CITATION:	*The Queen v Nicoli* [2019] NTSC 21
PARTIES:	THE QUEEN
	v
	NICOLI, Daniel
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NOs:	21811291 & 21833413
DELIVERED:	4 April 2019
HEARING DATE:	3 April 2019
JUDGMENT OF:	Riley AJ

CATCHWORDS:

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

Evidence of conduct on the part of the accused which would establish the accused will persist in pursuing and have sexual intercourse after a woman has clearly indicated no by both word and action to sexual intercourse, and that the accused has a particular state of mind to have sexual intercourse irrespective of consent – Must satisfy the requirements of ss 97(1) and 101(2) of the *Evidence (National Uniform Legislation) Act* 2011 (NT) ("ENULA") – Could evidence rationally affect to a significant degree the assessment of the probability of a fact in issue – If so, does the probative value of that evidence substantially outweigh any prejudicial effect it may have on the accused – Where tendency evidence relates to sexual conduct with a person or persons other than the complainant it is usually necessary to identify some features of other sexual misconduct and the alleged offending which serves to link the two together – Evidence that the accused

has committed a sexual offence against the first complainant proves no more about the alleged offence against the second complainant than that the accused committed a sexual offence against the first complainant – Two counts on indictment separate and distinct – The evidence did not have significant probative value within the meaning of s 97(1) of the ENULA – The probative value of the evidence did not substantially outweigh any prejudicial effect the evidence may have on the defendant under s 101(2) of the ENULA – Application dismissed.

CRIMINAL LAW – PRACTICE AND PROCEDURE – APPLICATION TO SEVER INDICTMENT

Evidence of separate complaints not cross-admissible – Severance application granted

Criminal Code 1983 (NT) s 192(3)
Evidence (National Uniform Legislation) Act 2011 (NT) s 97(1), s 101(2)

BD v The Queen [2017] NTCCA 2; *McPhillamy v The Queen* [2018] HCA 52, (2018) 92 ALJR 1045; *R v Bauer* [2018] HCA 40, 92 ALJR 846; *R v Grant* [2016] NTSC 54, referred to

REPRESENTATION:

Counsel:

Crown:	S Geary
Accused:	P Maley

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Maleys Legal

Judgment category classification:	C
Judgment ID Number:	Ril1901
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Nicoli [2019] NTSC 21
No. 21811291 & 21833413

BETWEEN:

THE QUEEN

AND:

DANIEL NICOLI

CORAM: RILEY AJ

REASONS FOR JUDGMENT

(Delivered 4 April 2019)

[1] The accused is charged by indictment dated 14 February 2019 with two offences of having sexual intercourse without consent contrary to s 192(3) of the *Criminal Code*, with two quite separate complainants. The first alleges that the offending took place against LD on 7 October 2017 and the second against MS on 7 July 2018.

[2] Two issues have arisen for determination prior to trial. The first is whether the Crown should be permitted to adduce tendency evidence pursuant to s 97(1) of the *Evidence (National Uniform Legislation) Act* ("the Act"). The second is an application to sever the indictment. The parties agree that the

determination of the application to adduce tendency evidence will determine the outcome of the severance application.

The tendency notice

[3] The Crown has delivered a tendency notice in accordance with s 97(1)(a) of the Act advising that the tendency evidence it seeks to adduce relates to the following issue:

> The accused will persist in pursuing and have sexual intercourse after a woman has clearly indicated no by both word and action to sexual intercourse.

[4] The Crown also asserts that the tendency sought to be proved is that the accused has a particular state of mind, namely to have sexual intercourse irrespective of consent.

[5] The Crown case in relation to each of the counts is outlined in written submissions. The first count alleges that on 7 October 2017 the complainant LD, who was then aged 27 years, went to Robertson Barracks with the accused where they engaged in consensual kissing and cuddling while lying on his bed. The accused tried to lift the complainant's dress but she pulled it down, saying "no" and pushing him away. This conduct continued until the accused overpowered her and used his right hand to move her underwear and insert two fingers into her vagina for one or two minutes. She continued to struggle and say "no". The accused only stopped when the complainant yelled at him and told him she felt pain.

