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**IN THE CROWN COURT IN NORTHERN IRELAND
SITTING IN BELFAST**

THE QUEEN

v

RAYMOND O'NEILL

**RULING (NUMBER 1)
ON TIMING OF BAD CHARACTER APPLICATION**

**David McDowell QC and Rosemary Walsh (instructed by the Public Prosecution Service
for Northern Ireland) for the Crown**
**Martin O'Rourke QC and Colm Fegan (instructed by McIvor Farrell Solicitors Ltd) for the
Defendant**

SCOFFIELD J

Introduction

[1] In this case the prosecution, on 22 January 2016, served a notice of intention to adduce evidence of the defendant's bad character, with an accompanying written submission. The defence oppose that application on its merits and served notice to this effect on 7 November 2019. The issue between the parties for present purposes is not the substance of the application to admit the bad character evidence but, rather, when the application should or must be moved and determined. Both parties have provided written arguments on this issue and I am grateful to all counsel for their helpful submissions.

[2] In the Crown's initial written submission in support of the bad character application, it is suggested that it "should not be heard until the conclusion of the evidence in this case", that is to say, at the conclusion of the prosecution case. The defendant's representatives initially concurred with this approach. However, at a review on 20 December 2021, it became clear that a different view has now been taken by the defence. The defendant's present position is that the Crown should

indicate if it wishes to pursue the application and, if so, move it at (or near) the commencement of the trial; or, in the alternative, should abandon the application. The reasons for this approach are explained in further detail below. For its part, the prosecution prefer to keep the matter under review as the trial progresses.

[3] I heard argument oral argument on the issue at a pre-trial hearing and give this ruling before the start of the trial under section 40 of the Criminal Procedure and Investigations Act 1996.

The statutory scheme

[4] The statutory provisions governing the adduction and use of bad character evidence in criminal proceedings in this jurisdiction are set out in Part II of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order") - and, for present purposes, particularly Article 6 of that Order - and in the Crown Court Rules (Northern Ireland) 1979 ("the Crown Court Rules").

[5] Since the issue which is the subject of the present defence application is essentially procedural, most assistance is to be found in the provisions of the Crown Court Rules. These were amended after the making of the 2004 Order, pursuant to Article 16 of that Order. In particular, Article 16(2) provided that:

"The rules may, and, where the party in question is the prosecution, must, contain provision requiring a party who -

- (a) proposes to adduce evidence of a defendant's bad character, or
- (b) proposes to cross-examine a witness with a view to eliciting such evidence,

to serve on the defendant such notice, and such particulars of or relating to the evidence, as may be prescribed."

[6] In turn, rule 44N of the Crown Court Rules (added by the Crown Court (Amendment) Rules (Northern Ireland) 2005 (SR 2005/80)) now provides in relevant part that:

- "(4) A prosecutor who wants to adduce evidence of a defendant's bad character or to cross examine a witness with a view to eliciting such evidence, under Article 6 of the 2004 Order, shall give notice in writing which shall be in Form 7F in the Schedule.

- (5) Notice under paragraph (4) shall be served on the chief clerk and every other party to the proceedings within 14 days from the date –
- (a) of the committal of the defendant ...”

[7] An application by a defendant to exclude bad character evidence must also be given in writing (in Form 7G) and must be served on the chief clerk and every other party within seven days of the date that notice under paragraph (4) was served on him: see rule 44N(8). The court may, in the interests of justice, allow the notice or application to be given in a different form or orally and/or may abridge or extend the relevant time limits: see rule 44N(10).

Summary of the defendant’s submissions

[8] The defence contend that the interests of fairness require the bad character application to be determined before the trial commences (or, at least, before the prosecution call the key witnesses of fact). There are a variety of reasons for this contention. First, it is submitted that, as a matter of general principle, the defendant is entitled to consider his approach to the Crown’s case taken as a whole. Put another way, his entitlement to know the case to be made against him includes an entitlement to know whether bad character evidence will be led in support of the case he has to answer.

[9] Second, and more particularly, the defendant submits that it would be unfair for him to have to conduct his defence, or a significant part of it, at a time when he is unaware whether his previous convictions are to be admitted or not. In turn, that is for two reasons: (i) it may influence the nature of his cross-examination of prosecution witnesses; and (ii) if the bad character evidence would be inadmissible under the gateway relied upon by the Crown (here, Article 6(1)(d), as evidence of propensity and relevant to an important matter in issue between the defendant and the prosecution), he would need to be alive to the possibility of “triggering its admissibility” through one of the other gateways. He might do so, for example, by attacking another’s character through cross-examination in a way relevant to the Article 6(1)(g) gateway. If the bad character evidence was admissible on the basis put forward by the Crown, the defendant and his representatives would not have to avoid or ‘tiptoe around’ issues they might otherwise decide they should pursue.

