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IN THE CROWN COURT IN NORTHERN IRELAND
SITTING IN BELFAST

THE QUEEN

v

RAYMOND O'NEILL

RULING (NUMBER 4) ON EVIDENCE OF THE DEFENDANT'S BAD CHARACTER

David McDowell QC and Michael Chambers (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

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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 have served notice to this effect on 7 November 2019. I heard the application on Friday 18 February 2022. It is being heard and determined at a relatively early juncture in the course of the prosecution case in light of my earlier ruling: *R v O'Neill: Ruling (No 1) on Timing of Bad Character Application* [2022] NICC 3.

[2] There are two types of previous convictions on the part of the defendant which the prosecution contend are admissible by virtue of Article 6(1)(d) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order"): convictions for burglary; and convictions for offences of violence.

[3] In terms of the offences of violence, the defendant has been convicted of three such offences:

(i) Assault occasioning actual bodily harm on a Michael Gibson on 16 July 1999, when Mr Gibson was hit on the back of the head with a piece of wood, requiring 6 staples;

(ii) Unlawful wounding of Stephen Clark and Patrick Eastwood on 1 January 2000, when each was struck on the head with a broken bottle and each required stitches; and

(iii) Assault causing harm on 31 December 2010 when, in the course of a burglary in County Louth, the owner of a car the defendant was stealing intervened and was dragged along the street by the car as the defendant sought to make off.

[4] In terms of the burglary offences, the defendant has been convicted of fifteen such offences ranging from 1996 through to 2012, which have helpfully been set out in a document prepared by the prosecution summarising these convictions (which occurred both in Northern Ireland and the Republic of Ireland). Most of these are domestic burglaries, although two relate to non-dwellings.

Summary of the prosecution submissions

[5] The prosecution's written submission argues that the two types of offences mentioned above are "admissible by slightly different routes": (i) the violence offences by virtue of Article 8 of the 2004 Order, as showing a propensity to commit offences of the kind with which he is charged (that is to say, offences of violence); and (ii) the burglary offences as being relevant since, although they do not show such a propensity, they are nevertheless evidence which supports the contention that the man who entered the deceased's home at 19 Hazel Rise was the defendant. The evidence should not, they submit, be excluded under Article 6(3).

Summary of the defence submissions

[6] The defence contend that "in the present case, the sole issue between the defendant and the prosecution is the identity of the perpetrator" of the offences and that neither type of past offending is relevant to this issue. They further contend that the violence offences do not show a propensity to commit murder, which is an offence of specific intent and in its own category of seriousness, and share no common features with the present alleged offences. In relation to the burglary offences, the defence contend that, although the prosecution do not rely on propensity, in fact their submissions amount to propensity arguments which are without merit. They submit that a propensity to unlawfully enter buildings is irrelevant to a propensity to commit murder; and that, in the present case, a propensity to commit burglary is irrelevant because there is no evidence of burglary in this case.

Relevant statutory provisions

[7] In this application it is 'gateway (d)' which is relevant, *viz* the condition for admissibility of evidence as to a defendant's bad character contained in Article 6(1)(d) of the 2004 Order. Insofar as material, Article 6 provides as follows:

> "(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if –
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> …
>
> (d) it is relevant to an important matter in issue between the defendant and the prosecution.
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> …
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> (3) The court must not admit evidence under paragraph (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
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> (4) On an application to exclude evidence under paragraph (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged."

[8] An important question in relation to the admission of bad character evidence under gateway (d) is what the "important matter in issue" between the parties is to which the evidence is relevant. Further guidance on what such a matter may be is given in Article 8 of the 2004 Order. Article 8(1) provides as follows:

> "For the purposes of Article 6(1)(d) the matters in issue between the defendant and the prosecution include—
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> (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
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> (b) the question whether the defendant has a propensity to be untruthful, except where it is not

> suggested that the defendant's case is untruthful in any respect."

