CITATION:	*The Queen v Hoeksema* [2018] NTSC 59
PARTIES:	THE QUEEN
	v
	HOEKSEMA, Gregory
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21743368
DELIVERED ON:	20 August 2018
HEARING DATE:	20 August 2018
JUDGMENT OF:	Grant CJ

CATCHWORDS:

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

Evidence relating to two previous occasions on which the accused was found in possession of dangerous drugs – requirements of ss 97 and 101 of the *Evidence (National Uniform Legislation) Act* (NT) – no particularly high degree of specificity of conduct or high degree of similarity between the different occasions – no strong inference to be drawn – probative value would not substantially outweigh any prejudicial effect – evidence ruled inadmissible for tendency purposes.

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

Ainsworth v Burden [2005] NSWCA 174, *Doklu v The Queen* (2010) 208 A Crim R 333, *DSJ v The Queen; NS v The Queen* (2012) 215 A Crim R 349, *Gonzales v The*

Queen (2007) 178 A Crim R 232, *Hughes v The Queen* [2017] HCA 20, *Papakosmas v The Queen* (1999) 196 CLR 297, *R v Ford* (2009) 201 A Crim R 451, *R v BD* (1997) 94 A Crim R 131 at 139; *R v Lock* (1997) 91 A Crim R 356, *R v Zhang* (2005) 227 ALR 311, considered.

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

Evidence relating to two previous occasions on which the accused was found to be in possession of dangerous drugs – requirements of ss 98 and 101 of the *Evidence (National Uniform Legislation) Act* (NT) – whether evidence provided a sound basis for inferring that the accused was knowingly in possession of the methamphetamine on this occasion because of the improbability that each event would have occurred by coincidence – where the similar features in each episode not uncommon the issue is whether the combination of all those similar features in each event is sufficiently striking as to give them significant probative value – absence of striking or unusual similarities deprived the evidence of significant probative value – probative value would not substantially outweigh prejudicial effect in any event – evidence ruled inadmissible for coincidence purposes.

Evidence (National Uniform Legislation) Act 2011 (NT) ss 98, 101

DSJ v The Queen; NS v The Queen (2012) 215 A Crim R 349, *R v Fletcher* (2005) 156 A Crim R 308, *R v Mason* (2003) 140 A Crim R 274, *R v Zhang* (2005) 227 ALR 311, considered.

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – CONSCIOUSNESS OF GUILT

Whether evidence accused ran from police at the time of his apprehension is admissible to prove consciousness of guilt – probative evidence of flight – parties advanced different reasons for that flight – appropriate course to direct the jury that it is for them to decide on the whole of the evidence what inference is to be drawn from the accused's conduct – probative value of the evidence not outweighed by the danger of unfair prejudice – evidence of flight admissible to prove consciousness of guilt.

Evidence (National Uniform Legislation) Act 2011 (NT) ss 55, 135, 137

CV v Director of Public Prosecutions [2014] VSCA 58, *CW v The Queen* [2010] VSCA 288, *Quinlan v The Queen* (2006) 164 A Crim R 106, *R v Adam* (1999) 106 A Crim R 510, *R v Cook* [2004] NSWCCA 52, *R v Bridgman* (1980) 24 SASR 278, *R v Festa* (2000) 111 A Crim R 60, *R v Melrose* (1987) 30 A Crim R 332, *R v Nguyen* (2001) 118 A Crim R 479, *R v Power* (1996) 87 A Crim R 407, *R v Taranto* [1999] NSWCCA 396, *Steer v The Queen* (2008) 191 A Crim R 435, considered.

Heydon JD, "Can Lies Corroborate?" (1973) 89 LQR 552; Palmer A, "Guilt and the Consciousness of Guilt" (1997) 21 MULR 95; Williams CR, "Lies as Evidence" (2005) 26 ABR 313, considered.

