R v Altomonte [2015] NTSC 57

PARTIES:	THE QUEEN v ALTOMONTE, John
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:	BARR J

CATCHWORDS:

CRIMINAL LAW – Voir dire – evidence – admissibility of tendency evidence – gross indecency and unlawful assault – two complainants – Crown alleges tendency of the accused to engage in inappropriate sexual touching of his massage clients and having a sexual interest in those clients upon which he was prepared to act – no reasonable possibility of concoction or contamination – probative value of the proposed tendency evidence substantially outweighs any prejudicial effect it may have – evidence of the two complainants cross admissible – tendency evidence admissible.

Criminal Code Act 1983 (NT), s 188(2) and s 192.

Evidence (National Uniform Evidence) Act 2011 (NT) s 97 and s 101(2).

BP v R [2010] NSWCCA 303; *R v OGD [No 2]* (2000) 50 NSWLR 433, applied.

GBF v The Queen [2010] VSCA 135, *R v Colby* [1999] NSWCCA 261; *R v Ford* [2009] NSWCCA 306; (2009) 201 A Crim R 451; *The Queen v JRW* [2014] NTSC 52, followed.

R v Cittadini (2008) 189 A Crim R 492; *R v Harker* [2004] NSWCCA 472, referred to.

REPRESENTATION:

Counsel:

Prosecution:	M Nathan
Defence:	T Evers

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Defence:	

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

R v Altomonte [2015] NTSC 57
No. 21338840

BETWEEN:

THE QUEEN

AND:

JOHN ALTOMONTE

CORAM: BARR J

REASONS FOR DECISION ON VOIR DIRE

(Delivered 3 February 2015)

[1] At the commencement of the voir dire hearing the accused was arraigned on three counts of gross indecency and in the alternative three counts of unlawful assault alleged to have been committed against DS, CH and another complainant.

[2] The intention of the Crown was that the accused should stand trial on the six counts, involving three complainants, and that four other women should give tendency evidence, as to the tendency of the accused to engage in inappropriate sexual touching of his massage clients and as to his having a sexual interest in his massage clients upon which he was prepared to act.

[3] By the time counsel made their closing submissions, however, the learned Crown prosecutor had reviewed the Crown's position and had decided that

the accused should stand trial (initially at least) on counts of gross indecency and unlawful assault against DS and CH only.[1] The Crown would not seek to lead tendency evidence from the four other women referred to in the previous paragraph.

[4] On 19 December 2014, I ruled that each of DS and CH could give tendency evidence at the trial of the charges arising from the complaint of the other, and that the evidence of DS and CH was cross admissible. I indicated that I would provide reasons, and I now do so. These reasons are published to the parties in confidence, pending the outcome of the trial, which is now listed for early June 2015.

[5] The submissions of both counsel at the preliminary hearing were ultimately directed at the issue as to whether there was a reasonable possibility of concoction between DS and CH which, if not excluded by the Crown, would mean that neither DS or CH could give tendency evidence at the trial of the charges against the accused arising from the complaint of the other, and thus there could not be a joint trial of the charges arising from the complaints of both DS and CH.[2]

Tendency evidence

[6] Tendency evidence, even if relevant, is inadmissible unless the court considers that the evidence either by itself or having regard to other

[1] Counts 1, 2, 5 and 6 in the indictment.
[2] A separate issue raised by defence counsel was whether the evidence of CH was contaminated by conversations between CH and another former client of the accused, CT.

evidence to be adduced, has significant probative value.[3] In a criminal case, even if the court is so satisfied, the evidence must be rejected unless its probative value substantially outweighs its prejudicial effect.[4]

[7] Tendency evidence is placed before the jury as evidence tending to prove the guilt of the accused. The jury is asked to reason by inference that, because the accused acted in a particular way on some other occasion or occasions, he acted in the same way on the occasion the subject of the charge or charges at trial.[5] Evidence that an accused had a particular tendency is adduced in order to render more probable the proposition that, on the particular occasion relevant to the proceedings, the accused acted in a particular way (or had a particular state of mind); that is, to provide the foundation for an inference to that effect.[6] In *GBF v The Queen*,[7] the Victorian Court of Appeal explained the use of tendency evidence as follows:

> By alleging tendency, the Crown seeks to establish that the applicant engaged in a pattern of conduct or behaviour emblematic of a tendency to act in a particular way, and that his tendency to so act makes it more likely that he acted in the way in which the complainants allege he did in relation to the offences charged.

