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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

ANGELINE MITCHELL

Before: GIRVAN LJ, COGHLIN LJ and GILLEN LJ

GILLEN LJ (delivering the judgment of the Court)

[1] This is an application by Angeline Mitchell for leave to appeal against her conviction on 20 October 2010 by a jury of the murder of Anthony Robin ('the deceased') on 11 May 2009. The applicant was sentenced to life imprisonment, the life sentence tariff being fixed at a minimum period to be served of 12 years.

[2] The applicant lodged her appeal against conviction on 24 January 2014. On 6 March 2014 Higgins LJ granted the application to extend time. Maguire J granted leave to appeal on ground 4 and refused leave on grounds 1-3 (see paragraph [35] of this judgment).

[3] Under section 4 of the Contempt of Court Act 1991, this court has concluded that in order to avoid a substantial risk of prejudice to the administration of justice in these proceedings it is necessary to order that the publication of this judgment or any report of this hearing be postponed until further order of this court.

Factual Background

[4] The deceased and the applicant were friends and then partners. Their relationship was a turbulent and volatile affair blighted by frequent abuse of alcohol, quarrels, public abuse and some actual violence.

[5] The relationship had been in a period of suspension just prior to the death of the deceased. However the two of them had agreed to meet the previous weekend and then a further agreement led to the meeting on the day of the killing, Sunday 10 May 2010. They shared food and drink at a nearby hotel and then came back to the flat where the deceased's flatmate and girlfriend were present.

[6] After midnight on 10 May, the deceased, in the wake of a telephone call from his ex-wife, attended at her home in the presence of the applicant in order to deal with a problem concerning one of his sons. The police had been summoned before their arrival and the son had been arrested and taken away.

[7] Shortly thereafter the deceased returned to his flat in the company of the applicant and his younger son Thomas.

[8] In the early hours of the morning a simmering quarrel erupted between the deceased and the applicant arising out of the arrest of his elder son. By this stage his flatmate and partner had gone to bed. Thomas was due to sleep on the sofa in the living-room.

[9] Whilst the exact sequence of events thereafter became a matter of some dispute at this hearing, it seems that the applicant left the living-room bent on vacating the house altogether. The deceased followed her out to the landing area where the quarrel continued. In the course of the quarrel she claimed the deceased had called her names and verbally abused her suggesting she was a "tout" and was sleeping with older men.

[10] The applicant alleged that she was struck by the deceased, put to the ground and at one stage was being strangled. She also alleged that he took a canoe paddle and was hitting her with it. It should be observed at this stage that whilst the applicant was medically examined at the police station she betrayed little if any sign of injury relevant to the allegations she made.

[11] It is clear that at some stage she entered the kitchen of the flat and there took a knife into her possession.

[12] It is common case that the applicant thereafter stabbed the deceased a number of times with the medical evidence revealing stab wounds to the chest (which in fact was the fatal blow), the left side of the scalp, the right of the scalp and upper left back. There was also an incised wound in the front of the left ear. After being stabbed it appears the deceased made his way to the living-room but within a short time he was dead.

[13] The police were summoned at 03.34 hours and death was pronounced at 04.12 hours.

[14] At the scene the applicant's immediate reaction was to attempt to deflect any blame in respect of the injuries sustained by the deceased from herself by giving a false account in respect of the injuries, claiming they had been inflicted by a fictitious blonde Swedish woman.

[15] Three aspects of the evidence during this six day trial were of particular importance during the appeal. Firstly, the accounts of the incident given by the applicant to the police and to the court at trial. The applicant was interviewed on six occasions by the police between 11 May 2009 and 12 May 2009. During the course of her first interview she said that prior to the incident she had drunk 15-20 Budweiser during the day and 4 vodkas. She claimed that the deceased had abused her verbally accusing her of being a police informant, an Orange bastard, having slept with older men and had ordered her out of the house. As she was leaving at the top of the landing to go down the stairs, he had struck her. This had occurred when she came out of the bathroom. His hands were around her throat and she was lying on the landing facing down the stairs with him on top of her. He had lifted a canoe paddle and was coming at her. She then ran into the kitchen where she lifted a knife and stabbed him in the kitchen. She said that she was just "lashing out blindly" and she asserted she just did not want him to hurt her.