[6] The Crown case in relation to the second matter is that on 6 July 2018 (some nine months later), a different complainant, MS, who was then aged 21 years, was introduced to the accused in circumstances where they dined and drank with mutual friends. Later that night members of the group went to the house where the complainant was staying. She took pain medication and went to bed in a bedroom. At about 1:30 am the complainant was woken by a third person who asked her to vacate her bed and sleep in a spare room where the accused was already laying on a mattress on the floor. The complainant lay on the mattress facing the wall. The accused began touching her to which she responded "no" and "please stop". The accused attempted to lift her nightie and attempted to kiss her. He rolled her onto her back and climbed on top of her and thrust his body onto hers. She said "just please stop". The accused pulled at her underwear and, when her vagina was exposed, he performed cunnilingus on her and thrust his right thumb into her vagina. The complainant said she was unwell and went to the bathroom. Upon her return they both fell asleep.

Admissibility of the tendency evidence

[7] There is no dispute regarding the adequacy of the notice issued pursuant to s 97(1)(a) of the Act and served on the accused by the Crown. The issue is whether the identified evidence has "significant probative value" in relation to the issue to be tried by the court. In the circumstances of this matter the issue is whether the evidence of LD regarding the sexual conduct of the

defendant toward her is admissible for tendency purposes in relation to the count concerning MS and vice versa.

[8] Section 97(1) of the Act provides for the admissibility of tendency evidence. It provides (relevant for present purposes):

> **The tendency rule**
>
> (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:
>
> (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
>
> (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

[9] The expression "probative value" is defined in the Act to mean "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue".

[10] As the High Court observed in *McPhillamy v The Queen*,[1] the assessment of the probative value of tendency evidence requires the court to determine the extent to which the evidence is capable of proving the tendency. It will then be necessary for the court to assess the extent to which proof of the tendency increases the likelihood of the commission of the offence. The

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1 (2018) 92 ALJR 1045 at [26].

High Court went on to observe that "it is the tendency to *act* on the sexual interest that gives tendency evidence in sexual cases its probative value".[2]

[11] Further, the High Court noted that where the tendency evidence relates to sexual misconduct with a person or persons other than the complainant, "it will usually be necessary to identify some feature of the other sexual misconduct and the alleged offending which serves to link the two together".[3] Dealing with the circumstances of the matter before the Court it was said:[4]

> It may be accepted that the evidence that the appellant had acted on his sexual interest in young teenage boys on the occasions with "B" and "C" is relevant to proof that he committed the offences alleged by "A", but it is not admissible as tendency evidence unless it is capable of significantly bearing on proof of that fact. In the absence of evidence that the appellant had acted on his sexual interest in young teenage boys under his supervision in the decade following the incidents at the College, the inference that at the dates of the offences he possessed the tendency is weak.
>
> …
>
> "B"'s and "C"'s evidence established no more than that a decade before the subject events the appellant had sexually offended against each of them. Proof of that offending was not capable of affecting the assessment of the likelihood that the appellant committed the offences against "A" to a significant extent. It rose no higher in effect than to insinuate that, because the appellant had sexually offended against "B" and "C" ten years before, in different circumstances, and without any evidence other than "A"s allegations that he had offended again, he was the kind of person who is more likely to have committed the offences that "A" alleged. The tendency evidence did not meet the threshold requirement of s 97(1)(b) of the *Evidence Act*.

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2 *McPhillamy v The Queen* (2018) 92 ALJR 1045 at [27].

3 *McPhillamy v The Queen* (2018) 92 ALJR 1045 at [31].

4 *McPhillamy v The Queen* (2018) 92 ALJR 1045 at [30] and [32].

[12] In the earlier case of *R v Bauer*,[5] the High Court observed in relation to a multiple complainant sexual offences case where a question arose as to whether evidence that the accused had committed a sexual offence against one complainant was significantly probative of the accused having committed a sexual offence against another:

> … the logic of probability reasoning dictates that, for evidence of the offending against one complainant to be significantly probative of the offending against the other, there must ordinarily be some feature of or about the offending which links the two together. More specifically, absent such a feature of or about the offending, evidence that the accused has committed a sexual offence against the first complainant proves no more about the alleged offence against the second complainant than that the accused has committed a sexual offence against the first complainant. And the mere fact that an accused has committed an offence against one complainant is ordinarily not significantly probative of the accused having committed an offence against another complainant. If, however, there is some common feature of or about the offending, it may demonstrate a tendency to act in a particular way proof of which increases the likelihood that the account of the offence under consideration is true.