[8] Where there is a reasonable possibility of concoction of the evidence of a proposed tendency witness, and the Crown fails to exclude that possibility, the evidence must be excluded. The reason is that concoction deprives the

[3] *Evidence (National Uniform Legislation) Act 2011*, s 97.
[4] *Evidence (National Uniform Legislation) Act 2011*, s 101(2).
[5] *R v Harker* [2004] NSWCCA 472 at [57], per Howie J; Santow JA and Bell J agreeing.
[6] *R v Cittadini* (2008) 189 A Crim R 492 at [22]-[23] per Simpson J; McClellan CJ at CL agreeing.

tendency evidence of its significant probative value.[8] Moreover, where the Crown fails to exclude the reasonable possibility of concoction, the probative value of the evidence of the tendency witness would be outweighed by its prejudicial effect.[9]

[9] It is not the risk of any contamination whatsoever which necessarily requires the exclusion of tendency evidence; it must be a risk of contamination going to the substance of the evidence and not merely to incidental details of no materiality. The Crown must therefore exclude "a real chance of contamination going to the substance of the evidence" to enable the tendency evidence to be admitted.[10]

[10] In the present case, neither DS nor CH knew one another. On the evidence before me, there was no relationship between them, and no opportunity to jointly concoct.

Crown case counts 1 and 2 - DS

[11] The Crown alleges that, in early January 2013, DS attended a massage appointment with the accused. During the massage, while she was lying on her stomach, the accused without warning pulled her underpants down to her mid thighs, exposing her buttocks. He then massaged her buttock cheeks. The accused then pulled her underpants up high, wedging them between her buttock cheeks, and commenced massaging high on her inner thighs. The

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[7] *GBF v The Queen* [2010] VSCA 135 at [20], per the Court (Nettle and Harper JJA and Hansen AJA).
[8] *R v Colby* [1999] NSWCCA 261 at [107], per Mason P; Grove and Dunford JJ agreeing.
[9] *R v OGD [No 2]* (2000) 50 NSWLR 433 at 447 [77].

accused also held his hands in certain positions for a long period of time, and while he was massaging her upper thighs, his hands went high up and close to her vagina. The Crown also alleges that during the massage, while DS was lying on her back, the accused bent down and positioned his mouth close to her belly button/pubic area, approximately one to two centimetres away from her skin, and that he then started to gently blow air onto her stomach and down towards her vagina for a period of approximately one to two minutes.

[12] The Crown further alleges that, in early February 2013, DS attended a remedial massage appointment with the accused. During that session the accused pulled her underpants down exposing her buttock cheeks without asking permission. He then pulled her underpants up high into her buttock cheeks and again massaged her high inner thighs. During that particular part of the massage, the accused's fingertips brushed her vagina on the outside of her underpants. The accused then paused, with his hand remaining in DS's vagina area, with his fingertips touching her vagina on the outside of her underpants. This occurred on two separate occasions with a pause in between of about 20 to 30 seconds.

Crown case counts 5 and 6 - CH

[13] The Crown alleges that, on 31 July 2013, CH attended a remedial massage appointment with the accused. Based on her evidence, this was the last of

[10] *BP v R* [2010] NSWCCA 303 at [123], per Hodgson JA; Price and Fullerton JJ agreeing.

four massages which CH received.[11] During the massage, while CH was lying on her stomach, the accused pulled her underpants completely to one side, exposing her vagina. He then continued massaging her. In the course of that massage the back of his hand and fingers brushed against her vagina, in between her legs. This brushing occurred several times as the accused massaged each of the victim's legs.

[14] The Crown alleges that the accused then asked the victim to roll over, onto her back. He then began to massage her shoulders. In the course of this part of the massage, he reached down with his hands and began running them around her breasts. He ran his hands three or four times down the sides of each breast in a sweeping motion and then brought his hands up over the top of the breasts resting one hand on each breast for a very brief moment. This occurred three or four times.

