Context Evidence (and how it differs from Tendency or Coincidence Evidence)

Arjun Chhabra
Barrister, Maurice Byers Chambers

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"… give a dog an ill name, and hang him."

- proverb, cited in *BBH v The Queen* (2009) 245 CLR 499 at 525 by Hayne J, describing the danger of similar fact evidence at common law

Introduction

1. The purpose of this paper is to explain the nature of context evidence; how it is admissible, and how its use differs from a tendency or coincidence purpose. In short, context evidence is evidence of a circumstance interconnected with evidence of another circumstance (or circumstances), made relevant by its capacity to explain, characterise or contextualise that other circumstance (or circumstances). Three common categories of context evidence are:

    a. evidence of uncharged acts;
    b. evidence of tools of the trade, and
    c. evidence of bad character (but not under ss 110 and 111 of the *Evidence Act*) inextricably linked to the preceding two categories.

2. The authorities (analysed later in this paper) demonstrate that context evidence is evidence of a circumstance that rebuts or excludes an 'innocent gloss', or alternative reasonable hypothesis, that may otherwise arise on the Crown case. That exclusion occurs because the jury are not left deliberating in a vacuum, or in ignorance of an explanatory circumstance that properly contexualises the accused's conduct and/or relationships with other persons: *Wilson v The Queen* (1970) 123 CLR 334 at 344 per Menzies J. Context evidence is consistent with the "principle of completeness": see *Thompson and Wran v The Queen* (1968) 117 CLR 313 at 317 per Barwick CJ and Menzies J.

3. Evidence of a circumstance said to be admissible for a context purpose is a circumstance which forms part of the mosaic of circumstances to prove the fact in issue. By contrast, tendency and coincidence evidence (ss 97 and 98, as well as s 101 in criminal proceedings) are evidence of a circumstance external to the fact in issue to be proved by the Crown, but upon which the Crown rely to assert the greater likelihood of the existence of the fact in issue; namely, that the accused acted in the way asserted by the Crown.

4. Context evidence is neither tendency or coincidence evidence. Both tendency and coincidence evidence invite a process of reasoning permitted only by the specific rules in Part 3.6 (see s 95).

5. It can be difficult to precisely delineate context evidence from either tendency or coincidence evidence. Where possible, it is important for defence practitioners to characterise evidence as relevant only for a tendency or coincidence purpose because it introduces the strictures prescribed in ss 97(1)(b) and 98(1)(b) (*significant probative value*) and 101 (*probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant*), as well as the notice requirements prescribed in ss 97(1)(a) and 98(1)(a) and regs 5 and 6 of the *Evidence Regulation* 2015. Those strictures create a basis to make inadmissible the material sought to be relied upon by the Crown.

6. The three common categories above demonstrate how closely related context evidence is to tendency or coincidence evidence. It is that very closeness that makes context evidence particularly damning in a jury trial as the direction prohibiting the jury embarking on tendency or coincidence reasoning may not be sufficient to ensure that chain of reasoning does not occur. Of course, the criminal justice system proceeds on the basis that juries are capable of understanding and following directions; even complex directions.[1]

Circumstantial evidence – relevance and general application

7. In the decision of *Elomar v R; Hasan v R; Cheikho v R; Cheikho v R; Jamal v R* [2014] NSWCCA 303 the Court (Bathurst CJ, Hoeben CJ at CL and Simpson J) provided a helpful statement as to the operation of circumstantial evidence and the threshold of relevance, writing at [240]:

> By s 55 of the *Evidence Act*, evidence that is relevant is evidence that, if accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings. The flaw in the appellants' argument is that it focuses only on [one piece of evidence], and isolates it from other evidence. The very point of a circumstantial case, as this was, is that it creates a mosaic of sometimes apparently tiny items of evidence, that, when put together, make up a whole picture. The tiniest fragment of evidence might, on completion of the mosaic, be shown to have significant relevance. It is a mistake, particularly in a circumstantial case, to attempt to determine the relevance of each individual item of evidence in isolation from all of the other evidence.

Context, tendency and coincidence evidence are each species of circumstantial evidence

8. Tendency and coincidence evidence are species of circumstantial evidence: see *Hoch v R* [1988] HCA 50; (1988) 165 CLR 292 at [9] per Mason CJ, Wilson and Gaudron JJ.

[1] *Gilbert v The Queen* (2000) 201 CLR 414; [2000] HCA 15 at [31] per McHugh J: "Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials."

9. The strictures in place for tendency and coincidence evidence exist because they are circumstances that permit a process of reasoning particularly hazardous for an accused. As much was recognised at common law where, in the decision of *D F Lyons Pty Ltd v Commonwealth Bank* (1991) 28 FCR 597, Gummow J said at 603:

> … [W]hilst evidence of a tendency or propensity to conduct of the kind alleged and in issue may be relevant and admissible as such, it is circumstantial evidence of a dangerous kind, particularly in a criminal case, because of the prejudice it engenders.

Context evidence is also a species of circumstantial evidence

10. Context evidence is also a species of circumstantial evidence. It is a common law concept that simply explains the nature of the circumstance – that is, how a particular circumstance helps explain, characterise or contextualise another aspect of the evidence. That explanatory power or process of reasoning is distinct from propensity or similar fact evidence at common law (the common law pre-cursors to tendency and coincidence).

11. The decision of *Harriman v The Queen* (1989) 167 CLR 590 is the seminal decision recognising context evidence as a species of circumstantial evidence that is distinct from propensity or similar fact evidence.

