Neutral Citation no. [2007] NICC 17 | *Ref:* **GILC5826**

Judgment: approved by the Court for handing down | *Delivered:* **17/05/07**
*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

_____

THE QUEEN

v

JASON KING

_____

GILLEN J

Identification

[1] The accused is to be tried on an indictment containing approximately 85 counts with 15 complainants in relation to sexual offences and offences of violence. For the removal of any doubt, and to preclude the necessity for wearisome repetition, I wish to make it clear that the entirety of the proceedings involving this accused are governed by Section 1 of the Sexual Offences (Amendment) Act 1992 as amended by Schedule 2 of the Youth Justice and Criminal Evidence Act 1999. This provision applies to all complainants in sexual cases regardless of whether they are children or adults. Accordingly no matter relating to any complainant in this case shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the person against whom the offences are alleged to have been committed. The matters relating to the persons in relation to which these restrictions are imposed include in particular –

(a) The person's name;

(b) The person's address;

(c) The identity of any school or other educational establishment attended by the person;

(d) The identity of any place of work, and

(e) Any still or moving picture of the person.

[2] Moreover, under Article 22 of the Criminal Justice (Children) (Northern Ireland) Order 1998, provision is made in cases where a child is concerned (ie proceedings by against or in which the child is a witness) in any criminal proceedings so that the court may direct that no report shall be published which reveals the name, address or school of the child or particulars likely to lead to the child's identification, and neither shall any picture of the child be published, except by the direction of the court. In the exercise of my discretion therefore I determine that in addition to the provisions of Section 1 of the Sexual Offences (Amendment) Act 1992, I invoke the powers under Article 22 of the Criminal Justice (Children) (Northern Ireland) Order 1998 to rule that no such report shall be published in the case of any child who has given evidence as a witness .

The Indictment

[3] The accused in this case is charged on an indictment bearing 85 counts stretching over a period between 1983 and 2005. The counts include allegations of rape, buggery, indecent assault, unlawful carnal knowledge, gross indecency, making indecent photographs of children and assault occasioning actual bodily harm.

[4] The complainants on the indictment number 15 in all and I shall refer to them (and all other witnesses in this application) by way of letters in order to anonymise their names in each relevant instance.

[5] The prosecution case is that the accused is alleged to have engaged in sexual relations with 15 young girls between 1983 and 2005. The majority of these alleged incidents are said to have occurred since 1994. The ages of the females are said to range broadly from 12 to 19 save in one instance . The accused is alleged to have befriended young girls, collected them from school, brought them to his flat and engaged in sexual activities with them. Whilst the accused has admitted that he knew all of the complainants, he denies all of the allegations made against him in the course of interviews with the police .He admits only to entering into sexual relationship with those complainants who were 17 years or older.

[6] Prior to the trial commencing, a number of preliminary applications were made to this court in relation to the trial and the witnesses to be called. I shall deal with each of them in turn:

[7] (1) Severance

[8] (a) The application

Mr Blackburn, who appears on behalf of the accused, submits that it is undesirable that a case of this complexity, involving 15 complainants, should be heard by one jury dealing with a great number of issues and a large volume of evidence. He submits that these 85 counts are alleged to have occurred over the course of nearly 25 years. Accordingly it is counsel's argument that it is desirable that this case be broken into three smaller cases involving smaller groups of complainants. Mr Russell, who appears on behalf of the prosecution, adopted a neutral stance but drew attention to the practical reality that in the event of severance and the trial process being divided into two or three separate trials, inevitably the prosecution would seek to adduce the evidence of all the complainants (and each witness as to bad character) in each of the trials under the provisions of Article 6 of the Criminal Justice (Evidence) (NI) Order 2004. This would inevitably lead to the stress and strain of a number of witnesses having to give evidence on sensitive issues on perhaps three occasions. Moreover the length of the trials might not be materially shortened by virtue of the need to have repetitive evidence in each of the separate trials.

[9] On the other hand Mr Russell frankly admitted that the Crown recognised the burden that will be cast on a jury of dealing with 15 separate complainants coupled with the inevitable difficulties of considering each charge separately taking into account only those other charges that were relevant to the individual case under consideration. Helpfully he and Mr Blackburn, who appeared on behalf of the defendant, had drawn up a tentative proposal for three separate trials in the event that I should decide that severance was necessary .This would result in a trial of eight complainants all of whom had been allegedly abused in a particular town area, three complainants who have been abused alleged in a separate geographical area and four complainants whose allegations were of some vintage stretching back to the period 1983-1997. Mr Russell recognised that in the event of convictions arising out of the first trial ie the eight complainants, then the subsequent trials would probably not require those eight to be recalled as the usual approach would be for agreed statements to be presented. He therefore recognised the possible benefits in severance. However his stance was neutral and he submitted that the matter was evenly balanced.

[10] (b) Principles Governing the Application

I consider that the following principles should govern this application for severance:

[11] (i) Courts should not underestimate the ability of jurors to cope even with complex and difficult cases. Lord Hope of Craighead in R v Christou [1997] AC 117 at 130c said:

> "It is inevitable, if a series of unconnected charges are allowed to go to trial at the same time, that evidence will be led in regard to one charge which is inadmissible in regard to another. A material risk of real prejudice to the accused is not thought however to arise merely because the charges relate to different kinds of crime committed at different times in different places and under different circumstances. Experience has shown that under proper directions juries are well able to consider each charge in an indictment separately. Their verdicts demonstrate time and time again that they have done so. In practice motions for separation of charges are granted only in very clear cases, where fairness to the accused makes this necessary."

[12] (ii) Equally, judicial criticism has been visited on the overloading of indictments which lead to long and complex trials occupying, as in this case perhaps, up to three months or more. In R v Andrew Novac & Ors CAR Vol 65 1977 page 109 at page 118 Bridge LJ said:

> "We cannot conclude this judgment without pointing out that, in our opinion, most of the difficulties which have bedevilled this trial, and which have led in the end to the quashing of all convictions except on conspiracy and related counts, arose directly out of the overloading of the indictment. How much worse the difficulties would have been if the case had proceeded to trial on the original indictment containing 38 counts does not bear contemplation. But even in its reduced form the indictment of 19 counts against four defendants resulted in a trial of quite unnecessary length and complexity. … Quite apart from the question of whether the prosecution could find legal justification for joining all these counts in one indictment and resisting severance, the wider and more important question has to be asked whether in such a case the interests of justice were likely to be better served by one very long trial or by one moderately long or four short separate trials. We answer unhesitatingly that

> whatever advantages were expected to accrue from one long trial, … they were heavily outweighed by the disadvantages. A trial of such dimensions puts an immense burden on both judge and jury. In the course of a four or five day summing up the most careful and conscientious judge may so easily overlook some essential matter. Even if the summing up is faultless, it is by no means cynical to doubt whether the average juror can be expected to take it all in and apply all the directions given. Some criminal prosecutions involve consideration of matters so plainly inextricable and indivisible that a long and complex trial is an ineluctable necessity. But we are convinced that nothing short of a criterion of absolute necessity can justify the imposition of the burdens of a very long trial on the court."