[16] The police had noted markings on her arm and a couple of scratches. She had said that there was "nothing major but a little tender".

[17] During the second interview she confirmed she lifted the knife in the kitchen, and said she could have stabbed him in the kitchen but she was not sure where she did it.

[18] During the course of her evidence at the trial, it is clear that her account was more confused. She related that the deceased had grabbed her at the top of the main stairs to the front door on the landing, that she was on the ground, and that he had his arms around her throat strangling her. She remembered him coming at her with a paddle and she had run into the kitchen. "The next thing I remember is going at the top of the hall again. I do know at the top of the landing I was waving a knife around and he was close to me and I think he had a hand on me".

[19] In the course of her evidence the applicant reiterated that she had run into the kitchen, that she had taken a knife to protect herself and "he had a big paddle".

[20] She added:

> "I did kill him but it was not deliberate. My eyes must have been shut. I don't think I held the knife in my fist above my head as Thomas described in the video interview. I didn't, I don't remember, I don't know".

Hence it is clear that she was not asserting in the course of her evidence at trial that the fatal blows had been struck in the kitchen.

[21] The second part of the evidence that is particularly relevant to this appeal is that of Thomas Robin, essentially the only eyewitness to the altercation that took place between the applicant and the deceased. He was the son of the deceased and a child at the time of the incident. It is clear that he did not see all of the exchanges that occurred between the applicant and the deceased.

[22] He had undertaken two ABE interviews, the transcripts of which were exhibited to the trial papers.

[23] In the course of his first ABE interview (on 11 May 2009) he made, inter alia, the following points:

- When he arrived at his father's flat at Fitzroy Avenue at 1.20 am the deceased and the applicant were already there.
- He heard the pair of them arguing after they had walked into the hall.
- Before that they had been arguing in the living-room of the flat for about 5 minutes prior to going into the hall.
- He heard the deceased shout "Thomas Thomas" and he then saw the applicant stick the knife into the deceased "a couple of times". The deceased then ran up to the living-room where Thomas stood between himself and the applicant. He said that when the deceased and the applicant had left the living-room during the argument they were standing on the stairs. He described how the applicant had her right hand raised in a stabbing motion, his father was facing her and at that stage she stuck the knife into him albeit he could not actually see where it had struck him.

[24] In the course of a second ABE interview on 13 May 2009, he said, inter alia:

> "They must have been walking in and out of the kitchen or something I do not know."

[25] Asked where the argument had occurred he said it would have been "on down outside the bathroom or something". He thought they were arguing for about a minute before the deceased shouted for him. When he came out of the room where he had been he saw them on the stairs. He added "I don't know what way they were holding each other but (inaudible) were like close to each other and I think they had their hands like on each other."

[26] The third element of the evidence particularly relevant to this appeal is that relating to bad character.

[27] Before outlining the evidence of bad character of the applicant that was introduced in this case, it is helpful to set out the statutory background governing its admission and use under the Criminal Justice (Evidence) (Northern Ireland) Order 2004. Article 6(1) provides:

> "(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if –
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> (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."

[28] Mr O'Donoghue QC, who appeared on behalf of the appellant with Mr Devine, accepted that the prosecution was entitled to call evidence of the applicant's bad character under Article 6(1)(d) and Article 6(1)(g) and that it was at least arguable that the evidence, if admitted, may have been capable of establishing that the applicant had a propensity to arm herself with a knife and to use the knife for the purpose of and with the intention of inflicting serious bodily harm. Moreover the applicant had challenged the character of the deceased.

[29] It is now well-established law that once such evidence is admitted, its purpose can extend beyond any reason appearing within the gateway through which the evidence was admitted.