[10] In light of these points, the defendant contends that he is entitled to know at or towards the start of the trial (before the commencement of the Crown’s civilian witnesses) what the position is. He submits this to be so on the basis of common law fairness and on the basis of his rights under article 6 ECHR (in particular, the right to be informed of the case against him and to have adequate time and facilities for the preparation of his defence). In respect of article 6, he relies, *inter alia*, on the statements of the European Court of Human Rights (ECtHR) in *Gregačević v Croatia* (2012, Application No 58331/09), at paras 50 and 51, that:

“The concept of a fair hearing implies, inter alia, the right to adversarial proceedings, according to which the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court’s decision ...

The Court further reiterates that Article 6 § 3 (b) guarantees the accused “adequate time and facilities for the preparation of his defence” and therefore implies that the substantive defence activity on his behalf may comprise everything which is “necessary” to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings ...”

[11] The defence further submit that the statutory scheme described above is consistent with a defendant’s entitlement to know at an early stage whether bad character evidence is to be relied upon against him.

Summary of the Crown’s submissions

[12] The prosecution’s written submission in support of the bad character application noted that its primary contention in relation to the hearing of this application was that it should not be heard until the conclusion of the evidence in the case. The reason for that was said to be to ensure that the court is in a position to evaluate the nature, extent, strength and weaknesses of the prosecution evidence and, therefore, to be in an informed position to properly contextualise the application. This was said to be a “commonly adopted procedure” such that, in recent times, “it is rare that [the prosecution has] sought to have bad character applications adjudicated upon at the outset of the proceedings, or that the Defence have requested that same be done.”.

[13] In their more recent written submissions in opposition to the defence application that the Crown be put on its election in relation to this issue at the start of the trial – and either proceed with the application now or abandon it – prosecuting counsel have made a number of further points. Understandably, they have drawn attention to the fact that the defendant previously, in his notice of intention to apply to exclude the evidence of his bad character, submitted that the application *should* be deferred until the conclusion of the prosecution evidence due to the potential weaknesses in the prosecution case. They rely upon the case of *Gyima*, discussed below. They further draw attention to the fact that where an

application is made and granted prematurely, that may result in evidence being adduced before the jury which (when later viewed with hindsight) affects the fairness of the proceedings or the safety of any resulting conviction. That is particularly so in a case such as the present, they submit, where a large number of civilian witnesses is anticipated (several of whom are or were well known to the defendant) and considering the passage of time between the commission of the offences and now.

The guidance given in the *Gyima* case

[14] Mr McDowell placed some emphasis on the guidance given in the case of *Gyima* [2007] EWCA Crim 429. The summary in *Blackstone's Criminal Practice* (2022) ("Blackstone"), at section F13.41, of the principle to be drawn from that case in the present context is as follows:

"Where it is foreseeable that the evidence of witnesses might not be as anticipated in their witness statements, and there is in consequence a risk that the use of bad character evidence will overshadow the rest of the prosecution case, it may be desirable to delay a ruling on admissibility until the Crown has called its witnesses."

[15] Of course, in very many cases, it will be foreseeable that the evidence of witnesses might not be as anticipated in their witness statements. The key issue, therefore, is likely to be whether that will result in a scenario where the bad character evidence will "overshadow the rest of the prosecution case". That depends to a large degree on the weakness of the prosecution case apart from the bad character evidence. The summary of the same case in Archbold, *Criminal Pleading, Evidence and Practice* (2022) ("Archbold"), at section 13-72, is in somewhat different terms and emphasises that the focus of enquiry will be on whether it is not possible to determine the weakness (or otherwise) of the prosecution case before the evidence is heard:

"In *Gyima and Adjei* [2007] EWCA Crim 429, it was said that, where it is not possible to say whether a prosecution case is "weak" before the evidence is heard, it is proper for the court to hear the evidence first and postpone the decision until after it has done so."

[16] *Gyima* was a case in which the complainant was assaulted and had personal effects including his watch and jewellery stolen; and it was alleged that all five members of a group of boys took part in the attack. The complainant himself was unable to identify who had been kicking and punching him, at least after an initial assault, because he had been curled up on the ground trying to defend himself. His cousin, who lived in the United States but was visiting on holiday, witnessed the attack and gave evidence in a recorded interview to police that all five of the boys

present had participated in the assault. In the event, this witness did not return to England for the trial and a key aspect of the appeal was whether or not his recorded interview ought to have been admitted in evidence. In addition, a robbery conviction on the part of the defendant Gyima was admitted as bad character evidence.

