Neutral Citation No. [2009] NICC 69 | *Ref:* **McCL7631**

Judgment: approved by the Court for handing down | *Delivered:* **16/10/09**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

LONDONDERRY DIVISION,
sitting in Coleraine

THE QUEEN –v- SEAN CRUICKSHANK and EDWARD McELENEY

RULING NO. 4: BAD CHARACTER EVIDENCE (NO. 2)

McCLOSKEY J

I INTRODUCTION

[1] This ruling determines the contentious issue of whether the prosecution should be permitted to adduce certain bad character evidence relating to the Defendant Edward McEleney.

[2] The indictment in this trial comprises two counts. The first count asserts that on 4th August 2007 in the County Court Division of Londonderry, the Defendants murdered one Liam Anthony Devlin. Both Defendants plead not guilty. The Defendant Sean Cruickshank has pleaded guilty to the second count, which accuses him of assaulting John Devlin thereby occasioning him actual bodily harm on the same date.

II TIME

[3] Certain provisions of Rule 44N of the Crown Court Rules (infra) regulate the procedure governing applications of this nature. It is clear from the terms of Article 16(2) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 that particular importance is attributed to the twofold requirement that the prosecution (a) serve on the Defendant notice of its intention to adduce evidence of the Defendant's bad character and (b) do so in accordance with Crown Court Rules. Article 16 provides, in material part:

> "*(1) Rules of Court may make such provision as appears to the appropriate authority to be necessary for the purposes of this Order …*
>
> *(2) 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.*
>
> *(3) The rules may provide that the court or the Defendant may, in such circumstances as may be prescribed, dispense with a requirement imposed by virtue of paragraph (2).*"

I consider that this double barrelled requirement is primarily designed to ensure fairness to the Defendant and expedition in the conduct of the trial. Furthermore, the proposition that the prosecutor is under a duty to conduct every prosecution in a disciplined, efficient, expeditious and professional manner seems to me unassailable in the world of contemporary criminal litigation .

[4] The statutory requirements in play, viz. those contemplated by Article 16 and duly enshrined in Rule 44N of the Crown Court Rules were considered by Gillen J in ***The Queen –v- King*** [2007] NICC 17, in the following passages:

> "*[18] It was common case in this matter that the applications by the prosecution to adduce evidence of bad character and hearsay evidence had been mounted outside the statutory time limits. The date of committal in these proceedings was 21 November 2006. Accordingly such applications ought to have been lodged no later than 5 December 2006 in order to comply with the rules. In the event the applications were all dated 29 January 2007. Mr Russell on behalf of the prosecution frankly conceded that the failure to lodge the applications within time was purely as a result of a failure in the part of the prosecuting authority and no other reason was put forward…*
>
> *[20] In so far as bad character is concerned, applications are governed by Rule 44 N which is couched in the following terms:*

> *'44 N (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;*
> *. . ……*
> *(10)The Court may ,if it considers that it is in the interests of justice to do so –*
> *……..*
> *(b)abridge or extend the time for service of a notice or application required under this rule ,either before or after that period expires"*

[21] A culture of non compliance with Rules of Court must not be tolerated by the courts. This is one of several cases in the recent past (including R v Black and Others (2007) NICC 4 and a decision of His Honour Judge Lynch in R v Fulton 05/59433 (unreported) where the prosecution have failed to comply with time limits without good reason. Time limits require to be observed. The objective of the Rules is to ensure that cases are dealt with efficiently, fairly and expeditiously and this depends upon adherence to the time tables set out. Parliament has clearly intended that the courts should have a discretionary power to shorten a time limit or extend it after it has expired. In the exercise of that discretion the court will take account of all the relevant considerations including the furtherance of the overriding objective of the legislation. In R (Robinson v Sutton Coldfield Magistrates' Court [2006] Cr App R 13 ("Robinson's case") the prosecution gave notice out of time of intention to adduce evidence of bad character. Owen J said at para 16:

> *"An application for an extension will be closely scrutinised by the court. A party seeking an extension cannot expect the indulgence of the court unless it clearly sets the reasons why it is seeking that*

indulgence. But importantly I am entirely satisfied that there was no conceivable prejudice to the claimant, bearing in mind that he would have been well aware of the facts of his earlier convictions; secondly, that he was on notice on April 14 that there could be such an application; and thirdly, that there was no application for an adjournment on June 16 from which it is to be inferred that the claimant and his legal advisers did not consider their position to be prejudiced by the short notice."

