

The Queen v Perner [2017] NTSC 23

PARTIES: THE QUEEN

v

PERNER, Josef

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 21551732 and 21554698

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JUDGMENT OF: KELLY J

CATCHWORDS:

EVIDENCE – Admissibility – Tendency Evidence – *Evidence (National Uniform Legislation) Act 2011* (NT) ss 97, 101

EVIDENCE – Admissibility – Coincidence Evidence – *Evidence (National Uniform Legislation) Act 2011* (NT) ss 98, 101

STATUTES – Interpretation – *Evidence (National Uniform Legislation) Act 2011* (NT) s 94

STATUTES – Interpretation – *Evidence (National Uniform Legislation) Act 2011* (NT) s 95

Evidence (National Uniform Legislation) Act 2011 (NT), s 94, s 95, s 97, s 97(1), s 97(1)(a), s 97(1)(b), s 98, s 98(1), s 101

R v Ellis (2003) 58 NSWLR 700; *R v Ford* (2009) 201 A Crim R 451;
R v Grakalic (2002) 27 WAR 19, referred to

REPRESENTATION:

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Commission

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

The Queen v Perner [2017] NTSC 23
No. 21551732 and 21554698

BETWEEN:

THE QUEEN

AND:

JOSEF PERNER

CORAM: KELLY J

REASONS FOR DECISION

(Delivered 22 March 2017)

- [1] The accused is charged with two counts of supplying a dangerous drug.
- (a) one charge of unlawfully taking part in the supply of methamphetamine between 27 August 2015 and 2 September 2015 (count 1); and
 - (b) one charge of taking part in the supply of a commercial quantity of cannabis on 20 October 2015 (count 2).
- [2] The Crown case in relation to count 1 is that the accused transported in excess of 33 grams of methamphetamine to the residence of Peter Talbot at 9 Kilfoyle Crescent, Nakara on 28 August 2015 and that on 30 August 2015, he picked up a bag of methamphetamine from Peter Talbot and delivered it to Liam Booth.

- [3] The Crown case in relation to count 2 is that the accused transported approximately three pounds of cannabis to the residence of Terry Booth at 7 Buckingham Street, Gunn on 20 October 2015.
- [4] Both of these offences are said to have been committed by the accused on instructions from a man named Liam Booth.
- [5] The Crown has served both a tendency evidence notice and a coincidence evidence notice. The evidence the subject of both these notices is the same. It consists of recordings of telephone intercepts, mostly of telephone conversations between the accused and Liam Booth, but some involving third parties, and evidence of a number of police officers about conversations they had with the accused in circumstances where illicit drugs were present and so was Terry Booth. (The Crown says Terry Booth is shown by the telephone intercept evidence to have been an associate of Liam Booth.) In these reasons I adopt the term “disputed evidence” used by counsel for the accused to refer to the whole of this evidence.
- [6] The substance of the facts the Crown says will be established by the disputed evidence is as follows.
- (1) On 29 August 2015, Liam Booth arranged for the accused to deliver dangerous drugs to him.
 - (2) On 1 September 2015, Liam Booth and the accused arranged to divide up dangerous drugs into deal bags for purchase by an unknown man.

- (3) On 6 September 2015, Liam Booth arranged for the accused to make up a deal bag of cannabis and transport it to the Rosebery shops.
- (4) On 8 September 2015, the accused negotiated for the sale of dangerous drugs on Liam Booth's behalf.
- (5) On 12 September 2015, the accused supplied a dangerous drug (MDMA) to Karlla Garling at Liam Booth's request.
- (6) On 12 September 2015, the accused attempted to source dangerous drugs from Liam Booth.
- (7) On 16 and 17 September 2015, Liam Booth arranged for the accused to meet with "Peter" so the accused could supply "Peter" with dangerous drugs.
- (8) On 30 September 2015, the accused offered to arrange dangerous drugs for Liam Booth.
- (9) On 1 October 2015, the accused met with Terry Booth and Shane Tapp in a car park in Palmerston at a time when Terry Booth was in possession of 9.05 grams of methamphetamine and 1.01 grams of MDMA and Shane Tapp was in possession of \$900.