Tendency evidence notices

[15] The Crown served a notice of intention to adduce tendency evidence[12] to prove that the accused had a tendency (whether because of his character or otherwise) to act in a particular way or to have a particular state of mind.[13]

[16] In the notice, the Crown specified the alleged "particular way" as follows:

> Engage in inappropriate sexual touching of females who were clients of his massage business.

[11] Exhibit P1, Tab 2, Statutory Declaration made 17 October 2013, par 16. CH alleges that, as a result of what took place during the 31 July massage, CH did not return for any further massage sessions with the accused.
[12] Dated 11 September 2014.
[13] Section 97(1) *Evidence (National Uniform Evidence) Act* (NT).

[17] The Crown also specified the alleged "particular state of mind" as:

> A sexual interest in female clients upon which he is prepared to act.

[18] The Crown alleges a similar modus operandi in the way in which the accused accessed victims through his massage business, developed a professional (or quasi-professional) relationship with them by conducting initial interviews, requesting that they fill out client history forms etc. The Crown alleges that, having developed a relationship of trust, the accused abused that relationship for the purpose of sexually assaulting the victims.

[19] The complaint evidence[14] tendered on the voir dire shows that, although the respective massage experiences of DS and CH were not identical, there were significant similarities, which I refer to in paragraphs [20] to [23] below.

[20] Prior to or during the massage, the accused did not discuss with the women the specific intimate parts or areas of their bodies which he intended to massage, and did not seek their consent to do so.

[21] During the massage, the accused pulled both women's underpants down just below their buttocks, exposing their buttocks completely.

[22] The accused massaged the high inner thighs, right up to the vaginal area, of both women. This happened to DS during her first session (inner thigh, right up to the groin, but without actually touching her vagina) and to CH during

[14] Exhibit P1, Tab 1, Transcript of recorded interview between DS and investigating police, 14 August 2013; Exhibit P1, Tab 2, Statutory Declaration of CH made 17 October 2013.

her last session (with his hands and/or fingers actually brushing against her vagina).

[23] The accused spoke to each woman, post-massage, hinting at a possible reason for massage of the intimate areas. He told DS after her first massage that he needed to continue to "work on" her thighs and inner thighs. At CH's third (second last) massage, the accused told her that her hamstrings were very tight.

[24] In summary, each of DS and CH made similar allegations about the accused, in circumstances where there was no reasonable possibility of joint concoction.

[25] The Crown will ultimately ask the jury to (1) find that the accused had a tendency to have a sexual interest in the female clients of his massage practice, and that he was prepared to act upon that sexual interest by engaging in non-consensual sexual touching of those female clients, thereby taking advantage of the relationship of trust and confidence between him and them; and (2) to then use that tendency evidence to infer that the events described by each of DS and CH did occur.[15]

[26] The Crown also wishes to rely on the tendency evidence to rebut any suggestion of accidental touching of the victims' intimate areas by the accused. The Crown contends that the evidence has clear significant probative value in that respect as well.

Defence contentions

[27] Counsel for the accused contended that the evidence of CH was contaminated by conversations between CH and another former client of the accused, CT.

[28] CH stated in her Statutory Declaration made 17 October 2013:

> I have spoken to other women who worked at the gym with me who had similar experiences with John – they are CT and JH.

[29] CT provided a witness statement to police on 8 October 2013 in which she said that, after the accused had been arrested, she phoned CH and another young woman JH, and that "the three of us had some long conversations over it maybe every day for a week … about stuff and just about the whole situation 'cause the three of us were really upset".[16]

[30] CH was extensively cross-examined on the voir dire as to the use by her of the words "similar experiences with John", and the implication in those words that she had been informed by CT of the experience(s) which CT had had with the accused, in order for CH to be able to say that those experiences were similar to those which she had had. CH said:

> We had discussed what had happened in the massages to the point of did you feel the massage had crossed the line, do you need to speak to the police.[17]

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[15] Consistent with the use of tendency evidence explained in [7] above.
[16] Exhibit P1, Tab 4, Transcript page 25.
[17] Transcript 03/11/2014, p 84.2.

