

IN THE CROWN COURT IN NORTHERN IRELAND

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**LONDONDERRY DIVISION,
sitting in Coleraine**
—————

THE QUEEN

-v-

**SEAN CRUICKSHANK and
EDWARD McELENY**
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RULING NO. 3: BAD CHARACTER EVIDENCE (NO. 1)
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McCLOSKEY J

[1] This ruling relates to an application on behalf of the first of the two accused persons to admit bad character evidence pertaining to one of the main prosecution witnesses, Declan Gillespie.

[2] In summary, the material available to the court demonstrates that Declan Gillespie has a criminal record and the application seeks to adduce evidence of the following convictions:

- (a) Aiding and abetting common assault on 11th May 2002, giving rise to a conviction made at Londonderry Youth Court on 5th September 2003.
- (b) Assault occasioning grievous bodily harm on 5th August 2006, giving rise to a conviction at Londonderry Crown Court on 9th January 2008, punished by imprisonment of six months, combined with sequential probation of twelve months.
- (c) Common assault on 8th February 2009, giving rise to a conviction at Londonderry Magistrates Court on 20th April 2009.

The application also seeks to adduce evidence of further criminal conduct generating a recent plea of guilty by Declan Gillespie to a new charge of common assault, on 7th June 2009, which will presently materialise into a formal conviction.

[3] There is no objection on behalf of the prosecution to evidence of the second of these convictions being adduced. On the basis of the information available this is, plainly, the most serious of the four convictions. It is also the most germane, in that the victim of this serious assault was the first-named Defendant, Mr. Cruickshanks. The court was informed by Mr. Cruickshanks' counsel, without challenge by the prosecution, that the conduct giving rise to the conviction involved Declan Gillespie "shoving" a glass into Mr. Cruickshanks' face. For the record, Mr. Cruickshanks is visibly scarred and it is evidently common case that his facial scarring was occasioned by this assault.

[4] The Defendants are prosecuted for the alleged murder of one Liam Anthony Devlin on 4th August 2007 at Linsfort Drive in the area of The Creggan, Londonderry. The outline of the prosecution case to the jury at the commencement of the trial was to the effect that evidence will be given by four eyewitnesses – Declan Gillespie, Neil Gillespie, Conor Porter and Stephen Hutton. They were in the company of the deceased. All five were walking along the street. Then an encounter with the Defendants occurred – about 100 yards from the Gillespies' house. All four eyewitnesses will say that the deceased was attacked by both Defendants. He was knocked to the ground, defenceless. The Defendants then kicked him repeatedly – *inter alia*, on his head. The Defendants were acting together throughout, with a common purpose, intending to support each other and intending at least to cause serious bodily harm to the deceased. At one point during the attack, the deceased got to his feet. It seemed that the attack was over at this stage. However, some further words were uttered and the Defendants stopped. Declan Gillespie said something to the effect "*One against one*". The deceased was shaking, staggering about and said he wanted no more fighting. The Defendant Mr. McEleney said "*He's faking it ...*". Then the Defendant Mr. Cruickshank ran at the deceased, punching him in the face and knocking him to the ground. Mr. McEleney then shouted "*Jump on his face ... jump on his face*". Both Defendants then kicked the deceased, as he lay on the ground unresponsive and defenceless. This kicking continued. The advent of a passing taxi (driven by Mr. McLaughlin) brought the attack to a conclusion. The Defendants then walked away.

[5] According to the prosecution case, the deceased was shaking badly and appeared unconscious. His lips were swollen and his face was covered in blood. Later, when the police located Mr. Cruickshank walking, at around 6.00am, he said he had put his clothes into a washing machine. Clothing and trainers were seized by the police. The trainers of both Defendants were seized. During interview by police, Mr. Cruickshank accepted that there had been an encounter with the deceased at the relevant time which involved discussion about the earlier incident (concerning the Defendants and John Devlin, younger brother of the deceased). Mr. Cruickshank suggested that a tussle between Mr. McEleney and the deceased ensued, with Mr.