- (10) On 1 October 2015, the accused took responsibility for cannabis located at the residence of Terry Booth at 7 Buckingham Street, Gunn.¹
- (11) On 2 October 2015, the accused negotiated the sale of dangerous drugs on Liam Booth's behalf.
- (12) On 11 October 2015, the accused asked Liam Booth if he was trying to source dangerous drugs.
- (13) On 16 October 2015, Liam Booth instructed the accused to negotiate the sale of a boat for dangerous drugs.
- (14) On 18 October 2015, Liam Booth instructed the accused to deliver dangerous drugs to him.
- (15) On 21 and 22 October 2015, Terry Booth transferred a vehicle to the accused.

Tendency evidence notice

[7] The Crown has served a tendency evidence notice in relation to the disputed evidence. The issues in the proceeding to which the disputed evidence is said to be relevant are:

- (a) whether the accused knowingly transported methamphetamine to the residence of Peter Talbot on 28 August 2015 and knowingly transported

¹ It is common ground that the accused was not in possession of this cannabis – Terry Booth was, and has been charged in relation to it.

methamphetamine from Peter Talbot to Liam Booth on 30 August 2015;
and

- (b) whether the accused knowingly transported three pounds of cannabis to the residence of Terry Booth at 7 Buckingham Street, Gunn on 20 October 2015.²

[8] The amended tendency notice states that the evidence listed in the notice will be adduced to prove the accused:

- (1) had a tendency to act in a certain way, namely, a tendency to be involved in the supply of illicit drugs on the instructions of Liam Booth; and

- (2) had a tendency to have a particular state of mind, namely a willingness to assist Liam Booth in the supply of dangerous drugs.

[9] Under the *Evidence (National Uniform Legislation) Act 2011* (NT) (“UEA”) s 97(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 the court thinks that the evidence will, either by itself or having regard to other evidence to be adduced, have significant probative value.

(There is also a reasonable notice requirement. Although the original notice

² In the original tendency notice the alleged relevant facts were not confined to issues which arose from the charges on the indictment.

did not clearly specify the tendency sought to be proved and the issues to which that tendency was said to be relevant, there is no dispute about the sufficiency of the amended notice.)

- [10] UEA s 101 imposes a further restriction on the admission of tendency evidence. In a criminal trial tendency 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.
- [11] The Crown submits that the evidence in question here has significant probative value as part of the circumstantial case against the accused and that its probative value substantially outweighs any prejudicial effect it may have on the accused. Before considering these submissions, it is convenient to deal with preliminary submissions by the accused.
- [12] Counsel for the accused has submitted that the evidence in question is not tendency or coincidence evidence, it is simply evidence of conduct by the accused over a relatively short period of time – about two months. I agree that before it was amended, the tendency notice served by the Crown did not adequately set out the tendency which is sought to be proved by the evidence. (The coincidence evidence notice suffered from a similar defect.) However, I do not agree that the evidence sought to be led is incapable of being evidence of a tendency on the part of the accused. It seems to me that if the jury accepts that the disputed evidence establishes the facts sought to

be proved (set out in [6](1) to (15) above), then those facts are capable of giving rise to an inference that the accused had a tendency to be involved in the supply of illicit drugs on the instructions of Liam Booth and that he had a tendency to have a particular state of mind, namely a willingness to assist Liam Booth in the supply of dangerous drugs.

[13] Counsel for the accused submitted that the disputed evidence could not be relied on for tendency reasoning because of the provisions of UEA ss 94 and 95. The essence of the submission is this: if evidence is admissible for any other purpose, it cannot be relied upon for tendency reasoning regardless of whether the conditions in s 97 have been met. [A similar submission is made in relation to coincidence evidence, regardless of whether the conditions in s 98 have been met.]

[14] Counsel for the accused made the following written submission (in addition to the contention dealt with above that the disputed evidence is not tendency evidence).

2. The accused objects to the reception of the disputed evidence on either basis [*ie as either tendency or coincidence evidence*] on the grounds that:

.....

