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IN THE CROWN COURT FOR NORTHERN IRELAND SITTING AT LONDONDERRY

THE QUEEN –v- JAMES OLIVER MEEHAN, BRENDA DOLORES MEEHAN and SEAN ANTHONY DEVENNEY

RULING: BAD CHARACTER

McCLOSKEY J

PREFACE

Prior to the development described in paragraph [24] below, this ruling had been prepared in draft, in the form of paragraphs [1] – [22], but had not been delivered because the text has not been finalised. The court received oral argument on 18th May 2009. The trial began the following day and, on 20th May, I intimated to the parties that the ruling would be finalised for promulgation the following day. However, before delivering the ruling, there was a significant development, consisting of the re-arraignment of two of the accused, including James Oliver Meehan. Hence the structure of this ruling.

Introduction

[1] The subject matter of this ruling is an application on behalf of the prosecution to adduce evidence of the asserted bad character of the first-named Defendant, James Oliver Meehan ("*this Defendant*"), arising out of previous convictions attributed to him.

The Indictment

[2] The indictment comprises three counts. The first alleges that all three Defendants murdered James McFadden ("*the deceased*") on 5th May 2007, in the County Court Division of Londonderry. The second alleges that, on the same date, all Defendants assaulted one Jason Graham, thereby occasioning him actual bodily

harm, contrary to Section 47 of the Offences Against the Person Act 1861. The third count asserts a freestanding charge of common assault, to the effect that the second-named Defendant, Brenda Dolores Meehan, assaulted Ashling McFadden on the same date. Accordingly, the only Defendant concerned in this application, James Oliver Meehan, faces one charge of murder and one of assault occasioning actual bodily harm. The Defendants, who are, in sequence, stepfather, mother and stepson and who all resided together at the material time, initially denied all the charges, until the third day of trial (cf. Paragraph [22], *infra)*.

Statutory Framework

[3] 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.

[4] 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*".

<u>The Application</u>

[5] The factual foundation of the application on behalf of the prosecution is constituted, firstly, by this Defendant's criminal record, which incorporates, *inter alia*, the following two convictions:

(a) Assault occasioning actual bodily harm.

(b) Common assault.

These convictions were made simultaneously, at Londonderry Crown Court, on 2nd February 2000. The criminal record documents that both offences were committed on the same date, 22nd July 1998. On behalf of the prosecution, Mr. Connell (appearing with Mr. Orr QC) summarised the factual matrix of these offences in the following way. This Defendant and two others were involved in an attack on an adult person at a nightclub in Londonderry. All were patrons of the establishment. The attack involved head butting the victim and inflicting several punches on him. Both perpetrators and victim were then ejected from the club. Outside, this Defendant perpetrated a common assault against a second adult victim, who was rendered unconscious. When interviewed by the police, he sought to exculpate himself and asserted that he had acted in self defence. At the Crown Court, some one-and-a-half years later, this Defendant pleaded guilty to both charges.

[6] It is appropriate to observe, at this juncture, that Mr. McCartney QC (appearing with Mr. Talbot on behalf of this Defendant) specifically confirmed to the court that the factual summary set out immediately above is undisputed. I shall address the implications of this presently.

[7] In the Notice served pursuant to Rules 44N(4) and (6) of the Crown Court Rules, it is contended on behalf of the prosecution:

> "[These convictions are] *sought to be admitted on the grounds that under Article 6(1)(d) of the* [2004 Order] …[they are] *relevant to an important matter in issue between the Defendant and the prosecution … being that the Defendant has a propensity to commit offences of the kind with which he is presently charged. It is submitted that the* [offences] *before the court* [are] *of the same type as that sought to be adduced* [sic]. *The investigating officer will attend to give evidence in relation to said record*".

