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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

-v-

SHAUNEEN BOYLE

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Before: Morgan LCJ, Sir Paul Girvan and Sir Ronald Weatherup

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MORGAN, LCJ (delivering the judgment of the Court)

[1] Shauneen Boyle was unanimously found guilty, along with her co-defendant Stephen Hughes, of the murder of Owen Creaney following a contested trial in the Crown Court at Laganside before Treacy J sitting with a jury. The appellant was given a life sentence with a 14 year tariff. She now appeals her conviction with the leave of the single judge in respect of the admission of bad character evidence, renews her application for leave on other grounds and seeks leave to introduce two further grounds of appeal. Mr Kearney QC and Mr Forde appeared for the appellant and Mr McCollum QC and Ms Auret for the PPS. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] The sentencing remarks of the learned trial judge set out the background to the conviction which we repeat here.

[3] In the early hours of 3 July 2014, after the consumption of what must have been a very considerable volume of alcohol, the two defendants and Owen Creaney went to the house of the first defendant, Stephen Hughes, at 140 Moyraverty Court. The evidence established that Owen Creaney was assaulted there that morning,

receiving extremely serious injuries to his chest and head. The assault appears to have commenced in the living room, where all three were present and then moved to the hallway where Owen Creaney was subjected to a savage and merciless attack causing catastrophic injuries.

[4] There were 29 injuries to his face and head; nine injuries to the legs; 24 injuries to the chest and trunk; five injuries to the back. The injuries included a fracture of the breastbone, seven fractured ribs on the right side, eight fractured ribs on the left side, damage to the heart and significant brain damage. The brain injuries included brain haemorrhaging or bleeding, a traumatic nerve fibre injury due to acceleration/deceleration of the head, tissue bleeds to the white matter of the brain and a tear of the back part of the white matter, known as the splenium.

[5] Mr Creaney was then taken upstairs, at which stage he was still alive. Despite the fact that he was gravely injured and obviously in need of medical attention neither of the defendants summoned a doctor or ambulance. The unfortunate Mr Creaney survived upstairs for a number of days during which, given the nature of his injuries, he must have been in very considerable pain and suffering. His body was discovered by police on 5 July 2014 compacted into a green refuse bin outside 140 Moyraverty Court.

[6] Hughes blamed Boyle for the assault and Boyle blamed Hughes, a so called cut throat defence. Both separately made admissions to third parties of their involvement in the assault. At the trial both gave evidence, each blaming the other and denying any participation in the assault. Entirely contrary to the case Hughes had made on oath to the jury over a number of days he admitted to the Probation Officer, in the pre-sentence report, to punching and kicking the victim a number of times. These admissions were accepted by Mr Irvine QC, on behalf of Hughes, and Mr Irvine confirmed that they were not being challenged. Indeed, Mr Irvine contended that this was, although very belated, some evidence of remorse.

[7] On the other hand the appellant, Boyle, still maintains that she did not participate in the fatal assault on the deceased. However, it is clear that the jury concluded that she and Hughes both directly participated in the fatal assault and did so intending to cause at least grievous bodily harm.

The admissions

[8] The undisputed evidence was that Mr Hughes made an admission to his ex-partner Danielle Smith that he had killed the deceased in the following terms: 'I am going to jail for a very long time'. 'I killed someone'. 'I killed wee Owen'.

[9] The appellant made an admission to a friend, a lady called Mairead McGuigan, that she had assaulted the deceased by jumping on his stomach and head. In her own evidence the appellant maintained that this had been a false admission designed to secure Ms. McGuigan's assistance to get Owen Creaney to hospital in the belief that if Ms. McGuigan thought Mr Hughes had done the assaulting she would not have assisted. It was accepted that the manner of the assault to which the applicant admitted is not consistent with the injuries sustained by the deceased and/or the forensic evidence obtained from the applicant's person and clothing. Whereas there was evidence of the deceased's blood on the trainers and jeans of Hughes the shoes worn by Boyle were light pumps and there was a limited amount of the deceased's blood on one of these. The appellant also admitted that she had been responsible for the assault on the deceased in phone calls to her uncle, Mr Tucker.

Bad character

[10] The admission of bad character evidence is now governed by the Criminal Justice (Evidence) (NI) Order 2004 ("the 2004 Order"). Article 3 defines "bad character" as evidence of, or a disposition towards, misconduct other than evidence which has to do with the alleged facts of the offence or misconduct in connection with the investigation or prosecution of that offence. Misconduct is defined in Article 17(1) as meaning the commission of an offence or other reprehensible behaviour. Decisions as to what is capable of constituting reprehensible behaviour are fact specific (see R v Palmer [2016] EWCA Crim 2237). In considering the application of the provisions of the 2004 Order it is important to recognise, therefore, that its reach extends beyond conduct that is unlawful.