[13] (iii) The advent of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 has now served to provide novel departures from the formerly restrictive rules governing for example hearsay and bad character. Accordingly it may now be regularly found that the evidence on each count even in lengthy indictments may well be admissible on the other counts. The argument against severance is clearly diluted. In many cases there will be no point in ordering separate trials if all the evidence was to be repeated in the severed trials.

[14] (iv) I consider that the test to be applied is still summarised well by Lord Taylor of Gosforth in R v Christou [1997] AC 129 at para (d) where he said:

> "They (the factors to be taken into account) will vary from case to case, but the essential criterion is the achievement of a fair resolution of the issues. That requires fairness to the accused but also to the prosecution and those involved in it. Some, but by no means an exhaustive list, of the factors which may need to be considered are:- how discrete or inter-related are the facts giving rise to the counts; the impact of ordering two or more trials on the defendant and his family, on the victims and their families, on press publicity; and, importantly were there directions the judge can give to the jury will suffice to secure a fair trial if the counts are tried together. In regard to that last factor, jury trials are conducted on the basis that the judge's

> directions of law are to be applied faithfully. Experience shows, as for example in Reg v Blackstock, 79 Cr App R 34 and in the instant case, that juries, where counts are jointly tried, do follow the judge's directions and consider the counts separately.
>
> Approaching the question of severance as indicated above, judges will often consider it right to order separate trials. But I reject the argument that either generally or in respect of any class of case, the judge must so order".

[15] (v) I have found this a particularly difficult and vexed issue. Notwithstanding my faith in the capacity of juries to consider each charge in an indictment under proper directions, I have concluded that 85 counts in one indictment would simply be unmanageable. The danger would be that irrespective of what directions I could give the jury, and what notes or recollections the individual jurors would have kept, it would be impossible over a three month trial for a jury to accurately recall the individual inflections, demeanour, body language, and evidential nuances of 15 complainants of similar age and sex dealing with 85 counts of similar offences . Even if the summing up was faultless the ability of jurors to recollect so much evidence over such a lengthy period (the prediction for this trial is three months if it is not severed) would in my view be calculated to bring about a situation where some essential matter could be easily overlooked in favour of either the defence or prosecution . In my opinion the dangers of a long and complex trial outweighs the benefit of having all these matters tried together. I have therefore come to the conclusion that this indictment should be severed.

[16] (vi) Counsel have helpfully suggested that in the event of my coming to this conclusion, the 15 complainants can be divided into three categories. First 8 complainants with a loose connection to the same school in the same town for offences committed between 1997 and 2002/3. Secondly those connected with a different town which I do not propose to name for the purposes of identification but which I will discuss with counsel in court. Thirdly four cases of rather longer vintage than the other cases. Again I do not propose to identify the names or dates when these occur in this judgment but I will discuss the matter in court with counsel. Accordingly I consider that there is an argument for three trials, one trial involving 8 complainants, one involving 4 and one involving 3.

[17] (2) Late applications to admit evidence of hearsay and bad character

[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.

[19] The relevant Rules governing such applications are found in the Crown Court (Amendment) Rules (Northern Ireland) 2005 ("the 2005 Rules"). In the case of a notice of intention to adduce hearsay evidence Rule 44 O is as follows where relevant:

> "Procedure for the admission of hearsay evidence
>
> 44 O. – (i) This Rule shall apply where a party wishes to adduce evidence on one or more of the grounds set out in Article 18(1)(a) to (d) of the 2004 Order and in this Rule such evidence is referred to as "hearsay evidence".
>
> (ii) A prosecutor who wants to adduce hearsay evidence shall give notice in writing which shall be Form 7H in the Schedule.
>
> (iii) Notice under paragraph (ii) shall be served on the Chief Clerk and every other party to the proceedings within 14 days from the date of –
>
> (a) The committal of the defendant;
> . . . ……
> (8)The Court may ,if it considers that it is in the interests of justice to do so ,-
> ……..
> (c) abridge or extend the time for service of a notice required under this rule ,either before or after that period expires

[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.

[30] (3) Hearsay applications

The prosecution made a series of applications under the provisions of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order") Article 18.

[31] Where relevant article 18 states as follows:

> "18. – (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if –
>
> (a) any provision of this Part or any other statutory provision makes its admissible,
> (b) any rule of law preserved by Article 22 makes it admissible,
> (c) all parties to the proceedings agreed to it being admissible, or
> (d) the court is satisfied that it is in the interests of justice for it to be admissible.

(2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant) -

(a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
(b) what other evidence has been, or can be, given on the matter or evidence mentioned in para. (a);
(c) how important the matter or evidence mentioned in para. (a) is in the context of the case as a whole;
(d) the circumstances in which the statement was made;
(e) how reliable the maker of the statement appears to be;
(f) how reliable the evidence of the making of the statement appears to be;
(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
(h) the amount of difficulty involved in challenging the statement;
(i) the extent to which that difficulty would be likely to prejudice the party facing it".

[32] Where relevant article 30 of the 2004 Order states as follows:-

"30. – (1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated –

(a) the statement was made other wise than in oral evidence in the proceedings, and
(b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.

(2) Nothing in this Part prejudices –

(a) any power of a court to exclude evidence under an Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (NI 12) (Exclusion of Unfair Evidence), or

(b) any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise)".

[33] In considering applications under this Article, I have approached this case with the following principles in mind:

[34] (a) Article 18(2) does not impose an obligation on a judge to reach a formal conclusion on each listed factor. In R v Taylor (2006) 2 Cr App R 222 ("Taylor's case"), construing the equivalent English legislation to that of Article 18(2), Rose LJ said at para 39:

> "They do not impose an obligation on the judge to reach a conclusion. What is required of him is the exercise of judgment, in the light of the factors identified in the sub section. What is required of him is to give consideration to those factors. There is nothing in the wording of the statute to require him to reach a specific conclusion in relation to each or any of them. He must give consideration to those identified factors and any others which he considers relevant … It is then his task to assess the significance of those factors, both in relation to each other and having regard to such weight as, in his judgment, they bear individually and in relation to each other. Having approached the matter in that way, he will be able, as it seems to us, in accordance with the words of the statute, to reach a proper conclusion as to whether or not the oral evidence should be admitted."