Mr Connell also drew to the attention of the court a prepared written statement, signed by this Defendant and dated 8th May 2007. This was submitted by this Defendant's solicitor to the police while this Defendant's interviews, which were largely of the "*no comment*" variety, were taking place. This statement describes an altercation of sorts, involving this Defendant and the third-named Defendant (on the one hand) and a group of other people (on the other) at an earlier stage of the night in question. The scene was the Redcastle Hotel, County Donegal, where all of the protagonists – the Defendants, the deceased, the injured parties and others - had been attending a wedding reception. Later (the statement continues):

> "*We came up to Derry in a taxi and when we got home I changed out of my suit. Someone said they were hungry and I remember something about cigarettes and I decided I would drive to the all night garage at Desmond's on the Strand Road. Brenda and Sean* [the other two Defendants] *were with me …*
>
> *As I was driving past the Shantallow shops I saw the wedding bus and the people who had been involved with Sean and me in the carpark. I wanted to make the peace and stopped my car and approached these people. I believe Brenda and Sean left the car at around the same time. As I got close a man swung a crutch at me. I grabbed this man and as we scuffled, we fell through a hedge landing very heavily in a garden. The man was underneath me facing away from me so that he landed face down and I landed on top of him with my front facing his back. The fall was a heavy one for us both and I was groggy and dazed from the fall. I remember standing up and someone pulling at me. I remember hearing screaming and shouting and a lot of movement around me and close to me. I made my way back to my car and Brenda, Sean and I drove away*".

[8] It is appropriate also to highlight the defence statement of this Defendant, which contains the following passage:

> *"The Defendant admits approaching the Deceased, who threatened him with an aluminium crutch, which had been handed to the deceased by S or D (minors).*
>
> *The deceased swung the crutch in an aggressive manner and the Defendant attempted to disarm him. Both men subsequently exchanged a number of blows and eventually they fell through an adjacent hedge landing together upon the ground (self defence). No further blows were exchanged. The Defendant who was dazed by this development remembers being pulled by someone before making his way back to the family car …*
>
> *The actions of the accused failed to make any significant or substantial contribution to the regrettable death of the deceased. The defendant by reason of his condition and physical involvement with the deceased could not have inflicted the injuries which were the cause of death …*
>
> *At no point during the events as outlined above did the Defendant form 'malice aforethought' or an intention to kill or to cause grievous bodily harm to the deceased …*
>
> *It is submitted that … the death was in all likelihood occasioned by the intervention of a third person or 'novus actus interveniens.' The said act was entirely independent of the actions of the Defendant …*
>
> *The Defendant's level of intoxication was such as to deprive him of the requisite degree of knowledge or specific intent".*

[The highlighted passages are a reflection of the final amended defence statement submitted on behalf of this Defendant].

As regards the second count of the indictment, the defence statement recites:

> *"8. There is no evidence that the Defendant contemplated any assault upon Jason Gerard Samuel Graham or that he actually assaulted the said Mr. Graham".*

<u>The Defence Response</u>

[9] The application to adduce evidence of this Defendant's previous convictions has elicited certain objections on his behalf, which are the following:

(a) The admission in evidence of this Defendant's previous convictions would adversely affect the fairness of his trial.

(b) The offences are of eleven years vintage.

(c) The convictions have little or no probative value.

(d) The convictions are insufficient to establish propensity.

In argument, particular emphasis was laid on the second and fourth of these objections.

The Prosecution Case

[10] Clearly, this application must be determined by reference to the prosecution case, as this has been outlined to the jury. The résumé provided by Mr. Orr QC at the outset of the trial identified two separate, though inter-related, phases of events. During the first phase, certain events unfolded at the Carlton Redcastle Hotel in County Donegal, a short distance from Londonderry. The second phase concerns the events which occurred at and in proximity to the address of the deceased in the Shantallow Estate of the city, both immediately prior to and at the time of his death. Certain evidence will also be adduced relating to what might be described as an intermediate phase, concerning (a) the taxi journey undertaken by all three Defendants from the hotel to their home in the Galliagh Estate in the city, (b) what transpired at this address and (c) in transit between this address and the locus where the second phase of events unfolded.

[11] In summary, the prosecution will seek to establish that all three Defendants instigated the critical events during the final phase of the sequence which culminated in the death of the deceased and the commission of the other two alleged offences. Based on my understanding and interpretation of Mr. Orr's opening address, the jury will be invited to infer that there were elements of motive, incentive, planning, revenge and the determined prolongation of hostilities in the Defendants' actions, in a context of very recent aggression in a social setting. The prosecution case is that there were very recent hostilities, at the Redcastle Hotel, between the two groups in question viz. the Defendants (on the one hand) and the injured parties and McFadden Family members (on the other). The thrust of the case against the Defendants is that almost immediately after this aggression they determined to prolong these hostilities, in a calculated manner. It is alleged that upon returning home from the wedding reception, the Defendants changed their clothing and, effectively, hatched a plan to attack the deceased and others, which they duly implemented. This entailed, firstly, driving from their home to the