Cruickshank fighting one of the Gillespies. Mr. Cruickshank and the deceased then fought. The deceased went to ground. Mr. Cruickshank said he was defending himself. He denied kicking the deceased. He also denied striking the deceased while on the ground.

[6] The prosecution further say that Mr. McEleney then accepted that he was present during the encounter and that there was discussion about the earlier incident. A fight then developed. Mr. McEleney ran in, got involved and was then on the ground. Getting up, he swung a boot at the deceased and hit him. He was unsure where – up around the chest or head? The deceased was on the ground, with his arms up around his face. It was “a good boot” – only once. Why? Because the deceased was getting up to attack Mr. Cruickshank.

[7] Mr. Cruickshank’s defence statement contains the following material passage:

“The Defendant was approached by the deceased who formed part of a group of approximately six males. The deceased challenged the Defendant in relation to an earlier assault on his brother. The deceased ‘squared up’ to the Defendant in a manner consistent with the intention of inflicting violent retribution for the earlier assault. In defending himself against the deceased, the Defendant punched the deceased thereby causing him to fall to the ground ...

The Defendant denies kicking the deceased or striking him in a manner which directly contributed to the tragic death ...”

[8] The Defence Statement of Mr. McEleney contains the following material passages:

“The Defendant admits to being present and striking the deceased ... during a fight which developed between the deceased and the co-accused. The Defendant had at the beginning of the fight shouted that it should be one to one but intervened when a companion of the deceased, one Declan Gillespie, attempted to involve himself on observing the co-accused getting the better of his friend. The Defendant rejects any assertion that he punched Mr. Devlin ... He had attempted to head butt Declan Gillespie as a result of which [the Defendant] lost his balance falling to the ground. It was in getting to his feet that he swung towards the deceased who had his hands raised at the time. The deceased and co-accused continued to fight thereafter, however the Defendant was involved in a scuffle with Declan Gillespie during this period”.

This Defendant's Defence Statement incorporates certain excerpts from responses made by him during police interviews:

"I did swing a boot like, his arms were up ... I couldn't say it was on his head ...

I remember getting up from the ground ... and that's when I swung a boot and hit his arms were up like that and I did swing a boot like, I swung a boot towards him like, his arms up like that and I don't know where I hit, whether I hit him like, but I did swing a boot towards there like."

At a later stage, this Defendant replied that his boot struck the deceased on "*the side of him on the chest, the chest around the head round there like*". This Defendant denied any suggestion of repeated kicking of the deceased or stamping on his head. This Defendant further denied Declan Gillespie's allegation that he shouted "*Jump on his face, jump on his face*".

[9] The witness statement of Declan Gillespie contains the following passages:

"With this Eddie just punched Liam in the face. Liam fought back but I don't think he hit him. [Cruickshank] then jumped on top of Liam knocking him to the ground ... Eddie was kicking at him and punching him. Stevie pulled Eddie off Liam ...

[Cruickshank] then just ran at Liam and punched him in the face. Liam tried to fight back, [Cruickshank] hit him in the face again and Liam fell to the ground. Eddie shouted 'Jump on his face, jump on his face'. Eddie and [Cruickshank] then started kicking Liam on the ground. Eddie was kicking his face and [Cruickshank] was kicking the back of his head. I told Eddie to stop but he wouldn't. No one tried to stop them, just shouted at them. A taxi then arrived and it stopped with us ...

I would say that Eddie and [Cruickshank] were kicking and punching Liam for a matter of minutes. [Cruickshank] would have kicked Liam seven or eight times and Eddie kicked him once or twice."

Having regard to the thrust of the prosecution case, as outlined in paragraphs [4] – [6] above, I approach the present application on the footing that the person to whom it relates, Declan Gillespie, is, by any measure, a very important witness for the prosecution.