12. The decision remains good law under the statutory regime. The decision of *R v Quach* [2002] NSWCCA 519 recognised that context evidence remains equally distinct from tendency evidence under s 97, such that if it is relevant under ss 55 and 56 it is admissible, subject to exclusionary provisions (notably, s 137).

13. The *Evidence Act* does not specifically provide for context evidence. Much like all evidence, the threshold question is whether the proffered material (being the evidence of the circumstance) is relevant: ss 55, 56. The Crown's submission will invariably be the circumstance is relevant because of its interrelationship with the other circumstances constituting the Crown case. It is crucial to remain aware of the relevance of context evidence – that it is a circumstance made relevant by its interconnection with other circumstances.

Tendency and coincidence evidence – the regime in Part 3.6

14. Section 97 relevantly 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:
> …
>
> (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.

15. Section 98 relevantly provides:

> (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:
>
> (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.

16. Section 101 relevantly 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 substantially outweighs any prejudicial effect it may have on the defendant.

What is tendency reasoning?

17. Tendency evidence is evidence that invites a process of reasoning. That process is:

    a. the accused was previously confronted with a set of circumstances;

    b. the accused responded to those circumstances by acting in a particular way (collectively, tendency evidence), and

    c. having done so, the accused is more likely to have responded to the circumstances alleged to exist in the present case in the particular way now being alleged by the Crown (tendency reasoning).

18. Evidence of (a) and (b) allows the inference to be drawn that the occurrence of (c) – being the fact in issue – is now more probable. It is the extent to which (a) and (b) help establish (c) that determines the probative value of the tendency evidence.

19. Section 97 proceeds on the basis of inferential reasoning that people behave consistently in similar situations. The evidence is used to provide a foundation for an inference to that effect: *FB v R; R v FB* [2011] NSWCCA 217 at [23] per Whealey JA (Buddin and Harrison JJ agreeing). In the decision of *R v Cittadini* [2008] NSWCCA 256 Simpson J observed at [22]:

> Proof of a tendency to act in a particular way of itself goes nowhere. Evidence that a person had a particular tendency is adduced in order to render more probable the proposition that, on a particular occasion relevant to the proceedings, that person acted in a particular way (or had a particular state of mind); that is, to provide the foundation for an inference to that effect.

20. In the decision of *Elomar v R; Hasan v R; Cheikho v R; Cheikho v R; Jamal v R* [2014] NSWCCA 303 the Court (Bathurst CJ, Hoeben CJ at CL and Simpson J) stated at [253]:

> Tendency evidence is evidence tendered to establish that a person has or had a tendency to act in a particular way or to have a particular state of mind. It is evidence that is tendered in order to provide the foundation for an inference that, because the person has or had that tendency, it is more likely that he or she behaved in a particular way, or had a particular state of mind at a time or in circumstances relevant to the issues in the dispute: see *Gardiner v The Queen* [2006] NSWCCA 190; 162 A Crim R 233 at [124].

21. In the decision of *Jacara Pty Ltd v Perpetual Trustees WA Ltd* [2000] FCA 1886, Sackville J wrote at [61]:

> The critical question in a case in which the tendency rule stated in s 97(1) is said to apply to evidence of conduct is whether the evidence is relevant to a fact in issue because it shows that a person has or had a tendency to act in a particular way. To adopt the language of Cowen and Carter, the question is whether the evidence of conduct is relevant to a fact in issue via propensity: insofar as the evidence establishes the propensity of the relevant person to act in a particular way, is it a link in the process of proving that the person did in fact behave in the particular way on the occasion in question?

<u>Example of tendency evidence – *R v Fletcher* [2005] NSWCCA 338</u>

22. The appellant was a priest charged with nine counts involving sexual or indecent offending against a male adolescent parishioner, who was 14 and 15 years of age at the time of the offences. Count 1 concerned the appellant speaking to the complainant in a sexually explicit way and then masturbating himself. Count 5 concerned the appellant fellating the complainant. The Crown case sought to demonstrate the appellant befriended the complainant's family; engaged the complainant in church activities; exposed the complainant to sexually explicit jokes, risqué speech and pornographic material; groomed the complainant, and impressed upon the complainant the need to keep the conduct a "secret".

23. The trial judge admitted the evidence of a witness GG, who claimed that three to four years earlier, he had twice been fellated by the appellant. That evidence was admitted for a tendency purpose. At the time of the appellant's conduct towards GG he was 12 to 13 years of age. Simpson J explained the tendency purpose of GG's evidence:

> [57] What was contained in the tendency material was capable of establishing a pattern of behaviour on the part of the appellant, incorporating at least the following features. GG was two or three years older than the complainant, and his allegations were of conduct three or four years earlier than that alleged by the complainant: both were therefore young adolescents, twelve, thirteen or fourteen, at the time of the alleged conduct. Both gave accounts of being members of practising Catholic families, who were befriended by the appellant. Both served as altar boys. Both recounted conversations of a sexual nature. Both recounted admonitions by the appellant not to divulge to anybody what had happened. Both recounted assertions made by the appellant that the activity was normal.
> …

> [70] If [GG's] evidence had been limited to the bald assertions of sexual intercourse [being the two times the appellant fellated GG]… then it may be that the probative value did not substantially outweigh its prejudicial effect. However, the circumstances that allowed the evidence to pass the s 97(1) test were also material in this evaluation. The evidence given by GG concerning the appellant's relationship with GG's family, and his involvement in the church, parallelling *[sic]* evidence concerning the relationship of the appellant with the complainant and his family, also affected the probative value of the evidence relative to its prejudicial effect.