[30] Since bad character has played such a pivotal role in the determination of this case, it merits some extensive recitation from the learned trial Judge's charge on this issue. He commenced as follows:

> "What are the facts, members of the jury, about bad character? Well, there are two things, two bits to this. There was an agreed Statement of Facts that was read to you. Now, that was read to you as part of agreed evidence … this was what was read to you that:
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> > `On 7 December 2007 a dispute arose between Donna Clarke and Angeline Mitchell whilst both were present at Flat Two, 78 Fitzroy Avenue. During that dispute Angeline Mitchell produced a knife and was disarmed. Angeline Mitchell then obtained two knives and during a struggle stabbed Lorraine Gallagher in the left calf and the left thigh. She also stabbed Donna Clarke in the right leg.'
>
> That was in the flat on 7 December 2007. Then … on 9 July 2003 in Larne where she lived at the time:
>
> > `During the time of the dispute about mobile telephones, Angeline Mitchell chased Andrew Macauley and James People with two knives and tried to stab them'.
>
> That's the incident which was raised and cross-examined by Mr Kerr when she said she chased them out into the green outside. Mr Kerr asked, well, why did you not stop at the door and shut the door when you had got them out. Now they were agreed facts … read to you as part of the evidence and they are part of the evidence of the case".

[31] The learned trial Judge then went on to explain to the jury that whereas these two incidents had originally been agreed to be submitted in written form by counsel:

- that the applicant in the witness box had appeared to "renege on that and did not agree that these things had happened or happened in that way or that she had stabbed these people and she refused to accept any fault on her part in

connection with these; talked about people coming at her with bottles and so on when she was in the flat and making fun of her and what have you."

- that counsel would not have agreed these matters without authority.

[32] The remaining aspects of bad character were outlined in the following terms:

> "There were also other details of bad character put before you which relate to the accused which were given by Michael McGeown and Jacqueline Cushinan. These were not agreed by the defence. You see, so there is a clear distinction. These details, the defendant says, have been made up by them. Jacqueline Cushinan, when she gave evidence, said that Angeline had tried to stab Michael McGeown, one night just after she and Tony had come home from Turkey; that she missed and that the knife went into the wall. So she says she saw that. She also said that Angeline had once had a knife and that Tony had hidden it in the fridge and that she, meaning Angeline, often hid knives in the flat. Now, the one person in this four ball that was in the flat, members of the jury, against whom there are no allegations of bad character made is Jacqueline Cushinan.
>
> Michael McGeown gave evidence and he said that 7 or 8 months before 11 May he had a row with Tony about a bet. They were face to face with each other and Jacqueline and Angeline were both present; that Angeline started interfering and getting involved until he, that is Michael McGeown, said that it had nothing to do with her. And the next thing was she disappeared but came back with a knife and took a swipe at him with it. And Tony and he then grabbed her and took the knife from her. He also said that 6 or 8 weeks later that she, that is Angeline, said to him that she was going to stab Tony but that she would stab me, meaning Michael McGeown, first because she knew he would try to intervene and help him. He then gave evidence about another occasion when he went out for breakfast one morning to get ham rolls and when he came back he couldn't find a sharp knife, and he had to use an ordinary butter-knife. And then later when he was talking to Tony, the deceased, said what about the knives? And Tony said to him that he had had a row with Angeline the night

> before and he had hidden them in the freezer for safety reasons because during the row she had gone down to the kitchen to get a knife. So that is what is meant by bad character members of the jury. And I repeat again, that may or may not help you. Take it into account or leave it out of account as you consider appropriate. But do not make an assumption because a person behaves that way that that means she is guilty of murder and had the necessary intent just because of those events."

[33] It emerged during the trial that Michael McGeown had many convictions for theft, burglary and traffic offences. He also had convictions for assault, kidnapping and robbery.

[34] In her evidence at trial the applicant denied these allegations of bad character.