Whilst Rose LJ was speaking in the context of s114(2) of the Criminal Justice Act 2003, the wording is the same as in the 2004 legislation and accordingly I intend to follow that approach. For the removal of doubt I make it clear that in each application before me I have given consideration to all of the factors although I have not reached a conclusion on all of them in each case.

[35] (b) Whilst I recognise that its precise role is not without academic dispute I consider that Parliament did not intend that article 18(1)(d) should be a lawyer's short cut to the admissibility of that which was hitherto

inadmissible. Article 18(1)(a)-18(1)(c) still requires careful consideration.Whilst on the face of the Order no priority is accorded to any sequential consideration of the sub-articles in art 18(1) it is probably only in exceptional cases that the court is likely to find prosecution or defence counsel moving immediately to 18(1)(d) without having considered other avenues of admissibility. That subsection constitutes a structured guide to the exercise of the discretionary power to invoke its use. Whilst Taylor's case precludes the necessity to reach a specific judicial conclusion in relation to each factor, nonetheless counsel, who fail to carefully consider all of these factors so as to enable the court to fulfil the mandatory application to have reference to them may find their application falls well short of judicial approval. It is only 18(1)(d) which requires the factors in 18(2) to be considered and hence it may be more profitable in most cases to first address the avenues detailed in 18(1)(a)-(c). I respectfully adopt the approach set out by Leveson J in Maher v DPP (2006) 170 JP 441 ("Maher's case") at paragraph 26 when he said:

> "Although the purpose of the hearsay provisions … was undeniably to relax the previously strict rules against the admission of hearsay, it is important that care must be taken to analyse the precise provisions of the legislation and ensure that any rule of admissibility is correctly identified."

In the event in the instant case Mr Russell on behalf of the prosecution and Mr Blackburn on behalf of the defence submitted that it was common case that only 18(1)(d) provided a potential avenue for admissibility in all the applications before me although Mr Blackburn resisted its implementation in each instance.

[36] (c) Whilst judicial consideration of this legislation may still be in its infancy , nonetheless already the confines of art 18(1)(d) are emerging. An illustration of this is to be found in R v Finch (2007) EWCA Crim 36 where the Court of Appeal refused to permit the invocation of the comparable section in the 2003 Act (section 114(1)9d) to article 18(1)(d) in the 2004 Order in a case where the defence sought to introduce a statement of confession by a co-accused (who had pleaded guilty) exculpating the defendant in the case in question. The co-accused had refused to give evidence but was available to give oral evidence if compelled to do so . At paragraph 24 Hughes LJ said

"24.What ever might be said if an erstwhile co-accused were to be unavailable or had demonstrably good reason not to give evidence ,it will …not be in the interests of justice for evidence which the giver is not prepared to have tested to be put untested before the jury .It is not in short the law that every reluctant witness's evidence automatically can be put before the jury under section 114"

The distinction in the present case is obvious in that all the proposed witnesses-none of whom are co-accused - are prepared to give evidence and be tested and this is a factor that I have taken into account .

[37] (d) Mr Russell relied on the case of R v Xhabri (2005) EWCA 3135 ("Xhabri's case") in a number of the applications. In this case a female immigrant had been abducted for the purposes of prostitution and was violently sexually assaulted. Complaints she had belatedly made to members of her family and other people she knew were admitted, inter alia, under the equivalent of article 18(1)(d) of the 2004 article. As in these applications now before me, the statements containing the hearsay evidence had been made in the normal way to police officers. Thus 18(1)(d) is clearly to be used in appropriate cases as a vehicle to permit the introduction of a witness's pervious statements as evidence of her thought process at the time of the event in question and as evidence of the truth of her account.This might be particularly so in circumstances where a jury might obviously wish to know whether the complainants had sought to communicate her plight to others and,if so, in what terms.

[38] (e) An important potential use of article 24 and 18(1)(d) of the 2004 Order may arise in the context of sexual offences where experience has revealed that victims, especially children and young persons, often make disclosures over an extended period of time i.e as soon as could be reasonably be expected in the particular context of each case (see R v O (2006) EWCA Crim 556)

[39] (f) In all of the application on this subject of hearsay I was conscious of the provisions of, and my powers under, article 30 of the 2004 Order whereby I could exclude evidence. For the removal of doubt I make it clear I considered article 30 in each case where I acceded to the prosecution application.

[40] I now turn to the individual cases:

[41] (a) A

This witness made a statement to police dated 18 July 2005. In it she relates she is a friend of the female complainant R in counts 9-20 being counts of indecent assault ,unlawful carnal knowledge ,assault occasioning actual bodily harm, rape and buggery . She had gone to the accused's flat on one occasion with R when both were about 15. Her statement includes the following:

> "When R was still at school I noticed that she had bruising on her arms and she said that Jason King had punched her. She had also bruises on her fingers because R told us Jason has slammed her fingers in a

> drawer. She also had burn marks on her hands which she said were as a result of Jason burning her with a frying pan. I also recall an incident when R had left Jason, she came into my house to get away from him. Jason came to the door and R was so frightened that she hid in our kitchen until my mother told him to go away."

[42] Mr Blackburn who appeared on behalf of the accused objected to this evidence being admitted on the basis that to do so was not within the interests of justice as the witness is simply repeating something told to her by R. Although she may have observed the injuries she has no real knowledge of how they may have occurred. In the first place I consider the evidence of the bruising was relevant evidence in any event and does not need to be considered under article 18. However R's complaint might have fallen foul of the rules against a late complaint under the old law and Mr Russell did not invoke article 24. I must then consider the matters that have to be taken into consideration under Article 18(1)(d). In relation to R the accused is charged with 6 counts of indecent assault, one of unlawful carnal knowledge, one of assault occasioning actual bodily harm, two of rape and two of buggery. R's statement made on 11 July 2005 contains several allegations of violence and beatings visited upon her by the accused. Prima facie the statement of A is evidence of the truth of the statements on how R sustained injuries. The jury would obviously wish to know if there was any evidence of bruising on R from a seemingly independent source and if she had discussed it with the observer. I found Xhabri's case of assistance in this regard. It is important in the context of the case a whole. It is therefore potentially of much probative value in relation to a matter in issue on the proceedings since the accused denies that he ever caused injury to her. Clearly other evidence will be given on this matter from R and the statement of A is important in the context of the whole case surrounding the allegations of R. It is impossible to say at this stage how reliable the maker of that statement is but it appears to be reliable as does the evidence of the making of the statement. I see nothing to prevent the accused through his counsel challenging the veracity of the allegation and I do not consider that any difficulty that does exist should prejudice his ability to conduct his case. The circumstances in which the statement was made do not arouse my concern. There is every reason why the jury should hear this evidence. It is in the interests of justice to so do.

