CITATION:	*The Queen v Marawar* [2019] NTSC 84
PARTIES:	THE QUEEN v MARAWAR, Tomalic
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21903254
DELIVERED:	27 November 2019
HEARING DATE:	28 October 2019
JUDGMENT OF:	Kelly J

CATCHWORDS:

Evidence – Admissibility and relevance – Tendency – Whether evidence tends to establish that the accused had a tendency to act in the way asserted – Whether tendency makes the fact in issue more likely – Where alleged fact in issue is fact relied upon as raising self-defence – Alleged fact in issue potentially not in issue – Alleged fact in issue not within tendency – Alleged fact in issue insufficient to raise self-defence – Evidence inadmissible at this point in proceedings

Evidence (National Uniform Legislation) Act 2011 (NT) s 97

Hughes v The Queen (2017) 263 CLR 338; applied

Director of Public Prosecutions v Campbell (No 1) [2013] VSC 665;
R v Smiler (No 2) [2017] NTSC 31, referred to

REPRESENTATION:

Counsel:

Crown:	M Seiler
Accused:	G Chipkin

Solicitors:

Crown:	Director of Public Prosecutions
Accused:	North Australian Aboriginal Justice Agency

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

The Queen v Marawar [2019] NTSC 84
No. 21903254

BETWEEN:

THE QUEEN

AND:

TOMALIC MARAWAR

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 27 November 2019)

[1] The defendant, Tomalic Marawar has been charged with one count of unlawfully causing serious harm to Zimeron Campion at Maningrida on 29 December 2018.

[2] The defendant intends to rely at trial upon defensive conduct pursuant to s 29 of the *Criminal Code*.

[3] The defendant has served a tendency notice upon the Crown alleging that the complainant has a tendency, when intoxicated with alcohol, to instigate and use physical violence towards a person in his immediate company, with the violence directed towards the person's upper body (including the head).

[4] The evidence by which the defence intends to prove this tendency is evidence of four convictions (following pleas of guilty) of violent assaults

committed by the complainant against his domestic partner over a three year period; all committed while the complainant was intoxicated; two involving violence directed at her head alone, one involving biting her upper arm and one involving a shove to the chest and a blow to the face.

[5] The defendant contends that this tendency is significantly probative of a fact in issue in the proceeding, namely whether the complainant grabbed the defendant by the shirt before the defendant punched him in the face and broke his jaw. This, (ie the grabbing of the shirt by the complainant) is the fact relied upon by the defence as raising self-defence).

[6] The allegation by the Crown is that the complainant and the defendant were drinking beer at the home of the complainant's aunt and uncle. They had come to an agreement the previous day that the defendant would give the complainant some beer in return for some fuel.

[7] The complainant asked the defendant to give him some of his beer pursuant to this agreement. The defendant refused saying, "Grog all finished. I haven't got any grog."

[8] They argued. The defendant shouted at the complainant, "Do you want to fight me?"

[9] During the argument, the complainant grabbed the defendant by the shirt with both hands. After a short time, he let him go. The, defendant then punched the complainant, twice, to the jaw with a closed fist causing him to

fall to the ground. The defendant kicked the complainant in the chest, with bare feet, while he was on the ground. The complainant did not at any time fight back.

[10] The Crown case is based on an amalgamation of a number of witness statements.

(a) In his statement, the complainant outlines the background of the previous day's agreement of beer for fuel and says that he asked the defendant for some of his beer and was refused. The defendant said, "You want to fight me?" and then, as he was trying to get up, the defendant grabbed the front of his shirt and punched him in the jaw twice. He fell over and lay on the ground and the defendant kicked him in the chest with his bare foot.

(b) The complainant's aunt (who had not been drinking) was an eye witness. She recounts the argument about the beer and says that the defendant said, "Grog all finish. I haven't got grog." Then the complainant grabbed the defendant by the front of his shirt with both hands. "He just grab him a little bit." And she told them to stop fighting. Then the defendant punched the complainant on the jaw, once, with a closed fist, and the complainant fell down. (The complainant had already let go of the defendant's shirt when the defendant threw the punch.) The complainant didn't fight back; he just walked away.

[11] Under s 97 of the *Evidence (National Uniform Legislation) Act* ("UEA") evidence of the conduct of a person is not admissible to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind, unless the appropriate notice has been given and the court thinks that the evidence will (either by itself or having regard to other evidence to be adduced) have significant probative value.

[12] There is no dispute about the adequacy of the notice. The question, therefore, is whether the evidence has significant probative value in relation to the issues set out above.

[13] The potential probative value of tendency evidence was explained by the High Court in *Hughes v The Queen* ("*Hughes*"):[1]

> The probative value of evidence is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue. Tendency evidence will have significant probative value if it could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent. The trier of fact reasons from satisfaction that a person has a tendency to have a particular state of mind, or to act in a particular way, to the likelihood that the person had the particular state of mind, or acted in the particular way, on the occasion in issue. … The starting point in either case requires identifying the tendency and the fact or facts in issue which it is adduced to prove. The facts in issue in a criminal proceeding are those which establish the elements of the offence. *(citations omitted)*

[14] Assessing the probative value of proposed tendency evidence is therefore a

1 (2017) 263 CLR 338; HCA 20 at 348 [16] per Kiefel CJ, Bell, Keane and Edelman JJ

two stage process. As the plurality said in *Hughes*:[2]

> The assessment of whether evidence has significant probative value in relation to each count involves consideration of two interrelated but separate matters. The first matter is the extent to which the evidence supports the tendency. The second matter is the extent to which the tendency makes more likely the facts making up the charged offence. Where the question is not one of the identity of a known offender but is instead a question concerning whether the offence was committed, it is important to consider both matters. By seeing that there are two matters involved it is easier to appreciate the dangers in focusing on single labels such as "underlying unity", "pattern of conduct" or "modus operandi". In summary, there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged.