[22] Whilst in this case I intend to exercise my discretion to permit an extension of time, the Public Prosecution Service should be aware that the patience of the courts in such matters is not inexhaustible. The public interest in ensuring that this public body complies with statutory obligations and the interests of justice in general may soon become overwhelming factors in the consideration of such applications should it become clear that a culture of non compliance has developed without appropriate attempts to address it. My comments should be drawn to the attention of the Director of the Public Prosecution Service and steps taken forthwith to ensure that time limits are complied with in the future.

[23] Deriving assistance from Robinson's case, R v M [2006] EWCA Crim 1509 (another case in the Court of Appeal dealing with applications to introduce evidence at a late stage) and R v Bovell & Dowds [2005] EWCA Crim 1091 I consider that the following factors, whilst not exhaustive, are relevant to late applications:

(a) Close scrutiny of the reasons for late applications will be given by the courts in each case. In this matter Mr Russell frankly was unable to give any explanation for the lateness of the applications.

(b) Has the accused had an opportunity to make any investigations into the matters which are the subject of the late application?

(c) Is the application so late as to put undue pressure on both the defendant and the judge?

(d) Has the lateness of the application compelled the defendant to apply to adjourn in order to conduct further

investigations particularly in circumstances where the complainant and other witnesses may already have given evidence?

(e) Has the application been made in such time as to afford the defendant the necessary information in relation to such matters as convictions and other evidence of bad character?

[24] Weighing all these matters up, I consider that it is in the interests of justice in this case to permit time to be extended to the date of the present application for the following reasons:

[25] (i) Whilst the delay in this case has not been adequately explained, it has not been unconscionable in length. A lengthier delay might well have elicited a different response from this court.

[26] (ii) Since the trial is not to commence until September 2007, and the applications were made in January 2007, there is ample opportunity for the accused to make appropriate investigations in this matter. Obviously an application made shortly before or during the trial will be looked at differently from late applications made very substantially before the trial commences.

[27] (iii) The lateness of the application has not in my view put any undue pressure on either the accused or the court in dealing with the applications. Moreover no application for an adjournment been made. Given that the trial is still several months away, no application for an adjournment was likely to succeed .

[28] (iv) In all the circumstances I do not believe that any prejudice has been occasioned to the accused by the late application. Prejudice to the accused is obviously an important matter in the court determining whether it is in the interests of justice that time for service of the notice should be extended notwithstanding the failure of the prosecution to provide an adequate excuse for the delay.

[29] I have therefore determined to extend the time for service of these notices in both the hearsay and bad character applications."

The tenor and import of these observations and exhortations are unequivocal and require no elaboration.

[5] In the present instance, based on the information supplied to the court by the parties, I consider the most significant dates to be the following:

(a) 4th August 2007: the date of the alleged murder.

(b) 2nd March 2009: the date when the Defendants were committed for trial.

(c) 26th May 2009: the date when the Notice of Intention (Form 7F) was served by the prosecution.

(d) 29th May 2009: date of service of Form 7G (the application to exclude the proposed bad character evidence) by this Defendant's solicitors.

(e) 19th June 2009: the last pre-trial review conducted by Hart J.

(f) 9th September 2009: the scheduled date of commencement of the trial.

In the event, the pre-trial hearing stimulated by the service of Form 7F, together with the reactive service of Form 7G by Mr. McEleney's solicitors, in accordance with Rule 44L(8) was conducted on 7th September 2009. I would add that this hearing would have taken place considerably earlier but for my commitment to a lengthy murder trial during the period May-July 2009 and the advent of the long vacation.

[6] In short, Form 7F was served by the prosecution approximately seven weeks later than it should have been, but over three months in advance of the scheduled trial commencement date. Mr. McEleney's solicitors reacted by serving Form 7G, constituting their client's application to exclude the proposed bad character evidence, within less than one week. Both the expeditious nature of their response and the impressive detail of the duly completed Form are to be commended. Given this timescale, in these circumstances, it would be objectively surprising if any unfairness, in the real sense and properly understood, could tenably be asserted on behalf of the Defendant concerned, since he and his legal advisers have had ample time to react to the proposal enshrined in the Notice, to consider their position and to prepare and respond accordingly. In my view, unfairness in this context places the spotlight strongly on the Defendant's right to a fair trial at common law and under Article 6 of the Convention. I consider that this right is not infringed by the presentation of evidence designed to fortify the prosecution case and undermine the defence. In the abstract, this perspective applies to all prosecution evidence in every criminal trial and this does not constitute the kind of unfairness against which the court must be astute to protect accused persons. In this respect, I refer to the observations of Rix LJ in ***The Queen –v- McNeill*** [2007] EWCA. Crim 297, paragraph [18]:

> "*Of course most evidence which the prosecution seek to bring at trial against a Defendant is prejudicial to the*

> *Defendant's case. That is in the nature of most prosecution evidence, but that does not mean that it falls within the rationale of the power to exclude under Section 78* [of PACE]. *In effect the admission of the evidence in question has to be unfair to the conduct of the trial in all its circumstances. These words are sometimes lost by saying: the evidence in question has to be unduly or unfairly prejudicial*".

[7] Self-evidently, it is necessary to examine the explanation proffered for the delay on the part of the prosecution. In this respect, it may be highlighted that Form 7F makes explicit provision for a particularised explanation, where required, in the following way:

> "***Extension of time for service ...***
>
> *Please indicate whether you are applying for an extension of time for service …*
>
> *If the answer is yes, please provide details: …*".

In the present instance, the Public Prosecution Service representative concerned replied "yes" to the first of these enquiries. In response to the second, it was stated:

> "*Unaware of details of incident until recently*".

I consider this reply to be manifestly unsatisfactory. It contains no "*details*" whatsoever and is uninformative to the extent of being virtually meaningless. It conveys nothing of substance to the reader. Moreover, its terms suggest that the cautionary words of Gillen LJ in ***King*** have not had their desired impact. I further consider that a deficiency of such proportions is not adequately remedied where an explanation appears in prosecuting counsel's skeleton argument and/or is proffered in oral submissions to the court (as occurred in this instance). If there exists a practice to this effect, it must be unambiguously deprecated. Furthermore, the failure to supply even the most basic particulars in the Notice is unfair to the Defendant concerned, as it limits his ability to test the accuracy and cogency of the explanation proffered.

[8] In accordance with Rule 44(N)(10)(b) of the Crown Court Rules, the overarching criterion to be applied is the interests of justice. The court is thus empowered:

> "*The court may, if it considers that it is in the interests of justice to do so …*
>
> *extend the time for service of a notice required under this rule …*".

I consider that the interests in play in a matter of this nature are not confined to the Defendant's right to a fair trial. This is clear from the celebrated statement of Lord Steyn in ***Attorney General's Reference No. 3 of 1999*** [2001] 1 All ER 577, at p. 584:

> "*The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public*".

I refer also to the observations of Rix LJ in ***The Queen –v- McNeill*** [2007] EWCA. Crim 2927, paragraph [18]: see paragraph [6], *supra*. Furthermore, I consider that, as a general proposition, it is in the interests of justice that all relevant and admissible evidence be adduced in every criminal trial: this proposition seems to me unexceptional.

[9] I propose to extend time in the present case, having regard to my assessment of the interests of justice, as explained above and taking into account two further considerations. The first is the timetable of material dates and events, recorded in paragraph [5] above, which, in my view, impels irresistibly to the conclusion that this Defendant and his legal representatives have, in the particular circumstances of this case, been given more than adequate notice of the intention on the part of the prosecution to adduce the evidence concerned and, in consequence, have had adequate opportunity to react and prepare accordingly. The second is that no tangible unfairness to this Defendant has been occasioned by the prosecution delay of approximately seven weeks. Accordingly, time will be extended to the date when the Notice was served, which is 26th May 2009. [I should add that this date had to be elicited by a circuitous enquiry and one trusts that in all future cases the Public Prosecution Service will ensure that formal Notices of this kind are properly dated].

[10] While determining that it is appropriate to extend time in this particular instance, I should make clear that I find the explanation proffered for the lateness of service of the Notice unsatisfactory. In certain cases, this consideration may well be determinative of the court's resolution of the question of extending time. However, in the context of the instant prosecution, I consider this to be outweighed by the three considerations highlighted in paragraphs [8] and [9] above.

III <u>STATUTORY FRAMEWORK</u>

[11] Applications of this kind are regulated by the statutory regime established by the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("*the 2004 Order*"). The cornerstones of this legislation are ascertainable in two of its provisions. Firstly, Article 3, bearing the title "Bad Character" provides:

> *"**3.** References in this Part to evidence of a person's "bad character" are to evidence of, or of a disposition toward misconduct on his part, other than evidence which –*
>
> *(a) has to do with the alleged facts of the offence with which the defendant is charged, or*
>
> *(b) is evidence of misconduct in connection with the investigation or prosecution of that offence."*

This is followed by Article 4, which is in these terms:

> *"(1) The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished.*
>
> *(2) Paragraph (1) is subject to Article 22(1) in so far as it preserves the rule under which in criminal proceedings a person's reputation is admissible for the purposes of proving his bad character."*

Thus the significant reform effected by this legislation is broadcast clearly in its opening provisions.