[9] Article 8(1) is plainly non-exhaustive. There may be many other matters in issue between the prosecution and defence besides the two types of propensity mentioned. Propensity to be untruthful is not relied upon by the prosecution in this case. However, propensity to commit "offences of the kind with which he is charged" is relevant. Some further assistance in relation to this concept is provided in the remaining provisions of Article 8. Article 8(2) provides:

> "Where paragraph (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—
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> (a) an offence of the same description as the one with which he is charged, or
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> (b) an offence of the same category as the one with which he is charged."

[10] Classic instances of bad character evidence showing a defendant's propensity to commit offences of the kind with which he is charged will be where he has been convicted of the same offence on previous occasions or of offences in the same category as the one presently before the court – although for this latter purpose, the categories of offence are prescribed by order by the Secretary of State (see Article 8(4)(b) and the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (Categories of Offences) Order 2006 (SR 2006/62)) and relate only to theft offences or sexual offences in relation to persons under seventeen years of age. Article 8(1) contemplates that a defendant's propensity to commit offences of the kind with which he is charged can, however, be supported in other ways, as is evident from the phrase "without prejudice to any other way of doing so."

[11] Article 8(3) provides that paragraph (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case. The length of time between the previous conviction and the alleged offending before the court must be considered. However, the court should reject the admissibility of evidence *via* Article 8(2) if it considers that it would be unjust to admit it for any reason. Some guidance in relation to this is contained in case-law.

The previous offences of violence

[12] The prosecution concede (rightly) that the defendant's previous offences are neither of the same description nor of the same category for the purposes of Article 8(2)(a) and (b) as the counts on the Bill of Indictment, namely murder and arson.

Evidence of "propensity to commit offences of the kind with which he is charged" must therefore exist on some other basis. They do however contend that the previous offences of violence show a propensity to commit murder since they show a preparedness and capability to use violence beyond what an ordinary person would. The previous offences of violence were said to be 'bullying type' incidents; but Mr McDowell QC's submission was that these offences say something "about the man" which speak to his character as a violent person and someone not possessing the empathy of a normal individual. That is because "it takes a particular type of person" to be able to use a bottle on someone's face or a piece of wood at the back of their head.

[13] The prosecution rely on *R v Hanson; R v Gilmore; R v P* [2005] 1 WLR 3169, which is an important authority in this area. In that case, the Court of Appeal in England and Wales considered the question of whether evidence should be admitted as demonstrating propensity under the analogue provision of Article 8. At paras [7]-[11], Rose LJ said as follows:

> "7. Where propensity to commit the offence is relied upon there are thus essentially three questions to be considered. 1. Does the history of conviction(s) establish a propensity to commit offences of the kind charged? 2. Does that propensity make it more likely that the defendant committed the offence charged? 3. Is it unjust to rely on the conviction(s) of the same description or category; and, in any event, will the proceedings be unfair if they are admitted?
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> 8. In referring to offences of the same description or category, section 103(2) is not exhaustive of the types of conviction which might be relied upon to show evidence of propensity to commit offences of the kind charged. Nor, however, is it necessarily sufficient, in order to show such propensity, that a conviction should be of the same description or category as that charged.
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> 9. There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged: compare *Director of Public Prosecutions v P* [1991] 2 AC 447, 460-461. Child sexual abuse or fire setting are comparatively clear examples of such unusual

behaviour but we attempt no exhaustive list. Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction for shoplifting, will not, without more, be admissible to show propensity to steal. But if the modus operandi has significant features shared by the offence charged it may show propensity.