vicinity of the home of the deceased. The prosecution contends that such explanation as has been proffered by the Defendants for their movements, direction of travel and, ultimately, presence at the scene of the crimes is utterly implausible. It is alleged that the Defendants were waiting for their victims at a location adjacent to the victim's home, where they instigated a violent confrontation when the McFaddens and others returned home from the wedding. It is contended that the cause of death was a laceration of the heart, giving rise to a rupture. This, the prosecution say, was almost certainly caused by blows to the chest of the deceased – a forceful kick to the chest or stamping. In summary, it is contended that the deceased was the victim of a brutal, savage and unprovoked attack.

[12] As will be apparent from the above summary, the outline of the prosecution case to the jury at the beginning of the trial did not delve into the details of the *inter-partes* hostilities at the Redcastle Hotel. Consistent with this, nothing was said about matters such as perpetrators, ringleaders or aggressors. The prosecution do not make the case that any of the Defendants had the role of culpable aggressor at the hotel. The prosecution case does not entail any dimension of allocation of blame or responsibility for those hostilities or any resulting injuries. Rather, the prosecution relies on events during this (the first) phase in order to establish the background to the second – crucial - phase and with a view to inviting the jury to infer that the Defendants were ill disposed towards the victims and harboured significant ill feelings, to the extent that they had the requisite state of mind, that is to say an intention to kill, or to cause grievous bodily harm to, the deceased. The prosecution case does not invite the jury to adjudicate on events during the first phase. Rather, it presents those events in a relatively neutral, anodyne fashion. The court was informed that this presentation of the prosecution case followed discussions between prosecuting and defence counsel, in which the latter highlighted certain concerns about exposure of the details of the aggressions at the hotel, based not least on the consideration that much of the evidence contained in the depositions bearing on this topic is contentious. Reduced to its essential core, this entails a claim by the Defendants that they were not the instigators or aggressors vis-à-vis these initial events.

[13] The evidence to be adduced will include forensic evidence linking both the trousers and the boots worn by this Defendant to the deceased. Evidence will also be led in an attempt to establish a deliberate scheme by the Defendants to dispose of contaminated clothing worn by them, in the aftermath of the alleged murder. The crown case also entails adducing evidence of statements made by two of the Defendants immediately before and during a taxi transit from the wedding reception to their home, which are said to be indicative of a planned and determined attack. At this juncture, evidence to this effect has already been adduced. It is also intended to adduce evidence of the movements of this Defendant's vehicle in the aftermath of the alleged offences.

<u>Consideration</u>

[14] The Northern Ireland legislation and its English counterpart have received much judicial attention since their introduction. In this jurisdiction, I refer particularly to the judgment of Gillen J in ***The Queen –v- King*** [2007] NICC 17, paragraphs [55] – [64]. One of the leading English authorities is ***The Queen –v- Hanson and Others*** [2005] Cr. App. R. 21 and [2005] EWCA. Crim 824. The following passages in the judgment of Rose LJ are especially noteworthy:

> "[7] *Where propensity to commit the offence is relied upon there are thus essentially three questions to be considered:*
>
> - *(1) Does the history of conviction(s) establish a propensity to commit offences of the kind charged?*
> - *(2) Does that propensity make it more likely that the defendant committed the offence charged?*
> - *(3) Is it unjust to rely on the conviction(s) of the same description or category; and, in any event, will the proceedings be unfair if they are admitted?*
>
> [8] *In referring to offences of the same description or category, s.103(2) is not exhaustive of the types of conviction which might be relied upon to show evidence of propensity to commit offences of the kind charged. Nor, however, is it necessarily sufficient, in order to show such propensity, that a conviction should be of the same description or category as that charged.*
>
> [9] *There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged (compare* ***Director of Public Prosecutions v P*** *(1991) 93 Cr.App.R. 267 at 279, [1991] 2 A.C. 447 at 460E to 461A). Child sexual abuse or fire setting are comparatively clear examples of such unusual behaviour but we attempt no exhaustive list. Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction for shoplifting, will not, without more, be admissible to show propensity to steal. But if the modus operandi has*

significant features shared by the offence charged it may show propensity.