[12] Consistent with the abolition of the former common law rules enshrined in Article 4(1), Article 6 specifies the conditions under which evidence of a Defendant's bad character is admissible. It provides:

> *"(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if –*
>
> *(a) all parties to the proceedings agree to the evidence being admissible,*
>
> *(b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,*
>
> *(c) it is important explanatory evidence,*
>
> *(d) it is relevant to an important matter in issue between the defendant and the prosecution,*
>
> *(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,*
>
> *(f) it is evidence to correct a false impression given by the defendant, or*
>
> *(g) the defendant has made an attack on another person's character.*

(2) Articles 7 to 11 contain provisions supplementing paragraph (1).

(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.

(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."

Article 7 elaborates on the concept of "*Important Explanatory Evidence*". The subject matter of Article 8 is "*Matter in Issue Between the Defendant and the Prosecution*" and it provides:

"*(1) For the purposes of Article 6(1)(d) the matters in issue between the defendant and the prosecution include –*

(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;

(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.

(2) 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 –

(a) an offence of the same description as the one with which he is charged, or

(b) an offence of the same category as the one with which he is charged.

(3) 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.

(4) For the purposes of paragraph (2) –

(a) two offences are of the same description as each other if the statement of the offence in a complaint or indictment would, in each case, be in the same terms;

(b) two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this Article by an order made by the Secretary of State.

(5) A category prescribed by an order under paragraph (4)(b) must consist of offences of the same type.

(6) Only prosecution evidence is admissible under Article 6(1)(d)."

Article 6(1)(d) and Article 8 are to be considered in conjunction with Article 17(1), which defines the words "*important matter*" as "*a matter of substantial importance in the context of the case as a whole*".

IV THE PRESENT APPLICATION

[13] Addressing the merits of the prosecution's quest to adduce the evidence in question, it is appropriate to observe, firstly, that the terms in which this notice was expressed, enshrined in the undated Form 7F, proved to be singularly defective, when the matter was duly probed in the course of oral argument. The Notice expresses an intention to adduce evidence of the following:

> "*A previous conviction for disorderly behaviour and the facts surrounding same.*"

Attached to the Notice are copies of this Defendant's criminal record and the statement of a police officer. When the issues were duly explored at the hearing, it was ultimately accepted on behalf of the prosecution that it would be inappropriate to seek to adduce evidence of the conviction in question, as this would be precluded by Article 8(2) and (4) of the 2004 Order. Rather, the intention is confined to the facts allegedly underlying the conviction. Secondly, the police officer's witness statement annexed to the Notice describes a later disorderly behaviour conviction concerning this Defendant and has nothing to do with the evidence which the prosecution seek to adduce. These fundamental flaws were not rectified until during the hearing of this matter, when the relevant witness statement – that of

Constable Alan Durkin – was produced. It is, hopefully, unnecessary to observe that shortcomings of this kind are unacceptable.

[14] The witness statement of Constable Durkin recounts the witness's observations about a fight outside a public house at Shipquay Street, Londonderry, during the early hours of 23rd December 2006 and contains the following material passage:

> "*I observed a male wearing a pink tee shirt who I now know to be Edward John William McEleney, dob 27/01/87 of 1 Circular Road Londonderry kicking another male that was lying on the ground. I along with my colleagues made our way to the scene where I restrained Mr. McEleney*".

These events precipitated the prosecution of this Defendant for disorderly behaviour and his subsequent conviction at Londonderry Magistrates Court on 11th January 2007.

[15] The prosecution seek to adduce the evidence concerned relying on Article 6(1)(d) of the 2004 Order. In argument, Mr. Mateer QC (appearing with Mr. Connell) emphasized the factor of comparability, submitting that evidence will be presented in the present case that this Defendant was engaged in kicking the deceased as he lay on the ground, by reference to the written statements of four civilian witnesses. It was argued that the bad character evidence demonstrates a propensity on the part of this Defendant to engage in this kind of violent conduct, rendering it more likely that he kicked the deceased as alleged. It is further argued that the bad character evidence sounds on the case which this Defendant makes, as expressed in his defence statement:

> "*The Defendant admits to being present and striking the deceased … during a fight which developed between the deceased and the co-accused. The Defendant … attempted to head butt Declan Gillespie* [a companion of the deceased] *as a result of which he lost his balance falling to the ground. It was in getting to his feet that he swung his foot towards the deceased who had his hands raised at time …*".