(c) The disputed evidence is, subject to its relevance being established, admissible *in proof of the facts in issue*, particularly:

(i) The state of mind of the accused as being willing to assist Liam Booth in the ongoing sale of illicit drugs

for the period 27 August to 2 September 2015 (Count 1), and 20 October 2015 (Count 2); and

- (ii) The state of mind of the accused as being knowingly concerned in that ongoing sale and acting accordingly; and
 - (iii) The character of the accused; and
 - (iv) To give context to the relationship between Liam Booth, Terry Booth, and the accused; and
 - (v) To demonstrate the nature of the supply business and the accused's part in it; and
 - (vi) To provide evidence of conduct (physical possession and moving of drugs) which forms part of the supply transaction; and
 - (vii) To rebut any suggestion by the accused of an innocent purpose in performing acts or an innocent association with Liam Booth or Terry Booth.
3. S94 [UEA] provides the scope for the tendency and coincidence rules. S94 [UEA] provides that since the "... character, reputation, conduct or tendency ..." of the accused is a fact in issue, the provisions of Part 3.6 [UEA] (including ss 97 & 98) do not apply to the disputed evidence."
4. Because ss 97 & 98 do not apply to the disputed evidence, s 95 [UEA] prevents the disputed evidence from being used for either a tendency or coincidence purpose, as it is not tendency or coincidence evidence because of the operation of s 94(3) [UEA]. *[punctuation and emphasis in original]*

[15] I took this to be a concession by the accused that the disputed evidence is admissible – subject to possible objections on the ground of relevance to certain individual items of evidence - but that the accused contends that the

evidence cannot be used for tendency or coincidence purposes. On the hearing of the *voir dire*, counsel confirmed that this understanding was correct.

[16] The accused refers to UEA ss 94 and 95 which provide:

Section 94:

Application

- (1) This Part does not apply to evidence that relates only to the credibility of a witness.
- (2) This Part does not apply so far as a proceeding relates to bail or sentencing.
- (3) This Part does not apply to evidence of:
 - (a) the character, reputation or conduct of a person; or
 - (b) a tendency that a person has or had;

if that character, reputation, conduct or tendency is a fact in issue.

Section 95:

Use of evidence for other purposes

- (1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.
- (2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

- [17] The first part of the accused's submission is that, "since the character, reputation, conduct or tendency" of the accused is a fact in issue, UEA ss 97 and 98 do not apply to the disputed evidence and, accordingly, it cannot be used for a tendency or coincidence purpose.
- [18] This is wrong in two respects. First, the premise (that the character, reputation, conduct or tendency of the accused is a fact in issue) is wrong. The issues in this trial will be whether the accused knowingly transported methamphetamine to the residence of Peter Talbot on 27 August 2015 and from Peter Talbot to Liam Booth on 30 August 2015 (count 1); and whether the accused knowingly transported cannabis to the residence of Terry Booth on 20 October 2015 (count 2). The elements of those charges do not include the accused's character or reputation or any tendency he may have had.
- [19] In relation to the phone calls that are relied on as direct evidence of the charges on the indictment, it is true that the conduct described, referred to or foreshadowed in those calls are facts in issue in the proceedings, but that is all. The conduct referred to in the other calls is not in issue in the proceeding, and even in relation to the conduct referred to in the calls relating directly to the charges on the indictment, the question on the *voir dire* is whether evidence of that conduct can be used as tendency or coincidence evidence in relation to the other charge.
- [20] Second, if the accused's tendency to act in a certain way were a fact in issue (which it is not), the application of s 94 would not mean that evidence that

he had the relevant tendency could not be used for a tendency purpose.

Quite the reverse: if the tendency were a fact in issue, then evidence of the tendency would simply be admissible without the condition in s 97 being met.

[21] The second part of the accused's contention is that the effect of s 95 is to prevent the disputed evidence from being used as tendency evidence. That, too, is incorrect. Section 97(1) provides:

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. *[emphasis added]*

That is to say evidence (of character, reputation or conduct) is not admissible for the purpose of proving that a person had a tendency to act in a particular way unless the conditions in s 97(1)(a) and (b) have been met. If those conditions have been met, evidence is admissible for that purpose.