[31] CH said that she had already formed her personal view after the massage where she felt that the accused had crossed the line, that is, after the massage of 31 July described in [13] and [14] above, where she felt violated by the accused's behaviour and subsequently did not have anything more to do with him. CH denied the statement of CT that she, JH and CT had long conversations about the allegations on a daily basis for about a week. Significantly, if her evidence is accepted, she clarified that she always spoke to those persons separately.[18] Moreover, CH said that her conversation with CT was more to do with "the events of the arrest [of the accused] and what was happening at the University".[19]

[32] The Crown contends that the evidence of CH was not contaminated by anything which may have been said to her by CT. More importantly for her ability to give tendency evidence, the Crown contends that CH was at all times effectively quarantined from DS.

[33] I accept the latter contention. As to the former, the suggested contamination of the evidence of CH by a person other than DS (and with no connection to DS) is an ordinary matter of credit and does not affect the ability of CH to give tendency evidence at the trial of the charges arising from the complaint of DS. It is the risk of joint concoction between a complainant and a tendency witness which deprives the tendency evidence of significant probative value. It may be that defence counsel will seek to attack the credit

[18] Transcript 03/11/2014, p 89.5, confirmed by CT at transcript 04/11/2014, p 96.5.
[19] Transcript 03/11/2014, p 88.7.

of CH at trial, in order to discredit her as a witness in the prosecution of charges against the accused arising from her complaint, and/or to discredit her as a tendency witness in the prosecution of charges against the accused arising from the complaint of DS. Those matters will be matters for the jury to consider and determine. In the circumstances, it is not appropriate that I make credit findings in relation to CH.

Conclusion

[34] I am satisfied that the Crown has excluded the reasonable possibility of joint concoction between DS and CH.

[35] I am satisfied that the Crown has complied or at least substantially complied with the requirement of s 97(1)(a) *Evidence (National Uniform Legislation) Act 2011* in relation to the proposed tendency evidence of DS and CH. Ultimately, it has not been contended otherwise.

[36] I am satisfied for the purposes of s 97(1)(b) of the Act that the tendency evidence of DS and CH has significant probative value, both by itself and having regard to other evidence adduced or likely to be adduced by the Crown in the prosecution of the accused. The essence of the alleged tendency was a tendency to commit a particular kind of act (inappropriate sexual touching) in particular circumstances, namely in the course of massage sessions with trusting clients.

[37] I acknowledge that to attribute significant probative value to the tendency evidence of DS and CH is to recognise a tendency on the basis of two

massage sessions undergone by DS and one particular massage session (out of four) undergone by CH. Nonetheless, I note that the Victorian Court of Appeal in *GBF v The Queen* recognised a tendency on the basis of "only two incidents of its manifestation", explaining its decision as follows:

> …. as logic dictates, and the common law similar fact cases confirm, an accused may have a tendency to engage in a particular kind of criminal behaviour which he or she has demonstrated on only very few occasions and yet which may still be significantly probative of the fact that he or she has so acted on a further occasion. It depends upon the nature of the tendency. … [20]

[38] In my opinion, the evidence of DS in relation to the offences charged as counts 1 and 2 would be significantly probative of the offence or offences charged as counts 5 and 6. Further, the evidence of CH in relation to the offences charged as counts 5 and 6 would be significantly probative of the offences charged as counts 1 and 2.

[39] As was recently explained by Riley CJ in *The Queen v JRW*,[21] there has been a difference in approach between the New South Wales Court of Criminal Appeal and the Victorian Court of Appeal as to the extent to which tendency evidence must possess common or similar features with the conduct charged so as to be significantly probative of the offence or offences charged. In the facts of the present case, as in *The Queen v JRW*, it is not necessary to choose between the lines of authority of those interstate appellate courts, because there are significant similarities in acts and circumstances. In any

[20] *GBF v The Queen* [2010] VSCA 135 at [34].
[21] *The Queen v JRW* [2014] NTSC 52 at [26] - [28].

event, however, I am not sure that the differences between the lines of authority are as marked as they might at first seem.