24. For completeness, the Crown at trial articulated the tendency purpose of GG's evidence as the tendency of the accused to behave in the following ways:

    - meet the family of the subject child through his position in the church
    - involve the family of the subject child in the church
    - develop a special relationship with the family of the subject child
    - develop a special relationship with the children of the family
    - develop a special relationship with the child, over and above that formed with the other children of the family
    - introduce the child to sexual material encouraging sexual activity and normalising it and encouraging secrecy
    - inappropriate sexual behaviour towards the subject child

What is coincidence reasoning?

25. The focus of tendency under s 97 is on the "evidence of a person". Coincidence evidence under s 98 instead focuses on the evidence of "2 or more events".

26. Coincidence evidence is also evidence that invites a process of reasoning. That process is explained in the decision of *R v Gale; R v Duckworth* [2012] NSWCCA 174 by Simpson J (McClellan CJ at CL and Fullerton J agreeing):

> [25] At its heart, s 98 is a provision concerning the drawing of inferences. The purpose sought to be achieved by the tender of coincidence evidence is to provide the foundation upon which the tribunal of fact could draw an inference. The inference is that a person did a particular act or had a particular state of mind. The process of reasoning from which that inference would be drawn is:
>
> - two or more events occurred; and
> - there were similarities in those events; or there were similarities in the circumstances in which those events occurred; or there were similarities in both the events and the circumstances in which they occurred; and
> - having regard to those similarities, it is improbable that the two events occurred coincidentally;

- therefore the person in question did a particular act or had a particular state of mind.

[26] … Part of that process involves findings of fact. Did the two (or more) events occur? Were there relevant similarities? Where the party tendering the evidence relies upon a number of asserted similarities, the tribunal of fact must identify which, if any, of those similarities have been established. Before asking itself the penultimate question - is it improbable that the two events occurred coincidentally? - it must discard any asserted similarities not established.
...

[31] In a case in which it is found that there is such evidence, then, in my opinion, the correct process in the determination of the admission of evidence under s 98 involves a series of steps, as follows:

- the first step is to identify the "particular act of a person" or the "particular state of mind of a person" that the party tendering the evidence seeks to prove;
- the second step is to identify the "two or more events" from the occurrence of which the party tendering the evidence seeks to prove that the person in question did the "particular act" or had the "particular state of mind";
- the third step is to identify the "similarities in the events" and/or the "similarities in the circumstances in which the events occurred" by reason of which the party tendering the evidence asserts the improbability of coincidental occurrence of the events…

Example of coincidence evidence – *Perry v The Queen* (1982) 150 CLR 580

27. The appellant was charged with two counts of the attempted murder of her third husband. It was alleged that she had tried to poison him with arsenic in 1978, and then again in 1979. There was evidence that the appellant would have stood to collect life insurance money in the event her husband had died.

28. The trial judge admitted into evidence the following material:

a. the death of the appellant's first husband in 1961 due to acute arsenic poisoning, in circumstances where she did collect life insurance money upon his death;

b. the death of the appellant's brother in 1962 by acute arsenic poisoning in their mother's house, in circumstances where she was the last person to see him alive and the first person to see him dead, and had days earlier placed weed killer (which contains arsenic) on a shelf in that house, and

c. the death of the appellant's second husband from an overdose of barbiturates in 1970, in circumstances where she did collect life insurance money upon his death.

29. Explaining the nature of coincidence reasoning, Gibbs CJ wrote at 587:

… [W]here a number of poisonings have occurred, and the victims have all been associated with the accused person, the evidence of the other poisonings may be admissible to support the inference that the accused was responsible for the death in issue, because it would be

> contrary to ordinary experience that a series of poisonings, caused by accident or suicide, would occur by coincidence in the circle of persons with whom the accused was associated.

30. Murphy J summarised the case of *R. v. Smith* (1915) 11 Cr App R 229 ("the brides in the bath case"), which is a clear example of coincidence reasoning, writing at 599:

> In the brides in the bath case the facts disclosed a clear pattern of involvement, on the part of the accused, with the very similar deaths, in rapid succession, of three women whom he had not long before married, each of whom had made a will in his favour. As Lord Maugham has concluded, "No reasonable man could believe it possible that Smith had successively married three women, persuaded them to make wills in his favour, bought three suitable baths, placed them in rooms which could not be locked, taken each wife to a doctor and suggested to him that she suffered from epileptic fits, and had then been so unlucky that each of the three had had some kind of fit in the bath and been drowned".

Further example of coincidence evidence – *R v Straffen* [1952] 2 QB 911 (cited in Uniform Evidence Law (ALRC Report 102))

31. The appellant was serving a prison sentence for the murder of two young girls. He had escaped from prison and his whereabouts were unknown for two hours. A young girl was killed in the vicinity of the prison during that same two-hour period. The circumstances of her killing were very similar to the killing of the two young girls for which the appellant was incarcerated.

32. It was not in dispute that the appellant had previously killed the two young girls, nor the circumstances in which they were killed. The trial judge admitted the appellant's killing of those two young girls. Explaining coincidence reasoning as it arose in that case, the ALRC said at para. 11.4:

> The relevance and admissibility of the evidence can also be justified using coincidence reasoning. The situation was one where the evidence showed that three young girls had been killed in similar circumstances and it was improbable that the killings would have been the acts of different people. It was established that Straffen had killed the two other young girls and therefore it was highly probable, he being in the vicinity of the murder, that he had killed the third.

Context evidence – the pre-*Evidence Act* decision of *Harriman v R* (1989) 167 CLR 590

33. The decision of *Harriman v R* (1989) 167 CLR 590 established that under the common law context evidence is a species of circumstantial evidence distinct from similar fact or propensity. That means context evidence is relevant for a purpose other than embarking on the process of reasoning that underpins similar fact or propensity.