[11] Article 6 (1) makes evidence of the defendant's bad character admissible if, but only if:

> "(a) all parties to the proceedings agree to the evidence being admissible,
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> (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,
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> (c) it is important explanatory evidence,
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> (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."

The evidence with which this case is concerned was admitted under Article 6(1)(d). Article 6(3) of the 2004 Order provides that 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.

[12] Article 8 (1) of the 2004 Order provides that for the purposes of Article 6(1)(d) the matters in issue between the defendant and the prosecution include:

> "(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
>
> (b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect."

The remaining subsections in Article 8 provide that a defendant's propensity to commit offences of the kind with which he is charged may be established by evidence that he has been convicted of an offence of the same category or description. Although propensity to commit offences of the kind with which he is charged is a matter in issue the court must be satisfied that it is an important matter in issue before determining that it is admissible pursuant to Article 6(1)(d).

[13] The new law making a propensity to commit offences of the kind with which he is charged a matter in issue in criminal proceedings was considered in detail in R v Hanson [2005] 1 WLR 3169. At paragraph [7] the court set out the well-known test requiring first, consideration of whether the history of convictions established a propensity to commit offences of the kind charge, secondly, did that propensity make it more likely that the defendant committed the offence charged and thirdly, was it unjust to rely on the convictions and in any event would the proceedings be

unfair. Although these are the appropriate questions when considering whether to admit convictions on the basis that it is contended that the defendant has a propensity to commit offences of the kind with which he is charged the position is different where it is sought to admit convictions on the basis that they are relevant to a different important matter in issue.

[14] The matters in issue in a criminal trial principally include whether the defendant did the act or made the omission charged against him and, if he did, whether he did so with the relevant state of mind. There may be available defences such as self-defence, duress or necessity. Where such issues are live they are invariably important matters in issue. In addition to these primary issues there may be other issues whose resolution one way or the other will not be determinative of the outcome of the case but the importance of those issues will depend on the facts of the individual case.

[15] In this case the prosecution applied to admit six previous convictions of the appellant. These were:

(a) Two assaults on the police when the police were conducting a search of Bridge Street on 27 December 2010. The appellant had been drinking. She kneed a police officer in the leg.

(b) On 19 May 2011 under the influence of alcohol, the appellant assaulted another woman in Lurgan by striking her and throwing her to the ground.

(c) On 31 October 2011 Stephen Hughes, the co-accused and the appellant were abusive and aggressive with the police. The appellant threw a can of beer striking a police officer.

(d) On 18 November 2011 the appellant and her mother were in a shouting and screaming match when police were called to 56 Dill Avenue, Lurgan. The appellant was highly aggressive and intoxicated. She banged her head against the sink and kicked the toilet. She kicked a police officer on the arm.

(e) On 2 December 2011 there was another domestic dispute this time at 35 Dill Avenue, Lurgan. The appellant had to be given a sedative in hospital. She kicked the door shattering a glass inset and also kicked a police officer in the face.

(f) On 29 December 2011 the appellant entered 32 Limefield Rise, Craigavon without permission in order to drink. She was abusive to the police, kicking out and finally biting Constable Dunlop on the arm.

[16] The written application was made on the basis that the prosecution would rely on the fact of the convictions without setting out the detail of the circumstances and it was contended that these were relevant to the issue of whether the appellant had a propensity to commit an offence of the kind with which she was charged. It is now common case that the convictions were in respect of assaults where limited harm was caused and where there was no specific intent involved in the commission of the offences. Apart from the last incident where the appellant was convicted of assault occasioning actual bodily harm the remainder of the convictions were for common assaults.

[17] In the course of the oral submissions the prosecution put the case in a rather different way. It was submitted that the convictions were relevant to the issue of the appellant's propensity to commit acts of violence. One of the issues in the case was whether the appellant and her co-accused participated in the assault and it was contended that the convictions were relevant to that issue. The second issue concerned the contention by the appellant that she had attempted to stop the co-accused from assaulting the deceased. The prosecution submitted that the history of assaults was relevant to whether in these alcohol fuelled circumstances the jury should accept that account.

[18] The defence contended that there were a number of grounds on which the application failed or alternatively which demonstrated that it was unfair to the appellant to admit the convictions. The first concerned the difference between the charge of murder and the assaults in respect of which she was convicted. That was clearly a good point in relation to a propensity to commit murder. The second was a related point concerning the gravity of the harm caused as a result of this incident as compared with the harm caused in the matters for which the appellant was convicted. That did not diminish the aggressive and uncontrolled behaviour of the appellant in the course of these crimes.

[19] The third point was based on the proposition that five of these six incidents occurred in the course of a confrontation with police. This was described by Mr Kearney as reactive violence. We accept that these convictions involving police tended to suggest an absence of premeditation and planning in respect of the assaults but they also supported a tendency to resort to violence, particularly after the consumption of alcohol, and undermined the argument that the appellant was likely to be a force for restraint in this situation.

