

## ***Queen v Pamkal* [2019] NTSC 80 (15 October 2019) – Northern Territory Supreme Court**

‘Evidence’ – ‘Probative value’ – ‘Relationship evidence’ – ‘Sexual and reproductive violence’ – ‘Tendency purposes’

Proceedings: Voir dire on admissibility of evidence of past violent conduct by the accused against the complainant

Issues: Admissibility of tendency evidence; whether probative value of the evidence substantially outweighs any potential prejudicial effect on the accused

Facts: One of the facts in issue is whether the complainant consented to sexual intercourse with the accused. The complainant alleged that the accused demanded she have sex with him and threatened her when she refused. The complainant complied by removing her shorts and underwear and lying down on the cement.

The Crown intended to lead evidence of past violent conduct by the accused towards to complainant [2]. The accused would resort "to violence against the [complainant] whenever she displeased him...or he had a state of mind in which he believed he was permitted to discipline her for any perceived failing – and that he was prepared to and did act on that state of mind." [3]. The Defence counsel conceded that the "evidence of past assaults is relevant for this ‘relationship’ or ‘context’ purpose but contends that it should be excluded under Evidence (National Uniform Legislation) Act 2011 (NT) ('UEA') s 137 because its probative value is outweighed by the danger of unfair prejudice to the defendant.

### Judgment:

The evidence was admitted both as relationship or context evidence and as tendency evidence and will not be excluded under UEA s 137.

The Judge disagreed with the Defence’s contention that the evidence of past violence by the accused against the complainant should be limited to mere references of past assaults without revealing any details. Kelly J provided that restricting the evidence in this way would conceal the nature of the relationship rather than explain why the complainant submitted in the way she did. His Honour also rejected the claim that the evidence should be excluded under the UAE s 137 as it had high probative value. Namely, it "explains something that may otherwise be inexplicable" [5]. While the risks of rank propensity reasoning and the jury being emotionally repelled by the accused were acknowledged, Justice Kelly believed that the probative value of the evidence outweighed them and thus admitted the evidence of prior assaults as relationship evidence.

Justice Kelly then turned to the Prosecution's request to use the evidence of prior assaults as tendency evidence. The Prosecution sought to use the tendency evidence to demonstrate the accused's tendency to engage in violent conduct against the complainant; to have a violent and controlling disposition towards his domestic partner; to believe that he is permitted to discipline his domestic partner for any of her perceived 'failings' [13]. Court noted that under UEA s 97, tendency evidence is not admissible unless 'appropriate notice has been given and the court thinks that the evidence will...have significant probative value' [14]. Applying the principles established in *Hughes v The Queen*, Kelly J concluded that the evidence of prior assaults satisfied the threshold test in UEA s 97, in that it supported "proof of a tendency to engage in violent behaviour, especially after consuming alcohol, for the purpose of controlling his partner's behaviour and/or punishing her for perceived failings"[18] and "if the jury accepts that the accused had this tendency (or tendencies) that "strongly supports proof of a fact that makes up the offence charged"... It explains what might otherwise be inexplicable and strongly supports proof of a fact in issue – namely whether the complainant consented to have sex with the accused and also, to perhaps a slightly lesser extent, proof that he knew of or was reckless as to her lack of consent."[19]. His Honour also concluded that the evidence substantially outweighed any prejudicial effect (as required by s 101 UEA) as the risks were "largely mitigated" by appropriate directions and warning to the jury. The tendency evidence was therefore admitted.