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

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

[12] *It will often be necessary, before determining admissibility and even when considering offences of the same description or category, to examine each individual conviction rather than merely to look at the name of the offence or at the defendant's record as a whole. The sentence passed will not normally be probative or admissible at the behest of the Crown, though it may be at the behest of the defence. Where past events are disputed the judge must take care not to permit the trial unreasonably to be diverted into an investigation of matters not charged on the indictment."*

[15] In ***King***, Gillen J reflected on the question of how many previous convictions might be necessary in order to establish a Defendant's propensity to commit offences of the kind charged. He stated:

> "[64](6) *In ruling on any such application, the judge should bear in mind … (c) that there was no minimum number of events necessary to demonstrate such a propensity though the fewer the number of convictions the weaker was likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category would often not show propensity, but it might do so where,* ***for example****, it showed a tendency to unusual behaviour …*".

[My emphasis].

Later, his Lordship reiterated:

> "[66](b) … *I recognise that whilst there is no minimum number of events necessary to demonstrate a propensity, a single previous conviction for an offence of the same description or category does not by itself necessarily show propensity*".

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.

[16] The first question to be addressed is whether this Defendant's previous convictions establish a propensity to commit offences of the kind with which he is charged in this prosecution. Self-evidently, offences entailing physical violence and the infliction of physical harm belong to a very wide spectrum of conduct, where there is scope for almost infinite variability. In making the comparison in the present case, the matter is one of degree, requiring an evaluative judgment on the part of the court. This Defendant's convictions on 2nd February 2000 related to acts of violence perpetrated by him in a social setting, where adults were gathered. The offences involved a significant degree of violence and there was more than one

victim. Further, injuries of some severity were inflicted. All of these features apply to the present case, with the modification that the social setting formed the backdrop to, rather than the locus of, the alleged offences. Moreover, this Defendant was a mature adult both when the earlier offences were committed and at the time of the more recent alleged offences. In addition, on both occasions, he was a member of a group of persons, all allegedly involved in criminality. Having regard to these factors and based on this analysis, I consider that the previous convictions of this Defendant, taken together, are sufficient to establish a propensity to commit the offences with which he is now charged.

[17] The second question to be addressed is whether this propensity makes it more likely that this Defendant committed the offences now charged. Based on the same factors and analysis as set out immediately above, I consider that this question attracts an affirmative answer. In thus concluding, it is appropriate to compare this Defendant with a person of previous unblemished character. It is also instructive to compare him with a person of previous tainted character who, nonetheless, within the terms of the legislation, is not deemed to have a propensity to commit the first and second offences charged in the indictment. Having regard to my finding of propensity against this Defendant, in my view he is more likely than either of these hypothetical comparators to have committed the offences. It seems to me that where a court makes a finding of propensity in an application of this kind, more often than not it will similarly hold that such finding makes it more likely that the accused committed the offences now charged. This will be a matter of rational, evaluative judgment for the judge concerned. I recognise that, in principle, where a court makes a finding of propensity it could then conclude that such propensity does not make it more likely that the accused committed the offence charged. However, I do not consider this to be such a case.

[18] Thirdly and finally, I must confront the double-barrelled question of whether it is unjust to rely on this Defendant's previous convictions and, in any event, will his trial be rendered unfair if they are admitted in evidence? Unfairness could arise, for example, where the available information about an accused person's previous convictions has diminished or has been substantially extinguished by the passage of time. That, however, is not this case. Unfairness could also arise if the accused were anxious to call an important witness, now infirm or deceased, to illuminate certain aspects of his previous offending. Again, that is not the present case. There could also conceivably be unfairness if the accused genuinely could not recall some important facts or circumstances, whether by reason of injury or otherwise: however, this is not asserted on behalf of this Defendant. In reality, the unfairness canvassed on behalf of this Defendant resolves to little more than bare assertion. The single factor highlighted in argument was the vintage of the convictions, the offences having occurred almost nine years prior to the offences specified in the indictment. However I find that the factor of vintage alone exists in a vacuum, giving rise to no tangible unfairness of any of the types just considered or of any other identifiable kind.

[19] In making this conclusion, I bear in mind the statement of Lord Steyn in ***Attorney General's Reference No. 3 of 1999*** [2001] 1 All ER 577 (at p. 584), in a celebrated passage which bears repetition:

> "*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*".