10. In a conviction case, the decisions required of the trial judge under section 101(3) and section 103(3), though not identical, are closely related. It is to be noted that the wording of section 101(3) – "must not admit" – is stronger than the comparable provision in section 78 of the Police and Criminal Evidence Act 1984 – "may refuse to allow." When considering what is just under section 103(3), and the fairness of the proceedings under section 101(3), the judge may, among other factors, take into consideration the degree of similarity between the previous conviction and the offence charged, albeit they are both within the same description or prescribed category. For example, theft and assault occasioning actual bodily harm may each embrace a wide spectrum of conduct. This does not however mean that what used to be referred to as striking similarity must be shown before convictions become admissible. The judge may also take into consideration the respective gravity of the past and present offences. He or she must always consider the strength of the prosecution case. If there is no or very little other evidence against a defendant, it is unlikely to be just to admit his previous convictions, whatever they are.

11. In principle, if there is a substantial gap between the dates of commission of and conviction for the earlier offences, we would regard the date of commission as generally being of more significance than the date of conviction when assessing admissibility. Old convictions, with no special feature shared with the offence charged, are likely seriously to affect the fairness of proceedings adversely, unless, despite their age, it can properly be said that they show a continuing propensity."

[14] The degree of similarity for offences required to demonstrate a propensity is further considered in Archbold 2022, at 13-51. It is clear that propensity can be shown in ways other than those specifically addressed in Article 8(2)(a) and (b). Although "striking similarity" is no longer required, it is usually the case that the greater the similarity the more strongly the previous behaviour suggests propensity.

Authority also suggests that the defendant's record should be looked at "in the round." In this jurisdiction, the case of *R v Shauneen Boyle* [2017] NICA 75, on which the prosecution rely, provides an example of the admission of evidence of previous offending for violence as relevant to the important matter in issue of whether the appellant participated in the assault on the deceased leading to his death: see paras [13] to [21]. Broadly speaking, this authority supports the contention that previous convictions for assault may be relevant to a count of murder, given the violence involved in each. In the present case, it might be said that the common feature is the preparedness to use a weapon and lack of concern as to the damage this may cause.

[15] The prosecution acknowledge that the first two violent offences occurred some 15 years before the subject matter of the present indictment. At the time of their commission the defendant was 21 years old; and he was 37 years old at the time of Jennifer Dornan's murder. The prosecution meet this issue in two ways. First, they submit that the offences demonstrate a preparedness to use a level of violence beyond that of which most people are capable, together with an utter disregard of the victims and the injuries they might sustain as a result of the defendant's actions. The attacks were particularly vicious and involved the use of a weapon on each occasion. Second, they submit that the third violent offence, which was committed in 2010, 'bridges the gap' between the two earlier violent offences and the incident with which this trial is concerned, showing an ongoing propensity to violence.

[16] Although I accept in principle that previous offences of violence may establish a tendency to violence and, thus, propensity to commit murder (and that someone who is prepared to attack others with a weapon is more likely to be able to stab someone three times to the chest, as in the present case), I nonetheless propose to exclude evidence of the defendant's previous offences of violence in the circumstances of this case. The first two violent offences occurred in 1999 and early 2000. They are both well over 15 years before the incident which has given rise to the present indictment and occurred when the defendant was a much younger man. They are also of a different character to the circumstances of the present offence. In the *Boyle* case, the question was whether earlier less serious convictions for assault (mostly common assaults with one occasioning actual bodily harm) were relevant to participation in a vicious assault where the victim was beaten and kicked and later died. In the present case, there is some force in Mr O'Rourke QC's submission that the forensic evidence in this case suggests a different type of violence from that in which the defendant had engaged in the past.

[17] Taking into account in particular the length of time between their commission and the index incident, and the lack of similarity or shared special features between these offences and the circumstances of Ms Dornan's murder, I consider that it would be unjust to admit them as evidence of propensity and/or that their admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit them. I do not consider the 2010 offence to remedy the concerns I have in this regard, given that it too shares no special feature with either the present alleged offences or the earlier convictions for violent offences and was

some 10 years after the earlier offences. I would not propose that it alone be admitted since it is of limited if any value in terms of showing propensity to violence; and it too will be excluded.