[13] The operation of the provision has also been discussed by the Northern Territory Court of Criminal Appeal in *BD v The Queen*[6] where it was observed that the admission of tendency evidence under the Act replaces the common law rules in relation to "propensity" or "similar fact" evidence. Whilst the common law generally required a "striking similarity" between similar facts for them to qualify as admissible, the Court said that under the Act:

> The existence of "similarity" is not a necessary requirement for tendency evidence. That said, the consideration of similarity remains

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5 *R v Bauer* (2018) 92 ALJR 846 at [58].

6 [2017] NTCCA 2 at [71] applying *R v Grant* [2016] NTSC 54 at [25]-[28].

> a guide in determining in some circumstances whether tendency evidence has sufficient probative value to pass the test for admissibility under the statutory regime.

[14] In addition, the Court of Criminal Appeal noted that 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 evidence is credible or reliable for that purpose. Further, the possibility of concoction will not automatically deprive propensity evidence of the requisite level of probative value to qualify for admission under the Act.

[15] In the event that the evidence is found to be of significant probative value s 101(2) of the Act provides that, in a criminal proceeding, tendency evidence cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect the evidence may have on the defendant.

Consideration

[16] In the present case there was no suggestion that concoction had, or could have, occurred and that is not an issue for consideration.

[17] The Crown submitted that, taken as a whole, the evidence shows a tendency on the part of the accused to act in a particular way, namely to continue to pursue and have sexual intercourse with a woman irrespective of her consent but particularly after she had clearly indicated “no” both verbally and physically. On both occasions, it was argued, the accused had used trust given to him by the complainants not to sexually assault them without

consent. He had clearly been told “no” to his conduct but he continued by overpowering the complainants. He used his hands to digitally penetrate the vagina of each complainant.

[18] In my opinion, consideration of the relevant circumstances demonstrates the Crown’s submission cannot be sustained. The two counts in the indictment are quite unrelated.

[19] The first offence is alleged to have occurred on 7 October 2017 and the second some nine months later on 7 July 2018 in relation to a different complainant. It is not suggested that the complainants were known to each other or had any connection to each other.

[20] The offences are alleged to have occurred at quite different locations and in quite different circumstances. The first was said to have occurred at Robertson Barracks where the accused was voluntarily alone with the complainant. The second was said to have occurred at an apartment where a group of people were staying. The accused and the complainant were not known to each other before meeting that night. They were not in the apartment alone together.

[21] The first is said to have involved consensual kissing and cuddling while laying on a bed followed by the complainant saying “no” when the accused sought to lift her dress. The second did not involve any preliminary consensual conduct. The complainant had gone to bed in another room and then been asked to move to the mattress, which she did. She lay on the

mattress facing the wall. It is alleged the accused then began to touch her and she said “no”.

[22] The first allegation on 7 October 2017 involved digital vaginal penetration while the second, on 7 July 2018, involved digital and oral vaginal penetration.

[23] The circumstances of the two alleged offences were separate and distinct and, in my opinion, the evidence in relation to those offences is not capable of significantly bearing on proof of the facts relied upon by the Crown. There is nothing that serves to link the two together. To paraphrase the High Court[7] the evidence goes no higher than to insinuate that the accused is alleged to have sexually offended against one complainant and nine months thereafter, in different circumstances, he is alleged to have offended again against the second complainant and, therefore, he was the kind of person who was more likely to have committed the offences. The tendency evidence does not meet the threshold requirement under s 97(1) of the Act.

[24] It is not necessary to address s 101(2) of the Act. However, had it been necessary to do so, I would have concluded that the probative value of the evidence did not substantially outweigh any prejudicial effect the evidence may have on the defendant.

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7 *McPhillamy v The Queen* (2018) 92 ALJR 1045 at [32].

[25] The evidence of the separate complainants is not cross admissible. Consistent with the submissions of the parties it follows that the severance application must succeed.
