly stronger than the case for its admission as tendency evidence. For the reasons set out at [10] above, I consider the evidence which the accused seeks to adduce to be rather weak evidence when it comes to proving that Mr Aden had the tendency alleged by the defence. When considering the same evidence as evidence of disposition, the fact that there have only been two such incidents in Mr Aden's lifetime remains a problem in establishing the alleged disposition (as it does for the alleged tendency), but more weight can be given to the qualitative nature of the violent conduct as evidence of that alleged disposition.

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6 *R v Cakovski* (2004) 149 A Crim R 21 at 30 [37] per Hodgson JA

Discretionary exclusion

[19] Where tendency evidence is sought to be led by the defence, the more restrictive requirement in UEA s 101 does not apply. However there is a discretion under s 135 to exclude any evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time.

[20] The Crown submits that this tendency evidence would be unfairly prejudicial to the Crown in that it might cause the jury to feel an emotional revulsion towards Mr Aden who is the complainant in Count 2. Although I agree that the tendency evidence does not have enormous probative value, it is (as I have held) significant. I do not think that its probative value is substantially outweighed by the risk that it might be unfairly prejudicial to the Crown, primarily because I do not think that risk is all that great either. The jury will receive the appropriate warnings to set aside emotion and prejudice and make their decision in accordance with reason and logic on the facts that they find made out on the evidence.

[21] The Crown also submits that admission of evidence of alleged violent conduct by Mr Aden in 2016 is likely to result in an undue waste of

time. The Crown says that the evidence of the eye witness proposed to be called by the defence is disputed. This raises the prospect of extensive cross-examination on this side issue, the possibility of evidence in rebuttal and, effectively a whole “trial within a trial”. However, Mr Aden is not willing to provide a statement in relation to the matter.

[22] Without knowing what Mr Aden may have to say about the 2016 incident, I am unable to say whether there will be a dispute about what occurred on that occasion and, if there is, what issues and evidence that may potentially open up. It seems to me that the best course would be to allow cross-examination of Mr Aden about both the 2006 and 2016 incidents, including cross-examination on any prior inconsistent statements and (if necessary) proof of the 2006 conviction and to reserve judgment on the question of what other evidence (if any) to allow in.