34. The applicant (on the application for special leave to appeal to the High Court) was charged with being knowingly concerned in the importation of heroin in April 1987. The chief Crown witness was a Mr Martin, an associate of the applicant who was criminally concerned in the importation.

35. It was not in dispute the applicant and Martin had separately travelled from Australia to Thailand; met in Bangkok by prior arrangement; travelled together to Chiang Mai and then returned together to Bangkok; and that Martin had then travelled to London from where he posted five parcels of heroin to various addresses in Australia. The factual dispute concerned the applicant's involvement in that importation.

36. Martin's evidence was that he and the applicant met in Bangkok to procure heroin; the applicant had arranged for heroin to be collected in Chiang Mai; the applicant had arranged for the heroin to be delivered to Martin upon reaching Chiang Mai; the applicant assisted Martin in dividing the heroin into five parcels, and finally the applicant directed Martin to travel to London to then post the parcels of heroin to various addresses in Australia. Martin attributed a financial motivation to the importation, claiming the company in which he and the applicant were principal shareholders and directors was in financial trouble.

37. The Crown case was that the two men acted in concert. Martin's evidence was essential to establish the applicant was "knowingly concerned" in the importation.

38. The defence case at trial was that Martin had participated in the importation independently of the applicant and that the applicant had travelled to Thailand as a tourist. The cross-examination revealed that Martin had travelled to Thailand one month prior and independently of the applicant, which the defence claimed was the occasion when Martin had made the arrangements to procure heroin. There was also evidence that Martin had previously been involved in the supply of heroin in Western Australia.

39. The trial judge, over objection, admitted evidence of the applicant's prior involvement with Martin in the sale of heroin in 1986 (the year prior to that of the charged offence). The admission of that material was ultimately the subject of the application for special leave to appeal to the High Court. Each of the five justices (Brennan, Dawson, Toohey, Gaudron and McHugh JJ) granted special leave to appeal. A majority of four justices (Brennan, Dawson, Toohey, and McHugh JJ) dismissed the appeal. Brennan J said at 595-597:

> A person who is shown to have participated to a substantial degree in [the drug trade] trade – I am not speaking of mere use or of an isolated sale – is likely to have incentives to continue his participation in the trade and, because of the nature of the trade, is more likely to have done so than one who has not been a substantial participant. Evidence of substantial participation in the heroin trade can support an inference of continued participation… In this case, the extent of Harriman's participation was such that, in the absence of anything to suggest that the participation by Harriman and Martin in the sale of heroin in Western Australia had been discontinued, the guilty inference might properly have been drawn.
>
> Evidence of Harriman's participation in the heroin trade not only strengthened the Crown allegation of motive; it tended to make it more likely that Harriman's relevant contacts with Martin – providing Martin with his (Harriman's) address in Bangkok and arranging to meet there, the visit to Chiang Mai, the furnishing of addresses in Western Australia – were for a

guilty rather than an innocent purpose: see *Plomp v. The Queen* [1963] HCA 44; (1963) 110 CLR 234.

40. Toohey J wrote at 608-609:

> Evidence of a [drug] transaction, shortly before, involving the sale of heroin… and in which the two men had been concerned was relevant to the likelihood of the applicant having acted in concert with Martin when the two men were in Thailand together and when one of them (Martin) had obtained heroin, taken it to London and then sent it to Western Australia.
>
> Now it is true that such evidence was also likely to demonstrate a propensity on the part of the applicant to engage in heroin trafficking. But the evidence went beyond that. It was relevant to the character of the association between the applicant and Martin and was admissible for that reason, though, questions of prejudice aside, possible misuse of the evidence by the jury required that its purpose be explained with some care to them. The evidence was not admissible as similar fact evidence for it related only to occasions on which the applicant had sold or used heroin. The offence with which the applicant was charged was that of being knowingly concerned in the importation of heroin into Australia, a different kind of offence, to which none of the usual attributes such as "striking similarities", "unusual features", "underlying unity", "system" or "pattern" (*Hoch*, at pp 294-295) could be applied. It was the relevance of the evidence to the likelihood that the two men acted in concert in Thailand that made it admissible. There was some prejudice in the notion that the applicant was likely to have been involved with Martin in the importation of heroin because the two had been involved in the sale of heroin a short time earlier. However, it is hard to see any proper basis on which the evidence should have been excluded. Its probative force was strong and clearly outweighed its prejudicial effect when the defence was that Martin was acting independently of the applicant.

41. McHugh J stated at 634-635:

> **Evidence tending to prove that Martin and the applicant jointly supplied heroin was admissible**
>
> In the present case the critical issue was whether Martin and the applicant acted in concert to import heroin into Australia. The disputed evidence tended to prove that Martin and the applicant were jointly involved in selling heroin… [and] the further supply of heroin depended on the applicant going overseas to organise the supply. Other evidence, whose admissibility was not disputed, suggested that the applicant obtained heroin from Chiang Mai.
>
> Although there is an air of artificiality in treating the heroin dealings in Western Australia as an act separate from the importation of the heroin from Thailand, the two events were not so connected that the Western Australian dealings in heroin could be treated as part of the *res gestae* or one transaction. However, in my opinion, any evidence which tended to prove that Martin and the applicant were jointly involved in the sale of heroin in Western Australia and obtained their supply from overseas was admissible as circumstantial evidence which tended to prove that in April 1987 Martin and the applicant journeyed to Chiang Mai for the purpose of obtaining heroin and sending it to Australia. *[emphasis added]*

Context evidence under the statutory regime

42. *Harriman* remains good law under the *Evidence Act*. The courts continue to recognise context evidence as a species of circumstantial evidence distinct from tendency or coincidence evidence.