[10] The statutory provisions regulating the admission of evidence of the bad character of a person other than the Defendant are found in Article 5 of the Criminal Justice Evidence (Northern Ireland) Order 2004 (*“the 2004 Order”*), which provides:

“(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—

- (a) it is important explanatory evidence,*
- (b) it has substantial probative value in relation to a matter which –*
 - (i) is a matter in issue in the proceedings, and*
 - (ii) is of substantial importance in the context of the case as a whole, or*
- (c) all parties to the proceedings agree to the evidence being admissible.*

(2) For the purposes of paragraph (1)(a) evidence is important explanatory evidence if—

- (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and*
- (b) its value for understanding the case as a whole is substantial.*

(3) In assessing the probative value of evidence for the purposes of paragraph (1)(b) the court must have regard to the following factors (and to any others it considers relevant) –

- (a) the nature and number of the events, or other things, to which the evidence relates;*
- (b) when those events or things are alleged to have happened or existed;*
- (c) where –*
 - (i) the evidence is evidence of a person's misconduct, and*
 - (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,*

the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;

(d) *where –*

(i) *the evidence is evidence of a person's misconduct,*

(ii) *it is suggested that that person is also responsible for the misconduct charged, and*

(iii) *the identity of the person responsible for the misconduct charged is disputed,*

the extent to which the evidence shows or tends to show that the same person was responsible each time.

- (4) *Except where paragraph (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court."*

On behalf of the moving party, the assertion of self defence in the Defence Statement was highlighted. Secondly, it was submitted that the evidence of Declan Gillespie's previous convictions is demonstrative that he is a person who is prone to violence, relates to the question of whether his evidence is truthful and has a bearing on the "orchestration" issue viz. the suggestion that the deceased and his five companions, including Declan Gillespie, orchestrated a confrontation with the Defendants, motivated by the alleged attack by the first Defendant on John Devlin, brother of the deceased, earlier in the evening in question.

[11] It is appropriate to record the basis on which evidence relating to the *second* of Declan Gillespie's convictions is to be adduced in evidence by agreement between prosecution and defence. In short, it is conceded by the prosecution – correctly, in my view – that this conviction has a bearing on the question of whether Declan Gillespie is ill disposed towards the Defendants, to the extent that his evidence against them might be untruthful. In this respect, I find it unsurprising that in *The Queen -v- Yaxlev-Lennon* [2005] EWCA. Crim 2866, the Court of Appeal held that the equivalent English statutory provision – Section 100 of the Criminal Justice Act 2003 – incorporates matters sounding exclusively on issues of credibility, as the following passage discloses:

"Although couched in different terms from the provisions relating to the introduction of the Defendant's bad character, in our view Section 100(1) does cover matters of credibility. To find otherwise would mean that there was a significant lacuna in the legislation with the potential for unfairness".

Having noted this, I turn to consider Declan Gillespie's other two convictions, coupled with his most recent offending and resultant plea of guilty to a further

charge of common assault. In short, all of this evidence establishes that he has indulged in aggressive or violent behaviour on three other occasions : but has it any other probative value , in the present context ?

[12] The question to be addressed is whether this evidence fits within the framework of Article 5 of the 2004 Order. In my view, it does not. I consider that the evidence indicates that Declan Gillespie is a person of an aggressive disposition, but nothing more. The evidence of the only prosecution witness who has testified already, Stephen Hutton, was that Declan Gillespie played no active part in the hostilities which occurred on the occasion in question. The evidence was to the effect that he was a spectator, in the sense that he did not actively participate in the physical exchanges. This was not challenged in cross-examination. When one juxtaposes this with the prosecution case and the Defence Statements, I consider it clear that the question of whether Declan Gillespie has an aggressive or violent disposition does not sound on any issue in this trial. Furthermore, I consider it highly questionable whether the disputed evidence has any bearing on the suggestion of an orchestrated attack, having regard to Mr. Hutton's unchallenged testimony about Declan Gillespie's conduct. Insofar as it can be said that the contentious evidence bears on the question of whether this witness participated in the planning and preparation of a confrontation between the two groups, or indulged in any kind of exhortation or encouragement of the combatants, I consider that this has at most a minimal bearing on the issue of self defence (raised in Mr. Cruickshank's Defence Statement) and is not of "*substantial probative value*" in relation to this issue, or any other identifiable issue, in any event. In thus concluding, I take into account that the jury will receive evidence about Declan Gillespie's conduct in the serious assault perpetrated against Mr. Cruickshank, culminating in the second of the previous convictions under consideration.