Furthermore, I consider that unfairness in this context is not generated merely by the introduction of certain evidence which may tend to strengthen the prosecution case and, correspondingly, undermine the Defendant's case. This is expressed with particular clarity by Rix LJ in ***The Queen –v- McNeill*** [2007] EWCA. Crim 2927:

> "[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*".

In my opinion, the probative value of the evidence of this Defendant's previous convictions outweighs any prejudicial effect, upon a true appreciation of the meaning of prejudice in this context. Ultimately, of course, the jury, having heard all the evidence, will be the arbiter of the strength, significance and probative value of this evidence.

[20] The application by the prosecution has a second dimension, which relates not to this Defendant's previous convictions but his response when interviewed by the police thereafter: see the summary in paragraph [5] above. Then, he sought to exculpate himself, asserting that he had acted in self-defence. Plainly, given his pleas of guilty, he did not maintain this stance subsequently. The prosecution invite the court to make an analogy between this response and the response made by this Defendant in his written statement, in the context of the present case, as rehearsed in paragraph [7] above. Under Article 8(1)(b) of the 2004 Order, the question to be considered is "*… whether*" the Defendant has a propensity to be untruthful. In this respect, this Defendant's plea of guilty to the earlier charges is not harmonious with his initial protestations of innocence and self-defence. The guilty pleas do not, of course, establish that he *was* untruthful in the aftermath. Rather, in the language of

Article 6(1)(d) and Article 8(1), the question is whether this constitutes a "*matter in issue*" between the prosecution and this Defendant in this trial. In my view, given that this Defendant presumably adheres fully to his written statement and taking into account that its veracity is firmly challenged by the prosecution, this plainly constitutes a matter in issue between the parties. While the previous conduct represents a single instance, there are striking similarities between the two contexts under consideration: see my analysis and reasoning in paragraphs [16] and [17] above. I conclude that the application succeeds under this limb of Article 8(1) also. Further, while I note that Article 8(3) of the 2004 Order does not apply to this aspect of the prosecutions application, I take into account this Defendant's right to a fair trial, both at common law and under Article 6 of the Convention, together with Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 and I conclude, for essentially the same reasons as those set out in paragraphs [16] – [17] above, that the admission of this evidence will not render this Defendant's trial unfair.

[21] In determining this application, I consider that the court must also take into account the nature of the evidence which the prosecution seek to adduce, how they propose to present it to the jury and its likely impact on the conduct of the trial. In considering this question, I note what the Court of Appeal said in ***Hanson***:

> "[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*".

In the present context, it has been specifically confirmed to the court that the evidence which the prosecution proposes to adduce in relation to this Defendant's previous convictions and his response when interviewed by the police is undisputed. I consider this evidence to be both compact and uncomplicated. It can be presented to the jury in a swift and simple fashion. It will neither complicate nor unduly extend the trial. Moreover, it will not, in my view, engage the jury in any unnecessary or undesirable diversion. In this respect, I refer to the recent decision of the English Court of Appeal in ***The Queen –v- O'Dowd*** [2009] EWCA. Crim 905.

[22] It is also important to bear in mind the policy of the new legislation. In ***The Queen-v- Bullen*** [2008] EWCA. Crim 4, Rix LJ observed:

> "[29] ... *Above all, the statutory language is no doubt intended to underline the significance of the complete change from the basic position of the common law, which was that, save for certain, limited, defined exceptions, previous bad*

> *character was not prima facie relevant at all to a Defendant's guilt*".

Under the previous common law rules, evidence of an accused person's bad character was generally inadmissible. The main rationale of the former exclusionary rule was the concern that such evidence would give rise to prejudice on the part of the jury and a risk that they would accord it disproportionate weight. However, as a matter of legislative policy, these concerns have been significantly diluted. The new rules entail the notion that a properly directed jury can be entrusted to evaluate evidence of bad character in a fair and balanced fashion. Where such evidence is adduced, the jury must be specifically directed to treat it as background information, to appreciate that of itself it cannot establish the Defendant's guilt and to accord primary importance to the evidence which they have actually heard during the trial is to be accorded most importance. In principle, there might be cases where the trial judge could justifiably entertain reservations about the efficacy of any direction of this kind to the jury. In the present case, however, I consider that no basis for a concern of this nature exists and I record that no contrary argument has been advanced.