REPRESENTATION:

Counsel:

Crown:	T Grealy
Accused:	JWM Adams

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Northern Territory Legal Aid Commission

Judgment category classification:	B
Judgment ID Number:	GRA1819
Number of pages:	18

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

The Queen v Hoeksema [2018] NTSC 59
No. 21743368

BETWEEN:

THE QUEEN

AND:

GREGORY HOEKSEMA

CORAM: GRANT CJ

EX TEMPORE REASONS FOR JUDGMENT

(Delivered 20 August 2018)

[1] The accused is charged by indictment dated 17 May 2018 with the supply of a commercial quantity of methamphetamine contrary to s 5(1) of the *Misuse of Drugs Act* (NT).

The Crown case

[2] The Crown case against the accused may be summarised briefly as follows. The accused acquired a quantity of methamphetamine from an unknown person with the intention of supplying it for profit. On 11 September 2017, the accused drove to the Community Corrections office in Palmerston for the purpose of reporting in accordance with the terms of an order suspending a sentence then in force.

[3] When the accused returned to his vehicle he was apprehended by police acting on information which led them to believe he was involved in the distribution of dangerous drugs. The vehicle was searched by police. A dark grey backpack located on the back seat of the vehicle was found to contain a set of digital scales and a number of empty clipseal bags. At that point the accused stood up from where he was sitting on the kerb and ran from police. Police gave chase and captured the accused near the Palmerston Post Office.

[4] The search of the accused's vehicle then proceeded. A black neoprene pouch located in the driver foot well was found to contain approximately 56 g of methamphetamine. A plastic tub located in the centre console was found to contain 6.1 g of methamphetamine, and a cigarette packet found in the same location contained a clipseal bag holding 3.15 g of methamphetamine.

[5] The accused was then arrested and searched. Australian currency in the amount of $1,450 was found in his right pants pocket.

[6] Police then obtained a warrant for the search of the accused's residence in Leanyer. During that search they found a glass ice pipe, a safe containing $4,660 in Australian currency, and two ledgers containing names and references to drug sale amounts.

Preliminary issues

[7] There are three evidentiary issues which require determination before evidence is called in the trial proper. They are:

(a) whether tendency evidence which the Crown seeks to adduce is admissible for that purpose;

(b) whether coincidence evidence which the Crown seeks to adduce is admissible for that purpose; and

(c) whether evidence that the accused ran from police at the time of his apprehension is admissible to prove consciousness of guilt.

Tendency evidence

[8] 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 possess dangerous drugs, to use vehicles to transport dangerous drugs, and to have a willingness to possess dangerous drugs. The notice provides that the evidence relates to the questions whether the accused knowingly possessed the methamphetamine the subject of the charge; whether there is a reasonable possibility of an innocent explanation for the presence of the accused's DNA on the packaging containing the methamphetamine; and whether there is a reasonable possibility of an innocent explanation for the cash found in the accused's possession.

[9] The evidence sought to be adduced relates to two previous occasions on which the accused was found to be in possession of dangerous drugs. Those occasions may be summarised as follows:

(a) on 17 January 2013 police executed a search warrant at the accused's residence in Adelaide River and he was found to be in possession of 7.5 g of methamphetamine, 490 g of cannabis, boxes of clipseal bags, sets of scales and an IOU recording drug transactions; and

(b) on 6 January 2016 the accused's vehicle was apprehended in Coconut Grove and he was found to be in possession of 0.91 g of methamphetamine, 871.4 g of cannabis, two boxes of clipseal bags and an ice pipe.

[10] Following the first incident, the accused pleaded guilty to possessing a trafficable quantity of methamphetamine and possessing a trafficable quantity of cannabis. Following the second incident, the accused pleaded guilty to possessing methamphetamine in a public place and possessing a commercial quantity of cannabis. In relation to that later offending, on 15 September 2016 this Court sentenced the accused to a total effective period of imprisonment of two years and three months which was suspended on a COMMIT sentencing disposition after the accused had served 49 days in prison.