[13] My second conclusion is that this is plainly not "*important explanatory evidence*", as this concept is defined in Article 5(2). In my estimation, the jury will be perfectly capable of understanding all the evidence likely to be called, without reference to this bad character evidence. Bearing in mind the repeated warnings about the undesirability of satellite enquiries and re-litigation of earlier events and issues, I further consider that to admit the disputed evidence would have the potential to distract the jury from concentrating on the central issues in the case and would not, accordingly, be in the interests of justice.

[14] It is also appropriate to highlight the threefold hurdle which must be overcome if evidence of the bad character of a person other than the Defendant is to be admitted under Article 5(1) of the 2004 Order. In short, the bad character evidence under consideration:

- (a) Must have *substantial* probative value ...
- (b) In relation to a matter in issue in the proceedings ...

- (c) Which is of *substantial* importance in the context of the case as a whole.

These governing criteria behove the court to evaluate not only the thrust and contours of the prosecution case but also the matters put in issue in the Defence Statements. Where applications of this kind fall to be determined, it seems to me that a detailed perusal of the latter by the court will frequently ensue. Furthermore, the italicized words in the summary of the legislation serve to highlight the elevated nature of the threshold which must be overcome for the evidence to be admitted. Finally, the terms of Article 5(1) suggest that, in appropriate cases, the court should defer its final ruling until the evidence has reached a certain stage. Referring to evidence of *the Defendant's* previous convictions, Gage LJ stated in *The Queen -v- Gyima and Another* [2007] EWCA. Crim 429:

"[40] 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 a 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 weakness of the prosecution case. In our judgment, 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."

I would add that in the present case, the promulgation of this ruling followed completion of the prosecution opening statement and the evidence of one of the main prosecution witnesses.

[15] There are two further issues relating to the admission of the evidence of Declan Gillespie's conduct underlying the second of his previous convictions. The first concerns the contours of the agreement between prosecution and defence regarding this matter. In this respect, I would highlight the following statement in *The Queen -v- Hanson and Others* [2005] Cr. App. R 21, paragraph [17]:

"We would expect the relevant circumstances generally to be capable of agreement and that, subject to the trial judge's ruling as to admissibility, they will be put before the jury by

way of admission. Even where the circumstances are generally in dispute, we would expect the minimum indisputable facts to be thus admitted. It will be very rare indeed for it to be necessary for the judge to hear evidence before ruling on admissibility under this Act”.

While there is no suggestion at present of any significant *inter-partes* dispute about this matter, it will be necessary for both prosecution and defence to address the court further, before it is ventilated in the presence of the jury.

[16] The second issue concerns the punishment imposed on Declan Gillespie arising out of the second of his convictions. As noted above, he was sentenced to six months imprisonment, combined with a sequential period of twelve months probation. In my view, this clearly falls outwith the ambit of Article 5 of the 2004 Order in the circumstances of this case. Firstly, it is not important explanatory evidence, as defined by the legislation. Secondly, it does not constitute evidence having substantial probative value in relation to a matter in issue which is of substantial importance in the context of this prosecution as a whole. Sentencing exercises are frequently complex and sophisticated and are invariably fact specific. At this remove, it is highly unlikely that an agreement satisfactory to the court about all of the factors influencing the sentencing equation and illuminating its outcome could be reached – and none has been mooted in the present case, unsurprisingly. In my view, it would be quite inappropriate for the jury to become immersed in issues of this kind. I consider that to adduce evidence of the sentence imposed on Declan Gillespie would potentially engage the jury in a quite unnecessary and undesirable diversion. In thus concluding, I take into account the observation in *Hanson* that evidence of this kind will not normally be admissible: see paragraph [12]. Accordingly, I rule that evidence of this discrete matter will not be admitted.

Addendum

Following efforts by the parties and some intervention by the court, the content of the evidence to be disclosed to the jury about the second of Declan Gillespie’s convictions was duly settled.