[20] The final point concerned the absence of any conviction between December 2011 and July 2014. We accept that it is relevant to take into account the passage of time as it may diminish the relevance of the convictions and accordingly assist with

the argument that it would be unfair to admit them. In this case, however, the passage of time is modest and the list of convictions demonstrated a clear tendency to resort to violence associated with the consumption of considerable quantities of alcohol.

[21] The learned trial judge noted that the prosecution contention was that the convictions were relevant to a propensity to commit acts of violence and to whether the appellant participated in the assault on the deceased. The issue of whether the appellant participated in the assault and the related issue of whether she sought to restrain her co-accused were clearly important matters in issue in the context of this case. There was no real answer to the fact that these convictions were plainly relevant to those questions. The passage of time between the convictions and the offence was relatively short. We consider that there is no basis for concluding that it was unfair to admit the convictions having regard to the issues to which they were relevant and in any event that we should not interfere with the learned trial judge's discretionary judgment to admit them.

The new grounds

[22] Before sending the jury out to deliberate the learned trial judge provided them with a route to verdict. In relation to each of the co-accused he advised that they should ask whether they were satisfied beyond reasonable doubt that the assault on the deceased which took place on 3 July 2014 materially contributed to his death. If the answer to that question was yes the next question was whether they were satisfied beyond reasonable doubt in respect of each defendant that the defendant directly participated in the assault. If the answer to that question was yes they should then ask if they were satisfied beyond reasonable doubt that the particular defendant intended to cause at least grievous bodily harm.

[23] During his evidence in the trial the co-accused denied that he had attacked the deceased but claimed that the attack had been carried out by the appellant. When he was interviewed for his pre-sentence report he admitted that he had kicked and punched the deceased on an unspecified number of times to the head in a moment of madness. His counsel relied upon this as a belated indication of remorse. It was accepted that the admissions made by him were entirely consistent with the jury's verdict and that the admissions did not involve him accepting sole responsibility for the attack nor did they exonerate the appellant.

[24] It was submitted that this admission demonstrated that the co-accused had lied on multiple occasions in the course of the trial. Such lies would plainly have affected his reliability and credibility as a witness against the appellant. It was submitted that the course of the trial would have been entirely different if the

co-accused had made his admissions in advance of the trial or pleaded guilty. Mr Kearney developed his submission as to the various ways in which the co-accused had lied and how that could have been used to the advantage of the appellant.

[25] The appellant and co-accused were jointly charged on a single count of murder. There was no application under section 5(3) of the Indictments Act (NI) 1945 to sever the indictment on the basis of prejudice to the appellant. The judge, of course, always retains a discretion as to whether or not the indictment should be severed but the discretion must be exercised judicially. That was helpfully established by R v Grondkowski and Malinowski [1946] KB 369 where two defendants were jointly charged with one count of murder. After conviction an appeal was lodged on the basis that the judge should have ordered separate trials in a case were an essential part of one prisoner's defence was an attack on the other prisoner. Lord Goddard CJ said:

> "The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners. If once it were taken as settled that every time it appears that one prisoner as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it.
>
> There is no case in which this has ever been laid down, and in the opinion of the court it would be most unfortunate and contrary to the true interests of justice if it were. The matter was well and, as we think, quite correctly dealt with in Rex v. Gibbins and Proctor , where Darling J., delivering the opinion of the court, said: "The rule is, that it is a matter for the discretion of the judge at the trial whether two people jointly indicted should be tried together or separately.""

Where the evidence is broadly the same against each defendant and the issues include whether either of them committed the murder individually or whether they did it together the interests of justice will invariably lead to a joint trial in the interests of the witnesses and the avoidance of inconsistent outcomes.

[26] It follows from the verdict that the jury must have concluded that the co-accused had lied and the members of the jury were, therefore, fully aware of the

frailties of his evidence in the trial. It was for the jury to determine which part of the co-accused's evidence, if any, was reliable and what weight they should give it. In light of the position taken by each accused at the time of the trial there was no suggestion that the procedure used for the trial was in any way unfair. In particular there was no proper basis for the judge to sever the indictment.

[27] We entirely accept that the trial would have been conducted on a different basis if the admission of the co-accused had been made before or during the trial but that does not in any sense render this conviction unsafe. The appellant would still have undergone a fair trial albeit that the approach of the prosecution and defence may well have been different. The fact that the trial would have been conducted differently does not cast any doubt on the fairness of the original trial.