[11] Section 97 of the ENULA provides for the admissibility of tendency evidence subject to the requirements of notice and significant probative value. The evidence will have "significant probative value" if it could rationally affect the assessment of the probability of the existence of a fact in issue in some important fashion.[1]

[12] The tendency evidence sought to be adduced in this case must be assessed as having a high level of cogency given the fact that it sustained the convictions described above. However, the inference of a "tendency" to possess and be willing to possess commercial quantities of methamphetamine which can be drawn from that evidence is not particularly strong. It discloses two episodes over the course of the past five years in which the accused has been found to be in the possession of dangerous drugs. A significant period of time elapsed between the first and second episodes. There is no particularly high degree of specificity of conduct, or high degree of similarity between the different occasions, beyond the fact that they involve the possession of dangerous drugs.

[13] That one of those instances of possession involved a motor vehicle, as does the offence presently charged, suggests nothing more than that drugs of this kind are commonly, if not usually, secreted in residences and motor vehicles. The same may be said of the presence of the clip

---

1 *R v Zhang* (2005) 227 ALR 311 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.

seal bags in the presence of other drugs and related paraphernalia. These are commonplace or unremarkable circumstances in this type of offending.

[14] Although it is not necessary for the Crown to establish a pattern of conduct or *modus operandi*, a degree of specificity or similarity, both between the episodes involved in the previous offending and between those acts and the facts alleged in the present charge, will elevate both the strength of the inference and the probative value of the evidence. There is no commonality in terms of the associates or accomplices involved in the different episodes, or in the persons or categories of persons to who drugs were supplied or intended to be supplied, or in the commercial arrangements relating to that possession or supply. While it may be accepted that the evidence concerning the episodes in 2013 and 2016 would no doubt establish that he has previously been convicted for the possession of methamphetamine, its capacity to support the inference of what might properly be described as a tendency to do so is less compelling.

[15] Even if it is accepted that the inference can be sustained, the second question is whether that tendency makes it more probable that the accused knowingly possessed the methamphetamine on this occasion.[2] In this case, the tendency, if proved, would not provide any particular

2 *Hughes v The Queen* [2017] HCA 20 at [40]-[41].

support for the contention that the accused knowingly possessed the methamphetamine on this occasion beyond the bare fact that he has previously done so on other occasions in circumstances involving some indicia of supply activity. That support is predicated on bare propensity reasoning. For that reason, the tendency evidence sought to be adduced by the Crown does not have significant probative value for tendency purposes.

[16] Even if it was accepted that the tendency evidence had some important or consequential value, it would not "substantially outweigh" any prejudicial effect within the meaning of s 101 of the ENULA. There is a real risk that the evidence would be misused by the jury in some unfair way.[3] In these circumstances, the risk of unfairness is that a jury would reason that the accused knowingly possessed the methamphetamine on this occasion because he had done so in the past, where the basis for drawing such an inference on tendency grounds is relatively weak. While it may be accepted that the risk a jury may use the evidence improperly can ordinarily be accommodated by suitable directions, that acceptance presupposes that the probative value of the evidence permits something other than the simple conclusion that the accused is the sort of person who is more likely to commit this kind of offence. In this case it does not.

---

3 *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].

The coincidence evidence

[17] The Crown has also served notice pursuant to s 98(1) of the ENULA that it intends to adduce coincidence evidence. That is, evidence that two or more events occurred in order to prove that the accused did a particular act or had a particular state of mind on the basis that it is improbable that the events occurred coincidentally having regard to their similarities and/or circumstances. The evidence is the same as that identified in the tendency notice. That evidence is said to be probative in proof of the fact that the accused had a willingness to possess and did in fact possess the methamphetamine as charged, and used his vehicle to transport that methamphetamine. It is also said to relate to the subsidiary facts concerning the reasonable possibility of an innocent explanation for the DNA on the packaging and the possession of the cash.

