Neutral Citation No. [2009] NICC 70 | *Ref:* **McCL7640**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **05 / 10 / 09**

IN THE CROWN COURT IN NORTHERN IRELAND

LONDONDERRY DIVISION,
sitting in Coleraine

THE QUEEN –v- SEAN CRUICKSHANK and EDWARD McELENEY

RULING NO. 6: SCOPE OF EVIDENCE/DISCHARGE OF JURY

McCLOSKEY J

[1] The circumstances in which the requirement for this ruling has arisen may be summarised thus. On the thirteenth day of the trial, Mr. Mateer QC, in response to an enquiry from the court, disclosed that the prosecution were proposing next to adduce evidence from the witnesses John Devlin, Thomas Edgar, Gavin McLaughlin, James McLean, Anthony Rodgers and Tara Rogers. The court then invited submissions from both prosecution and defence regarding the appropriate scope and limits of the evidence to be adduced from these witnesses. The reasons for this concern will become apparent presently. Before focussing further on these six witnesses, I refer to paragraphs [4] – [8] of Ruling No. 3 (Bad Character Evidence No. 1), for an understanding of both the prosecution case and the defence cases. The context for the present ruling may be appreciated from the following passage in the Defence Statement of the first Defendant, Sean Cruickshank:

> "*The Defendant was approached by the deceased who formed part of the 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 deceased is Liam Devlin and his brother is the aforementioned John Devlin.

[2] At this stage of the trial, it is clearly common case that there was indeed an earlier incident involving the first Defendant and John Devlin. Indeed, this incident forms the basis of the second count on the indictment, assault occasioning actual bodily harm, to which the first Defendant pleaded guilty some time ago. In passing, the court has been informed that there is no agreement between prosecution and defence concerning the factual basis of this plea. However, the effect of the plea is that the first Defendant admits that he assaulted John Devlin thereby occasioning him actual bodily harm, without any legal justification. The jury, of course, are unaware of this Defendant's plea of guilty to the second count. Furthermore, the prosecution have not applied to the court for leave to adduce evidence of this.

[3] Each of the aforementioned six witnesses – including the victim - John Devlin – has made a written statement describing the incident giving rise to the second count. The statements are contained in the committal bundle and they have the following salient contents:

(a) In his statement, John Devlin describes an incident at a location known as the Creggan Shops. According to him, he was in conversation with one Vicky Wray, who "*… was mouthing about it but she was not aggressive*". He describes his own conduct in unremarkable terms. The statement continues:

> "*I was chatting to Vicky and some other boy who I don't know when I heard a boy called Hughie* [the first Defendant] *say 'What's he mouthing about*'. *He then pushed one young boy aside and head butted me on the bridge of my nose. He head butted me with his forehead. As a result I took a step back …and walked away*".

(b) Thomas Edgar, in his statement, provides a somewhat different description of the incident. He recounts that John Devlin and Vicky Wray were arguing, in the course of which John Devlin began "roaring" at Gavin McLaughlin –

> "*And then* [the first Defendant] *came over to Gavin and John Devlin and said 'Stop roaring in his face'. John Devlin then said something back to* [Cruickshank] *and the next thing* [Cruickshank] *head butted Devlin on his nose. Devlin didn't hit or fight back…"*.

(c) In his witness statement, Gavin McLaughlin describes the conduct of a male person who *appears* to be John Devlin. The latter allegedly said to Vicky Wray "*You are the one who is going to get us battered*", whereupon:

> "*Then Sean Cruickshank came up and I heard Sean saying 'Don't be raising your voice' and then I saw him head butt the boy and he just ran off*".

(d) James McLean, in his witness statement, recounts the following:

> "*… I heard Vicky saying to John Devlin about boys from Burnfoot wanting to hit her or something … Devlin was raising his voice and saying he didn't say that …*
>
> *Then Sean told Devlin not to raise his voice again, but Devlin did raise his voice and then Sean went over and head butted Devlin on the nose and face*".