The previous offences of burglary

[18] The prosecution also seek to rely upon the defendant's record of previous offences of burglary under the Article 6(1)(d) gateway. They submit that it is now plain that the test under this gateway is simply relevance, rather than any enhanced form of relevance required under the previous common law rules. In this regard, they rely on *R v Weir & Others* [2006] 1 WLR 1885, in which the Court of Appeal in England and Wales pointed out that the common law rules on the admissibility of evidence of bad character had been abolished, saying (at para [35]) that:

> "The 2003 Act completely reverses the pre-existing general rule. Evidence of bad character is now admissible if it satisfies certain criteria (see section 101(1)), and the approach is no longer one of inadmissibility subject to exceptions (see also para 358 of the explanatory notes to the Act and the observations of Professor Sir John Spencer in his paper for the Judicial Studies Board, at paras 37 and 143). The Act does not say anything about "enhanced probative value" or "enhanced relevance" (the words used in *R v Edwards*). Para 363 of the explanatory notes does refer to an "enhanced relevance test" but only in relation to section 100 of the Act. The terms of that section clearly impose a higher test in respect of the introduction of a non-defendant's bad character than the test for the introduction of a defendant's bad character. If the evidence of a defendant's bad character is relevant to an important issue between the prosecution and the defence (section 101(1)(d)), then, unless there is an application to exclude the evidence, it is admissible. Leave is not required. So the pre-existing one stage test which balanced probative value against prejudicial effect is obsolete: see also section 99(1)."

[19] The prosecution also rely upon *R v D; R v P; and R v U* [2005] 1 WLR 3169 ("*D, P & U*"), in which the court considered that the possession of indecent photographs of children could be relevant to whether a defendant had committed sexual assault, as the collection or viewing of such images demonstrated a sexual interest in children. Hughes LJ said, at para [8], that:

> "The evidence with which we are dealing is evidence of propensity in the true sense of that word, by which we mean evidence of a character trait making it more likely

> that the defendant did indeed behave as charged. We are conscious that in the shorthand of the criminal courts the word "propensity" is sometimes applied, no doubt conveniently, to the case where there is evidence that the defendant has previously committed an offence similar to that which is now charged. Propensity may of course be proved by evidence of the previous commission of such an offence, and it may well be that that is the kind of propensity evidence most frequently adduced, but it is not limited to that kind of evidence. On the contrary, it may include any evidence that demonstrates that it is more likely that the defendant did indeed behave as he has been charged."

[20] In this instance, the defendant has multiple convictions for burglary, both domestic and commercial, over many years, both in this jurisdiction and in the Republic of Ireland. The prosecution assert that these demonstrate that he has the ability and experience to unlawfully enter buildings and that he is likely to have acquired a degree of forensic awareness over his criminal career in this respect. I agree. I would add that the entering of another person's home in the middle of the night is itself a matter of some gravity which most people would never think of doing. The defendant, as is apparent from his previous convictions in this regard, obviously does not possess the qualms the average member of the public would.

[21] In the present case, the murderer managed to get into Jennifer Dornan's house in the middle of the night. The prosecution contend that he did so without her permission. The defence respond that there is no evidence of this but, in my view, that can plainly be inferred from the circumstances in which the perpetrator can be seen to enter her property and takes steps to avoid detection in so doing. The perpetrator entered through the back door, such that he was less likely to be seen. The CCTV evidence in the case suggests that, as he approached her house, he covered his head and face with his coat; and did so again on two occasions when he was outside the house in the driveway area within sight of the cameras on 17 Hazel Rise. He climbed over her fence at the furthest point from those cameras, walking close to the front of the house before making his way to the back of the house. On the prosecution case, the attacker is also shown after the offences in the CCTV captured at White Rise where, again, it is suggested that he took steps to evade detection by quickening his pace and lowering his head as he passed another domestic CCTV camera.