[18] The requirements of notice and "significant probative value" are the same as those imposed on the admission of tendency evidence. The essence of the Crown contention in this respect is that the similarities between the episodes of possession in 2013 and 2016 and the episode now charged, or the similarities between the circumstances in which each event occurred, provide a sound basis for inferring that the accused was knowingly in possession of the methamphetamine on this occasion because of the improbability that each event would have occurred by coincidence.

[19] In *R v Zhang*[4] the New South Wales Court of Criminal Appeal considered circumstances in which the appellant had been convicted of attempting to import prohibited drugs found in packets purporting to contain food and addressed to her foodstuff importing business, and of possession of prohibited drugs in a package inside a bag in her apartment which she claimed she had been asked to mind. The only issue in the trial was whether she was aware that the packets attempted to be imported and the package inside her apartment contained prohibited drugs. The Crown sought to establish that fact by the improbability of the coincidental presence, in the appellant's business premises on two occasions and close in time, of large quantities of prohibited drugs without her knowledge.

[20] The majority held that the processes by which the tender of coincidence evidence is to be determined were[5]:

(1) coincidence evidence is not to be admitted unless the trial judge is satisfied that:

(a) the two or more events are substantially and relevantly similar or that the circumstances in which they are alleged to have occurred are substantially similar, and

---

4 (2005) 227 ALR 311.

5 *R v Zhang* (2005) 227 ALR 311 at [139]-[140].

(b) the evidence would, either by itself or having regard to other evidence already adduced or anticipated, have significant probative value,

(2) probative value is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue;

(3) the actual probative value to be assigned to any item of evidence is a question for the jury;

(4) the probative value actually to be assigned to any item of evidence cannot finally be determined until all of the evidence in the case is complete; and

(5) the task of the judge in determining whether to admit evidence tendered as coincidence evidence is therefore essentially an evaluative and predictive one.

[21] That approach was subsequently confirmed by the unanimous decision of a five-judge bench of the Court of Appeal.[6] In the application of that formulation, the relevant questions are whether the three events and/or the circumstances in which they occurred have the relevant similarities required; and, in relation to the episodes in 2013 and 2016, whether the evidence as to the accused's admitted state of knowledge

6 *DSJ v The Queen; NS v The Queen* (2012) 215 A Crim R 349.

during those episodes has significant probative value in establishing his state of knowledge in relation to the offence charged.

[22] It may be accepted for these purposes that the three events and the circumstances in which they occurred have a degree of similarity in that all involve the possession of methamphetamine, albeit in quite different quantities, and the 2016 episode involved that possession in a motor vehicle. It may also be accepted that "striking" similarity is not always required and the requisite probative value may arise in different ways. However, in the assessment of probative value such matters as striking similarities and underlying unity, system or pattern may guide the evaluation of whether the evidence is capable of having significant probative value.[7] Where, as in this case, the similar features in each episode might be explained away as not being uncommon, and similarity is the basis for the assertion of improbability, the issue must be whether the combination of all those similar features in each event is sufficiently striking as to give them significant probative value.[8]

[23] Here, there is no doubt that the accused was present on all three occasions. There is also no doubt that there was methamphetamine present on all three occasions. Ranged against that, there is no temporal proximity between the three events or any of them; there is no circumstantial similarity beyond the common elements already

7 *R v Fletcher* (2005) 156 A Crim R 308 at [33], [60].

8 *R v Mason* (2003) 140 A Crim R 274 at [40].

described in the analysis of the tendency argument; there was no unusual technique employed; and there was no commonality in terms of the associates, purchasers or commercial arrangements. That absence of striking or unusual similarities deprives the evidence of significant probative value in the absence of some other basis.[9] None has been suggested.

[24] It cannot be said in these circumstances that it is improbable that the events in 2013, 2016 and 2017 occurred coincidentally having regard to their similarities and/or circumstances. Even if I am wrong in that assessment, such probative value as the evidence may have does not substantially outweigh its prejudicial effect for the same general reasons discussed in the context of the tendency evidence.