(e) Anthony Rodgers, in his witness statement, recounts an argument in which John Devlin, Vicky Wray and Gavin McLaughlin were participating and he continues:

> "*Devlin was pointing and poking Vicky with his finger and* [Sean Cruickshank] *said to Devlin not to raise his voice and then … just head butted Devlin …*"

(f) Tara Rogers says in her witness statement:

> "*John Devlin started to give Vicky a hard time by shouting at her …*
>
> *Cruickshanks then came over and said to John Devlin 'Don't be talking to her like that'. John Devlin then started to shout at* [Cruickshanks, who] … *then head butted John Devlin on his nose.*"

The jury have not yet heard evidence from any of the above witnesses.

[4] At this stage of the trial, some evidence touching on the incident at the Creggan Shops involving the first Defendant and John Devlin has been given. It may be summarised in the following terms:

(a) Stephen Hutton testified that John Devlin and Neil Gillespie left the Gillespies' house for the purpose of purchasing cigarettes and returned later, with John displaying a visibly "busted" and bleeding nose. Continuing, Mr. Hutton said that he was told by Neil Gillespie that the two of them had been making their way to the Creggan Shops, where a crowd was assembled and something was said, whereupon the first

Defendant head butted John Devlin. In cross examination by Mr. McCartney QC (on behalf of the first Defendant), Mr. Hutton was asked whether this incident had involved a verbal altercation between John Devlin and a girl named Vicky at the shops, with John shouting in her face and (apparently) declining to stop when asked to do so, thereby giving rise to the interaction between the first Defendant and John Devlin. Mr. Hutton replied, in terms, that he was unaware of the details. He stated specifically that he did not know what had provoked the injury. At this stage, I expressed some concern about the line of questioning being pursued, particularly because this witness said that he had not witnessed the incident (and this appeared to be common case).

(b) The next prosecution witness was Declan Gillespie. He testified that upon returning from the Creggan Shops, it was observed that John Devlin had a "busted" nose and said that the first Defendant had head butted him in the nose. He was not cross-examined about his knowledge of the details of the incident.

(c) The third prosecution witness, Neil Gillespie, testified that he and John Devlin went to the Creggan Shops, where they were talking to some people, in the course of which Vicky Wray began "*mouthing off*" to John Devlin. According to this witness, John Devlin told her to stop, whereupon the first Defendant approached and head butted him on the nose. He was cross-examined about some of the detail of the incident, during which he agreed that John had used some abusive language to Vicky Wray and had told her to shut up.

[5] I am in no doubt about the relevance of the Creggan Shops incident to the first count on the indictment viz. the murder of Liam Devlin. It is relevant because it serves to explain the background to the critical, later incident, in particular the confrontation and exchanges transacted between the first Defendant and the deceased. Secondly, it is indisputably relevant to the assertions in the first Defendant's Defence Statement that the deceased was the aggressor and that his intention was to exact violent revenge for the earlier attack by this Defendant on his brother. Thirdly, it is relevant to the plea of self defence in the Defence Statement. Fourthly, it has a bearing on the case consistently made in cross-examination of the prosecution witnesses that the earlier incident provoked fury on the part of the deceased and, further, precipitated an intentional and deliberate plan – to which the contributors were the deceased and the four prosecution witnesses to date (the two Gillespies, Stephen Hutton and Conor Porter) – to confront or "ambush" the Defendants.

[6] Next, it is appropriate to comment on the limited nature of the evidence concerning the Creggan Shops incident which has been adduced to date. The jury have heard about this incident in general terms only. The only witness who has

purported to describe the incident from the perspective of personal observation is Neil Gillespie, it being common case that he was present. The evidence which he has given about the matter is set out in paragraph [4](c) above. It will be perfectly clear to the jury that none of the other witnesses from whom evidence has already been adduced about the incident was present and, in consequence, none of them purported – or could even attempt – to describe it in any kind of detail.

[7] I would also highlight that, at the conclusion of the trial (and earlier, if deemed necessary) the jury will specifically be instructed to consider and evaluate the Creggan Shops incident in the manner set out in paragraph [5] above. They will further be instructed that they are not to concern themselves with the details of the incident, they are not to adjudicate upon it in any way and they are to completely ignore questions of culpability, instigation, provocation and so forth.

[8] The next question to be addressed is whether the provisions of the Criminal Justice (Evidence) Northern Ireland) Order 2004 ("*the 2004 Order*") have any bearing on these issues. The term "*bad character*" is defined in Article 3:

> "*References in this Part to evidence of a person's 'bad character' are to evidence of, or of a disposition towards, 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*".

