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	Delivered: 21/03/2022

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

THE QUEEN

v

RAYMOND O'NEILL

**FURTHER RULING (NUMBER 7)
ON EVIDENCE OF THE DEFENDANT'S BAD CHARACTER (No.2)**

**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**

SCOFFIELD J

Introduction

[1] This day last month, I gave a ruling on the admissibility of evidence of the defendant's bad character in these proceedings: see *R v O'Neill: Ruling (No 4)* [2022] NICC 6 ("my previous ruling"). I held that the prosecution were entitled to adduce evidence of the defendant's convictions relating to burglary, which were relevant to an important matter in issue between the parties, namely whether it was the defendant who entered Ms Dornan's house on the night of the murder. I did not permit the prosecution to adduce evidence of three offences of violence of which the defendant had been convicted, which they wished to adduce as evidence of the defendant's propensity to commit offences of the kind with which he is charged.

[2] In light of developments in the trial since that time and, in particular, the defendant's attack on the character of two prosecution witnesses, David Quinn and Kevin McCaughley, the prosecution have invited me to revisit my conclusion on the earlier application in relation to the offences of violence – now applying for their admission under gateway (g) in Article 6(1) of the Criminal Justice (Evidence)

(Northern Ireland) Order 2004 (“the 2004 Order”) – and, on the same basis, have applied to admit a number of further convictions on the part of the defendant which speak to his credibility and character.

[3] There are three violence offences with which this application is concerned. These are set out in para [3] of my previous ruling, as follows:

- (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] I previously held that the first two of these offences of violence *were* relevant to the issue of propensity but that it would be unjust to admit them in relation to propensity under Article 8(3) of the 2004 Order and also unfair to admit them under Article 6(3): see paras [16]-[17] of my previous ruling. Mr O’Rourke QC on behalf of the defendant urges me to maintain that view and asks rhetorically how, if it was unfair to admit those convictions then, it could be fair to do so now. Mr McDowell QC’s riposte is that the balance of fairness has shifted with the ferocity of the attack made on prosecution witnesses (and, in particular, on Mr Quinn). Relying on Lord Lane CJ’s comments in *R v Powell* [1985] 1 WLR 1364, at 1369, he says that, in light of the attack on prosecution witnesses, “it is only fair that the jury should have before them material on which they can form their judgement whether the accused person is any more worthy to be believed than those he has attacked.”

[5] However, the prosecution go further and, on the authority of *R v Highton* [2005] 1 WLR 3472 at para [10], however, contend that, if the offences of violence are admitted under gateway (g), they may then also be relevant not only to the defendant’s credibility but also to propensity to commit offences of the kind with which the defendant is charged and should be taken into account by the jury for that purpose.

Is gateway (g) engaged?

[6] Article 6(1)(g) of the 2004 Order provides as follows:

“In criminal proceedings evidence of the defendant's bad character is admissible if, but only if –

- ...
- (g) the defendant has made an attack on another person's character."

[7] The concept of an attack on another's character is further defined in Article 11(1), in the following terms:

"For the purposes of Article 6(1)(g) a defendant makes an attack on another person's character if –

- (a) he adduces evidence attacking the other person's character,
- (b) he (or any legal representative appointed under Article 26(4) of the Criminal Evidence (Northern Ireland) Order 1999 (NI 8) to cross-examine a witness in his interests) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so, or
- (c) evidence is given of an imputation about the other person made by the defendant –
 - (i) on being questioned under caution, before charge, about the offence with which he is charged, or
 - (ii) on being charged with the offence or officially informed that he might be prosecuted for it."

[8] Article 11(2) provides as follows:

"In paragraph (1) "evidence attacking the other person's character" means evidence to the effect that the other person –

- (a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or
- (b) has behaved, or is disposed to behave, in a reprehensible way;

and "imputation about the other person" means an assertion to that effect."

[9] I am entirely satisfied that the defendant has made an attack on another person's character in relation to David Quinn. Evidence of his own bad character was put to him, including at times in a line of questioning which was relevant (and could only be relevant) if the defence was intending to suggest to the jury that David Quinn may have been responsible for, or involved in, the murder.

[10] On balance, I am not persuaded that D did make an attack on Kevin McCaughley's character – although, since he did do so in relation to David Quinn, that is probably academic. The defence probed Mr McCaughley's evidence and, in particular, tested whether he was correct in his assertions as to when and why CCTV equipment at his house had been removed. Had the cross-examination of Mr McCaughley been the only basis on which the prosecution contended that the defendant had lost his shield and gateway (g) was engaged, I would have been inclined not to allow their application.

[11] However, since the defendant has plainly attacked David Quinn's character, his own bad character is *prima facie* admissible under Article 6(1)(g) unless its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it as a result of Article 6(3). I have already held that it would be so unfair in relation to the first two convictions for violence. The question is whether the balance of fairness in the trial has now shifted to the extent that it would no longer be unfair to admit those convictions.

