

# SUPREME COURT OF QUEENSLAND

CITATION: *The Queen v SZK and TBN* [2022] QSCPR 6

PARTIES: **THE QUEEN**  
(respondent)  
**v**  
**SZK**  
(first applicant)

AND

**TBN**  
(second applicant)

FILE NO: Indictment 1731 of 2021

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 June 2022

DELIVERED AT: Brisbane

HEARING DATE: 30 May 2022

JUDGE: Jackson J

ORDER: **The matters in paragraphs 9, 11, 14, 15, 16, 17, 18 and 19 of the Statement of CPA are excluded from evidence at the trial.**

CATCHWORDS: CRIMINAL LAW – EVIDENCE – PROPENSITY, TENDENCY AND CO-INCIDENCE – ADMISSIBILITY AND RELEVANCY – PROPENSITY EVIDENCE – GENERALLY – where the deceased died from a stab wound – where the defendants applied to exclude evidence in a statement that one of the defendants would often carry a knife with him and that on an occasion three to four months before the stabbing, he said that if he ever came across someone who was bigger than he was, he would use the knife against them – whether the probative value of the evidence exceeded its prejudicial effect

*Criminal Code* s 31, s 271, s 272, s 304

*Hoch v The Queen* (1988) 165 CLR 292, applied

*Pfennig v The Queen* (1995) 182 CLR 461, applied

*R v Delgado-Guerra; Ex parte Attorney-General* [2001]

QCA 266, cited

COUNSEL: C Cook for the Crown  
J Robson for the first applicant  
D Wilson for the second applicant

SOLICITORS: Office of the Director of Public Prosecutions for the Crown  
Legal Aid Queensland for the first applicant  
Stewart Burr & Mayr Lawyers for the second applicant

**JACKSON J:**

- [1] The defendants apply for an order excluding evidence of matters in eight paragraphs of the statement of one of the proposed witnesses at the trial. The evidence is to be tendered by the prosecution as circumstantial evidence in the nature of propensity or similar fact evidence.
- [2] The defendants are charged that on 13 March 2020 at Redcliffe they murdered BBA. A short description of the alleged circumstances is sufficient for present purposes. Shortly after 8:00 pm on 13 March 2020, BBA was in company with three other young people near the intersection of Anzac Avenue and Oxley Avenue, Redcliffe. A member of BBA's group engaged in a sale of less than two grams of cannabis to the defendants or the defendants and another who was with them at a toilet next to the youth centre at that location.
- [3] Shortly afterwards, the seller ran away from that vicinity pursued by the defendants along a path that runs between the museum and an open drain towards Anzac Avenue. BBA went through a car park on the other side of the museum towards Anzac Avenue. Near the entrance to the car park BBA passed the seller walking in the direction of the defendants. They confronted one another at the entrance to the car park. BBA was armed with at least knuckle dusters and perhaps a knife. At least one of the defendants was armed with a knife. Within moments, the defendant TBN stabbed BBA in the heart. BBA collapsed almost instantly. The defendants ran away from the scene. BBA died shortly afterwards. The confrontation and the stabbing were video recorded by a nearby CCTV camera in the car park.
- [4] The prosecution case against the defendant TBN is that he stabbed BBA intending to do grievous bodily harm and is criminally responsible for his murder. The circumstances also raise the possible question of the prosecution excluding self defence under either s 271 or 272 of the *Criminal Code* (Qld).
- [5] The challenged paragraphs of CPA's statement contain evidence of two facts that may be relevant to the question of intention or otherwise. One fact is that TBN would often carry a knife with him. He would keep the knife in his shorts with his shirt covering over the top. The other is that on an occasion three to four months before the stabbing, TBN said to CPA that if he ever came across someone who was bigger than he was, he would use the knife against them. The prosecution submits that evidence of those facts will prove that TBN would carry a knife and was prepared to use it against another larger than him. It submits that the evidence is relevant to TBN's intention when stabbing BBA and to exclude the possible justification of self-defence.