Grounds of Appeal

[35] The grounds of appeal can be summarised as follows:

The learned trial Judge in his charge to the jury:

(i) failed to direct the jury to identify precisely the point in time and circumstances in which the fatal blow was administered ("ground 1");

(ii) failed to deal adequately with all of the evidence of Thomas Robin ("ground 2");

(iii) had used inappropriate language at the point of dealing with the applicant's interviews with the police, when he had said:

> "Now members of the jury that covered 56 pages of the interview and you will have observed that it was a disjointed interview, but what I am trying as it were to tell you in summary here is what this lady was saying at that first interview at 8.00pm on the evening **following the murder** (*our emphasis*) ("ground 3").

(iv) failed to direct the jury properly as to the purpose of the bad character evidence or the standard of proof to which the jury had to be satisfied before any member of the jury could take the bad character evidence into account in any way("ground 4").

[36] Before turning to a consideration of these grounds of appeal in detail we pay tribute to the care and thoroughness with which the respective arguments, both written and oral, were presented to us by Mr O'Donoghue and Mr Devine on behalf of the applicant and Mr McCollum QC and Mr Russell who appeared on behalf of the prosecution.

Ground 1 of the appeal

[37] Mr O'Donoghue's argument on this ground can be summarised briefly. The applicant had asserted in her first police interview that she had obtained the knife in the kitchen and that the altercation with the deceased commenced in the kitchen. Whilst Thomas Robin had seen the parties holding each other on the stairs and had alleged that the applicant had used the knife on the stairs, this was not conclusive evidence that she had not initially used the knife, and inflicted the fatal stab wound, in the kitchen. The jury had to be satisfied where the fatal stabbing took place because the state of mind of the applicant might vary according to where the fatal wound was inflicted. If on the stairs, then the defence of self-defence and provocation might be less compelling. If it occurred in the kitchen it might be more compelling because of the closer temporal connection between her need to seize the knife and the wound being inflicted. Whilst she had not made the case in her evidence at trial, she had never resiled from her assertion made to the police at interview that the incident had commenced in the kitchen. The learned trial Judge had failed to leave the option open to the jury that she had inflicted the fatal wound in the kitchen when acting in self defence or under provocation and in any event the speed with which she had acted in the kitchen might be relevant to the issue of intent.

Conclusion on Ground 1

[38] We have no hesitation in dismissing this ground of appeal for the following reasons:

(i) There was not a scintilla of objective forensic evidence that the stabbing had occurred in the kitchen e.g. no blood was found there and there was no trail of blood moving from the kitchen towards the stairs or into the lounge area.

(ii) The applicant had neither made the case in her evidence in chief or cross examination at trial that the incident had occurred in the kitchen nor asserted that she had acted in self-defence or under provocation in the kitchen.

(iii) This point had not been drawn to the learned trial Judge's attention at the termination of his summing up notwithstanding that two opportunities for requisitions had been afforded to the defence counsel (namely during the course of his summing up at the end of the first day of the charge and again the following day when he concluded his charge to the jury).

(iv) The trial had not proceeded on the basis that there was a live issue as to where the fatal stab wound had taken place.

(v) It is not incumbent on a trial judge to dream up or speculate on points of issue where there is no objective evidence to suggest them or where counsel have not even raised them with him.

Ground 2 of the Appeal

[39] Mr O'Donoghue's contention in this instance was that in reviewing the ABE interviews of Thomas Robin, the learned trial judge had failed to deal adequately or at all with the evidence of the witness from the second ABE interview. He had no complaints about his review of the first such interview.

[40] In particular it was counsel's contention that the following matters relevant to the second ABE interview had been omitted by the learned trial Judge in his charge:

- That Robin had made no reference to the deceased being in the kitchen at all.
- That he had heard the sound of their feet and of them arguing somewhere before he saw them on the stairs. Could this have been in the kitchen?
- That his attention had been drawn to the exchange when he heard his father call out his name. What had happened before this and could it have occurred in the kitchen?

[41] Mr O'Donoghue asserted that these omissions were important when considering the defences of lack of intent, self-defence and provocation.

