

*The Queen v Gjonaj* [2017] NTSC 15

PARTIES: THE QUEEN

v

GJONAJ, Gjergj

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING TERRITORY  
JURISDICTION

FILE NO: 21613773

DELIVERED: 28 FEBRUARY 2017

HEARING DATE: 2 FEBRUARY 2017

JUDGMENT OF: KELLY J

**REPRESENTATION:**

*Counsel:*

The Queen: M Nathan SC with L Hopkinson  
Gjonaj: J Adams

*Solicitors:*

The Queen: Director of Public Prosecutions  
Gjonaj: Maleys

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

*The Queen v Gjonaj* [2017] NTSC 15  
No. 21613773

BETWEEN:

**THE QUEEN**

AND:

**GJERGJ GJONAJ**

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 28 February 2017)

- [1] The accused is charged with one count of taking part in the supply of a commercial quantity (19,719.34 grams) of cannabis plant material. The Crown case against the accused is that he was transporting the cannabis into the Northern Territory from South Australia in a vehicle driven by him and of which he was the sole occupant. The cannabis was in 44 packages hidden in three suitcases. The Crown intends to call evidence that the accused's fingerprint(s) were found on one of the packages.
- [2] The Crown wishes to adduce evidence that on three previous occasions (in 2001, 2002 and 2008) the accused pleaded guilty in a South Australian court to charges of unlawfully producing a controlled substance. Each charge involved cannabis plants which were hydroponically grown in the accused's

home. In each case police searched the accused's home and seized a number of cannabis plants – four plants in 2001, three plants in 2002 and six plants in 2006. (The plants seized during the search in 2006 were the subject of the charge dealt with by the court in 2008.)

- [3] The Crown proposes adducing evidence from South Australian police officers as to the execution of search warrants at the accused's home and what was found there. On each occasion police found a hydroponic grow room with associated lights, water and other equipment and a number of cannabis plants which were being (or had been) grown hydroponically. The Crown also intend tendering a document recording the court outcome of each matter. The accused pleaded guilty each time, and each time received a relatively small fine, twice without proceeding to conviction and once with a conviction.
- [4] The Crown has served a coincidence evidence notice in relation to this evidence. The issue in the proceeding to which the evidence is said to be relevant is the accused's "[k]nowledge of the presence of a commercial quantity of cannabis plant material within a motor vehicle driven by the accused for the purpose of supplying the quantity of dangerous drugs."
- [5] The notice states that the coincidence evidence will be adduced to prove the accused:
- (a) did a particular act, namely transported a commercial quantity of cannabis plant material, and

(b) had a particular state of mind, namely knowingly possessing a commercial quantity of cannabis plant material for the purposes of supply.

- [6] Under the *Evidence (National Uniform Legislation) Act 2011* (NT) (“UEA”) s 98(1), evidence that two or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless 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. (There is also a reasonable notice requirement. There is no dispute about the sufficiency of the notice.)
- [7] UEA s 101 imposes a further restriction on the admission of coincidence evidence. In a criminal trial coincidence evidence about a defendant that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.
- [8] The Crown submits that the evidence in question here has significant probative value as part of the circumstantial case against the accused.

- [9] Under s 40 of the *Misuse of Drugs Act 1990* (NT) proof that a dangerous drug was in or on a place of which the person was the occupier; or concerned in the management or control; is taken to be proof that the drug was in the person's possession unless the person proves that he neither knew nor had reason to suspect that the drug was in that place.
- [10] The practical result of that provision is that if the Crown can prove that the accused was the occupier of the car (or had management or control of the car or the suitcases), then the evidentiary onus will switch to the accused to prove (on the balance of probabilities) that he did not know the cannabis was there and had no reason to suspect it was where it was.
- [11] The Crown submits that evidence of the accused's prior familiarity with cannabis production has significant probative value in the assessment of the likelihood that he was aware the cannabis was there (or had reason to suspect it was there) given that evidence will be given by police witnesses that there was a strong odour of cannabis in the vehicle when it was stopped by police at Adelaide River. I am not at all sure that this is coincidence reasoning of the kind prohibited by UEA s 98(1) unless the conditions of that subsection (and s 101) are satisfied. However, whether it is or not, I agree that the evidence has significant probative value for this purpose.
- [12] The Crown also submits that the evidence of the accused's prior involvement with cannabis will also be of significant probative value in rebutting innocent association or explanation on the part of the accused.

The Crown submits that it is highly improbable that the relevant events happened by coincidence (the relevant events being the accused's involvement with cannabis production on three previous occasions and there being a large quantity of cannabis in a vehicle he was driving which he knew nothing about) given the following events and circumstances:

- (a) The accused was the sole occupier and driver of the vehicle in which the cannabis was found.
- (b) The cannabis was located in four separate containers – three suitcases and a backpack – in two separate locations in the vehicle.
- (c) There was a significant quantity of cannabis in 44 separate bags weighing nearly 20 kilograms.
- (d) The cannabis had a very strong odour which could be smelt by a person approaching the vehicle – let alone someone sitting inside it.
- (e) One of the packages had the accused's fingerprint on it.
- (f) The accused has previously been involved in and pleaded guilty to the production of cannabis in his home.

[13] The accused denies that the evidence has significant probative value in light of the differences between the prior offending and the present charge.

- (a) The prior offending involved indoor hydroponic cultivation which is significantly different conduct from driving a vehicle over a long distance.
- (b) The prior offending involved small amounts of cannabis (four, three and six plants) whereas the current charge involves over 19 kilograms of cannabis.
- (c) There is nine and a half years between the last of the prior offences and the current allegations.

[14] Had the evidence been proposed as tendency evidence it seems to me that there would be a great deal of force in the defence position. The differences between the prior offending and the present offending, and to a somewhat lesser degree the time that has elapsed between the two, would mean that the evidence would have little value in establishing that the accused had a particular tendency other than by inappropriate general propensity reasoning.

[15] However, the Crown is not seeking to rely on the evidence for a tendency purpose and it does seem to me that the evidence has significant probative value in the circumstances of this case. In particular, it seems to me that the evidence of the accused's prior involvement with cannabis production is likely to be of significant probative value in the assessment of whether the accused had reason to suspect there was cannabis in the vehicle given the evidence of the strong odour present.

[16] The evidence must nevertheless not be admitted unless its probative value substantially outweighs any prejudicial effect it may have on the accused. The jury will of course receive the usual warning against general propensity reasoning, and the defence has not identified any other potential unfair prejudice that might be occasioned by the admission of this evidence. It seems to me that the probative value of the evidence to the question of the accused's knowledge is very high and that the danger of the jury misusing the evidence by propensity reasoning can be overcome by the giving of appropriate directions. In those circumstances I am of the opinion that the probative value of this evidence substantially outweighs any prejudicial effect it may have on the accused and the evidence ought to be admitted.