[43] I have, as in all cases, to further consider whether this evidence should be excluded pursuant to article 30 of the 2004 Order. I find no basis to exclude this evidence under that article.

[44] (b) AB

This witness made a statement dated 10 May 2006. It is relevant to the complainant J in relation to whom the accused faces 7 counts, 5 of indecent assault and 2 of unlawful carnal knowledge. In it he relates how when he was living with J when she was 17, she had told him that she had sex with the accused when she was young because of what he had said to her and that she needed a place to stay when she was 12 or 13. Allegedly the accused had told her that if she stayed with him she had to do something for him so she had sex with him at his flat. The witness also indicates that the accused had told him that he had taken J's "cherry" and "that he had had her when she was young". Counsel did not seek to invoke article 22(5) of the Order but relied on article 18(1)(d) in relation to what the accused had allegedly said to him. Mr Russell did not seek to relay on article 24 or the case of O in relation to J's complaint. Once again I have viewed this statement in light of the factors identified in article 18(1)(d) of the 2004 Order. I have found Xhabri's case of assistance in this application. I consider that evidence has probative value to the issues surrounding the allegations of J. J can give evidence herself on the matter. It is important evidence in the context as a whole given the denial by the accused in interviews with the police in that he ever had sexual relations with J when she was under age. The circumstances in which the statement was made do not arouse my concern. The reliability of the maker of that statement remains to be tested but he appears reliable on the face of the statement. The accused will be able to cross examine him on the matter and I do not think it likely that any difficulty or prejudice per se will be thereby engendered. I consider that the jury would wish to know whether or not J had confided in someone else about her sexual relationship with the accused particularly since he was someone with whom she had been living. I therefore conclude that the oral evidence should be admitted. In this as in all other cases, I bear in mind that there is a considerable body of evidence against the accused quite apart from this evidence.

[45] (c) JM

This witness has made a statement dated 24th March 2006 to police in which he, being the husband of one of the complainants(N), reveals conversations with the complainant in which she gave details of her sexual relationship with the accused. The accused has denied having any sexual relationship with N. Once again prosecution counsel did not seek to rely on article 24 as interpreted in the case of O. He applied under article 18(1)(d). I have again found the principles in Xhabri's case of assistance in this application. I have considered all the factors in Article 18(2). I consider that this evidence is probative assuming it is true in relation to the charges that the accused now faces. This evidence matches other evidence in the case and is important in the context of the case as a whole. The statement was made by this young woman to her husband in circumstances that do not arouse my suspicion. The reliability of the maker remains to be tested but I have no evidence at the moment to doubt his reliability or of the making of the statement. I do not contemplate the accused

having any material difficulty challenging that evidence in cross examination or that he will be prejudiced in so doing. Oral evidence will be given by both the witness and I therefore admit this evidence in the exercise of my discretion.

[46] (d) A2

This witness is the mother of the complainant K who is the subject of two counts of indecent assault against the accused. She made a statement to police in April 2006 which included the following:-

> "I can recall an incident around 21 years ago when K was around 4 years old and Jason King was in Northern Ireland visiting his mother. On that day I had to do some shopping so I left (*another person)* J in the house waiting for K to come home from school. When I came home I noted that K was changed out of her uniform and I asked her if she had taken her uniform off and she said that Jason had taken her upstairs and changed her. I was very cross about this and I told Jason King that I was angry. I asked him to leave my house and never come back. I told my sister M about this and my partner BG wrote a letter to Jason's grandmother, gave Jason the letter and put him on a train to the Republic of Ireland. The letter contained details of why Jason had to leave our area. After than I didn't have much contact with Jason and I didn't want any contact with him."

The hearsay content in this statement is of probative value in relation to the allegations made by K and is relevant to other evidence about the offence. It is important in relation to the evidence as a whole. The maker of the statement, which was made to the police, appears reliable. Oral evidence will be given by both K and A2 I was conscious there was a long gap between the commission of the alleged offence and this statement to the police but this is a matter that can be explored by counsel on behalf of the accused. I see no material difficulty in the evidence being challenged or prejudice thereby accruing to the accused. I therefore admit the evidence.

[47] (e) CF

This witness was a friend of the complainant C. She is the person named in 11 counts against the accused namely 1 of gross indecency, 3 of indecent assault, 4 of unlawful carnal knowledge, 2 of buggery, 1 of making indecent photographs. In this statement made on 20 April 2006 to police, the witness recalls seeing the accused in the company of the complainant C. I do not

regard this statement as having very much probative value and I do not believe that it is important in the context of the case as a whole. Whilst I have considered all the other factors, the conclusion I have reached on 18(2)(a) and (b) outweigh all the others and I therefore see no basis for admitting this evidence.

[48] (f) RM

This witness in a statement to police in 2006 relates conversations with K2 when she and K2 a complainant were about 14. In this matter K2 is the alleged victim in counts 21-38. These counts include allegations of indecent assault, rape, buggery and of taking indecent photographs. RB's statement refers to conversations in which K2 asserts she was having under age sexual relations with the accused. The accused, in interviews with the police, denies meeting this girl until she was 16 years old. The prosecution did not seek to introduce these statements as complaints under article 18(1)(d). I have found the principles in Xhabri's case of assistance in this matter. I regard this evidence to be of probative value in relation to the charges given the age of the alleged victim and her circumstances and is relevant to the other evidence given. It is important evidence in relation to the evidence as a whole. The statement was made in circumstances where K2 was allegedly confiding in a friend as to her predicament. The reliability of the statement maker remains to be tested but I see no material difficulty or prejudice to the accused in challenging her account. Oral evidence can be given by both K2 and RM. In my view this statement is admissible .

[49] (g) VE

This witness statement made on 26 April 2006 to the police. She is a friend of complainant N2. She describes seeing the accused in the company of 13 and 14 year old girls in his car. In particular she adverts to N2, the alleged victim in counts 58-61(counts of indecent assault and rape)
relating that she had slept with the accused at a time when she was about 15. I consider that this is of probative value in relation to the issue in this case and relates to other evidence in the matter. It is potentially important evidence in the context of the case as a whole. I see no basis currently for regarding the statement maker as other than reliable and the circumstances of the making of the statement do not arouse suspicion. Oral evidence is to be given by both VE and N2. Whilst the reliability of VE remains to be tested, I do not see any difficulty or prejudice to the accused in cross examining this witness and challenging the evidence. The accused denies that he ever had any sexual relationship with this complainant. He has asserts that there is a conspiracy against him I consider this statement/evidence to be relevant to that. I therefore admit this evidence.