Preliminary Conclusion

[23] For the reasons elaborated above, I would have been minded to accede to the application, thereby permitting the prosecution to adduce evidence about this Defendant's two previous convictions in respect of assault offences, together with his exculpatory assertions of innocence and self defence when interviewed by the police in connection with such offences. Subject to any further representations by prosecution or defence, the mode of adducing this evidence would properly be to submit an agreed statement to the jury, essentially in the terms of paragraph [5] above. Plainly, it would be wrong to equip the jury with a copy of this Defendant's criminal record, given that it has other contents which lie outwith the boundaries of the present application.

Trial Developments and Final Conclusion

[24] As explained in the "Preface", paragraphs [2] – [22] of this ruling were prepared in draft, between the first and third days of the trial. The text had not, however, been perfected, with the result that no ruling had been promulgated. On the third day of trial, this Defendant, together with the third Defendant (Sean Devenney) applied to be re-arraigned and, in the presence of the jury, they entered revised pleas to the first count in the indictment, pleading not guilty to murder but guilty of manslaughter. The question which then arose was the impact of this development on the prosecution's application to admit bad character evidence and, in particular, whether any reorientation of the application would be appropriate.

[25] Coincidentally, the sequence was similar in the case of ***Bullen*** (cf. paragraph [22] above). There, in the context of the Defendant's denial of a murder charge, the prosecution served notice of its intention to adduce bad character evidence comprising several previous convictions relating to the Defendant. The convictions concerned offences of assault occasioning actual bodily harm, common assault, affray and using threatening words or behaviour. The prosecution notice asserted that these previous convictions were relevant as they demonstrated that the Defendant had a propensity to be violent and, further, should be admitted to determine whether the Defendant was acting in lawful self defence, a claim which he had made in respect of four of his previous convictions. Subsequently, at the beginning of the trial, the Defendant pleaded guilty to manslaughter. As a result, as noted by Rix LJ:

> "[3] ...*The issue for the jury, therefore, was simply whether he had intended to kill or cause grievous bodily harm and thus been guilty of murder.* ***There was no other issue. His defence was lack of specific intend and he relied on his drunkenness***."

[My emphasis].

There was "*no other issue*" for the jury to determine, because the Defendant's revised plea of guilty to manslaughter was based on his acceptance of the prosecution evidence about his conduct causing the death in question. The trial judge duly acceded to the prosecution application, a verdict of murder ensued and an appeal proceeded. The central issue to be determined by the Court of Appeal was formulated by Rix LJ thus:

> "[1] *This appeal concerns, as its primary ground, a novel and interesting point about the recent provisions governing the admissibility of bad character under the Criminal Justice Act 2003. Following a plea of guilty to manslaughter, are previous convictions of (relatively low level) violence admissible to prove the specific intent of the offence of murder?*"

In the event, the court disagreed with the judge's ruling, concluded that the conviction was unsafe and allowed the appeal.

[26] Certain features of the defence case and the reasoning of the appellate court may be highlighted:

(a) The only issue for the jury to determine was whether the Defendant had intended to kill or cause grievous bodily harm. There was no other issue.

(b) The Defence was one of a lack of specific intent and a reliance on drunkenness.

(c) The prosecution application was based on, *inter alia*, an expectation that the Defendant was asserting self defence.

(d) When the Defendant changed his plea to one of guilty to manslaughter at the outset of the trial, the prosecution did not reconsider its application and its terms remained unaltered.

(e) In pleading guilty to manslaughter, the Defendant admitted that his use of violence was unlawful. Further, he did not dispute carrying a bottle or employing it or that he smashed it on the head of the deceased, thereby causing his death. "*Only his intent was in issue*": see paragraph [27].

(f) In those changed circumstances, the appellate court concluded "*... we do not think that a propensity for violence was relevant to or itself an important issue in the trial, if it could be said to be an issue, or relevant to an issue, in the trial at all*": paragraph [28].

(g) However, the judge's direction to the jury failed to acknowledge this and failed to properly advise them on the correct approach to the previous convictions.

