



HIGH COURT OF AUSTRALIA

19 October 2022

TL v THE KING
[2022] HCA 35

Today, the High Court unanimously dismissed an appeal from a decision of the New South Wales Court of Criminal Appeal. The High Court held that tendency evidence admitted against the appellant at trial was admissible under s 97(1) of the *Evidence Act 1995* (NSW). Tendency evidence is evidence of the character, reputation or conduct of a person which is adduced to prove that the person has or had a tendency to act in a particular way or to have a particular state of mind, and is not admissible under s 97(1)(b) unless the court thinks that it will, either by itself or having regard to other evidence, have "significant probative value".

The appellant was convicted in the Supreme Court of New South Wales of the murder of his two and a half year old stepdaughter. The victim died as the result of blunt force trauma to her abdomen. There was no dispute that only three people had the opportunity to inflict the fatal injuries. To support its case that the appellant was the perpetrator, the prosecution adduced two categories of tendency evidence to prove that the appellant had a tendency to "deliberately inflict physical harm on the child". The first category concerned burns the victim sustained 10 days prior to the fatal injuries while in the bath in the appellant's care, and the second comprised three pieces of hearsay evidence of statements the victim made to relatives to the effect that the appellant had hurt her neck, caused bruising on her arm, and punched her. The trial judge admitted both categories. The appellant contended that the tendency evidence was wrongly admitted because it was not sufficiently similar to the charged conduct, relying on the observation of the majority in *Hughes v The Queen* (2017) 263 CLR 338 ("*Hughes*") that, where tendency evidence is adduced "to prove the identity of the offender for a known offence, the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence".

The High Court unanimously held that the majority's observation in *Hughes* does not establish a general rule requiring close similarity between the conduct evidencing the tendency and the offence in every case where the identity of the offender is in issue. It instead postulates a situation where there is little or no other evidence of identity, and the identity of the perpetrator is at large. The assessment of probative value requires consideration of two interrelated but separate matters: the extent to which the evidence supports the asserted tendency, and the extent to which the tendency makes more likely the fact or facts sought to be proved by the evidence. Here, the evidence supported the existence of the asserted tendency. As there was other strong evidence which went to identity, and there were only two other possible perpetrators, the tendency was sufficiently striking that its existence was capable of being important to a conclusion that the appellant was the perpetrator and, accordingly, the evidence had significant probative value. This was so even without the close similarity insisted upon by the appellant.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*