Consciousness of guilt

[25] I turn then to the question whether evidence that the accused ran from police at the time of his apprehension is admissible to prove consciousness of guilt of the offence with which he is charged. Post-offence conduct on the part of an accused which is said to demonstrate a consciousness of guilt of a charged offence, including fleeing the scene of an incident, will almost inevitably possess a level of ambiguity.[10] However, the defence asserts in this case that the

9 *CW v The Queen* [2010] VSCA 288; *CV v Director of Public Prosecutions* [2014] VSCA 58.

10 See generally Heydon JD, "Can Lies Corroborate?" (1973) 89 LQR 552; Palmer A, "Guilt and the Consciousness of Guilt" (1997) 21 MULR 95; Williams CR, "Lies as Evidence" (2005) 26 ABR 313.

evidence of the accused's flight, even if accepted by the jury, could not rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue, and so does not satisfy the test of relevance stipulated by s 55 of the ENULA. The fact in issue in this case is, in broad terms, whether the accused knew of the presence of the methamphetamine in the vehicle.

[26] The defence assertion is put on two bases. The first is that the accused's flight might more plausibly be attributed to panic or emotional reaction. Other possible explanations posited include prior dealings with police and/or the fact that he had just visited the office of Community Corrections in relation to a sentence previously imposed for drug-related offending. The second basis on which the assertion is put is that his flight could have no purpose related to the methamphetamine in the car because he had already been seen by police and apprehended at the vehicle, he was subject to electronic monitoring, and he was known to police through previous dealings.

[27] There is no doubt that the evidence which the Crown intends to call, if accepted by the jury, is properly characterised as "flight" for these purposes. This is not a case in which the evidence would be deficient or equivocal in establishing that there was any flight on the part of the accused.[11] That being so, the threshold question of relevance is to be

11 See, for example, *R v Adam* (1999) 106 A Crim R 510 at 523 [62].

answered by asking whether the evidence is properly open to be used by the jury for the purpose of drawing an inference as to the state of the accused's mind at the relevant time, having regard to such matters as the circumstances in which the conduct occurred and the issue in proof of which the evidence is tendered.[12] In this case, the presence of the methamphetamine in the vehicle and the apprehension by police found a possible rational connection between the accused's flight and the assessment of the fact in issue.

[28] In those circumstances, it will properly be for the jury to decide, on the basis of the evidence as a whole, whether the post-offence conduct of the accused is related to the crime before them or attributable to some other reason. Where there is probative evidence of flight, and the parties advance different reasons for that flight, the appropriate course is to direct the jury that it is for them to decide on the whole of the evidence relevant to the charge what inference is to be drawn from the accused's conduct.[13] If the jury determines to infer a consciousness of guilt in the accused for the offence alleged, they will have done so following direction that they must be satisfied beyond reasonable doubt of such an inference and that there is no other plausible explanation for the conduct.

---

12 See, for example, *R v Nguyen* (2001) 118 A Crim R 479 at 489 [20]; *Quinlan v The Queen* (2006) 164 A Crim R 106; and *Steer v The Queen* (2008) 191 A Crim R 435.

13 See, for example, *R v Melrose* (1987) 30 A Crim R 332 at 338-339; *R v Power* (1996) 87 A Crim R 407 at 409; *R v Festa* (2000) 111 A Crim R 60 at 66 [14].

[29] That direction will include a number of components. First, the jury must be satisfied that there was deliberate flight on the part of the accused. Secondly, the jury must be satisfied that the flight relates to the material issue in the case, being knowledge of the presence of the methamphetamine in the car. Thirdly, the jury must be satisfied that the reason for the accused's flight was because he feared that the presence of the methamphetamine might reveal his guilt in respect of the charge he now faces. Finally, the jury will be directed that people do not always act rationally, and that conduct of this sort may sometimes be attributable to other matters quite distinct from consciousness of guilt, such as panic, the desire to escape an unjust accusation, a desire to protect some other person, or a desire to avoid a consequence unrelated to the offence.