43. What follows are summaries of instructive decisions where the evidence, seemingly inviting tendency or coincidence reasoning, was found by the court to be relevant as context evidence and not subject to the strictures contained in Part 3.6.

R v Quach [2002] NSWCCA 519

44. The appellant had been charged with the large commercial supply of heroin. The alleged transaction was said to have taken place at his home. The buyer was a person by the name of Le. Visual and electronic surveillance tracked Le driving his car from Melbourne to the vicinity of the appellant's home in Leichhardt, Sydney. The car was observed to enter the rear laneway which ran behind the appellant's home from which his garage could be accessed. Call charge records showed Le had contacted the appellant's phone 30 seconds before his car was observed to enter the rear laneway. Le's car was not observed for 12 minutes but the electronic surveillance indicated his car was stationary and remained within the vicinity of the appellant's home.

45. Le's car was subsequently observed to drive away from the vicinity of the appellant's home. Le was stopped by police, his car searched, and 5.9 kg of heroin discovered, which was valued between $726,000 and $770,000. The appellant's house was later searched where police found a piece of paper with "[Le] $748,000" written on it in the appellant's handwriting. Also found at the appellant's home was $780,720 of cash constituted in new notes. There was evidence the garage to the home was large enough to simultaneously accommodate two cars.

46. The contested evidence concerned 11 intercepted phone conversations between Le and the appellant. The date of the supply was 2 May 2000; the 11 intercepted phone conversations occurred between 19 and 29 April 2000. There was expert evidence regarding some of the content of some of the calls that the appellant and Le were using code to discuss drugs and money.

47. The appellant argued that the 11 intercepted phone calls were either not relevant; or if relevant were inadmissible because they were relevant only for a tendency purpose such that ss 97 and 101 applied, or otherwise should have been excluded under s 137. The Court (Sully J, with Spigelman CJ and James J agreeing) dismissed the appeal. Spigelman CJ wrote:

> [15] Admissibility can be justified on two bases. First, a narrow basis that the evidence of the conversation of 29 April was admissible as possibly referring to a drug supply to occur within a few days and earlier conversations establishing the true nature and content of that conversation. Alternatively, the earlier conversations were admissible on a broader basis identified in *Harriman v The Queen* (1989) 167 CLR 590, that the prior relationship of other

drug dealings was such that no innocent explanation of Le's trip from Melbourne to the vicinity of the Appellant's residence was open.

…

[24] … The reasoning in *Harriman* is consistent with the admissibility of evidence of prior heroin dealings on a basis other than tendency reasoning. In *Harriman*, it was admitted that there was in fact a meeting between Harriman and his co-offender Martin and the issue was to determine the events that occurred at that meeting. The same is true in this case, albeit the fact of the meeting is not admitted.

…

[27] So in this case it can be concluded that the evidence of the contact between the Appellant and Le occasioned by Le driving from Melbourne to the immediate vicinity of the Appellant's house could be said to be, to use Brennan J's phrase, "for a guilty rather than an innocent purpose".

48. Addressing specifically the decoding of the purported drug talk between the appellant and Le, his Honour observed at [11]:

> The conversation of 29 April, like the other conversations on the tapes, is virtually incomprehensible. It could, at least theoretically, be explained on the basis that the parties to the conversation spoke in a form of shorthand derived from considerable familiarity with each other. The contents of the earlier conversations do counteract any such conclusion. Furthermore, some of the code words used on 29 April – "stuff" as heroin and "dong" as a quantity – had appeared in earlier conversations.

49. Regarding the non-innocent association between the appellant and Le at Leichhardt, his Honour said at [43]:

> So, in this case, the idea that the relevant association between the Appellant and Le, being the occasion on which Le drove a car to the immediate vicinity of the Appellant's residence, could be regarded as innocent, was decisively rebutted by the evidence of prior drug dealings. Without that evidence, to use McHugh J's phrase *[in Harriman]* "it was just possible they (the Appellant and Le) were acting independently of each other". This does not involve any tendency reasoning. His Honour's other formulation "whether two persons jointly involved in drug dealings would not be involved in the purchase (and sale) of heroin" when one had driven from Melbourne to the immediate vicinity of the residence of the other and then immediately commenced the return journey, may be closer to tendency reasoning, but that need not be determined.

50. In a separate judgment, Sully J stated at [72]:

> In such a trial setting, it seems to me that the evidence of the eleven intercepted telephone conversations was relevant and admissible in order to show such a relationship between the appellant and Le as would establish that it was no mere series of unfortunate coincidences that began with a flurry of telephone conversations about drugs; caused Le to drive from Melbourne to Sydney overnight to a destination in Sydney that was practically on the appellant's door-step; and that found Mr. Le shortly thereafter on his way back to Melbourne in possession of 5.9 kilograms of heroin; and found the appellant, at the same time, in possession of an enormous sum of money in bank notes, many of them new bank notes, the

> total amount of such money equating strikingly to the current market value of that 5.9 kilograms of heroin.

Masri v R [2015] NSWCCA 243

51. The appellant was charged with one count of doing "anything with the intention of dishonestly causing a loss" to a Commonwealth entity, namely the Australian Customs and Border Protection Service, contrary to s 135.1(3) of the *Criminal Code (Cth)*. It had been alleged the appellant and a co-offender imported cigarettes into Australia, pursuant to a joint criminal enterprise, between about 30 December 2011 and 17 January 2012, which was falsely represented as float glass and aluminum frames in order to avoid customs duties. That importation was referred to as the "Alternative Glass" importation, being the name of the company used by the alleged co-offender to import the cigarettes.