- [6] The prosecution accepts that the proposed evidence is propensity evidence and therefore must meet the requirements for admission as such under *Pfennig v The Queen*.<sup>1</sup> The prosecution submits that propensity evidence may serve the purpose of proof of a state of mind that is an element of the offence and rebuttal of an innocent explanation for the act in question.<sup>2</sup>
- [7] The prosecution submits that the only rational inference from TBN's statement to CPA is that TBN regularly carried a knife with the intention to use it, including against someone bigger than him, thereby demonstrating his motivation to use a knife against BBA.
- [8] The prosecution submits that the evidence is also relevant to the operation of s 272(2) of the *Criminal Code* which excludes self defence in a case where a defendant begins his assault with intent to kill or intent to do grievous bodily harm, which is the same or similar question to the intention the prosecution alleges TBN had under s 302(1)(a) of the *Criminal Code*.
- [9] The defendants submit that the challenged evidence has the quality of general propensity evidence and is also evidence of the defendant TBN's prior bad character because it implicitly asserts prior weapons offences in carrying a knife or knives.
- [10] The defendants submit that the circumstances in which TBN made the statement as to using a knife militate for a finding that the evidence is not relevant or otherwise admissible. The circumstances are that the statement was made three to four months prior to the stabbing, was not made in relation to BBA in particular, and was made in the context of two teenage young people discussing the carriage of knives generally. The defendants submit that in those circumstances the statement does not demonstrate the intention to cause grievous bodily harm to BBA by stabbing and has no or very slight probative value. The defendants also submit that the evidence of TBN previously regularly carrying knives is highly prejudicial.
- [11] The plurality in *Pfennig* identified that:
- “...evidence of mere propensity, like evidence of a general criminal disposition having no identifiable hallmark, lacks cogency yet is prejudicial. On the other hand, evidence of a particular distinctive propensity demonstrated by acts constituting particular manifestations or exemplifications of it will have greater cogency, so long as it has some specific connexion with or relation to the issues for decision in the subject case. That evidence ... will be admissible only if its probative value exceeds its prejudicial effect.”<sup>3</sup>
- [12] As to the degree of that probative value, the plurality in *Pfennig* approved the reasons in *Hoch v The Queen*,<sup>4</sup> where it was said:
- “The basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency ... such that, if accepted, it bears no reasonable explanation other than the

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<sup>1</sup> (1995) 182 CLR 461.

<sup>2</sup> *R v Delgado-Guerra; Ex parte Attorney-General* [2001] QCA 266 [16].

<sup>3</sup> *Pfennig v The Queen* (1995) 182 CLR 461, 483.

<sup>4</sup> (1988) 165 CLR 292, 294.

inculpation of the accused in the offence charged. In other words, for propensity or similar fact evidence to be admissible, the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged.”<sup>5</sup>

- [13] In my view, the proposed evidence in the present case does not have sufficient probative value to exceed its prejudicial effect. First, the fact that TBN regularly carried a knife on prior occasions says nothing or only a little about when or with what intention he might have been prepared to use it. It may be relevant to prove that he was carrying a knife before he stabbed BBA but it says little about whether he was prepared or in what circumstances he was prepared to use a knife. Although the general issue is joined by a defendant’s plea of not guilty to the charge and no formal admission has been made as to TBN having a knife, the evidence to be tendered otherwise including that of the video recording of the stabbing leaves no practical room for doubt that TBN had a knife.
- [14] Second, TBN’s statement to CPA that if he ever came across someone who was bigger than him he would use a knife against them also does not say much about TBN’s intention at the time of the stabbing. The statement was made in the abstract, not in relation to BBA or any particular circumstances, except the size of the person against whom TBN might use a knife. It is not inconsistent with a possible justification of self-defence, depending on the circumstances. Its probative value in relation to TBN’s intention at the time of the stabbing is relatively low.
- [15] Against that, in my view, both statements have a relatively high prejudicial value. The statement that TBN would use a knife against a bigger person would invite the jury to reason impermissibly that TBN intended to cause grievous bodily harm to BBA because BBA was bigger than him. The fact that TBN regularly carried a knife would invite the jury to reason impermissibly that it was more likely that when TBN stabbed BBA he intended to cause grievous bodily harm. The risks of those prejudices exceed, in my view, the probative value of the challenged evidence.

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<sup>5</sup> (1995) 182 CLR 461, 481.