The defence statement incorporates certain responses made by this Defendant during interviews by the police, which include the following:

> "*I did swing a boot like, his arms were up…*
>
> *I swung a boot towards him like, his arms up like that, I don't know where I hit, whether I hit him like, but I did swing a boot …*".

Thus, it is argued, the bad character evidence will call into question the veracity of this Defendant's account of his actions at the critical time.

[16] The witness statement of Conor Porter purports to describe the conduct of two individuals, identified by him as "*Eddie McElhinney*" and "*Shuey Cruickshank*" and, in particular, their interaction with "*Liam*" (presumably Liam Devlin, the deceased). It contains the following passages:

> "*I then saw Eddie push Shuey outa the way and head butted Liam. Then Shuey and Eddie jumped on top of Liam and started swinging punches at Liam … and then it was all broken up …*
>
> [Later] *Shuey just ran down and hit him with his fist. Liam stumbled a bit. Then Shuey pulled Liam's top over his head and threw him to the ground. I then saw Shuey boot Liam on the head,* ***he just kept booting him to the head him and Eddie both. I think Shuey booted him about three or four times and Eddie booted him twice. This booting would have lasted about ten seconds***".

[Emphasis added].

The witness statement of Neil Michael Gillespie contains the following material passage:

> "*Shuey then just ran down and he punched Liam in the face and Liam went straight to the ground and Shuey started kicking him on the head and then Eddie ran over and started kicking Liam on his head also …*
>
> *I think Cruickshank kicked Liam around ten times. Eddie kicked Liam just about three times on his head.*"

[17] The witness statement of Stephen Hutton contains the following material allegations:

> "*Both Edward and Sean started booting him and stuff like that. Sean was at the front and Eddie at the back, both kicking him on the head, roughly fifteen to twenty times …*
>
> *Sean and Eddie both went back at Liam …*
>
> *Conor and Decky try* [sic] *to not let Sean and Eddie at Liam but they still end up getting their boots in for about another three to five minutes, they just went back, back at him again.*"

Conor Porter has now testified at the trial. His evidence essentially divided the incident into two separate phases. He claimed that during the first phase, after the victim had fallen to the ground, the first Defendant "booted" him in the head some ten to twelve times, while the second Defendant did likewise more than once. He further alleged that during the second phase, both Defendants again kicked the victim in the head, while the second Defendant shouted "*Jump on his head, jump on his head*".

[18] In the witness statement of Declan Martin Gillespie, the allegations against the Defendants include the following:

> "*With this Eddie just punched Liam in the face …*
>
> *Shoey then jumped on top of Liam knocking him to the ground …*
>
> *Liam was still on the ground and Eddie was kicking at him and punching him. Stevie pulled Eddie off Liam …*
>
> *Shoey then just ran at Liam and punched him in the face. Liam tried to fight back, Shoey hit him in the face again and Liam fell to the ground. Eddie shouted 'Jump on his face, jump on his face'. Eddie and Shoey then started kicking Liam on the ground. Eddie was kicking his face and Shoey was kicking the back of his head. I told Eddie to stop but he wouldn't.*"

This witness has also testified at the trial. In common with Conor Porter, he too divided the incident into two stages. He did not describe any kicking of the victim during the first stage. However, he alleged that during the second stage, when the victim was on the ground, both Defendants kicked him repeatedly in the head. He also alleged that this Defendant said "*Jump on his face*".

[19] A convenient summary of the prosecution case can be found in paragraphs [4] – [6] of Ruling No. 3 [Bad Character Evidence, No. 1]. On behalf of this Defendant, it was submitted by Mr. Mallon (appearing with Miss McDermott QC), firstly, that the bad character evidence makes it no more likely that this Defendant is guilty of murder as charged. Secondly, Mr. Mallon highlighted a series of asserted frailties in the prosecution case, giving rise to the contention that it would be disproportionate to seek to bolster the case by reference to the bad character evidence. To permit the evidence to be adduced would be merely prejudicial in such circumstances, he argued. Mr. Mallon also drew attention to the vagueness of the terms in which Constable Durkin describes this Defendant's conduct on the previous occasion. Finally, Mr. Mallon highlighted that the bad character evidence relates to a single previous incident.