(h) In particular, the trial judge had failed to appreciate that the previous convictions related to offences which did not require a specific intent to cause grievous bodily harm. Per Rix LJ:

> "[33] *Even offences of basic intent must be done deliberately. Given that the issue was not whether the Appellant had committed a violent unlawful act causing death, but whether he had the specific intent necessary to murder, the judge should ... have been reminding himself, even while accepting that the Appellant's career had certainly showed a propensity for violence, that 'a propensity to commit offences of the kind charged' was a deliberately broad concept, properly designed for the generality of cases,* ***but to be handled with care when the sole issue was specific intent***".

[Emphasis added].

(i) The court seemed disposed to accept, in principle, that the evidence could have been properly admitted if relevant to certain specific factual "sub-issues" rather than the legal requirement of specific intent.

Finally, it is appropriate to highlight the following passage:

> "[36] *We would emphasize that the special difficulty in this case is the combination of the narrow issue of intention at trial with the Appellant's merely general history, poor as it was, of violence involving only offences of basic intent which had not resulted in grievous bodily harm. The Crown was unable to run a case that his previous history had illustrated the danger of violence as a cause of really serious injury. We are not saying that a more focussed approach might not have been able to identify an (important) issue to which the Appellant's bad character was relevant and probative. In particular, the incidents which formed the subject matter of his convictions on the one occasion he had pleaded not guilty, which had involved the use of a glass might possibly, in some circumstances have been relevantly and fairly deployed. However, for the reasons we have given above, we conclude that on this occasion the judge erred*".

[27] When this Defendant altered his plea on the third day of trial, it seemed to me that this had two immediate consequences. Firstly, his legal representatives should revisit the terms of their client's defence statement. Secondly, the prosecution should reflect on the orientation and grounds of its application and, if minded to pursue it, should consider any desirable amendments. This stimulated, firstly, an amended defence statement on behalf of this Defendant, containing the following material passages:

> "*[2]. The Defendant admits approaching the deceased, who threatened him with an aluminium crutch …* [and] *swung the crutch in an aggressive manner and the Defendant attempted to disarm him. Both men subsequently exchanged a number of blows and eventually they fell through an adjacent hedge landing together upon the ground. No further blows were exchanged …*
>
> *[3] The actions of the accused failed to make any significant or substantial contribution to the regrettable death of the deceased. The Defendant by reason of his condition and physical involvement with the deceased could not have inflicted the injuries which were the cause of death.*
>
> *[4] (i) At no point during the events … did the Defendant form 'malice aforethought' or an intention to kill or to cause grievous bodily harm to the deceased.*
>
> *(ii) The Defendant accepts that by engaging the deceased in the manner admitted to by him, he has inadvertently or*

> *indirectly contributed to or caused the unforeseen and untimely death of the deceased. To this extent and upon this basis the Defendant enters a plea* [of guilty] *to manslaughter" …*
>
> *[5] … death was in all likelihood occasioned by the intervention of a third person … entirely independent of the actions of the Defendant."*

[28] The prosecution then reconsidered its application and submitted a skeleton argument, which highlights that, in the amended defence statement, this Defendant is still asserting self defence and continues:

> *"[8] The prosecution case remains that he, along with his co-accused, embarked upon a 'joint enterprise' to attack the McFadden family, in particular the deceased, with the intention to either kill or inflict serious bodily injury upon him …*
>
> *[9] It remains the prosecution case that he threatened to kill the deceased* [and] *that he along with his co-accused launched a violent attack upon the deceased during which he kicked and stamped upon the deceased inflicting fatal injuries …*
>
> *[10] The prosecution application … submits that the previous convictions show a propensity to violence and a subsequent claim of 'self defence' …*
>
> *[11] … it is evident from the amended defence statement that the defence still dispute the factual aspects of the incident and in particular the Defendant's actions …*
>
> *[13] The question of propensity would therefore still be relevant to the issues for the jury".*

This submission further highlights that this Defendant maintains his plea of not guilty to the second count on the indictment.