[17] The ruling in relation to the admission of this bad character evidence, like the ruling on the admission of the complainant's cousin's video interview, was made at the start of the trial. At that point, the complainant's own statement had provided evidence against the defendant, since he contended that four of the five boys, including the defendant, had attacked him (see paragraphs [30] and [35]). After cross-examination of the complainant however, during which he accepted that he could not identify those attacking him whilst he was on the ground, the only real evidence against the appellant Gyima had been the video interview of the witness who did not attend trial and who could not therefore be cross-examined.

[18] In light of this the Court of Appeal found it would have been very difficult for the jury to have been sure that the appellant had been involved in the offences. The video interview was the crucial evidence against him; and another defendant facing the same evidence, but who did not have a conviction admitted as bad character evidence against him, was acquitted. The Court of Appeal further concluded that, had the judge been asked to make a ruling on the admission of the previous convictions at the *end* of the prosecution case before it closed, he would almost certainly have refused the application to allow the conviction to be placed before the jury, for fear of it overshadowing the otherwise very weak case against him. At para [38] the court pointed out:

“However, he was invited to make his ruling at the start of the case and we can see that in most cases there is good reason for a judge to give such a ruling at that stage.”

[19] Crucially, the court determined that, even assessing the issue at that point, namely at the start of the trial, the judge was wrong to have admitted the previous conviction (see para [39]). There had been a clear risk “that the evidence of the only live witness might not be as anticipated in the witness statement”. In those circumstances, the members of the Court of Appeal would either have refused to admit the convictions at that stage or, more probably, would have deferred making any ruling until the Crown had called its evidence but before it closed its case. That course of action would almost certainly have led to a different ruling once the complainant had not come up to the proof. The appeal was allowed on the basis that the judge gave no reasons for the exercise of his discretion and that, even at the stage he considered it, it was wrong to admit the conviction.

[20] At para [40] of the judgment the Court of Appeal went on to give some general guidance in this field and said this:

“There is a matter which we think worthy of note on a general point. We can entirely understand the practical reason for inviting a judge at the outset of the trial to rule whether a defendant’s previous convictions are or are not admissible. There are plainly good reasons for this for the purposes of the administration of justice where there is a prospect that, once the ruling to admit the convictions is made, the defendant will plead guilty. However, in our judgment judges and practitioners should be astute to recognise that there may be cases where it is important to defer such a ruling until the whole of the evidence of the prosecution has been adduced. In such cases, where it appears that there may be weaknesses or potential weaknesses in the prosecution case, it is unwise to rule on the admission of previous convictions until the court is able to make a better assessment of the strength or weaknesses of the prosecution case. In our judgement, it is as well for both the judges and practitioners to have this in mind when the court is invited to rule on the admission or otherwise of previous convictions.”

[21] The prosecution rely on this guidance in the present case to assert that it would be unwise to accede to the defendant’s application that the matter be addressed and ruled upon at the start of the trial; and in order to submit that this is the type of case where it is important to defer such a ruling.

[22] The approach counselled in *Gyima* is, however, simply guidance; and in an earlier decision of the English Court of Appeal in *R v D* [2006] EWCA Crim 1703, the court emphasised that there were no hard and fast rules. That was a case in which the defendant appealed against conviction on the basis, *inter alia*, that the trial judge ought to have left the determination of whether to admit bad character evidence to the end of the prosecution case rather than ruling upon it at the start of the trial. In the course of her judgment for the court, Dobbs J (at para [19]) said:

“We have been invited by counsel for the Appellant to give some guidance in relation to the proper timing of such applications. Applications of this kind can be made at different times during the trial. We decline the invitation offered because we cannot set down any rules as to when such applications should be made. They will depend on the circumstances of the case and the views of counsel and the court. In this case if it had been thought that the application was premature, it was open to defence counsel to ask the judge to defer the decision until the evidence of the witnesses had been heard. There was no such application. However, counsel made submissions

about the weakness of the prosecution case when he opposed the admission of the convictions. On the facts of this case it would be difficult in our view to wait until the end of the Crown's evidence, because it would have affected the shape of how the case was conducted, not only by the Crown but also by the defence."