[My emphasis].

Based on the assessment which I have set out in paragraph [5] above, I conclude without hesitation that the evidence which has been adduced thus far about the Creggan Shops incident is evidence which "*has to do with*" the allegations pertaining to the charge of murder against this Defendants. In my view, the statutory words "*evidence which has to do with*" conjure up the notions of relevance and nexus and, furthermore, are couched in relatively elastic terms. In this respect, I concur with the observations of Rix LJ in ***The Queen –v- McNeill*** [2007] EWCA. Crim 2927, at paragraph [14]. I have already concluded above that the evidence in question is plainly relevant and, based on the same assessment, I consider its nexus with the alleged facts bearing on the charge of murder clear and indisputable. It follows that the evidence under consideration is not, in my view, "bad character" evidence, as defined, with the result that the provisions of the 2004 Order do not govern its admission. Rather, the issue of its admission is governed by common law principles and Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("*PACE*").

[9] Having regard to the first Defendant's Defence Statement, as rehearsed in paragraph [1] above, coupled with my assessment of the evidence in question set out in paragraph [5] above, I consider it to be of important probative value, as it unquestionably has a bearing on issues of substantial significance. Its probative value is such that this clearly outweighs any potentially prejudicial impact on this Defendant. As regards the latter, as the summary in paragraph [4] above indicates, the evidence about the Creggan Shops incident which the jury have heard thus far is both limited and relatively anodyne in nature. In my view, any risk of prejudice to this Defendant resulting from the evidence already adduced is at most minimal. Furthermore, I am satisfied that any such risk will be adequately addressed by the judicial instruction to the jury mooted in paragraph [7] above. The test to be applied is "*… whether a fair-minded and informed observer would conclude that there was a real possibility, or a real danger, that the jury would be prejudiced against a Defendant by wrongly admitted prejudicial information*") per Auld LJ in ***The Queen –v- Lawson and Others*** [2007] 1 Cr. App. R 20, paragraph [64]. The overarching touchstone applied by His Lordship was "*… whether to continue with the trial would or could, by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction*". I have also considered the test propounded in Blackstone's Criminal Practice 2009, paragraph D13/49, which is whether there is "*a high degree of need*" to discharge the jury. For the reasons elaborated above, I conclude that the application of these tests to the present context impels firmly to the conclusion that there is no justification for discharging the jury at this stage.

Conclusions

[10] It follows from the above:

(a) The jury will not be discharged.

(b) It will be impermissible to seek to adduce from any of the six witnesses identified in paragraph [2] above evidence pertaining to the details of the Creggan Shops incident and/or bearing on questions of culpability, instigation, aggressor identity and like matters. Thus the evidence of John Devlin should be confined to the bare fact of being struck by the first-named Defendant . It will also be appropriate to elicit evidence from him about the other material events during the evening/night in question, both preceding and following the Creggan Shops incident. Bearing in mind that the fact of the assault by the first Defendant on John Devlin and the resulting injury is undisputed it seems to me that, while it is the current intention of the prosecution to tender the other five witnesses concerned, it will probably be inappropriate for any evidence to be adduced from them. Moreover, it has been specifically confirmed to the court that there is no intention on the part of the first Defendant to cross-examine these witnesses about any matter other than the assault on John Devlin at the Creggan Shops. Thus no unfairness will accrue to this Defendant if the

witnesses give no evidence at all. I would add that the risks of calling any of these witnesses to testify are manifest and, in their witness statements, they do not appear to deal with any factual matters other than those relating to the Creggan Shops incident.

(c) It will also be impermissible (1) to adduce any evidence touching on the first Defendant's plea of guilty to the Section 47 assault and (2) to embark on any questioning which might disclose this fact to the jury. While it was the intention of this Defendant's legal representatives both to reveal this matter to the jury and to cross-examine the aforementioned witnesses in an attempt to portray the first Defendant in a favourable light, vis-à-vis the Creggan Shops incident, I consider that both courses have the potential to prejudice the jury against this Defendant to the extent that the fairness of his trial could be irredeemably compromised.

[11] Both prosecution and Defence will be at liberty to address the court on any matters arising out of this ruling.