

CITATION: *The King v Andrews* [2024] NTSC 77

PARTIES: THE KING

v

ANDREWS, Andy

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 22311805; 22335620

DELIVERED: 16 September 2024

HEARING DATE: 1 May 2024

JUDGMENT OF: Burns J

CATCHWORDS:

CRIMINAL LAW – Evidence – Tendency evidence – *Evidence (National Uniform Legislation) Act 2011* (NT) s 97, s 101 – Admissibility – Whether probative value of the evidence outweighs any potential prejudicial effect on the accused – To the extent that the suggested tendencies refer to “adult females” or to “women”, the tendencies are too broadly framed to have significant probative value – To the extent that the suggested tendencies are refined to allege tendencies against current or former domestic partners, the tendencies do have significant probative value – Any risk of prejudicial effect on the accused may adequately be addressed by appropriate judicial directions – Evidence admissible if alleged tendencies are amended such that they only allege tendencies relating to current or former domestic partners

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

Hughes v The Queen [2017] HCA 20; *TL v The King* [2022] HCA 35, referred to.

REPRESENTATION:

Counsel:

Crown:	R Everitt
Accused:	P Crean

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Hubber Legal

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

The King v Andrews [2024] NTSC 77
No. 22311805; 22335620

BETWEEN:

THE KING
Crown

AND:

ANDY ANDREWS
Accused

CORAM: BURNS J

REASONS FOR RULING

(Delivered 16 September 2024)

Introduction

[1] The accused is awaiting trial on an indictment alleging the following three

Counts:

- Count 1, a charge that on or about 30 December 2022 at Palmerston in the Northern Territory of Australia, the accused unlawfully caused serious harm to ST.
- Count 2, a charge that on or about 11 March 2023 at Palmerston in the Northern Territory of Australia, the accused unlawfully caused serious harm to ST.

- Count 3, in the alternative to Count 2, a charge that on or about 11 March 2023 at Palmerston in the Northern Territory of Australia, the accused unlawfully assaulted ST, and that the unlawful assault involved the following circumstances of aggravation, namely:
 - (i) that ST suffered harm;
 - (ii) that ST is a female and the accused is a male; and
 - (iii) that ST was threatened with an offensive weapon, namely, an umbrella.

[2] The Crown has filed and served a notice under s 97(1) of the *Evidence (National Uniform Legislation) Act 2011* (NT) giving notice that it intends to adduce tendency evidence at the trial of the accused. The Crown alleges that the proposed tendency evidence is relevant to the following facts in issue in the proceedings against the accused:

- (a) Whether the accused committed the offences charged in Counts 1 to 3 on the indictment.
- (b) To rebut an innocent explanation for the complainant's injuries, in particular that she fell over on 30 December 2022 or 11 March 2023.

[3] The Crown submits that the proposed tendency evidence will enable the jury to conclude that the accused has the following tendencies:

- (a) to act in a particular way, namely:

- (i) to become easily or quickly enraged towards adult females, particularly current or former partners;
- (ii) to engage in violent conduct towards adult females, particularly current or former partners;
- (b) to have a particular state of mind, namely:
 - (i) an angry and/or violent disposition towards women, particularly current or former partners.

The Crown case

[4] The following is taken from the Outline of Crown Case:

- (1) The accused in this matter is Andy Andrews, a 45-year-old male.
- (2) The complainant in this matter is ST, a 34-year-old female.
- (3) The accused and the complainant were in a relationship together for about one year prior to March 2023.

Count 1

- [5] In December 2022, the accused was asked by VC to move into and look after her unit located in Gray, whilst VC returned interstate to visit family in Queensland.
- [6] During the evening of Thursday, 29 December 2022, the accused and the complainant consumed a quantity of alcohol at VC's residence. A verbal argument broke out between the accused and the complainant during the

early hours of Friday, 30 December 2022 at which time the accused became jealous and angry towards the complainant.

- [7] Fearing for her safety, the complainant ran outside the unit to get away from the accused but he ran after her, chasing her down in the car park, catching her and physically marched her back inside their unit.
- [8] The accused armed himself with a long wooden stick, which he used to hit the complainant with great force twice on her lower left leg and twice on her lower left arm.
- [9] The blows to the left arm of the complainant caused an open “Monteggia fracture” (fracture of the proximal ulna associated with dislocation of the radial head) of her left arm - with dislocation of the ulna at the radiocapitellar joint.
- [10] The blows to the left shin of the complainant caused a deep laceration with soft tissue damage, swelling, bruising and pain.
- [11] The complainant complained that her arm was clearly broken and the accused told her to have a shower and lie down, which she did.
- [12] The accused threatened the complainant with further harm if she talked to police or medical staff and coached her to say she "fell on stairs".
- [13] At 11:29am on Friday, 30 December 2022, the accused drove the complainant to the Palmerston Regional Hospital and left her at the

Emergency Department. The complainant told medical staff that her injuries were from "falling on stairs".