52. The extent of the appellant's involvement was alleged to have included: facilitating and dealing with necessary "paperwork"; providing funds for import freight charges; and obtaining an electronic delivery order ("EDO"), which was necessary to secure the release of the shipping container in which the cigarettes were stored. During the period of the offending conduct, there were frequent phone calls between the appellant and the co-offender which were captured by electronic surveillance. The two used a form of code during these conversations. Those recordings were a significant aspect of the Crown case.

53. The Crown alleged the appellant and co-offender utilised the "piggyback" method of importation. Simpson J described the method at [8]:

> This involved the use of the name of a legitimate importer with a satisfactory record, who would, therefore, be less likely to attract a high degree of scrutiny from Customs authorities, who had in operation a risk "profiling" system, that enabled a lower risk profile to be assigned to regular and compliant importers. A fraudulent importation would then be forwarded to that importer, but intercepted before it could be delivered. By that means, the fraudulent importation would escape the scrutiny of Customs officers.

54. The trial judge admitted into evidence, over objection, material which had the capacity to show the appellant and his co-offender had on three separate occasions previously been involved in importations of cigarettes, also utilising the piggyback method. Those were the "Pakplast" importation, "Alpha Tiles" importation, and "Livingstone" importation. Those three importations were uncharged acts. The Crown Prosecutor at trial identified the basis of the tender of the evidence as "background, context, and relationship" and expressly disavowed a tendency purpose.

55. The appellant submitted on appeal that the evidence was relevant only for a tendency purpose or, if relevant as context, should have been excluded under s 137. The Court dismissed the appeal. Simpson J (R A Hulme and Bellew JJ agreeing) wrote at [48]-[51]:

> The principal argument advanced in relation to Ground 2 was that the evidence is, properly characterised, tendency evidence within the meaning of s 97 of the *Evidence Act*.

> Throughout the voir dire, the Crown prosecutor was at pains to insist that the evidence was not tendered for a tendency purpose. It was stated, as set out above, to be tendered for the purpose of showing the context in which the appellant and Elomar were operating, the relationship between the two, and the extent of the appellant's participation in the importation.
>
> "Tendency evidence" is evidence tendered for that purpose: see the Dictionary to the *Evidence Act*… The nature of tendency evidence was explored by this Court in *Elomar v R; Hasan v R; Cheikho v R; Cheikho v R; Jamal v R* [2014] NSWCCA 303; 316 ALR 206 at [353]-[372]. Tendency evidence is evidence to provide a foundation for an inference that, because the person in question had the relevant tendency, it is more likely that he or she acted in the way asserted by the tendering party, or had the state of mind asserted by the tendering party, on an occasion the subject of the proceedings.
>
> That was not the purpose of the evidence the subject of this ground of appeal. It was, in the true sense, evidence tendered to establish, and capable of establishing, the context in which the events the subject of the trial took place.

To illustrate the practical difficulty confronted by Queen's Counsel at trial in having to countenance the admission of the three previous importations as context evidence, part of his opening address to the jury is extracted below:

> One thing you are going to have to watch out for and it will become an issue in this case is this, there are a series of telephone calls prior to December the 30th. You will hear them probably tomorrow and that is Omar Elomar and Masri and others. And the conversations, quite frankly, is pretty shifty. They are clearly talking, you might think about the tobacco smuggling business ...
>
> Now that will paint a very bad picture for Mr Masri, as being a bloke who you might think is well and truly involved in the black market of cigarettes and maybe even containers. But he's not charged with that. That evidence is there so you can, as Mr Crown says, see what the system is, so you can interpret the words, Dell, D, paperwork. It is going to be a hard job. And his Honour will give you a warning because the case is not about whether Mr Masri is the sort of person who might be involved in black market of cigarettes. The case is not about whether Mr Masri might have done something before, though you will form a bad opinion about him probably, if he has. The case is not about whether he knows people who are smugglers. What the case is about is this case. The one you're dealing with. Has the Crown proved beyond reasonable doubt that he was facilitating the removal of a container in an agreement with Mr Elomar and others or Mr Elomar as part of a joint criminal enterprise to get the container off the docks.

Mac v R [2014] NSWCCA 24

56. The appellant was charged with four counts:

1. attempting to import a marketable quantity of heroin (Commonwealth offence);
2. dealing with money that was the proceeds of crime (Commonwealth offence);
3. supply not less than the large commercial quantity of heroin (State offence), and

4. supply not less than the large commercial quantity of methylamphetamine (State offence).

57. The Crown case was that the appellant had travelled to Vietnam (his country of origin) in October 2010, returning 1 November 2010. On 7 November a package arrived in Australia from Vietnam addressed to the appellant's daughter at a Punchbowl address, which was a property owned by the appellant (but in which he did not reside). Customs examined the package and found it to contain heroin. On 11 November an undercover police officer attempted to deliver the package to the Punchbowl address but no one was home. The undercover officer left a note indicating there was a package awaiting collection from the Delivery Centre. The next day the appellant went to collect the package and was arrested (importation count).

58. On the date of his arrest investigating police searched the appellant's properties. At his home they located a safe in his bedroom containing $554,250 cash (proceeds of crime count); large quantities of heroin and methylamphetamine (two supply counts), and a set of scales. The scales had traces of methylamphetamine and cocaine on them. Also found was a box containing plastic bags, another set of scales, an electronic money counter, rubber bands and a roll of wire ties.