[40] The Victorian Court of Appeal in *GBF v The Queen* stated that "one is loath to accept that offending on one occasion is significantly probative of offending on another unless there are significant or remarkable similarities as between previous acts and the act in question, or as between the circumstances in which previous acts were committed and the circumstances in which the act in question was committed or, more compendiously, unless the evidence reveals a pattern of conduct, *modus operandi* or some other underlying unity, which logically implies that, because the accused committed the previous acts or committed them in particular circumstances, he or she is likely to have committed the act in issue."[22]

[41] However, notwithstanding the statement extracted in the previous paragraph, the Victorian Court of Appeal in *GBF v The Queen* agreed with the observation of Campbell JA of the New South Wales Court of Criminal Appeal in *R v Ford*, set out below:[23]

> In my view, there is no need for there to be "a striking pattern of similarity between the incidents". All that is necessary is that the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged.

[22] *GBF v The Queen* [2010] VSCA 135 at [27].
[23] *R v Ford* [2009] NSWCCA 306; (2009) 201 A Crim R 451 at [125].

[42] In explaining its agreement with the stated proposition, the Victorian Court of Appeal made reference to the context in which Campbell JA had been speaking in *R v Ford*:

> In *Ford* the Court was concerned with a case in which the tendency sought to be proved was one to act in a particular way, namely, sexually to assault young women who: (1) had stayed over at the accused's house after attending a party there, (2) had consumed a significant amount of alcohol, (3) were asleep, and (4) where there was a risk of the applicant's offending being discovered by others. In effect, it was a case in which the evidence revealed a *modus operandi* that was substantially probative of the offence alleged. One argument put against that conclusion was that the sexual offences alleged were unremarkable, and thus lacking such striking similarity as to make offending on one occasion probative of offending on the other. Campbell JA rightly rejected the argument on the basis that the *modus operandi* was capable in itself of being sufficiently probative of the offending in issue. … the evidence established a tendency on the part of the accused 'to do something unusual, that is to indecently assault women who are asleep at his place after having attended a party there'.[24]

[43] In brief, it would appear that the generality or, conversely, the specificity of the alleged tendency sought to be proven may vary in each case. However, as a general and obvious proposition, it is necessary for a judge to carefully consider the proposed tendency evidence – including the particular acts alleged and the particular circumstances in which the alleged acts were committed – to determine whether those matters significantly increase the probability that the accused committed the acts charged.[25] For the purposes of this ruling, further review and analysis of the decisions of interstate intermediate courts of appeal is unnecessary.

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[24] *R v Ford* [2009] NSWCCA 306; (2009) 201 A Crim R 451 at [32].

[44] As a further matter, I am satisfied for the purposes of s 101(2) of the Act that the probative value of the proposed tendency evidence (which I assess as significant) substantially outweighs any prejudicial effect it may have. I remind myself that "prejudicial effect" does not mean an increased likelihood of conviction, but rather refers to unfairness at trial. As to potential unfairness, the members of the jury at trial would be directed that they would need to be satisfied beyond reasonable doubt as to the truth of the tendency evidence and, from the act or acts that are proved beyond reasonable doubt, that the accused had the tendency alleged by the Crown. If not, the jury would be directed to reject the evidence as tendency evidence. The jury would also be directed that they should not reason that, because the accused had committed one crime or act of misconduct, he is generally a person of bad character and must therefore have committed the offence(s) charged. The evidence must be such as to disclose a tendency which must be established beyond reasonable doubt.

[45] In my view, an appropriate direction or set of directions, in conformity with what is set out in the previous paragraph (and supplemented as necessary by further or additional directions following evidence given at trial) would eliminate or minimize any risk of an unfair trial.

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[25] See s 97(1)(b) *Evidence (National Uniform Legislation) Act* and the reference to "significant probative value". See also definition of "probative value" in the Dictionary to the Act.

[46] It follows that DS and CH may each give tendency evidence at the trial of the charges against the accused arising from the complaint of the other. I have ruled that the evidence of DS and CH is cross admissible.

[47] It also follows that there may be one trial of the charges arising from the complaints of both DS and CH. I confirm that the trial is listed for eight (8) days to commence on Monday, 1 June 2015.