[50] (h) Y

This is a statement made to the police in May 2006.She is the sister of the complainant M on counts 56 and 57 which are offences of assault occasioning actual bodily harm. Ygives evidence, inter alia, of noticing bruises on the complainant's face and arms at a time when she was associating with the accused. I regard this part of the evidence as admissible and relevant irrespective of the contents of article 18. The complainant also told Y subsequently that she had been struck by the accused. I consider this evidence is of probative value and assuming it to be true in relation to the issues arising out of the counts 57 and 58. Other evidence is relevant to this account and it is important in the context of the case as a whole. This statement was made in circumstances when it would be not unusual for M to confide in her sister and whilst the reliability of the maker is yet to be tested she appears to be reliable. I do not see any difficulty involved in the accused challenging this evidence or that any material difficulty should occasion prejudice. There is other relevant evidence to be given in the context of this evidence but this material does potentially provide added evidential value. I therefore admit the evidence.

[51] (i) K4

K4 is a complainant in this case who is the alleged victim of counts 1 to 6. These are counts of indecent assault, unlawful carnal knowledge and gross indecency. In the course of video evidence which she is to give, she refers to another complainant K5 who is the alleged victim in count 7, namely a count of indecent assault. In the course of her video interview K4 states:

> "He didn't have sex with my friend (K5), he just like if you know what I mean, put his hand on the outside of her trousers and rubbed up and down in between her legs and he kissed her full on with all the tongue action as she says".

[52] I am not clear as to the source of the information upon which K4 is relying with reference to the indecent assault. I am not clear if K4 is relating what K5 told her about the indecent assault allegation or whether it is the product of rumour or multiple hearsay. I am therefore unable to form any view as to the probative value or how important the evidence would be in the context of the case. I can conceive therefore of great difficulty in the accused dealing with this matter and I have therefore concluded that this evidence should not be admitted.

[53] (j) K6

This witness is a complainant and is the alleged victim in counts 21-38. These are counts of indecent assault, rape, buggery and taking indecent photographs. In the course of her video recorded evidence, she relates a conversation

between herself and N, the complainant in counts 70 to 77. In that conversation N is purported to have said that she performed sexual acts for reward with the accused. Mr Russell did not rely on Article 24. I therefore now consider article 18. I regard this matter as of probative value in relation to the issue in these counts and is relevant to other evidence in the case.The circumstances in which the statement was made does not arouse my concern . I regard it as important in the context of the case as a whole. The allegations was made during a conversation between two friends and those are circumstances which seem reasonable for such information to be confided. The reliability of the maker of the statement is yet to be tested as is the circumstances of the making of that statement but I see nothing as yet that causes me to doubt her reliability. However I do not see there is any great difficulty in the accused challenging the statement in cross examination and accordingly I do not believe that any difficulty as there is likely to prejudice him. There is oral evidence to be given of these matters by K6 and N. In the circumstances I consider that the evidence is admissible.

[54] For the removal of doubt I make it clear that in each of the instances which I have considered, I have borne in mind the contents of Article 30 of the 2004 Order and my general discretion to exclude evidence in the circumstances therein delineated.

Bad Character

[55] In this case the prosecution sought to adduce evidence of the defendant's bad character from six witnesses and in addition to introduce a conviction for common assault on one of the complainants R on 5 November 2003. I have decided to refuse the prosecution application in each case. Before outlining my reasons, I shall set out the statutory background and the principles that have governed my approach.

Statutory Background

[56] Article 6 of the 2004 Order where relevant states as follows:

> "Defendant's Bad Character
> 6.-(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.

…

(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 8(1), where relevant is as follows:

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

(a) The question of whether the defendant has a propensity to commit offences of the kind with which he is

charged, except for his having such a propensity makes it no more likely that he is guilty of the offence.

(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."

The Applications

[57] In respect of the witness evidence which the prosecution proposed to introduce Mr Russell invoked articles 6(1)(d) and 6(1)(g). He contended in relation to 6(1)(d) that the evidence in question displayed that the accused had a propensity to commit offences of the nature charged. In relation to article 6(1)(g) counsel relied on the fact that the defendant had made an attack in the course of his interviews with the police upon the character of a number of the prosecution witnesses alleging that there had been attempts to fabricate the case against the him.

Principles governing the approach of the Court to Articles 6(1)(d) and (g) of the 2004 Order

[58] (1) Bad character is defined by Article 3 of the 2004 Order as:

"Evidence of, or of a disposition towards, misconduct on his part, other than evidence which has to do with the alleged facts of the offence with which the defendant is charged or is evidence of misconduct in connection with the investigation or prosecution of that offence".

Article 17 of the Order defines misconduct as meaning "the commission of an offence or other reprehensible behaviour. "

[59] (2) Misconduct is susceptible to a broad interpretation and is not confined to convictions. In R v Renda & Ors [2005] EWCA Crim 2826 the defendant had, in relation to a previous matter, been found unfit to plead on a charge of assault occasioning actual bodily harm in which he was alleged to have assaulted another person with a chair leg. He had, however, also been found to have committed the physical act pursuant to s4a of the Criminal Procedure (Insanity) Act 1964. He was absolutely discharged. Although the defendant had not therefore been convicted of a criminal offence the original act of hitting someone with a chair was held by the Court of Appeal to have been sufficient to amount to reprehensible behaviour. At paragraph 24 the President of the Queen's Bench Division said:

> "Before us it was argued that the Judge's rulings were wrong. An absolute discharge following a finding that the defendant was unfit to plead did not constitute a criminal conviction, nor did it constitute `reprehensible behaviour' which amounted to conduct for the purposes of the `bad character' provisions in Part II of the Criminal Justice Act 2003. We agree that the appellant was not `convicted' of a criminal offence. We also accept that as a matter or ordinary language the word `reprehensible' carries with it some element of culpability or blameworthiness. What however we are unable to accept is the mere fact that the appellant was found unfit to plead some 18 months after the apparent incident of gratuitous violence has occurred, of itself, connotes that at the time of the offence his mental acuity was so altered as to extinguish any element of culpability when the table leg was used in such a violent fashion."