Is it still unfair for the defendant's offences of violence to be admitted?

[12] This is a finely balanced decision. On the one hand, I previously took the view that the violence offences from 1999 and 2000, though relevant to the issue of propensity generally, were not of particular probative value in relation to Mr O'Neill's propensity in this case, given their age and the difference in their circumstances from the present charges. My concern was, and is, that the jury may be overwhelmed by them and that their prejudicial weight would outweigh any probative value. On the other hand, the defence cross-examination of David Quinn was such that he repeatedly raised the objection that it was not him who was on trial. In the ruling I gave in relation to the propriety of the cross-examination of him, I held that the witness was clearly being impugned to such an extent that fairness required that he be given an opportunity to comment on the logical conclusion of the line of questioning (namely, that he may himself have been involved in the murder of Jennifer Dornan). His past convictions were explored in cross-examination including not merely his convictions for burglary but, in particular, (a) the occasion in 2001 in respect of which he was convicted of carrying a handgun with criminal intent and (b) an offence of assault occasioning actual bodily harm from 1996. Even accepting that the cross-examination of Mr Quinn was not gratuitous and was an integral part of the defendant's case, gateway (g) can still be engaged: see para [8] of Hughes LJ's decision in *R v Singh* [2007] EWCA Crim 2140.

[13] In light of that, the Crown has raised a strong argument that – in order that the jury know the character of the man on whose behalf that attack was made – the entirety of his previous convictions should be before them.

[14] I have ultimately concluded that I am not going to permit the defendant's convictions for offences of violence in 1999 and 2000 to be admitted. The defence accept that it would in principle be permissible for me to alter the view I took on this issue previously: see *R v Edwards* [2006] 1 Cr App R 3. That case emphasised that the fairness of the proceedings and the impact on it of admitting the evidence has to be gauged *at the time when the application is made* and by reference to the gateway under which the admissibility is sought (see Rose LJ at para [14]). To like effect, Spencer – in *Evidence of Bad Character* (3rd edition, 2016, Hart) (“Spencer”), at para 4.168 – observes that, “Decisions taken on the basis of what seems fair to the defendant at the outset might deserve to be revised if he turns proceedings into a mud-slinging match once he gets into the witness box.” Nonetheless, I do not propose to do so for the following reasons:

- (a) First, and most importantly, for the reasons set out in my earlier judgment in relation to Mr O'Neill's bad character, I have concerns that these convictions on the part of the defendant for violent offences may be prejudicial to an extent which outweighs their probative value on the issue of propensity. I return to this issue below.
- (b) Albeit Mr Quinn was questioned in relation to burglary offences and the offence of possession of a firearm, none of these involved the use of violence. He was not questioned in detail about the offence of violence on his part. Insofar as there may require to be some balancing of the books in respect of this as a matter of fairness generally, I consider that this is achieved by the admission of the defendant's most recent offence of violence – which is *not* relevant to propensity (and, therefore, in respect of which I do not harbour the same concerns as arise in relation to the 1999 and 2000 offences). I also return to this issue below.
- (c) I also take into account the following factors, although give them limited weight:
 - (i) Kevin McCaughley's bad character evidence was not permitted to be led before the jury. The defence submissions on the present application major on that issue. I do not consider it to be a particularly weighty factor for two reasons. First, the non-admission of Mr McCaughley's bad character is as a result of the significantly enhanced threshold for the admissibility of non-defendant bad character (along with the evidential rule that answers given in cross-examination relating to credit are final). Second, the attack on the character of David Quinn was much more obvious and sustained than the attack, if any, on the character of Kevin McCaughley. The question of fairness therefore, in

my view, falls to be determined principally by reference to any imbalance between what the jury are entitled to know about Mr Quinn and the defendant respectively, rather than Kevin McCaughley and defendant respectively. Nonetheless, I take into account the fact that the defence have been deprived of testing Mr McCaughley's evidence in the way they would have wished by reason of the non-admission of his previous bad character.

- (ii) The prosecution agreed to the admission of David Quinn's bad character evidence and agreed the relevant details of the convictions. Again, this was a major strand of the defence submissions on this application. I do not consider that much turns on it. The precise basis on which the prosecution agreed to the admission of David Quinn's bad character has not been explained to me but, whatever it was, it was still a matter of choice for the defence as to whether or not it was deployed.
- (iii) I also take into account that certain particulars of the two offences of violence where a weapon was used – which are those on which the prosecution principally relied as establishing propensity (see paras [12] and [15] of my previous ruling) – are apparently not accepted by the defence, such that there may be a satellite argument about what should and should not be taken to have been proven against him.