[30] It falls then to consider whether the evidence may or must be excluded in the application of ss 135 and/or 137 of the ENULA. There is no basis on which to suppose that the evidence might be misleading or confusing or cause or result in undue waste of time. The single issue is whether the probative value of the evidence is outweighed by the danger of unfair prejudice. The potential danger arising in this case is that if the evidence is admitted for the Crown purpose of establishing consciousness of guilt, the accused must then decide whether to give

evidence providing an explanation for his conduct which might expose him as a person with a criminal record.[14]

[31] The accused has not sought to give evidence during the course of the *voir dire* hearing to the effect that his flight was actually and subjectively referable to something other than consciousness of guilt. Rather, the potential for unfair prejudice lies in the assertion that on an objective assessment there are alternative and plausible explanations for the accused's conduct and the giving of those explanations in evidence might expose his criminal record to the jury, and that the flight could have had no operative purpose in the circumstances. As already described above, those alternative explanations include panic, prior dealings with police and/or the fact that he had just visited the office of Community Corrections in relation to a sentence previously imposed for drug-related offending.

[32] The potential for unfair prejudice must be assessed in circumstances where the court has no direct evidence from the accused that one of these alternative explanations was in fact operating on his mind at the time. The possible explanation that the accused's flight was attributable to panic would not require him to expose his criminal record. The fact that a potentially credible explanation is advanced is not of itself sufficient to render the evidence inadmissible.[15] Similarly,

14 See, for example, *R v Cook* [2004] NSWCCA 52.

15 See, for example, *R v Power* (1996) 87 A Crim R 407.

an explanation involving the desire to escape an unjust accusation or a desire to protect some other person would not require the accused to expose his criminal record. There is no suggestion made that the flight was motivated by a desire to avoid a consequence unrelated to the offence.

[33] That leaves the possibility that the accused's explanation might involve his prior dealings with police or the fact that he had just visited the office of Community Corrections. In the absence of evidence from the accused, it is difficult to see how that latter matter might afford some plausible explanation. The accused had reported as required, and there is nothing arising out of the circumstances of his visit to Community Corrections which would suggest he harboured any concern that the sentence held in suspense would be restored and so rationally explain his flight.[16] So far as the accused's prior dealings with police are concerned, the explanation could only be that he had previously been apprehended by police for alleged or proven drug-related activity and ran away despite the fact that he had no reason to believe there were drugs in his vehicle on this occasion. Again, in the absence of evidence from the accused, that suggestion is both speculative and implausible.

16 See *R v Bridgman* (1980) 24 SASR 278 dealing with an accused who absconded from bail due to an apprehension that parole would be revoked.

[34] This is also not a case in which the evidence or circumstances disclosed that the accused ran because he was wanted by police in connection with a criminal matter unrelated to the offence with which he is charged[17], the explanation of which would necessarily expose him as a person with a criminal record for similar offending.[18]

[35] The utility of the flight is irrelevant to the consideration of probative value and prejudice. The fact that the accused had been identified at the scene and was subject to electronic monitoring has no necessary bearing on the question whether the flight was motivated by consciousness of guilt. In these circumstances, the probative value of the evidence of flight in the Crown case is not outweighed by the danger of unfair prejudice to the accused.

Rulings

[36] The rulings on the preliminary issues are:-

(a) The evidence identified in the Crown's tendency notice is inadmissible for tendency purposes.

(b) The evidence identified in the Crown's coincidence notice is inadmissible for coincidence purposes.

(c) The evidence that the accused ran from police at the time of his apprehension is admissible to prove consciousness of guilt.

———————————————————

17 Cf *R v Taranto* [1999] NSWCCA 396.

18 Cf *R v Cook* [2004] NSWCCA 52.