[29] I consider that in ***Bullen***, the main error which arose was a failure on the part of prosecution, defence and trial judge to reconsider the propriety of admitting evidence about the Defendant's previous bad character in the changed circumstances brought about by the Defendant's revised plea of guilty to manslaughter. Furthermore, I am of the opinion that the judgment in ***Bullen*** does not exclude the possibility of bad character evidence being properly adduced in such circumstances. I refer particularly to paragraphs [33] and [36]. I consider it significant that, in the present case, this Defendant's revised plea of guilty to

manslaughter is made on a factual basis of a limited nature. It leaves in dispute between prosecution and defence a substantial number of material factual issues. Furthermore, this Defendant continues to plead not guilty to the second count on the indictment. I recognise, of course, that this Defendant's previous convictions relate to offences requiring no specific intent. However, this distinction is relevant only to the first count on the indictment. It does not apply to the second count. Moreover, if necessary, this consideration can be highlighted and explained to the jury. For these reasons, I adhere to the preliminary conclusion expressed in paragraph [23] above. Accordingly, I accede to the application. I further rule that, in the absence of some compelling reason or other persuasive factor, the evidence of this Defendant's previous convictions should, as mooted above, be submitted to the jury in the form of an agreed statement, in writing, essentially in the terms of paragraph [5] above. I shall, if necessary, consider further argument on this discrete issue.

Addendum

[30] At an advanced stage of the prosecution case, Mr. McCartney QC invited the court to reconsider its conclusion that the application to adduce bad character evidence against his client should be granted. I consider that, in principle, a court should be amenable to reconsidering a ruling of this kind, where there is some sufficient basis for doing so. Moreover, it seems to me that this course is not precluded by the legislation.

[31] The invitation to the court to review its earlier ruling was advanced on three grounds, set out in Mr. McCartney's skeleton argument in the following terms:

> "*(i) There is no factual comparison between the incident which occurred on 29th July 1998 and the present Defence* [sic]. *Despite working as a bouncer at the time there was no evidence of propensity to violence either before or after that date.*
>
> *(ii) A single previous conviction is now bolstering a significantly weaker Crown case.*
>
> *(iii) The court in inviting the jury to consider a single previous incident runs the risk of encouraging a disproportionate regard for one incident and which in consequence could severely prejudice the deliberations of the jury in the matter presently at hearing*".

[32] My response to these three grounds is, seriatim:

(i) For the reasons elaborated in paragraph [16] above, I consider that there is a sufficient degree of comparison between the factual matrix to which the two previous convictions belong and the factual matrix in

the present case. There is no warrant for making any different conclusion at this stage of the trial.

(ii) There are two previous convictions in play: see paragraph [5] above. If the suggestion is that the prosecution case is "**significantly weaker**" than it was when the earlier ruling was delivered (on 4th June 2009), I am unable to agree. Having regard to the totality of the evidence at this stage, when the prosecution case is virtually complete, I consider that there is an indisputably **prima facie** case against this Defendant, particularly on the count of murder. Furthermore, and in any event, the admission of bad character evidence will always have the potential to fortify the prosecution case, irrespective of it`s objective strength. Whether it actually does so will be a matter for the jury.

(iii) In our legal system, the weight to be attributed to any particular piece of evidence in a trial by jury is a matter for the jurors, collectively. As jury verdicts are unreasoned, the weight actually ascribed by the jury to individual aspects of the evidence is, post-verdict, unknown. The possibility that a jury might, in a particular case, place disproportionate weight on a Defendant's previous convictions, following the admission of bad character evidence, is, in my view, an incident of the legislation which allows evidence of this **genre** to be admitted. Moreover, it is a risk which, in the abstract, arises in every case. I consider that in the present case this risk is of no greater magnitude than it would typically be in other cases. The final consideration bearing on this discrete issue is the direction which must be given to the jury before retiring to consider their verdict. This direction will remind the jury that while they are obliged to consider all the evidence adduced during the trial, this particular piece of evidence cannot, of itself ,, establish this Defendant's guilt of either of the counts preferred against him. Rather, this evidence should be treated as a background matter. The jury should consider whether this evidence demonstrates that this Defendant has a tendency to commit the kind of offences of which he is accused. The contribution, if any, which this evidence makes to the jury's final decision will be a matter for them. They must be careful not to be unfairly prejudiced against this Defendant simply on account of the evidence of his previous convictions.

[33] A direction to the jury couched in the terms outlined above would be considered conventional. It may be that, in theory, in some individual case it might be considered insufficient to address the risks of disproportionate weight and unfair prejudice to the Defendant. However, in my view, there is no special feature of the present case which would warrant thus concluding.

[34] Accordingly, for the reasons given, I adhere to the ruling expressed in paragraph [29] above.