[60] In R v Weir & Manister & Ors [2005] EWCA Crim 2866 ("Weir's case) the Court of Appeal again looked at the question of what amounts to "reprehensible behaviour". In the case of Manister, the 39 year old appellant was convicted of three counts of indecent assault upon a 13 year old girl, A. Pursuant to s101(1) of the Criminal Justice Act 2003 ("the 2003 Act") which is the equivalent of article 6 of the 2004 Order, bad character had been admitted as follows. First, through gateway (d), evidence relating to a sexual relationship between the appellant and a girl of 16, when he was 34. Secondly, through gateway (c), evidence relating to the appellant's behaviour towards the sister of A. The sister had been 15 at the material time, and the defendant was alleged to have said "why do you think I am still single ?If

only you were a bit older and I a bit younger". In relation to both of these matters the Court of Appeal held that the behaviour of the appellant did not fall within sections 101,102,or 103 of the 2003 Act.At paragraph Kennedy LJ said ;

> "The definition of `misconduct' in Section 112(1) is very wide. It makes it clear that behaviour may be reprehensible, and therefore misconduct, though not amounting to the commission of an offence. The appellant was significantly older than B. But there was no evidence, or none that the Crown put forward and the Judge ruled admissible, of grooming of B by the appellant before she was 16 or that her parents disapproved and communicated their disapproval to the appellant, or that B was intellectually, emotionally or physically immature for her age, or that there was some other feature of the lawful relationship which might make `reprehensible'. Indeed it might be inferred from the simple agreed facts that the relationship with B was a serious one, with some real emotional attachment, because it lasted some time.
>
> 95. However once it is decided that evidence of the appellant's sexual relationship with B did not amount to `evidence of bad character', the abolition of the common law rules governing the admissibility of `evidence of bad character' by Section 99(1) did not apply. We have no doubt that evidence of the relationship was admissible at common law, in the particular circumstances of this case, because it was relevant to the issue of whether the appellant had a sexual interest in A. It was capable of demonstrating a sexual interest in early or mid teenage girls, much younger than the appellant and therefore bore on the truth of his case of a purely supportive, asexual interest in A. It was not in our judgment unfair to admit the evidence (see Section 78 of the Police and Criminal Evidence Act 1984)."

[61] In relation to what the appellant had previously said to the sister of A when she was 15, its implied assertion of sexual attraction was "unattractive" but not reprehensible.

[62] Weir's case has attracted some academic criticism (see "Bad Character: Feeling Our Way One Year One" by Adrian Waterman and Tina Dempster [2006] CLR p614). For my own part I have some difficulty understanding why the expression of sexual interest in a child of 15 was not regarded as reprehensible behaviour in terms of gateway (c). Nonetheless the court did render it admissible on the ground of relevance as to whether he had a sexual interest in A, the 13 year old complainant. Accordingly if the behaviour alleged does fall outside the definition of misconduct and of the parameters of the legislative framework, then its admissibility will be determined by the common law of relevance subject to the exclusionary discretions of the court to prohibit the adducing of evidence the prejudicial effect of which is greater than the probative value or evidence which would have an adverse effect on fairness pursuant to section78 of the Police and Criminal Evidence Act 1984.

[63] (3) In relation to the attempt by the prosecution to introduce the conviction of common assault against the complainant R in the past, it was Mr Blackburn's submission that not only was this evidence of no real relevance to the great number of sexual offences that the accused is alleged to have committed, but that it should be rejected on the basis of the principle enunciated by Lord McKay in Director of Public Prosecutions v P [1991] 2 AC 447 to the effect that the statutory provisions require an enhanced relevance in order to ensure that the ambit of the trial remains manageable. I reject that submission. I find nothing in the legislation which provides any emphasis on the need for such enhanced relevance in the context of Article 6(1)(d) or (g). If the evidence of a defendant's bad character is relevant to an important issue between the prosecution and the defence then, unless there is an application to exclude the evidence, it is admissible. There is therefore a significant contrast between Article 5 of the 2004 Order in relation to a non defendant's bad character – where the probative value must be substantial – and Article 6 in relation to the defendant's bad character where it is not necessary for the evidence of bad character to be of some substantial probative value.

[64] (4) For the purposes of Article 6(1)(d) the matters in issue between the defendant and the prosecution include the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where having such a propensity makes it no more likely that he is guilty of the offence. One of the leading cases on the propensity provisions is R v Hanson, R v Gilmore, R v P [2005] Cr App R 21 ("Hanson's case"). Rose LJ, commencing at p303 paragraph 7 set out guidance to the court which I intend to follow in this case. I regard the guidance provided by the court to be as follows:

(1) First a judge should consider whether the history of the convictions establishes a propensity to commit offences of the kind charged.

(2) Does that propensity make it more likely that the defendant has committed the offence charged?

(3) Is it unjust to rely on the conviction(s) of the same description or category (see Article 8(3) of the 2004 Order)?

(4) As to propensity to be untruthful, previous convictions are likely to be capable of showing such propensity only where, either there was a plea of not guilty and the defendant gave an account which the jury must have disbelieved, or the way in which the offence was committed showed such propensity eg by making false representations.

(5) Applications to adduce such evidence should not be made routinely, simply because the defendant had a previous conviction but should be based on the particular circumstances of each case.

(6) In ruling on any such application, the judge should bear in mind (a) that in referring to offences of the same description or category, Article 8(2) was not exhaustive of the types of conviction which might be relied on; (b) that it was not necessarily sufficient however in order to show such propensity that a conviction should be of the same description or category as that charged; (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. Child sexual abuse cases are comparatively clear examples of such unusual behaviour although this is not exhaustive. Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction of 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.

(7) That the strength of the prosecution case must be considered. If there was no or little other evidence against the defendant it was unlikely to be just to admit his previous convictions whatever they were.

(8) If there was a substantial gap between the date of the commission and the date of the conviction for the earlier offence the date of the commission would generally be of more significance than the date of conviction when assessing admissibility.

(9) That it would often be necessary to examine each individual conviction rather than merely looking at the name of the offence in that the sentence passed would not normally be probative or admissible.

(10) Where past events were disputed, the judge had to take care not to permit the trial to be unreasonably diverted into an investigation of matters not charged in the indictment.