[23] These observations suggest not only that the views of counsel are relevant to the issue of the timing of the application; but also that there may be circumstances where it will be difficult to wait until the end of the Crown's evidence to rule on the application because of the potential effect (either way) on the running of the Crown and defence cases up to that point.

Consideration

[24] In light of the purpose for which the Crown wish to introduce and rely upon the bad character evidence - namely as evidence of propensity to support its case that the accused is guilty - it seems to me that it plainly forms part of the case against the applicant which (subject to its being admissible) he is entitled to know about and will have to answer. The key question in the present application is *when* the defendant is entitled to know the position in relation to this - at least in principle - that is to say, whether the bad character evidence is admissible or not.

[25] There are obvious advantages to the defendant of his knowing in advance whether (and to what extent) the bad character evidence on which the Crown wish to rely is admissible or not. He identifies those as including being able to know the totality of the case which will be made against him from the start of his trial; to properly prepare his defence; and to properly organise his defence, allowing him to present his case without restriction. I explored with Mr O'Rourke whether, if the course suggested by Mr McDowell was followed and some or all of the defendant's previous convictions were admitted towards the end of the Crown case, any concerns he had in relation to how previous Crown witnesses had been questioned and challenged could be dealt with by way of their being recalled. I accept his submission that this would be undesirable, and is best avoided, for a range of reasons, including not only the inconvenience or distress it may cause to the witnesses concerned but also in terms of the smooth running of the proceedings more generally and having the case presented in a way which is most conducive to jury understanding.

[26] I do not place significant weight on the suggestion made in the defendant's submissions that the previous convictions of other civilian witnesses may require to be explored "if they were to be considered as potential suspects for the murder." No application on behalf of the defence to admit the previous convictions of a non-defendant witness under Article 5 of the 2004 Order has been made or intimated. Nor has any positive case been disclosed on behalf of the defendant as to any other identified individual whom he contends is or may be guilty of the murder.

[27] However, given that many of the previous convictions on the part of the defendant which the prosecution wish to have admitted relate to burglary and theft, I do accept that the defence may well wish to explore in cross-examination of prosecution witnesses whether there was any evidence of theft or burglary in the present case. I also consider there to be force in the defendant's suggestion that the scope of cross-examination may be restricted if he feels required to avoid attacking another's character in cross-examination.

[28] I do not accept the Crown's characterisation of the defendant's position on this issue as being one of seeking some mere tactical advantage. In any event, even if the matter comes down to which party, if either, should have a tactical advantage arising from a contested view of when the application should be moved, in my view fairness suggests that the defendant should presumptively take the benefit of any such advantage, rather than the prosecution. It is perhaps also relevant that, since the Crown does not require leave to adduce bad character evidence in relation to the defendant under Article 4 of the 2004 Order (cf. the position in relation to a non-defendant under Article 5(4) whereby leave of the court is required, except where this evidence is adduced by consent), the application with which I am presently concerned is the application on the part of the defendant to *exclude* the Crown's intended evidence under Article 6(3) of the 2004 Order. One might say that, in those circumstances, the defendant's own view as to when the application should be moved and dealt with should carry more weight.

[29] I of course accept the submission on behalf of the Crown that the bad character application requires careful consideration and that prosecuting counsel, in accordance with their duty, will wish to ensure that there is a sound legal basis present before launching the application. However, those obligations arise at any time the application is to be moved or should be moved (in accordance with any ruling of the trial judge), and indeed arise at the time when the decision is made to serve notice of intention to adduce such evidence. I cannot accept the submission that requiring the prosecution to take a position on that matter at the outset of the trial, where this is the defendant's preference and the court concludes that it is the fairer course in all of the circumstances of the case, is "contrary to the professional obligations of the prosecution".

[30] The key issue of concern which arises for the prosecution in respect of an early decision on the bad character evidence arises only if the evidence is in principle admissible. If it is inadmissible, it will be excluded and the trial will simply proceed without the jury hearing of it. However, if the bad character evidence is admitted but a number of the prosecution witnesses thereafter fail to come up to proofs, there is a concern that the defendant will then contend that the bad character evidence ought *not* to have been admitted and, in that event, that it is no longer admissible because it is merely shoring up an otherwise weak Crown case with "no or very little other evidence" against the defendant (as discussed in *R v Hanson, Gilmour and P* [2005] EWCA Crim 824, at paras [10] and [18]). In those circumstances,

Mr McDowell submits, Mr O'Rourke would be seeking a ruling that the jury be discharged. Although that risk cannot be discounted, I consider it to be overblown and capable of being mitigated for a number of reasons, summarised below.