[14] Palmerston Regional Hospital commenced urgent care for the complainant before transferring her to the Royal Darwin Hospital for emergency surgery resulting from the complicated fractures to her left lower arm. Surgeons installed a plate and eight screws to stabilise the fractures to the complainant's arm.

[15] On 2 January 2023, the complainant was discharged from the Royal Darwin Hospital.

Counts 2 and 3

[16] On 11 March 2023, the complainant was at a unit in Gray, in the company of the accused and an unidentified female. At about 5:00 am, the accused picked the complainant up and physically removed her from the unit so that he could be alone with the unidentified female. The unidentified female protested against the actions of the accused which caused the accused to become angry.

[17] The accused began chasing the complainant around a car parked in the car park of the unit block. The complainant ran from the accused, screaming. The complainant screamed for help, allegedly scaring a jogger passing by before the accused caught the complainant at a bus stop on Victoria Drive.

- [18] The accused took hold of the complainant and dragged her back to the unit, where he yelled "[ST] stop being so silly" and took her up the stairs where he armed himself with a dark green umbrella and began attacking the complainant.
- [19] The accused used the umbrella to repeatedly strike the complainant to the head so many times that the complainant lost count. The accused continued to assault the complainant by striking her with his fists and kicking her with his feet all over her body, especially targeting her head. The accused then told the complainant he was going to assault her with a silver metal wheel spanner. The complainant attempted to run from the accused but he took hold of her.
- [20] The complainant was in pain and bleeding from the head. She did not realise the extent of her injuries. The complainant fell asleep. The following morning the accused put the bedsheets in the washing machine to get rid of the blood. He took the complainant to the Palmerston Regional Hospital on the afternoon of 12 March. Not realising the extent of her injuries, the complainant left the hospital before being seen.
- [21] On or about 15 March 2023, the complainant felt unwell and attended at the Royal Darwin Hospital via ambulance where she was diagnosed with an infected scalp wound over the right parieto-occipital region with maggot infestation. She had a fever and was nauseous. The scalp wound was open to the bone and tender to touch. The complainant was initially admitted and

subject to washouts and debridement of the wound. The wound was 8x8cm to the right occipital area. The subcutaneous tissue was necrotic. A 1.5x1.5cm area of the skull bone was on view. The complainant was treated with intravenous antibiotics.

[22] On 17 April 2023, the accused was located at a unit in Gray in the company of the complainant. The accused was arrested at 10:47 am by Detective Senior Constable First Class Anthony Jones and Aboriginal Community Police Officer Bianca Copeland.

[23] While being arrested, the accused stated that the complainant had been intoxicated and had fallen into the balustrade of the staircase causing the injury to her skull.

[24] The complainant provided an explanation of the assault at the location, showing Detective Jones where the incident had occurred and the location of the umbrella used to strike her. The umbrella was subsequently seized.

[25] An ambulance was requested to convey the complainant back to hospital due to fresh concerns regarding her head injury.

The proposed tendency evidence

[26] It is alleged that the accused committed the offence in Count 1 on 30 December 2022, and the offences in Counts 2 or 3 on or about 11 March 2023. The Crown proposes leading evidence of each of these charged events as tendency evidence with regard to the charge or charges for the other

event. In addition, the Crown proposes leading evidence of “uncharged acts” as tendency evidence relating to all charges on the indictment.

[27] The Crown proposes leading evidence of the following uncharged acts as tendency evidence:

- (a) Evidence that on 17 and 18 May 2019, the accused punched AA to the face with a closed fist. In addition, he assaulted MA by dragging her, punching her and choking her before striking her with a bottle of rum and continuing to assault and kick her when she was incapacitated. The Crown proposes leading evidence that on 1 October 2020, the accused entered pleas of guilty to charges arising out of this event. It is alleged that the victims, AA and MA, were known to the accused through family. The accused had been drinking rum with AA and others. As the accused began to be intoxicated he became angry, and was swearing and yelling. Without warning, the accused punched AA to the face with a closed fist. He later assaulted MA after arguing over the ownership of the bottle of rum.
- (b) Evidence that on 25 May 2018, the accused assaulted LL by dragging her, choking her and continuing to assault her when she was incapacitated. The Crown proposes leading evidence that on 1 July 2018, the accused entered a plea of guilty to a charge arising out of this event. The accused and the victim were former partners.