(11) It is worth mentioning that in R v. Bovell; R v. Dowds (2005) 2 CR App. R 27 (Bovell's case) it was said to be necessary for all parties to provide information in relation to convictions and other evidence of bad character whether in relation to an defendant or some other person in good time. I observe also that in Hanson's case the Court of Appeal indicated that the prosecution ,when giving notice or making an application ,should state whether it relies on the mere fact of the conviction or also on the circumstances of it

(12) It is important to appreciate that in dealing with applications under Article 6(1)(d) and (g) that Article 6(3) applies only to these gate ways. Article 8(3) applies only to evidence of convictions used to establish propensity. In Hanson's case, the Court of Appeal said that the two sub sections were closely related, although not identical. It seems to me however that judges should also continue to apply article 76 of PACE when making rulings as to the use of evidence of bad character and exclude evidence which it would be appropriate to do so under article 76. In Hanson's case Rose LJ at page 304 paragraph 10 referred to a number of factors which need to be taken into account in assessing fairness:

> "When considering what is just under section 103(3) [*the equivalent of article 8(3)*], and the fairness of the proceedings under s 101(3) [*the equivalent of article 6(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 proscribed 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 the defendant it is likely to be just to admit his previous convictions, whatever they are."

(13) The case of R v Edwards & Others (2006) 1 Cr App R3 is instructive on the fluid nature of the assessment of fairness. In that case, where an accused was charged with counts of common assault and of having a bladed article in a public place, the trial judge had refused to admit a previous conviction for robbery under the equivalent of gate way 6(1)(d) on the basis that to admit that evidence would have so adverse an effect on the fairness of the proceedings that it ought not to be admitted at that stage. However the court admitted it in the course of his second application under gate way (g) when there had been a sustained attack upon the character of the police. On this basis the judge had come to the conclusion that although the conviction for robbery had been some 15 years previously, once the attack was made on the prosecution witness the earlier decision to exclude the application was properly changed and the convictions admitted. According to the circumstances of the application, and the time and the trial when it is made, will alter the assessment of fairness. Notwithstanding that precisely the same test is applied by Article 6(3).

[65] Applying the principles to the factors of this case

[66] The accused had a criminal record but the prosecution sought only to adduce evidence of one entry namely common assault on an adult 5 November 2003. It was common case that this was an assault on R a complainant in the case. Apparently the defendant had resisted police who attempted to intervene in the assault. I refused this application for the following reasons:

(a) Hanson's case and Bovell's case make it clear that the court may require sufficient information about the misconduct relied upon to make a proper assessment of its admissibility. Merely because he had assaulted the complainant R before is in my view insufficient information to be placed before the court in order to show a propensity to be violent. I was unclear as to whether or not the accused had pleaded guilty or not guilty, what the circumstances of the assault had amounted to and, even if there had been a plea of guilty the basis of that plea particularly if it demonstrated differences from the manner and nature of the alleged assault in this case. It is important that the prosecution appreciate in the early days of the interpretation of this Order that the courts will be searching in their enquiries about previous convictions which are sought to be admitted. It is incumbent upon the prosecution to ensure that full information about a previous conviction which is sought to be adduced is available to be given to the court if it is requested.Mr Russell was unable to furnish me with the full details of the conviction and I was unsatisfied as to the circumstances in this instance.

(b) Following the principles set out in Hanson's case, 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. I was given no information which would have led me to believe that this particular

conviction exhibited a tendency to the kind of unusual behaviour which would have merited admission. Nothing suggesting a particular modus operandi was obvious to me.

(c) In so far as Article 6(1)(g) is concerned, the prosecution submitted that the accused had not only denied the charges against him but alleged that many of the complainants had become involved in the conspiracy against him and had concocted their evidence to obtain compensation. The vast majority of the offences alleged against the accused were of a sexual nature albeit there were 6 counts of assault occasioning actual bodily harm. I came to the conclusion that the admission of the evidence of this single count might have an adverse weight and effect on the fairness of the proceedings given that it was of an isolated nature and the precise circumstances were unknown.

[67] The evidence of M

[68] This was the evidence of a 20 year old woman who had been in the company of the accused during the period when a number of these alleged offences had committed. On one occasion she had been sitting chatting with him in his car in a car park and he had put his left hand on her right leg as they sat together in the front of the car. She remonstrated with him and he desisted. She said that thereafter she was never in his company again. Prior to that she had been in his company and a 15 year old girl but she had never seen him touch her in a sexual way or speak to her in a suggestive manner. I refuse to admit this evidence for the following reasons:

[69] (a) I consider that his behaviour towards this young woman was reprehensible and it prima facie constituted an indecent assault upon her. However I found nothing about this matter which would indicate a propensity that he had committed the offences alleged against the children in the indictment. MW was an adult and whilst his conduct was reprehensible, I do not consider that it indicates a propensity to commit offences of the kind charged or that this behaviour, even if it amounted to a propensity, made it more likely that he had committed the offences charged given the circumstances of this incident.

[70] (b) In so far as Mr Russell sought to admit it through gate way 6(1)(g), - that the accused had made an attack on the character of complainants in the case – I consider that the admission of the evidence would potentially have such an adverse effect on the fairness of the proceedings that I ought not to admit it. I was of this view because his behaviour towards an adult was in my view of a different genre to that of his behaviour towards children. It might therefore be unfair to introduce such evidence in the context of a case which essentially concerned his behaviour towards children.

L

[71] L was a young woman who admitted that when she was 16 or 17 she had a sexual relationship with the accused including sexual intercourse, hugging and kissing. She added in her statement "I was happy enough about this and don't want to make any complaint about it". If this young woman was 17, as she admits she may well have been, there was no criminal offence in this matter and the court does not readily treat her as a child. I rejected the admission of this evidence for the following reasons:

> (1)As in the case of M, I consider that someone having legal consensual sexual relations with a young woman does not necessarily connote a propensity to commit offences of the kind with which the defendant is charged namely against children. Even if it showed such a propensity, I do not think it makes it more likely that he had committed the offences charged given the nature of the offences in the indictment. I consider it would have been unfair to have admitted such evidence notwithstanding that there was a plausible argument made to me by Mr Russell that it did indicate a sexual interest in teenage girls. I consider that the vital distinction here is that this was very possibly lawful behaviour with a girl who was beyond the teenage years of protection afforded by the law for acts of consensual sex.
> (ii) I invoke art 6(3)in this instance as I consider that the admission of this evidence under gateway6 (1)(g)would have such an adverse effect on the fairness of the trial for the same reasons as I have set out above .