[20] In the particular circumstances of the present case, I formed the view that the court should defer its ruling on whether the bad character evidence should be adduced until the prosecution case had reached an advanced stage. I considered that this would enable the court to make a ruling on a more fully informed basis and, in particular, to evaluate any asserted unfairness to this Defendant. I was prompted to adopt this course by virtue of the matters highlighted in argument relating to asserted frailties and discrepancies in the evidence of key prosecution witnesses, together with the timing of service of the witness statements concerned. It would be wrong, in my view, to attempt any prediction of what the evidence of the witnesses will be. This would make it inappropriate to endeavour to forecast the nature and substance of *important matters in issue between this Defendant and the prosecution*, to borrow the statutory language: see Article 6(1)(d) of the 2004 Order. I would also highlight Article 17(1), which defines "*important matter*" as "*a matter of substantial importance in the context of the case as a whole*". In the particular circumstances of this prosecution, I consider the the shape and substance of the overall case will be considerably clearer when the key prosecution witnesses have completed their evidence than at present.

[21] In opting to adopt this approach, I was influenced by the following passage in the judgment of Gage LJ in ***The Queen –v- Gyima and Another*** [2007] EWCA. Crim 429, paragraph [40]:

> "***[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."

Accordingly, this ruling was deferred until the prosecution case had reached an advanced stage, with evidence having been adduced from some of the most important witnesses – including Stephen Hutton, Declan Gillespie and John Devlin.

[22] In determining the present matter, the court must address the following questions:

(a) Is the bad character evidence in play relevant to an important matter in issue between the prosecution and this Defendant?

(b) What is the issue (or what are the issues) in question?

(c) In particular, does the bad character evidence give rise to a propensity on the part of this Defendant to commit the offence of murder as alleged by the prosecution?

(d) If the propensity threshold is overcome, does the bad character evidence make it more likely that this Defendant committed the murder?

(e) If the threshold requirements outlined above are satisfied, would it be unjust to permit the evidence to be adduced and, in any event, will this Defendant's trial be rendered unfair if the evidence is presented to the jury?

[23] The first issue on which the bad character evidence could have a bearing is that of kicking. The prosecution is that this Defendant engaged in kicking the deceased and that this caused or contributed to the death. This is a highly contentious issue, as the excerpt from the Defence Statement set out in paragraph [15] above makes clear. Secondly, and relatedly, the question of propensity falls to be considered. In this respect, the court must first be satisfied that the bad character evidence gives rise to a propensity on the part of the Defendant to commit an offence of the kind with which he is charged. Secondly, if thus satisfied, the court must further be satisfied that this renders him more likely to be guilty of such offence. Thirdly, the court must be satisfied that these considerations constitute an important matter in issue between the Defendant and the prosecution. Fourthly, the court must be satisfied that the contentious evidence is relevant to this issue. I consider that in determining these questions, it is appropriate for the court to bear in mind that if the evidence in question is admitted, the jury will be the ultimate arbiter of whether it in fact establishes (a) a propensity on the part of the Defendant to commit the offence alleged and (b) a greater likelihood that he in fact did so. In other words, the court, in my view, should be alert to the distinct roles of judge and jury in the context of the prosecution as a whole. Furthermore, the assessment which the court carries out is of a somewhat limited nature, based exclusively on the relevant documentary materials.

[24] The next question of whether the admission of the contentious evidence "*… would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it*" falls to be considered only where these threshold requirements are overcome. Further, by virtue of Article 6(4), the court is enjoined to take into account *particularly* the elapse of time between the earlier event/s and the date of the subject offence. The rationale underlying this discrete provision presumably is that the more distant in time the previous conduct the less likely it is to be indicative of propensity and likelihood, in the terms in which these concepts are explained in the legislation.