[22] Mr O'Rourke submits that the defendant's previous burglary convictions are simply irrelevant to the facts of this case: they make it no more likely that he was the person who entered the deceased's home. He relies, in particular, upon the fact that there is no evidence of burglary in this case, since there is no evidence of anything being stolen (and, indeed, there is evidence of valuables being *left* in the house). In my view, this is to miss the point. Offences of burglary require, as a constituent

element of the offence, that the defendant entered a building (or part of a building) as a trespasser. A person will also be guilty of burglary if, having entered as a trespasser, he inflicts on any person therein any grievous bodily harm: see section 9 of the Theft Act (Northern Ireland) 1969. It is fanciful to suggest that the person who entered the deceased's home in this case shortly before her death did so otherwise than as a trespasser, that being a common sense inference to be drawn from the circumstances, including some of the features mentioned at para [21] above.

[23] Mr O'Rourke also submitted that the prosecution application in this case was really about propensity and not relevance. However, that is a distinction which, even assuming it can readily be drawn, is far from hermetic. Propensity to commit offences of the kind charged is merely one species of relevance in this context. As the *D, P & U* case illustrates, previous bad character evidence can be relevant in a variety of different ways, provided it goes to the question of whether it is more likely that the defendant committed the offence charged in the circumstances alleged.

[24] I accept that the defendant's previous bad character in this regard is relevant to the key issue between the parties, namely whether it was this defendant who entered the deceased's home that night. His ability and experience in burgling houses and other premises is a matter which the jury ought to be able to take into account (subject, of course, to appropriate direction as to its use and to the arguments about its significance to be made to them in the parties' closings). It is relevant to the important issue of whether the defendant was the man who entered the house. As Hughes LJ indicated in para [7] of his judgment in the *D, P & U* case, whether the previous convictions are relevant to an important matter in issue is a "commonsense question which must receive a commonsense answer" through the exercise of specific judgment in each trial. The fact that the defendant has a significant previous history of burglary is in my view, as a matter of common sense, relevant to whether he was the person who entered the deceased's home on the night of her death. It makes it more likely that he was the person who entered her home that evening in the circumstances mentioned in para [21] above. Again, drawing on the words of Hughes LJ in para [8] of his judgment in *D, P & U*, his experience in this regard makes it more likely that he would have behaved as alleged. That is evidence of propensity, albeit not in the narrower sense described in Article 8(1)(a) and 8(2) of the 2004 Order. It is certainly relevant to an important issue between the parties for the purpose of Article 6(1)(d).

[24] Further, in *R v Myers* [2015] 3 WLR 1145, the Privy Council held (at para [44]) that evidence of bad character could be admissible, even under the common law, as evidence which "contributed to the proposition that it was the defendant who had done it, by supporting the other evidence that it was he who was responsible." That case indicates that bad character evidence can operate as a further strand of a circumstantial case: see the discussion in the judgment of Lord Hughes at paras [44] to [49], in particular at paras [46] and [49]. In addition, in *R v Eastlake* [2007] EWCA Crim 603, the Court of Appeal in England held that previous offences of violence

were properly admitted as lending support to the evidence of identification against the accused: see paras [19]-[21].

[25] The defence contend that there were, or may have been, others in the area of the deceased's home at the relevant time who also had criminal records for instances of burglary. That may be so; but the question is whether the defendant's previous convictions are relevant to the prosecution case *against him*, taking into account the other evidence against him. In addition, the *Myers* case indicates the fallacy of the submission that the bad character evidence in this case is only of relevance if all others in the relevant area can be excluded from having similar convictions. To be admissible the characteristic need not be possessed uniquely by the defendant (see para [45] of *Myers*).

[26] I accept, therefore, that the evidence of the defendant's previous convictions for burglary are relevant and admissible on the issue of whether the defendant was involved in the murder, that is to say whether he is the person seen on CCTV to enter the victim's property. I further conclude that the evidence does not require to be excluded under Article 6(3), since it does not appear to me that its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Conclusion

[27] By reason of the foregoing, I accede to the defence application that the defendant's previous convictions for offences of violence should be excluded; but refuse the application that his previous convictions for burglary should be so excluded.