Conclusions on Ground 2

[42] We have come to the conclusion that there is no substance in this ground. A summing-up must accurately direct the jury as to the issues of fact which it must determine. It must fairly state and analyse the case for both sides and assist the jury to reach a logical and reasoned conclusion on the evidence. The directions given by the Judge to the jury should provide the jury with the basis for reaching a rational conclusion. (See D Potter & Heppenstall [2007] EWCA Crim 2485 at [33]).

[43] Provided however the Judge fairly reviews the essential features of the evidence, the structure of his summing-up cannot be impugned simply because the defence would have preferred a different format. (See Archbold 15th Edition at paragraph 4-439 and R v Richardson 98 CR App R 174 at 178.)

[44] The jury in the instant case had fully heard the evidence of both ABE interviews shortly before the Judge's charge. No requisitions had been made to the learned trial Judge on these matters by defence counsel. Whilst the obligation is on

the Judge to ensure that all relevant issues are brought to the attention of the jury, nonetheless it cannot be forgotten that this is an adversarial system where the Judge is entitled to have the assistance of counsel and his attention drawn to issues of salient importance. We regard it as highly significant that no requisition on this alleged omission had been made in this case. There is no obligation on the trial Judge to include every single defence argument particularly where such arguments have not even been made in the course of the trial by counsel.

Ground 3 of the Appeal

[45] It was the submission of Mr O'Donoghue that it was a matter for the jury to determine if the deceased was "murdered". It was not for the trial Judge to invoke this description at a time when the issue of murder was very much in dispute. What was not in dispute was that the appellant was responsible for the death of the deceased and that this is the phraseology that ought to have been adopted by the trial Judge.

Conclusions on Ground 3

[46] We find no substance in this ground. The learned trial Judge had been conspicuously careful in directing the jury in the course of his charge that there was a clear issue in this trial between murder and manslaughter. He had invested considerable effort in drawing that distinction to the jury's attention on a number of occasions throughout his charge. This oversight in mentioning only murder in this context could not conceivably have influenced the jury in the wake of his earlier and subsequent comments. It is a classic case of where counsel should have drawn the matter to his attention in a requisition. Indeed it may well be that counsel chose not to do so because it might have served to introduce confusion into an already crystal clear charge on this aspect of the case.

Ground 4 of the Appeal

[47] On this ground Mr O'Donoghue's argument can be couched in short form. It is simply that where non conviction evidence of bad character is being relied on to establish propensity and, as in the instant case, the evidence is disputed, the jury must be directed not to rely on it unless they are sure of its truth i.e. it must be established to the criminal standard of proof beyond reasonable doubt. Counsel contended that the judge had clearly admitted the various incidents of bad character on the basis of them constituting evidence of propensity on the part of the applicant to wield a knife when crossed. However, in the wake of her firm denial in the witness box as to the truth of any of the allegations made against her, he had failed to inform the jury that they must be sure of the truth of the evidence before relying on it. Absent such an admonition the danger was that the jury might erroneously approach this matter on the basis of "no smoke without fire".

[48] In response Mr McCollum made the following points:

- It is difficult to know through which gateway the evidence had been admitted. Counsel did not accept that it was necessarily admitted on the basis of propensity. The applicant had never denied using a knife and therefore the admission of the evidence of these previous incidents could have been relevant to the issue of intent, self-defence or provocation without the need to invoke propensity. Hence any authoritative strictures dealing with the necessity to be sure on issues of propensity may not have applied in this instance.
- Some of the evidence invoked may not even have constituted evidence of bad character. The incident of hiding knives in the flat, that of her assertion that she was intending to stab McGeown and the hearsay evidence from McGeown, himself a person of bad character, that the deceased had told him that she had hidden a knife on another occasion were scarcely incidents of bad character notwithstanding the judge's finding and therefore one had to question the jurisprudential basis of a need to prove these beyond reasonable doubt.
- There was nothing in the 2004 legislation which dictated that such evidence of bad character required to be proved beyond reasonable doubt.
- All the jury had to do was look at the evidence that was admissible, bearing in mind that they would rarely have the necessary tools to prove the incidents beyond reasonable doubt in the absence of forensic evidence, police interviews etc. and ask themselves if the evidence assisted them in coming to their conclusions.
- The authorities relied on by Mr O'Donoghue asserting the need to be certain before admitting such evidence of propensity were in the event statements obiter dicta and no court had ever really addressed this issue before.
- He drew the analogy of cross-admissibility where an accused faced multiple charges and circumstantial evidence as comparable instances where it was not necessary to be sure of the evidence before taking it into account.
- The learned trial judge had instructed the jury that on every salient issue they needed to be satisfied beyond reasonable doubt. There was therefore no lack of safety in the conviction based on this charge.
- In any event the bad character aspect of the case constituted a small part of the totality of the evidence against this accused. The court should stand back and look at the whole of the case and conclude that even if the learned trial judge had failed to give a proper charge on this aspect, the guilty verdict was not unsafe.