[22] Section 95 is directed to the situation in which evidence under that Part of the Act is not admissible to prove a particular matter (for example that a person had a tendency to act in a particular way). That will only be the case where the conditions in s 97(1)(a) and (b) and s 101 have not been met. So, in this case, if the disputed evidence is relevant for another purpose or purposes (as the accused concedes it is) then the effect of s 95 is that it can be used to prove that the accused had a tendency to act in a certain way provided the conditions in ss 97(1)(a) and 101 have been met, but not otherwise. [Precisely the same analysis applies to the interaction between s 95 and s 98 which relates to coincidence evidence.]

[23] The tendency sought to be proved by this evidence is a tendency to participate in the supply of illicit drugs on instructions from Liam Booth. The evidence relates to 15 instances of the accused participating in the supply of drugs on instructions from or in conjunction with Liam Booth over a two month period during which the two counts on the indictment are said also to have occurred. On each occasion, the accused spoke with Liam Booth on the phone and organised some aspect of supply – transportation, delivery, preparation for sale. (In addition there is evidence to be adduced from police officers referred to above.) The Crown submits that this evidence involves sufficient common or similar features with the conduct alleged in connection with the charges on the indictment to demonstrate a pattern that cogently increases the likelihood of the occurrence of the conduct the subject of the charges, and also demonstrates the accused's state

of mind – ie that he was during that period of time willing to assist Liam Booth in the supply of dangerous drugs.

[24] The Crown submits that in conjunction with the other evidence to be adduced in the case (seizure of methamphetamine from Peter Talbot's residence on 1 September 2015, and seizure of cannabis located in the car driven by the accused on 20 October 2015) the disputed evidence has significant probative value. I agree. Indeed counsel for the accused conceded that if the arguments mounted by the accused in reliance on ss 94 and 95 were not successful, the evidence did have probative value. I am not sure counsel went so far as to concede that the evidence had significant probative value. However, in my mind there is no doubt that it does, in particular to negative any innocent explanation for cannabis being found in the car driven by the accused on 20 October 2015.

[25] Nevertheless, under s 101, the evidence must not be admitted unless its probative value substantially outweighs any prejudicial effect it may have on the accused. This requires the court to carry out a balancing exercise involving assessing the probative weight of the evidence and weighing that against its potential prejudicial effect.³

³ *R v Ford* (2009) 201 A Crim R 451 at 470 [61] per Campbell JA; citing *R v Ellis* (2003) 58 NSWLR 700 at 718 [94] – [95]:

Section 101(2) calls for a balancing exercise which can only be conducted on the facts of each case. It requires the Court to make a judgment, rather than to exercise a discretion.

[26] Prejudicial effect does not mean the tendency of the evidence to prove the Crown case. It refers to the possible misuse of the evidence by the jury.⁴

[27] The Crown submits that the probative value of this evidence substantially outweighs any prejudicial effect it may have on the accused. I agree. The probative value of the evidence is high. If accepted by the jury, this evidence is capable of demonstrating that the accused had engaged in the transport and supply of dangerous drugs at the behest of Liam Booth during the period in which the conduct the subject of the charges is alleged to have occurred, making it substantially more likely (in conjunction with the other evidence referred to above) that he was engaged in the supply of drugs on instruction from Liam Booth on the two occasions the subject of the charges, and substantially less likely that there was an alternative explanation for the drugs found in his possession.

[28] Counsel for the accused did not identify any potential misuse of the evidence. It seems to me that the only such potential misuse is the risk of generalised propensity reasoning. (The whole point of admitting tendency evidence is to allow a specific form of legitimate propensity reasoning.) It seems to me that the risk of generalised propensity reasoning can be overcome by giving an appropriate warning to the jury.

⁴ *R v Ford* (2009) 201 A Crim R 451 at 569 [58] per Campbell JA (referring to *R v RN* [2005] NSWCCA 413 where the New South Wales Criminal Court of Appeal adopted the statement of McHugh J in *Pfenning v The Queen* (1995) 182 CLR 461 at 528-529)

[29] I find that the probative value of the evidence for the purpose set out in s 97 substantially outweighs any prejudicial effect it may have. For that reason, it will be admitted for the purpose set out in the amended tendency evidence notice.