[25] These latter considerations were addressed extensively in ***The Queen –v- Hanson and Others*** [2005] Cr. App. R 21 and [2005] EWCA. Crim 824, paragraphs [7] – [12] especially and in ***The Queen –v- King*** [*supra*], paragraphs [55] – [64] particularly. Having considered these decisions, I observed in a recently delivered ruling:

> *"As these passages – and comparable passages in other decided cases make clear – there are no absolute rules in play. Plainly, a simple arithmetical head count would be inappropriate. The correct approach will invariably depend upon the individual facts and features of the particular case. The potential, in principle, for a single previous conviction to establish propensity exists and this was noted most recently by the English Court of Appeal in* ***The Queen –v- O'Dowd*** *[2009] EWCA. Crim 905, at paragraph [71]. The important consideration, in my view, is that the court should, in any given case, be alert to the need for caution where the previous convictions in question are few in number. The court must equally be cautious where a single previous conviction fails, or a small number of previous convictions fail, to demonstrate a tendency to unusual behaviour, while recognising simultaneously that such a tendency need not necessarily be demonstrated. I approach the present application in this way."*

See ***The Queen –v- Meehan and Others*** [unreported, 4th June 2009].

I consider the above passage to be applicable in the present instance, where the application relates to a single previous incident.

[26] I conclude that the bad character evidence under consideration is plainly relevant to the question of whether this Defendant kicked the deceased, as the prosecution alleges. It relates to this Defendant's conduct on a previous occasion which I consider to be clearly analogous with his alleged conduct on the occasion of the death giving rise to this prosecution. Secondly, I consider that the similarities between the two incidents are such that this evidence establishes a propensity on the part of this Defendant to commit the offence of murder alleged against him.

Thirdly, in my view, such propensity renders him more likely to be guilty of this offence. As already observed, the jury will be the ultimate arbiter of these issues. Fourthly, this is clearly, in the language of Article 4(1)(b), "*an important matter in issue between the Defendant and the prosecution*". Fifthly, having regard to the substance of the evidence which it is proposed to adduce, I consider that it would not be unjust to admit it. The reception of this evidence should not have any disproportionate impact on the trial. It is of a focussed and self-contained nature and will not give rise to any inappropriate diversion or distraction for the jury. I further consider that it does not have the potential to mislead the jury. Furthermore, there is no suggestion that this Defendant is in any way unable to deal with the evidence. Accordingly, there will be no adverse impact on the fairness of his trial. Finally, there is no reason for doubting the jury's ability to evaluate the evidence and give it such rational and proportionate weight, if any, as they consider appropriate.

[27] Accordingly, I accede to the application. While the expectation of the court is that the evidence to be adduced is, in substance, as set out in paragraph [14] above, there will be an opportunity for further argument if necessary, followed by any appropriate consequential ruling.

ADDENDUM

[28] Just before the conclusion of the prosecution case, at a stage when the trial was of approximately six weeks vintage, a significant new, and contentious, issue arose. Pursuant to the ruling in paragraph [27] above and with reference to the evidence in question, as set out in paragraph [14] above, prosecution and defence sought to formulate an agreed Statement of Facts, to be read to the jury. When alerted that there were certain contentious aspects of this exercise, I asked the prosecution to arrange for efforts to be made to assemble documentary materials such as Constable Durkin's notebook entry, any transcripts of PACE interviews and the custody record. The following day [15th October 2009] two further documents were disclosed by prosecution to defence. One of these is the notebook entry of Constable Durkin, which records:

> "*At approximately 00.20 hours I was on mobile patrol on Shipquay Street when a fight broke out. Myself and my colleagues headed towards the fight. On making my way to the fight I observed a male who I now know to be Edward John William McEleney d.o.b. 27/1/87… kicking an unknown male "on the head" while he lay on the ground.*"

[My emphasis].

Secondly, the custody records have been disclosed. This documents that the reason for the arrest of Mr. McEleney was "*disorderly behaviour*", that he was charged with

this offence at 01.41 hours at the police station and that the circumstances of his detention were:

> "[Detained person] *observed* ***jumping on another male's head who was on the ground,*** *arrested disorderly behaviour*".

[My emphasis].

[29] The emphasis in the passages quoted above serves to highlight the significant distinction between the witness statement of Constable Durkin (paragraph [14] *supra*) and the two new documentary items belatedly disclosed. As a result of the unearthing of these two additional sources, the position of the prosecution is that the bad character evidence *now* to be adduced concerning the second Defendant should be to the effect that he was observed kicking the head of another male person lying on the ground. The defence have, inevitably, objected, giving rise to the need for a further ruling by the court.