Conclusions on Ground 4

[49] Having scrutinised the charge to the jury, it is clear to us that the evidence of bad character was admitted by the judge on the basis that it might help it to resolve an issue or issues between the prosecution and the defence, namely that it

constituted evidence of a propensity on the part of the applicant to deliberately and unlawfully wield or use a knife in circumstances where she had neither been provoked nor was acting in self-defence.

[50] We are satisfied that Archbold 2015 at 13-68 page 1614 correctly summarises the law when it states:

> "Where non-conviction evidence is being relied on to establish propensity and the evidence is disputed, the jury must be directed not to rely on it unless they are sure of its truth: R v Layafette [2009] Crim. LR 809 and R v Campbell [2009] Crim. LR 822, CA."

[51] Two other cases cited before this court lend authoritative weight to this proposition.

[52] First, R v Ngyuen [2008] EWCA Crim 585. In that case the defendant had been involved in an incident in a public house, the "Great Harry", on 7 December 2006 during which he allegedly smashed a glass and used it to cause injuries to three men. No action had been taken by the CPS in relation to that incident because there was insufficient evidence to proceed. Two weeks later, on 23/24 December, the defendant was involved in another altercation in a public house, once again he used a broken glass as a weapon causing fatal injuries to the victim whom he struck on the side of the neck. At his trial for murder, the first incident was introduced as evidence of bad character under s. 101(1)(d) of the Criminal Justice Act 2003. The trial judge directed the jury that if they were sure that during the first incident the defendant had deliberately broken a glass and used it unlawfully with the intention of causing serious bodily harm they could take those facts into account in their deliberations on the charge of murder

[53] The trial judge charged the jury, inter alia, in the following terms:

> "You hear about it (*the Great Harry incident*) because it may help you to resolve an issue or issues between the prosecution and the defence, namely the question as to whether he has a propensity, or a tendency, deliberately to use a glass as a weapon …. First of all, you have to decide what happened in the Great Harry. There is no charge in the indictment so you will not be asked for a verdict. Nevertheless the prosecution have to make you sure of any fact before you can bring it into your consideration of the events of 23/24 December. ….. If you are not sure of any of those facts, the events in the Great Harry are irrelevant to your deliberations on the charge of

> murder. ….. You cannot convict him only, or even mainly, on the basis of facts you find proved arising out events on 7 December but, when you are considering whether prosecution have proved murder, if the facts of 7 December make you sure that, bearing in mind it is only one incident, the defendant had a tendency deliberately and unlawfully to use a broken glass as a weapon, then you can consider whether that makes it more likely that he is guilty of murder."

[54] The Court of Appeal clearly lent its imprimatur to this direction to the jury at paragraph [43] where Dyson LJ said:

> "We cannot accept that the direction given by the judge in this case was too much for the jury to apply faithfully and conscientiously. In our judgment, it was clear and should have been easily intelligible. They were told that they could not rely on the Great Harry assaults unless they were sure of the three relevant factors. There is no criticism of the judge's summing up as to the elements of murder. In our view, there is no basis for any suggestion that any jurors may have applied a lesser standard of proof either in relation to the Great Harry assaults or the murder."