- (c) Evidence that on 30 September 2017, the accused assaulted LL by dragging her, choking her and continuing to assault her when she was incapacitated. The Crown proposes leading evidence that on 16 November 2017, the accused entered a plea of guilty to a charge arising out of this incident.
- (d) Evidence that on 19 August 2016, the accused assaulted FA by striking her to the head with both fists a number of times and kicking her to the face. The Crown proposes leading evidence that on 17 July 2017, the accused entered a plea of guilty to a charge arising from this event.

The relevant legislation

[28] The tendency rule is found in s 97(1) of the *Evidence (National Uniform Legislation) Act 2011* (NT), and provides:

- (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.

[29] Also relevant is s 101(2), which provides:

- (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the

evidence outweighs the danger of unfair prejudice to the defendant.

- [30] The effect of these provisions is that tendency evidence is not admissible unless the Court thinks that the evidence will, either by itself or having regard to other evidence, be adduced by the party seeking to adduce the tendency evidence, have significant probative value and that the probative value of the evidence outweighs the danger of unfair prejudice to the accused.

Consideration

- [31] In the present case, it appears that the accused has asserted that the injuries observed on the body of the complainant after each of the alleged events was a consequence of an accident in which the complainant fell on stairs. It appears that the accused has denied any involvement in causing those injuries, and denies any offences involving the complainant on those occasions.
- [32] The accused opposed the present application on the grounds that the proposed tendency evidence does not have significant probative value and that the danger of unfair prejudice to the accused exceeds the probative value of the evidence.
- [33] The accused submitted that the proposed tendency evidence possesses insufficient similarity to the allegations relating to the charged events to

possess significant probative value. In that regard, I note the recent decision of the High Court in *TL v The King*:¹

There is no general rule that demands or requires close similarity between the conduct evidencing the tendency and the offence. Such a rule is not required by the text of s 97. The authorities establish that similarity is relevant to, but not determinative of, probative value. Indeed, universal rules are to be avoided, as the relevant facts are determinative in tendency cases. Other things being equal, evidence of a more generally expressed tendency is less likely to satisfy the threshold of "significant probative value". That is because, while generalised tendency notices may be supported by a broader array of evidence, that evidence will often not be significantly probative of the fact or facts in issue. The specificity of the tendency has a direct impact on the strength of the inferential mode of reasoning. Put in different terms, that is why tendency evidence must have significant probative value. Otherwise, s 97 is reduced to relevance, which is addressed in s 55.

(Footnotes omitted)

[34] This is not a case where the Crown seeks to adduce tendency evidence to prove the identity of the accused as the offender. In cases where tendency evidence is adduced for such a purpose there will almost always be a requirement that the proposed tendency evidence bears a close similarity to the charged acts.² In the present case, the accused is well known to the complainant. The proposed tendency evidence is to be adduced to prove that the accused did the acts alleged by the complainant.

[35] In *Hughes*, the High Court said with regard to assessing probative value of evidence in a case such as the present, at [41]:

¹ [2022] HCA 35 at [29].

² See *Hughes v The Queen* [2017] HCA 20 at [39] ('*Hughes*').

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.

[36] In my opinion, to the extent that the suggested tendencies refer to “adult females” or to “women”, the tendencies alleged by the Crown are too broadly framed to have significant probative value. To the extent that the suggested tendencies are refined to allege tendencies against current or former domestic partners, I am satisfied that they do have significant probative value. If the jury were satisfied that the accused had such tendencies regarding current or former domestic partners, this would strongly support the Crown case that the injuries observed on the complainant after the charged events were not caused accidentally but were caused by the accused’s violent conduct.

[37] The Crown will need to amend its alleged tendencies such that they only allege tendencies relating to current or former domestic partners. I am satisfied that the Crown will be entitled to lead evidence of the charged events and evidence of the assaults on LL as tendency evidence. That evidence has significant probative value in proving the tendencies.

[38] The tendency evidence to be led by the Crown carries with it a risk of unfair prejudice to the accused as there is a danger that the jury may reason that the accused is the type of person who would commit the charged offences or may punish the accused for the earlier offending by finding him guilty of the charged offences. I consider the risk of these eventualities occurring to be low, and may adequately be addressed by appropriate judicial directions.

[39] On the basis that the Crown amends the alleged tendencies by deleting the references to “adult females” and “women”, I make the following orders:

- a) the evidence relevant to each Count on the indictment is cross-admissible as tendency evidence on each of the other Counts; and
- b) the evidence of uncharged acts relating to LL is admissible as tendency evidence on each of the Counts.