[30] It seems to me that the first question to be addressed is whether this is a new application by the prosecution under Part II of the 2004 Order. On the elementary ground that this is new material which did not form part of the original application, did not feature in the arguments of the parties and, in consequence, lay outwith the framework of this ruling when first delivered some two weeks ago, I consider that this question invites an affirmative answer. In short, this new material at no time formed part of the bad character evidence to which the application initially related: see Form 7F and the materials attached thereto. It could not have done so, since the new materials were not in the possession of the prosecution at that time. As a result, these new materials formed no part of the second Defendant's corresponding application to exclude the evidence: see the completed Form G. I would add that the procedural regime regulating applications for the admission of bad character evidence, enshrined in Rule 44N of the Crown Court Rules, does not expressly make provision for the amendment of applications. It was not argued by the prosecution that such a power is implicit in the rules and, as a result, I do not purport to decide this discrete issue.

[31] Given the circumstances in which and stage at which the new materials entered the arena, the application pursued by the prosecution was made orally, rather than in writing. The court is empowered by Rule 44N(10) to entertain such an application "*… if it considers that it is in the interests of justice to do so*". Bearing in mind that both parties proceeded to address full argument to the court and taking into account the advanced stage of the trial, coupled with the circumstances in which the materials in question came to the notice of the parties (as set out above), I am prepared, not without some reluctance, to exercise this power in the present instance. In thus concluding, I apply the "triangulation of interests" reasoning set out in paragraph [8] above.

[32] However, this is not determinative of the substantive issue, which is whether the prosecution should be permitted to adduce the additional evidence in question. On behalf of Mr. McEleney, it was submitted by Mr. Mallon that the proposed introduction of the additional evidence transforms the landscape dramatically. Its late introduction *per se* is unfair to the Defendant, particularly in circumstances where the solicitors who represent him in this trial were not his legal representatives in connection with the December 2007 incident and ensuing prosecution and conviction. Mr. Mallon also drew attention to the passage in Archbold, paragraph 13-66. In response, Mr. Mateer QC, on behalf of the prosecution, contended that the broad issue pertaining to the December 2007 interest has been in play since service of the prosecution Notice of Intention (Form 7F) on 26th May 2009, with the result that there has been ample opportunity to obtain instructions from the second Defendant and pursue such enquiries as may be deemed appropriate.

[33] I consider that this latter submission overlooks both the transformation of the landscape under consideration and the undeniably important issue of timing, with all the consequences thereof. In my view, there is a very significant difference between a vague, unparticularised allegation of kicking and a specific, concrete allegation of kicking a person (unidentified) in the head. Secondly, the timing of this matter unavoidably gives rise to unfairness on the part of the Defendant concerned, bearing in mind that the prosecution have now called all of their witnesses and have adduced all of the evidence upon which they intend to rely, with the exception of this outstanding matter. The third material consideration is the contentious nature of the evidence. As it is not capable of being agreed, it will be necessary for the prosecution to adduce oral evidence from Constable Durkin and this will, predictably, be the subject of extensive cross-examination. In this way, the attentions of the jury will inevitably be diverted from the central factual issues in this trial and they will find themselves having to adjudicate on the satellite factual issues of what actually happened on the occasion in question, on 23rd December 2007. This would, in my view, be manifestly undesirable. It will not be conducive to a fair trial and it is unlikely to promote the triangulation of interests, as expounded by Lord Steyn.

[34] I would add that if the prosecution are to be permitted to adduce the additional evidence, it will be necessary to adjourn the trial for a period of time to enable reasonable investigative and preparatory steps to be taken on behalf of the second Defendant. I make this assessment on the basis of the submission addressed to the court by his counsel. Self-evidently, an interruption of even a couple of days duration at this very advanced stage of the trial would be most unwelcome. As emphasized in ***The Queen –v- O'Dowd*** [2009] EWCA Crim 905, in the contemporary world of criminal trials the presiding judge must be particularly alert to the jury at all times: see paragraph [62] in particular. I also heed the warning in ***The Queen –v- Hanson*** [2005] 1 WLR 3169 that care must be taken "*… not to permit the trial unreasonably to be diverted into an investigation of matters not charged on the indictment*": see paragraph [12]. Similarly, in ***The Queen –v- Edwards and Others*** [2006] 2 Cr.

App. R 4, the court highlighted the importance of guarding against "*satellite litigation*": see paragraph [1](vii).

[35] For this combination of reasons, I rule that the additional evidence should be excluded. I would add that the problems which have beset these twin applications from the outset have been manifold. Regrettably, they have given sustenance to the three arch enemies of a properly conducted criminal trial namely unfairness, inefficiency and delay. I would urge the agencies concerned to take steps to prevent any recurrence.

[36] Finally, my adjudication on the terms in which the bad character evidence should be presented to the jury is set out in the text appended.