[15] The first question is the extent to which the evidence sought to be adduced tends to establish that the complainant had the tendency to act in the way asserted in the notice. In this case, the Crown contends that the evidence (consisting as it does of four convictions for domestic violence against the complainant's domestic partner) does not tend to establish that the complainant had a tendency "to instigate and use physical violence towards a person in his immediate company". There is no evidence that he is violent towards anyone other than his domestic partner, and that (unfortunately) is a rather specialized form of violent conduct. There is some force in this contention by the Crown. The defence relied on *R v Smiler (No 2)* ("*Smiler*"),[3] for the proposition that, in determining this first question, the court does not have to decide whether the evidence sought to be led does

2 ibid at 356 [41]

3 [2017] NTSC 31 at [11]

prove the alleged tendency, merely whether it is capable of doing so. If the evidence is capable of proving the alleged tendency, it should be allowed in (subject to satisfaction of the conditions in s 97); and it will be a matter for the jury whether they are satisfied that it proves that the complainant had the tendency alleged by the defence.

[16] Assuming for the purposes of the argument (without deciding for the time being) that the evidence does support the wider tendency contended for by the defence, there are a number of further difficulties with the defendant's application.

[17] The second matter to be considered, following the analysis in *Hughes*, is the extent to which the tendency makes more likely a fact in issue in the proceeding – that is to say, one or more of the facts making up the charged offence. The fact in issue which the tendency is said, by the defence, to support, is whether the complainant "initiated the violence" by grabbing the defendant's shirt; and that fact is said to be relevant to the issue of whether the defendant acted in self-defence in punching the complainant in the jaw.

(a) It is not clear that whether the complainant grabbed the defendant's shirt is actually a fact in issue. The Crown seems to accept that this occurred – based on the eye witness evidence of the aunt.

(b) If it is accepted that whether or not the complainant grabbed the defendant's shirt is a matter which the jury will have to determine – because of the differing accounts of the aunt (who says he did) and the

complainant (who says the defendant grabbed his shirt) – it is not clear to me how the alleged tendency (ie to instigate and use physical violence towards a person in his immediate company) makes it more likely that he grabbed the defendant's shirt. Grabbing a shirt, without more, it seems to me, is not conduct which falls within the description of the tendency.

(c) Finally, it does not seem to me that the fact in issue (if it is in issue) is one which, without more, is relevant to the issue of self-defence. The competing versions of events are (from the complainant) that the defendant grabbed his shirt, and (from the aunt) that the complainant grabbed the defendant's shirt "a little bit" and then let go before the defendant punched him. It is hard to see how anyone could reasonably believe that it was necessary to punch someone in the jaw to defend himself against someone who briefly held onto the person's shirt and then let go; and harder still to see how punching someone in the jaw hard enough to break it in two places could possibly be seen as a reasonable response in the circumstances. (In other words, as the evidence stands on the statements, it is hard to see how self-defence arises.)

[18] The defendant relied on *Smiler*,[4] for the following proposition.

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4 [2017] NTSC 31 at [16]; See also *Director of Public Prosecutions v Campbell (No 1)* [2013] VSC 665 at [41]: 'the evidence must have significant probative value to the establishment of a particular reasonable possibility of a state of facts consistent with the innocence of the accused person.'

> It needs to be borne in mind that the Crown bears the legal onus of proof on all issues including negating self-defence. The accused need only point to a reasonable possibility that he was acting in self-defence and submit that the Crown has not eliminated that possibility. Very little may be required for evidence to be "significant" or "of consequence" in pointing only to a reasonable possibility that the accused may have been acting in self-defence. [emphasis added]

[19] That is correct, but the "very little" must still be something. In my view, if the evidence rises no higher than the statement by the aunt, it cannot be said that the tendency (if it can be proved) can be said to have significant probative value on the question of whether there is a reasonable possibility that the defendant was acting in self-defence.

[20] Of course, as the evidence comes out, the analysis may change. For example, a more detailed description of the grabbing of the shirt may reveal it to have been a violent act instigated by the complainant which does fit within the alleged tendency (assuming it is accepted that the evidence of four convictions for domestic violence against the complainant's partner establishes that tendency). Alternatively (or in addition) it may be established that, as a result of those convictions, the complainant had a reputation as a violent and dangerous man and that the defendant knew that, and truly believed it was necessary, in order to protect himself, to launch a pre-emptive punch.

[21] Accordingly, in my view, the application is premature. It is refused for the time being. The defendant may choose to renew the application for leave to prove the four prior violent convictions to prove the alleged tendency, if (for

example) the evidence shows that the complainant's conduct in grabbing the shirt was a violent act such that the alleged tendency makes it more likely that the complainant did it; and/or if the evidence shows that the defendant was aware of the convictions or the complainant's violent tendency and considered it necessary to deliver a pre-emptive defensive punch.