[28] This was a case in which the admission by the co-accused accepted in substance the finding of the jury as to his guilt. The admission did not call into question the participation of the appellant or undermine in any way the verdict. It did not give rise to any concern about the safety of the appellant's conviction. Taking this argument to its ultimate conclusion the admission is irrelevant. Once the jury convicted both accused it must follow first, that they rejected the evidence of the co-accused. That called into question the reliability of his evidence against the appellant because the jury must in substance have concluded that the entire core of his case was a fabrication. Since his evidence was unreliable the submission was that it accordingly called into question the safety of the appellant's conviction because he had been called as a witness of fact. Of course exactly the same argument could be made in respect of the safety of the conviction of the co-accused. This submission is an undisguised attempt to evade the consequences of a perfectly properly joined indictment. We refuse leave to add this ground of appeal.

[29] The second ground which the appellant sought to introduce concerned the evidence that was given in relation to a cut on the deceased's nose. The appellant's case was that after the assault upon the deceased she had had to clean up and in particular had wiped substantial quantities of blood from his nose. The pathologist, Dr Bentley, gave evidence that he thought it probable that the injury to the nose occurred after rather than before death and that it did not, therefore, bleed. The judge directed the jury on the basis that the evidence of Dr Bentley was to the effect that the injury to the nose had been caused after death and that accordingly it would not have bled. That was, therefore, an inconsistency in the appellant's account.

[30] In fact Dr Bentley had accepted in cross-examination that he could not be certain that the injury was caused after death and that it was possible that the injury had been caused before death. If so it could have bled profusely. The appellant

sought to adduce as fresh evidence report from Dr Cary but his evidence was essentially the same as that of Dr Bentley on this issue. Before the end of the charge a juror raised this issue in a note as a result of which the learned trial judge read out the evidence of Dr Bentley correctly including that portion of his evidence dealing with the possibility that the injury to the nose had occurred before the death of the deceased and accordingly would have bled profusely. In light of the requisition and subsequent correction of the position put by the learned trial judge there is no basis for admitting this ground or admitting the fresh evidence.

Applications to renew leave to appeal

[31] The prosecution opened the case on the basis that the defendants were guilty of the crime of murder either on the basis that each of them participated in the attack or that one had committed the attack and the other had encouraged, aided and abetted with the requisite *mens rea*. At the end of the defence case it was submitted that the prosecution should be confined to the direct participation case in light of the manner in which the accused was cross-examined. The learned trial judge accepted that submission.

[32] The appellant then launched an application for a direction on the basis that the evidence was equally consistent with the murder having been committed by either of them individually or together at the same time. These were the three different routes by which the jury could convict. Throughout his submissions Mr Kearney characterised "at the same time" as "simultaneous". That description is accurate as long as one does not interpret the word as meaning at exactly the same time. It was submitted that since it was impossible to determine which of the three routes led to the death of the deceased the appellant should succeed in the direction application. We do not accept that submission. In respect of each defendant there was plain evidence of admissions in respect of the attack upon the deceased. Those admissions together with the circumstantial evidence which included the forensic evidence tying each defendant to the blood of the deceased, the fingerprint evidence in relation to the appellant on the outside of the bannisters below where the attack took place, the conduct of the appellant after the assault, particularly in not using any of the opportunities available to her to get medical help, and the bad character material meant that the submission on a direction application could not succeed.

[33] It was further contended that the conduct of the prosecution in closing the case and including secondary participation as a basis on which the conviction could be established rendered the verdict unsafe. We reject that submission. The jury were advised on the law by the learned trial judge. It is common case that he did not

leave open to the jury a verdict on the basis of secondary participation. The route to verdict was absolutely clear that direct participation was required.

[34] A further point raised was that the learned trial judge ought to have closed the case to the jury on the basis that the appellant might have engaged in some form of assault either before or after or possibly even during the attack by the co-accused without a common plan and that this was what was described as a fourth way in which the death might have occurred. It is common case that there was absolutely no evidential basis for such an analysis of the events to be put before the jury. In order to do so it would have required the learned trial judge to proceed for the purposes of that part of his closing on the basis that the appellant's case that she played no part whatsoever in the attack but sought to restrain the co-accused was untrue. That could have been damaging to the appellant and might even have formed a ground of appeal after conviction.

[35] We are satisfied, however, that this point is also without substance. The route to verdict clearly required the jury to come to the conclusion that there was both direct participation and the requisite *mens rea* before the appellant could be convicted of murder. If the jury had concluded that the appellant participated in some way in the attack but did not have an intention to cause grievous bodily injury the route to verdict would have led to an acquittal. The failure to refer to this contrived possibility described as a fourth way was effectively catered for in the route to verdict.

Conclusion

[36] We are satisfied that the bad character evidence was relevant to important matters in issue in this trial being the appellant's participation in the attack and her account that she sought to restrain the co-accused. The learned trial judge did not consider that it was unfair to admit the evidence and we consider that he was correct to do so. We refuse the renewed applications for leave and the applications to pursue further grounds and introduce fresh evidence. The appeal is dismissed.