[15] Taking all of the above into account, I still incline to the view that the admission of the defendant's more serious 1999 and 2000 offences of violence involving the use of a weapon would have such an adverse effect on the fairness of the proceedings that I ought not to admit them. I am sympathetic to the suggestion that, given the ferocity of the attack on David Quinn's character, they should be before the jury on the question of the defendant's credibility – in order to show his character. However, the concern I have arises because it does not appear to me to be open to me to restrict the jury to considering them in that way given my previous finding that, in principle, they are relevant to the question of propensity.

[16] In *R v Clarke* [2011] EWCA Crim 939, at para [32], Elias LJ referred to a case (*Lamaletie*) in which a judge admitted bad character evidence under gateway (g) but directed the jury that the convictions went not to propensity but only to the question of the defendant's credibility. Elias LJ observed, relying on the *Highton* case, that the jury could in fact have relied on the evidence on the issue of propensity too, once the convictions were admitted. At para [40] of the *Clarke* judgment, Elias LJ further noted that if old convictions were admitted under gateway (g) but demonstrated propensity to commit the offence – albeit adduced for the purpose of going to general credit – then it may be highly prejudicial and unfair to admit them.

[17] I also note that in the *Edwards* case (*supra*), although the trial judge changed approach between his first and second rulings on the defendant's bad character, he

nonetheless continued to exclude offences of violence in his second ruling whose prejudicial effect would outweigh their probative value: see para [16]. In the *Highton* case itself, it seems to have been accepted that, where bad character evidence was admissible under gateway (g) but in circumstances where it might then unfairly be used in relation to propensity to commit the crime, the remedy was not a direction as to the limited use to which the evidence would be put but, rather, the use of the equivalent of Article 6(3) to exclude that evidence: see para [12] of the judgment of Lord Woolf CJ.

[18] For these reasons, I do not propose to permit the prosecution to adduce evidence of Mr O'Neill's offending in 1999 and 2000. I remain of the view that admitting them, in circumstances where they could be taken into account in assessing the defendant's propensity, would be unfair for the purposes of Article 6(3) of the 2004 Order. The prosecution can, of course, rely on the defendant's burglary convictions (which I have already ruled admissible) not only in relation to propensity but also in relation to general credibility.

[19] I will, however, additionally allow the prosecution to adduce evidence of the defendant's conviction in the Republic of Ireland for assault causing harm in 2010. In para [17] of my previous ruling, I concluded that it did not cure the non-admissibility of the 1999 and 2000 offences by establishing an ongoing series of violent offences (see the reference to the prosecution argument in this regard at para [15] of my previous ruling). I did not consider that, on its own, it provided any evidence of propensity and, therefore, it failed to meet the test for admissibility under gateway (d). For the same reason I do not have the same concerns about its admission affecting the fairness of the trial as I had, and continue to have, in relation to the 1999 and 2000 offences which were both much older but more prejudicial and relevant since they involved the use of a weapon. I do not consider that, under gateway (g), it would be unfair to admit the 2010 assault conviction. Accordingly, I will allow the Crown's application in relation to the offences of violence – to that extent only – and permit evidence of the 2010 conviction to be adduced. The jury will be directed that it is relevant only to the defendant's credit and not to propensity. I consider that to be consistent both with my earlier ruling and with the decision in *R v Lafayette* [2008] EWCA Crim 3238 on which the prosecution relied as authority for the proposition that previous convictions could be admitted under gateway (g) with a direction that they were not relevant to propensity where there was a risk that they might be considered by the jury for that purpose.

[20] I do not consider that such a direction can be given where (as with the defendant's earlier offences of violence) the previous offending could be taken to show propensity. At any rate, even if such a direction could be given, I would not be prepared to adopt that course in relation to the two earlier offences of violence in light of the common sense criticism of such an approach set out at para 4.170 of *Spencer*, namely that such directions (that evidence which is logically relevant to issue A may only be considered in relation to issue B) are "certain to be confusing

and unlikely in practice to be followed” and have been castigated by Sir Rupert Cross as “gibberish.”

The defendant's other convictions relevant to credibility

[21] I further accede to the prosecution application that other offences of which the defendant has been convicted which are relevant generally to his credibility and character, which have not previously been ruled admissible under Article 6(1)(d), may now be put in evidence pursuant to Article 6(1)(g), namely his various convictions for theft; handling stolen goods; receiving stolen property; taking or attempting to take a motor vehicle without the owner's consent; theft of a vehicle; going equipped for theft; allowing himself to be carried in a stolen vehicle; criminal damage; and possessing an offensive weapon in a public place.

Conclusion

[22] By reason of the foregoing, the defence application to continue to exclude the defendant's offences of assault occasioning actual bodily harm on 16 July 1999 and unlawful wounding on 1 January 2000 is successful. The prosecution application that additional evidence of the bad character of the defendant now be admitted pursuant to Article 6(1)(g) of the 2004 Order is successful save to the extent just mentioned.