P

[72] P is an adult who had known the accused for 11 or 12 years since 1994-1995. She recalled an incident when she had permitted the accused and his girlfriend to baby sit for her daughter Z then aged 4. Upon her return from an evening out, the child told her she wouldn't get into bed and that J said he would get into bed beside her. She also remembered an occasion when Z was about 12 or 13 and the accused made a comment to her about whenever Z was 16. However P stopped him before he said any more and therefore it is not clear what he was going to say about this. Z herself made a statement about the babysitting incident recalling that when she was about 7 years of age the accused had babysat for her. Her statement recalls:

> "I went back upstairs and King followed me up and said through the door "If you don't get into bed I will get in beside you and make sure you stay there". I

> was frightened so me and my brother held the door but King made no attempt to come in".

[73] While this is suspicious behaviour particularly given the context of the charges now against him, I consider that the purport of the evidence was too uncertain and the circumstances too ambiguous to permit me to conclude that this evidence established bad character or therefore a propensity to commit offences of the kind charged. I consider it would be unfair if such ambiguous and uncertain allegations were admitted. I could not be certain that there had been a sexual connotation to the comments made particularly when his girlfriend was present and where no positive steps had been taken to commit any offence.

Z

[74] For the reasons outlined above I have also refused the admission of the evidence of Z on this subject. She added one further matter. She recalled an occasion when she was about 8 or 9 years of age and had been sitting in the garden of her house on an old sofa. King was also in the garden and she went on -

> "When I got up he said, "Oh I saw your pants". I pulled my skirt down and walked away and King said, "It wouldn't be the first time I have seen them". An adult speaking to me this way made me feel very strange".

[75] Whilst that is reprehensible behaviour by a man of his age to a child of only 8 or 9, I was not convinced that such a wholly inappropriate mode of speaking necessarily connoted a propensity to commit offences of the kind with which the defendant is charged. I further concluded that it would be unfair to admit such evidence in that it might disgust members of the jury and deflect them from the real nature of the type of offences with which this man is charged. A more difficult decision arose when Z also asserted a further incident when she was 15 years of age. Her statement records:

> "When I was around 15 years old, again, I was babysitting for King's sister Tara. King appeared at the door and asked if anyone was in the house. I replied that there wasn't and he said that he needed bin bags so I said I would go and look for some so I went into the kitchen and looked under the sink. When I turned around King was standing behind me and I became frightened. I lifted A, the child I was looking after, because King's sister had told me he was not to get near the child. King asked me if I

> had a boyfriend and I said no. He then asked me, "Are you interested in an older man". I said that I wasn't. He then said, "Well if you were you know where to go". I was scared so I told him to go and he left the house. After that I stopped speaking to him because I was scared of him".

[76] This was not dissimilar to the statement considered in Weir's case to which I have adverted in paragraph 60 of this judgment. In that case, the Court of Appeal considered that the statement, with its implied assertion of sexual attraction was "unattractive" but not reprehensible. The Court of Appeal went on to admit the matter however on the grounds of it being relevant to the question of whether the defendant "had a sexual interest in" (a) the 13 year old complainant. It was sufficiently relevant to that issue to be probative. I beg to differ with the conclusions of the Court of Appeal. In my view the statement was not merely unattractive but is reprehensible. On the other hand it seems to me that notwithstanding the reprehensible nature of the statement and the fact that in my view it does show a propensity to have an unhealthy interest in teenage girls, I am not satisfied that it connotes a propensity to commit offences of the kind with which the defendant is charged. It seems to me that there is a very grave difference between reprehensible statements of this kind and the commission of the alleged criminal offences in this case. In my view Article 6(3) must be invoked here on the basis that the admission of the evidence might have such an adverse effect on the fairness of the proceedings that I ought not to admit it. A jury might find the remarks of this child so abhorrent that it might serve to unfairly influence consideration of whether or not the accused had committed the offences of the kind charged. While this conduct might have come within the definition of bad character I invoke the use of art 6(3) in considering art 6(1)(g) because I consider that this evidence of this nature would have a disproportionate and therefore adverse effect on the fairness of the trial by virtue of what he has said whereas the key to these counts is a determination of what he actually did .

D

[77] This witness gave evidence of her daughter, then aged 18, moving into live with the accused a short time after she had met him. As in the case of NW, I do not consider that evidence of behaviour with an adult, albeit she was only a teenager, necessarily amounts to bad character within the definition in the Order or therefore connotes a propensity to commit offences of the kind with which the accused is charge. Even if it did, I consider that Article 6(3) must be invoked on the basis that the evidence could have such an adverse effect on the fairness of the proceedings that I ought not to admit it. This witness added a further aspect to her evidence when she stated:

> "When my grandson was born I used to visit my daughter quite often at her home with my husband and there would be young girls in the house a lot. These girls looked to me as if they were about 11 or 12 years old and I noticed that when I visited and Jason was there with my daughter, the girls would be there but when my daughter was in the house on her own the young girls were never there. On one occasion when I was at her house, four young girls were smoking at the back door and I asked (my daughter) why the girls were always there and she told me that the girls were Jason's friends. My daughter introduced me to the girls and three of them were called (*had the same name as my daughter*)and I remember it because I thought it was strange that these girls all had the same name as my daughter. There were a lot of occasions when I took my daughter out either to Ards or to my house in Portavogie."

[78] A plausible argument could be made in this instance that this connoted an unhealthy interest in young children given the age of the accused. Somewhat reluctantly I have come to the conclusion that the absence of any evidence demonstrating a sexual interest in these children either by way of comment or action is sufficient to dissuade me that it necessarily illustrates bad character within the definition in the Order or therefore connotes a propensity to commit the kind of offence with which he is charged. Had there been some evidence of sexual overtures , grooming, conversations with sexual overtones, etc I would most certainly have admitted this evidence. In the absence of same, however, particularly since his girlfriend with whom he was living was always present. I therefore refused the prosecution application.In my view a high degree of suspicion which evidence such as this clearly generates is not enough to render it admissible .

M2

[79] This is an elderly lady who made a statement of seeing the accused with young girls either in his car or in his house. Unlike the evident of VE there is no connection between any of the girls in the car and sexual behaviour with any one of them. As in the case of D, I came to the conclusion that the absence of any concrete evidence to suggest that there were sexual overtures , grooming, or sexual activity was sufficient to dissuade me from concluding that this behaviour amounted to bad character within the definition of the Order or therefore connoted a propensity to commit offences of the kind with which he is charged. I stress again that had there been the slightest evidence emanating from this witness of sexual overtones, I would certainly have

admitted this evidence. Whilst there are grounds for suspicion as to the motivation of the accused in engaging in such behaviour were it to be proved nonetheless I must remind myself that this is a criminal trial and that suspicions are inadequate to persuade me to admit this evidence

I conclude by acknowledging the care and skill with which both counsel approached these submissions before me both in their written arguments and oral submissions .