59. At the Punchbowl address police found a chemical compound known as dimethyl sulfone, which can be used to cut methylamphetamine. The methylamphetamine found at the appellant's home in the safe had been mixed with this chemical compound. The Crown alleged that the drugs and other items were indicia of a drug supplying enterprise, with the money its proceeds.

60. The appellant's case at trial was that he was a drug user and not a drug dealer / importer. He asserted the $554,250 cash was the proceeds of gambling; that his trip to Vietnam was legitimate; he had sought to collect the package from the Delivery Centre on behalf of his daughter, and that he was unaware the package contained heroin. He further claimed the drugs in the safe were being kept for an acquaintance to whom they would be returned and that he had used some with the permission of that acquaintance.

61. The trial judge refused an application by the appellant for separate trials, agreeing with the Crown Prosecutor that the evidence of each count was cross-admissible to prove the other counts. The Crown at trial did not seek to rely on the evidence for a tendency purpose.

62. On appeal the appellant argued that to allow the evidence to be cross-admissible was effectively to permit tendency reasoning. That was so notwithstanding the Crown had not asserted such use, nor had it satisfied the strictures of ss 97 and 101. The Court (Hidden J, with Basten JA and RS Hulme AJ agreeing) dismissed that ground of the appeal. Hidden J observed at [28]:

> Of course, evidence relating to two or more counts may be cross-admissible on a basis other than tendency or coincidence. It is on this issue that the cases of *Harriman* and *Quach* are important. Neither case was concerned with the joint trial of counts, but each of them raised

the question whether evidence of wrongdoing on the part of an accused other than that charged was admissible. Harriman involved a charge of being knowingly concerned in the importation of heroin, while Quach was concerned with a charge of supplying heroin. In each case the accused was alleged to have committed the offence with an accomplice, and in each evidence of their prior dealing with heroin was held to be admissible to provide context to the conduct giving rise to the offence charged, so as to demonstrate its criminality.

63. Dealing specifically with the appellant's complaint, his Honour wrote at [32]-[34]:

> The submissions of the Crown prosecutor in this court that the evidence relating to the four counts was cross-admissible are persuasive. In relation to count 1, the attempted importation of heroin, the critical issue was whether the appellant was proved to have known that the package contained heroin or was reckless as to that matter. The appellant's case was that he had no knowledge of its contents. The Crown had to rely upon circumstantial evidence to establish the contrary. Plainly enough, evidence relating to the other three counts to the effect that he had large quantities of drugs in his possession for sale, together with a large sum of cash and various indicia of drug supply, was strongly probative on that question. It might be added that the quantities of heroin the subject of counts 1 and 3 were both found to be of South-East Asian origin, with similar purity levels.
>
> Equally, the evidence relating to counts 1, 3 and 4, pointing to the appellant's involvement in the importation and supply of illicit drugs, was relevant and probative in respect of count 2, the money laundering count. Particularly was this so given the appellant's defence that it was the proceeds of gambling. Similarly, the evidence relating to counts 1 and 2 was important in considering the issue raised by counts 3 and 4, the supply of the heroin and methylamphetamine. Those counts relied upon the deeming provision to be found in s 29 of the Drug Misuse and Trafficking Act, and the appellant bore the burden of proving that he possessed them otherwise than for supply. His case, as I have said, was that he was minding them for another person (albeit with that person's permission to use some of them).
>
> The appellant has no legitimate complaint if the joint trial of the counts had indeed left the jury "with a great deal of scepticism" about his defence to each of them. A realistic assessment of each defence would not have been possible without the evidence relating to the other counts. Justice would not have been done by separate trials of the counts, with each jury left to evaluate the defence case in ignorance of whole of the circumstances established by the evidence on the other counts.

64. Hidden J approved of the trial judge's direction against tendency reasoning, which further removed the specter of unfair prejudice for the purposes of s 137: at [36]. The direction was given in the following terms:

> ... [Y]ou cannot take the evidence in support of the other counts into account in the sense of thinking, 'If the accused committed those other offences, therefore he must have been the kind of person who commits offences, and therefore he must have committed this offence charged in count 1.'

Elomar v R; Hasan v R; Cheikho v R; Cheikho v R; Jamal v R [2014] NSWCCA 303

65. The decision concerned the conviction after trial of the five appellants on the charge of conspiracy to do an act or acts in preparation for a terrorist act or acts, pursuant to ss

101.6 and 11.5 of the *Criminal Code (Cth)*. Part of the evidence tendered against each appellant was a recorded conversation in which a Mr Benbrika, an Islamic cleric, said to a co-offender (who pleaded guilty) that, in the cause of Jihad, it was necessary that Muslim adherents "do maximum damage" to the lives and the property of non-believers or the enemies of Islam. This came to be known as "the maximum damage conversation". That conversation took place in Melbourne on the date that co-offender and the appellant Hasan had travelled from Melbourne to Sydney.

66. The admission of that evidence was challenged on appeal on the basis it was not relevant or, if so, was relevant for a tendency purpose only and should have been subject to the statutory regime. The Court (Bathurst CJ, Hoeben CJ at CL and Simpson J) rejected the appellants' submissions, finding the evidence was relevant, and not for a tendency purpose.