Coincidence evidence notice

[30] The amended coincidence notice states that the disputed evidence will be adduced to prove that the accused knowingly transported the drugs in question on 28 August 2015 and 20 October 2015 on the basis that, having regard to similarities between the events in which the Crown says the accused took part - set out in [6](1) to (15) above – and the events which are the subject of the charges on the indictment, it is improbable that the events occurred coincidentally.

[31] To be more specific, in relation to count 1, the Crown submits that it would be open to a jury to conclude that it is highly improbable that the accused did not transport methamphetamine to and from Peter Talbot in circumstances where:

- (a) evidence from the telephone intercept is that Liam Booth specifically requested the accused to transport “the thing” (which the Crown says it can be inferred was methamphetamine);
- (b) in the two months after the offending, the telephone intercept evidence shows that the accused arranged to assist Liam Booth to transport and deliver drugs to various people; and

(c) on 20 October the accused was located by police transporting a commercial quantity of cannabis in a vehicle. (This is the subject of count 2.)

[32] The evidence referred to in (a) above is directly relevant to count 1. The disputed evidence is that referred to in (b) and also whether the evidence in (c) – which is directly relevant to count 2 – can be used for a coincidence purpose in relation to count 1.

[33] In relation to count 2, the Crown submits that it would be open for a jury to conclude that it would be highly improbable that the accused would be innocently in a vehicle containing approximately 1.3 kilograms of cannabis outside the residence of Terry Booth in circumstances where:

- (a) in the two months prior to the alleged offending the accused had arranged to assist Liam Booth to transport and deliver drugs to various people;
- (b) 20 days before the alleged offending the accused was located by police in a car park with Terry Booth and Terry Booth was in possession of dangerous drugs;
- (c) the accused was later that same day seen by police at the residence of Terry Booth and claimed ownership of cannabis found at that address by police; and

(d) on the day of the alleged offending Liam Booth and Terry Booth entered into an agreement for the supply of two pounds of cannabis.

[34] The Crown submits that the improbability of these events occurring by coincidence could (and would) lead the jury to conclude that the accused committed the acts that are the subject of the counts on the indictment.

[35] Under the 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 to be adduced by the party, have significant probative value. (There is also a reasonable notice requirement. There is no dispute about the sufficiency of the amended notice.)

[36] 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.

[37] The Crown submits that the evidence in question here has significant probative value as part of the circumstantial case against the accused

essentially for the reasons outlined in [31] to [34] above. I agree. Counsel for the accused did not make any positive submission to the contrary, but relied on the arguments arising out of its contended construction of UEA ss 94 and 95, which have been dealt with above. For the reasons set out above, I have rejected those contentions.

[38] The evidence must nevertheless not be admitted unless its probative value substantially outweighs any prejudicial effect it may have on the accused.

[39] Counsel for the accused did not identify any potential misuse of the evidence. It seems to me that the only such potential misuse is the risk of generalised propensity reasoning and the jury will of course receive the usual warning against general propensity reasoning. It seems to me that the probative value of the evidence is very high and that the danger of the jury misusing the evidence by propensity reasoning can be overcome by the giving of those appropriate directions.

[40] 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 for the purpose set out in UEA s 98.

[41] The Crown also seek to rely on the disputed evidence for the purpose of proving the accused's state of mind during the relevant period of time (namely a willingness to assist Liam Booth in the supply of dangerous drugs) and to demonstrate the nature of the relationship between the accused

and Liam Booth and the accused and Terry Booth. Specifically the Crown submits that the disputed evidence is “... evidence of a guilty relationship capable of rebutting any suggestion that their association was merely of an innocent character ...”.⁵

[42] It is not necessary for me to make a ruling on these matters as counsel for the accused has conceded that the disputed evidence is relevant and admissible for these purposes (subject to reserving the right to object to specific portions of the telephone intercept evidence on the ground of relevance).

⁵ *R v Grakalic* (2002) 27 WAR 19 at 26 [23] per Murray J