[55] We are of the view that this was the nature of the charge/direction that ought to have been given in the instant case. During the course of the hearing before this court , the rhetorical question was posed as to what would have been the direction of the judge had a member of the jury questioned whether or not they had to be sure of the relevant facts of bad character. The answer is contained in Nyguen's case because that is precisely the question that the jury posed in a note sent to the judge after the completion of the summing up. We have no hesitation in concluding that, as the trial judge did in Nyguen's case (see paragraph [24]), the learned trial judge in the instant case would have been bound to direct the jury that before they could take into account the events described in the bad character evidence, "you must be sure of all the relevant facts".

[56] In R v O'Dowd [2009] EWCA Crim. 905 the accused was convicted of a number of offences against a female. The trial lasted an extremely long time due to the introduction of bad character evidence concerning three other allegations of rape, two of which related to events that occurred 22 and 17 years before the charges. The first of those allegations resulted in an acquittal, the second in a conviction and the third had been stayed on the ground of abuse of process.

[57] At paragraph [65] Beatson J said:

> "In this case there were significant complications with the allegations. Only one was supported by a conviction, which this court in McKenzie [2008] EWCA Crim. 758 at [23] referred to as the launch pad for establishing propensity. Without that launch pad, a trial of the collateral or satellite issues is necessary with the dangers to which we have referred. Because the evidence was disputed, significant factual issues would have to be explored in relation to all three allegations, each of which needed witnesses. As Moses LJ stated in DM [2008] EWCA Crim. 1544 at [22] the jury would need 'to consider with as much detail and concentration all the facts' in relation to each of the three allegations as they would in relation to offences with which the appellant was charged, before relying on it in relation to the index offence. This is because the jury would have to be sure those allegations were true before relying on them in relation to the index offences."

[58] In short, in O'Dowd's case, the jury was directed by the judge that they should only take into account those items of bad character evidence which they were sure were reliable and if there was any real possibility that a witness's evidence was contaminated in a significant way they should ignore that witness's evidence entirely.

[59] The fact of the matter is that evidence of previous misconduct which has not been the subject of a conviction needs to be approached with considerable caution. If a judge decides to admit such evidence he must consider how to deal with it in his summing up in a way which is fair and does not give undue prominence to the bad character evidence. Such evidence may be stale or incomplete or, as in the instant case, potentially flawed due to the character of the author or the hearsay nature of the content. The defendant may be prejudiced in trying to meet it for lapse of time or inability to pinpoint details. Moreover the jury may be left thinking there is no smoke without fire unless they are firmly disabused of such an approach. However, it is not wrong in principle or perverse to conclude that such evidence can be regarded as tending to show that an accused has a propensity to behave in a particular way, as in the instant case, provided the judge fairly reviews the essential features of the evidence and makes it clear that the jury must not rely on it unless they are sure of its truth.

[60] We are not satisfied that the learned trial judge in this instance made that sufficiently clear in his charge to the jury and we are fearful that the jury, absent such a firm direction, may have been tempted into concluding that there was no smoke without fire due to the number of incidents related . The fact of the matter is that the defendant denied all of these incidents, even those that she had originally accepted, and she was entitled to have these denials firmly put before the jury and the jury informed that they must be sure that the allegations had been proven.

[61] The task to be performed by this court in determining an appeal was addressed in R v Pollock [2004] NICA 34 at paragraph [32] where Kerr LCJ set out the principles to be followed:

> "1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
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> 2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
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> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
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> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[62] Invoking these principles in this instance, we do entertain a significant sense of unease about the impact of the bad character evidence notwithstanding the weight of the other evidence in the case. The bad character evidence potentially may have carried substantial weight with the jury in circumstances where the appellant was mounting a defence of lack of intent, self-defence and provocation. They needed to be reminded in that particular context that they had to be sure of its content before relying on it.

[63] In all the circumstances having refused leave to appeal on the earlier grounds, on this ground of appeal we grant the appeal and quash the conviction for murder. We shall hear counsel on the question of a retrial.