- (a) First, this is not a case – as *Gyima* was – where the sole or decisive evidence against the defendant rests entirely on the oral testimony of one or two key eyewitnesses, much less where only one key witness will give oral evidence in court. The prosecution case is a circumstantial one, drawing on a range of strands of evidence, a key element of which relates to timed CCTV footage of (what is alleged to be) the offender entering and leaving the injured party's home, together with a variety of pieces of evidence, from a variety of witnesses, as to the defendant's movements and actions before and after the offences were committed. The nature of the evidence in the case is such that, in the defence's submission, "the nature and strength of the case is reasonably ascertainable" at this point (without prejudice to the defendant's contention that the case against him is weak). That is not to say that there is not some risk that aspects of the oral evidence may differ from what the prosecution anticipates. However, this is not a case where the case hinges on a very small number of eyewitnesses whose evidence is highly contentious. The scope for the prosecution case collapsing to the extent that there is little or no other evidence against the defendant is therefore less than was the case in *Gyima*.
- (b) Second, even if the bad character evidence is ruled admissible, the Crown is not required to lead that evidence either at all or at any particular stage. Prosecuting counsel retain a discretion as to whether to introduce the evidence and as to the stage at which it is deployed before the jury. Those are matters I cannot dictate. If the prosecution is seriously concerned about the risk which is identified in its submissions, that risk can be managed by only introducing such bad character evidence (if any) as is ruled admissible at a late stage of the Crown's presentation of its case. In the meantime, the defendant would be armed with knowledge as to whether, in principle, such evidence was excluded or not.
- (c) Third, if it transpires to be the case after the Crown's witnesses have given oral evidence that the prosecution case is much weaker than anticipated at the start of the trial, the primary means of dealing with that would be by way of an application for a direction of 'no case to answer' at that stage. Where the case is not sufficient to be left to the jury even with the bad character evidence admitted – recognising the limitations of the reliance which can be placed on such evidence and the warning which would be given to the jury against placing undue reliance on previous convictions – it will be dismissed.

[31] In my judgement, the approach which is most consistent with the statutory scheme and the promotion of fairness to defendants generally is for the application to be made and dealt with at the start of the trial, so that the defendant knows where he stands, unless there is good reason for doing otherwise. The judgment of the

English Court of Appeal in the *Gyima* case supports the view that “in most cases” there is good reason for the ruling in a bad character application to be made at the start of the trial. One such reason is that it allows the defendant to make a more informed assessment as to whether or not to plead guilty. However, allowing the defendant to know precisely what he faces at an early stage and to prepare and manage his defence accordingly is another such reason, particularly where (as here) he asserts that that is necessary in the circumstances of the case and eschews the suggestion that the case is in the *Gyima* category.

[32] Conversely, there may be a good reason to take a different approach. Such a reason will of course include those cases, of which *Gyima* is an example, where there is a heightened risk of the prosecution case (leaving aside the bad character evidence) collapsing to a significant degree. It would also in my view include a case where there is agreement between the parties that it is appropriate to defer consideration. The case of *R v D* referred to at para [22] above indicates that the views of counsel will be relevant. But where the defendant (perhaps unusually) seeks to insist on a ruling at the start of the case, in my judgement the court should be slow to defer the ruling unless the case clearly falls within the *Gyima* category or some other good reason for deferral arises. This course may obviously entail an element of tactical risk for the defendant since, in considering the admissibility of the bad character evidence at this stage, I will be required to take the Crown case at its height.

Conclusion

[33] In view of the above considerations, I accede to the defence application that its application to exclude the bad character evidence which the prosecution has indicated an intention to adduce should be determined at a convenient time at or towards the start of the trial (before the Crown calls its first civilian witness). I do not need to determine whether the alternative course, urged upon me by the Crown, would result in a breach of the defendant’s article 6 rights or right to a fair trial since I consider that it is open to the court, within the scope of its case-management discretion, to direct that the application be dealt with at an earlier stage simply on the basis that this is a preferable or fairer way to manage the application in the circumstances of this case.

[34] The defendant’s written submissions accept that there may be cases where it is appropriate to reserve the hearing of a bad character application until the conclusion of the prosecution case, for the court to properly assess the strength of the case against an accused. He confined his submissions on fairness to what was required in the circumstances of this particular case. It is common practice in the Crown Court in Northern Ireland, usually with the consent or acquiescence of the parties, to defer consideration of such an application to the end of the prosecution case. Nothing in this ruling is designed to undermine that practice in the generality of cases where it is used.