67. The Court said the following on the relevance of "the maximum damage conversation" at [241]:

> It is not to the point that, on the evidence, of the [various offenders], only [the co-offender who pleaded guilty] could be shown to have been present at the conversation. The point of the Crown evidence was that the [various offenders], particularly [the co-offender who pleaded guilty], were closely associated with Benbrika and his group, and took spiritual guidance from them, especially Benbrika. The evidence was therefore relevant to show what Benbrika's attitudes were. It was also part of the case that the Crown proposed to make that each of the appellants had attitudes consistent with those attributed to Benbrika. That Benbrika advocated doing "maximum damage" in the cause of Jihad, or Islam, was capable of throwing light on what operated on the minds of the appellants in amassing the chemical products that they did, and the literature that they did.

68. Rejecting the contention that the "the maximum damage conversation" was relevant for a tendency purpose, the Court stated:

> [254] [The trial judge] said, in passing, that [the "maximum damage conversation"] was not tendency evidence, but merely "a circumstantial fact" which, together with other material would be assessed by the jury in its overall evaluation of the Crown case…
> …
>
> [256] The purpose of the tender of the evidence was not to establish that Benbrika had a tendency to use that phrase. The evidence was tendered to establish his attitudes, and accordingly the behaviour he encouraged in the appellants.

Section 137 has a role to play in seeking to exclude context evidence

69. Unlike where tendency or coincidence evidence is properly admissible having satisfied ss 97 or 98, as well as s 101, s 137 continues to have a role in excluding context evidence. In the decision of *R v Quach* [2002] NSWCCA 519 Spigelman CJ stated at [30]:

> As s 95 makes clear, evidence may be admitted if it is relevant for another purpose without passing the special test of the balance between probative value and prejudicial effects. Sections 97 and 98 identify distinct kinds of evidence and, apply to them a higher order of

test, namely significant probative value. In criminal cases where such evidence is sought to be adduced by the prosecution, s101(2) imposes a more stringent requirement for the balancing exercise, i.e. requiring the probative value to "substantially outweigh" any prejudicial effect. The lower order tests in s135 and s137 of the Act do, however, apply to evidence admitted for a purpose other than a tendency or coincidence purpose.

Workshop scenarios

Scenario 1

Charge: deemed supply – drug X

Crown case: accused found in motor vehicle in possession of indictable quantity of drug X; also found in car is a stack of cash and electronic scales

Challenged evidence: accused's phone contains an SMS from two days earlier disclosing an actual supply of drug Y

Issue: admissibility of SMS

Scenario 2

Charge: armed robbery, weapon is a shotgun

Crown case: accused entered a convenience store with a shotgun, pointed the shotgun at the store clerk and made away with various items; CCTV evidence shows the armed robbery but the assailant is wearing a balaclava which conceals his head and face

Challenged evidence: the police execute a search warrant at the accused's home and find four legally registered pistols properly stored in a safe; they also find in that same safe $5,000 cash in hundred dollar bills

Issue: admissibility of pistols and cash

Scenario 3

Charge: importation of drug X

Crown case: accused arranged for Mule 1 to receive package (which, unbeknownst to Mule 1, contains drug X); instructions from accused to Mule 1, contained in a series of SMS messages, are:

- package to be received at home address of Mule 1
- upon receipt call Y number
- attend shopping center in suburb A to handover package

Challenged evidence: accused's phone contains SMS messages to three other individuals over the last five months with similar instructions to each individual, but the package is to be received at their respective home addresses; statements taken from each individual setting out their receipt of packages and handover of them to the accused

Issue: admissibility of SMS text messages to three other individuals; statements of those same three individuals

Scenario 4

Charge: break, enter and steal

Crown case: a safe that utilises 'type-X' locking mechanism located at a hotel / pub is broken into by means of explosion; chemical compounds consistent with accelerant allowing for combustion are identified; the safe door has been blown off the hinges; the DNA and fingerprints of the accused are found on surfaces in the room containing the safe

Challenged evidence: during a search of the accused's home by the police a toolkit that contains sophisticated safe-breaking instruments is found; the instruments are capable of tricking "type-X" and "type-Y" locking mechanisms on a safe to disable

Issue: admissibility of toolkit and the instruments

Scenario 5

Charge: murder

Crown case: accused shot the deceased with intent to murder

Defence case: shooting was accidental

Challenged evidence: prior history of domestic violence complaints by deceased to two friends

Issue: admissibility of domestic violence complaints

Scenario 6

Charge: common assault / intimidation

Crown case: accused is the son of the complainant; each are at home at midnight; accused threatens to kill the complaint and punches him in the face; neighbor calls '000'

Challenged evidence: 20 minutes after the '000' call police arrive at the street-front of the residence and park across the road from the home; police observe the accused exit the front door stumbling; holding a bottle of alcohol; yelling at people in the street; accused

throws bottle of alcohol in the direction of the police and it smashes upon hitting the ground (no charge of assault police is laid)

Issue: admissibility of police observations of accused's conduct in circumstances where the complainant makes no mention of the accused being drunk at the time of the alleged offence

Scenario 7

Charge: dangerous driving causing death

Crown case: accused was driving his motor vehicle at excessive speeds, collided with an oncoming vehicle **around** 5:00 pm, causing the death of the other driver

Challenged evidence: at 4:50 pm a householder standing out the front of his property observes the accused's car travel "a distance of 300 metres, much faster than the posted speed limited, the engine was roaring loudly and the car crossed the diving line when it went around the bed and out of sight"

- assumption 1: opinion evidence re "much faster than the posted speed limited" is admissible
- assumption 2: as the collision was "around" 5:00 pm, the time it took the accused's motor vehicle to travel the distance from the witness' house to the collision site is unknown, such that it can not be deduced what speed he was travelling over that distance

Issue: admissibility of witness observations of accused's driving to establish he was speeding at the time of the collision