

***The Queen v Lewis* [2021] NTSC 40 (6 May 2021) – Northern Territory Supreme Court**

‘Evidence’ – ‘History of domestic and family violence’ – ‘Jury directions’ – ‘Probative value’ – ‘Protection order’ – ‘Relationship, context, tendency and coincidence evidence’ – ‘Relevance’ – ‘Threats to kill’

Charges: Aggravated unlawful assault x 1; Recklessly engaging in conduct giving rise to danger of serious harm x 1.

Proceedings: Application to adduce evidence.

Facts: The male accused and female complainant were in a relationship. The Crown’s case was that the accused “flipped her” to the ground twice, threatened to kill her, and stamped his foot on her head, dragged, kicked and punched her. The Crown applied to adduce evidence of two prior charged assaults by the accused against the complainant (aggravated assault and contravention of a domestic violence order relating to her) as tendency or context (relationship) evidence.

Issues:

1. Whether the evidence ought to be adduced as tendency evidence.
2. Whether the evidence ought to be adduced as relationship evidence.

Decision and reasoning: Application to admit the evidence as tendency evidence was dismissed. Application to admit the evidence as relationship evidence was upheld.

Tendency evidence: The evidence did not have significant probative value. Additionally, on prejudice, the only other substantial evidence supporting the Crown’s case was to be given by the complainant. There was consequently a risk that the jury might place too much reliance on the fact that the accused had tendencies and acted on them. This potential prejudice was virtually impossible to address by a direction to the jury as the concept of “not giving too much weight” would be very difficult for the jury to comprehend and follow.

Relationship evidence: The evidence was relevant to a fact in issue in the proceeding. While the defence argued that evidence of two physical assaults against the complainant in their 2.5 year relationship was more appropriately characterised as “transient flare-ups of anger or annoyance” not ongoing hostility, the court disagreed stating: “Physical assaults are not part of the ordinary incidents of a domestic relationship, and the second of those assaults occurred in the same month as the alleged offending.”

Additionally, unlike the risk of unfair prejudice with the tendency evidence, the jury could be directed that they must not use the relationship evidence to engage in propensity or tendency reasoning, and that it was only tendered to ensure that they had a true and proper context to understand what the complainant said happened, rather than thinking what she said was unlikely because it happened “out of the blue”. This would obviate any risk of unfair prejudice.