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*(subject to editorial corrections)**

THE CROWN COURT IN NORTHERN IRELAND

SITTING IN BELFAST

REGINA

v

LOUIS MAGUIRE & CHRISTOPHER POWER

RULING (Evidence against co-accused)

DEENY J

[1] A matter has arisen today, Monday, 3 October in regard to this trial of Louis Maguire and Christopher Power. The court had earlier acceded to two applications from the prosecution and from and on behalf of the first Defendant to admit bad character evidence against Christopher Power. The context of that is obvious and I will return to that in a moment if necessary, but briefly his counsel put to the co-accused, Louis Maguire, that he murdered Eamon Ferguson and that Power was asleep upstairs. On the evidence before the jury at this stage, either one of them killed Mr Ferguson or the other or both.

[2] The stage of the trial has been reached where Christopher Power is about to give evidence. The jury have been waiting all morning. In an ideal world dealing with a novel application that has been made to me, one might adjourn the matter at some length, but the trial has already, for a variety of reasons, run beyond its estimated length and I have a duty to try and bring it to a close while my jury remain intact. I therefore concluded it is my duty to resolve this matter now without more than a short adjournment which I have had and I believe I can deal with it justly in that context.

[3] The issue is that the Defendants became aware from the Crown that there was CCTV footage from Belfast city centre of Christopher Power committing an offence of actual bodily harm in 2013, i.e. as it was August, less than a year before the

murder with which he is now charged. It was obtained by the defendants, apparently last week, through the Crown. No objection is taken, quite rightly, on notice grounds as it only came to their attention then.

[4] Mr Sam Stein QC who appears with Mr McCreanor for Louis Maguire wants to play this video for the jury. It is not in dispute that the images contained in it are graphic as the first part of the video shows a Polish gentleman, the injured party, flying through the air on to the street and moments later a figure who is Christopher Power comes and punches him several times on the ground and kicks him.

[5] There is then a longer piece of video showing Power with some other persons walking away. At one point he is feeling his right hand or fist which he presumably used in punching the injured party. As I say, there was a subsequent conviction.

[6] The issue is that Mr Duffy objects to the admission of that video. Firstly, I have to look at the legal questions, the legal context in which I have to decide this matter. The matter is helpfully set out in the first of the two leading textbooks, Blackstone's Criminal Practice 2016 and counsel in their helpful submissions, including Mr Murphy for the prosecution, have drawn my attention in particular to paragraph F12.68 of the current addition of Blackstone's, although I have taken into account 12.67 as well. Paragraph 12.68 insofar as relevant reads as follows:

> "Note that there is no discretion to restrain an accused from taking advantage of Section 101(1)(e), and the PACE 1984, s. 78, which may be prayed in aid in relation to the prosecution evidence has no application to evidence tendered by the defence. Where evidence of propensity satisfies the test for admissibility in Section 101(1)(e), it may be adduced notwithstanding that it is also highly prejudicial: s. 101)(3) does not apply (*Musone* [2007] 1 WLR 2467, where the Court also considered and dismissed arguments based on Article 6 of the European Convention on Human Rights before concluding that, 'The only apparent control on the deployment of evidence by one defendant against another is that which is contained in Section 101(1)(e)'. See also *Apabhai* (2011) 175 JP 292 pointing out that there is no statutory or residual common-law support for such a discretion, and Philips [2012] 1 Criminal Appeal Reports 332, emphasising that there is no discretion to exclude such evidence on either fairness or 'case management' grounds where the introduction of untried satellite fraud issues and an already complicated prosecution was likely to confuse the jury.

> The common law followed the same rule: e.g. in *Grant* [2004] EWCA Crim 2910, G was charged with murder and was shown by his co-accused to have a relevant propensity by reference to an incident some months earlier for which he was awaiting trial. G relied on his privilege against self-incrimination in respect of the earlier incident, as he was entitled to do, thereby hampering his challenge to the evidence. Provided however that G had the opportunity to give the evidence he wanted and to cross-examine the witnesses called for the co-accused and the matter was summed up fairly, the Court was satisfied there is no unfairness."

[7] Section 101(1)(e) of the Criminal Justice Act 2003 is to the same effect as Article 6(1)(e) of the Criminal Justice (Evidence) Northern Ireland Order 2004, and insofar as relevant it reads:

> "In criminal proceedings evidence as to the defendant's bad character is admissible if, but only if –
> (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant."

[8] Now, Mr Stein brought an application earlier which was successful, as was the Crown's, as I have mentioned, to introduce bad character evidence against Power. I concluded that it had substantial probative value in relation to an important matter in issue between the defendant and the co-defendant, namely which of them, if it was not both of them, murdered Eamon Ferguson. So the dicta from the English cases are fully applicable here.

[9] Part of the importance of this matter and that Mr Stein for Maguire stressed is that Article 6(3) of our 2004 Order has an express discretion by which the Court must not admit evidence if it appears to the court 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, that is in relation to Article 6(1)(d) and (g), (d) being an important matter in issue between the defendant and the prosecution and (g), the defendant has made an attack on another person's character.

[10] Now in fact I concluded that both of those did apply to Power in any event. But the point being stressed is that where a co-defendant wants to put in the matter, the court in effect does not have a discretion and therefore Mr Stein is entitled to put this in, in effect, as of right.

[11] The passage in Blackstone's makes express reference to a decision of the Court of Appeal in England in R v Musone [2007] 2 Criminal Appeal Reports 29, at page 379, where Lord Justice Moses delivered the decision of the court and where he deals

with the relevant issues, particularly at Paragraphs 50 to 53 of the judgment. Amongst other things he addresses the issue of Article 6. He concludes:

> "In short it is difficult to envisage room for invoking the right to a fair trial enshrined in Article 6. Once the Judge concluded that the evidence was of substantial probative value, he had no power, absent the application of the rules made under Section 111, to exclude the evidence on the basis that to admit it would be to infringe...rights to a fair trial under Article 6. The only apparent control on the deployment of evidence by one defendant against another is that which is contained in Section 101(1)(e). Admissibility rests solely on the court's assessment of the probative quality of that evidence."

[12] I accept this has probative value and I might say more about that in a moment as a decision of the Court of Appeal of England is not strictly binding on me but is of highly persuasive authority and in the past our own Court of Appeal has been reluctant to depart from decisions of the Court of Appeal sitting in London.

[13] The other leading textbook, Archbold, deals with the matter at para. 1372(a) at page 1588 of the 2016 Edition and Mr Stein helpfully took me to those matters and they re-enforce the point that is being made.

[14] He further points to the decision cited in the textbook Archbold, in the Queen v Rafik [2005] Criminal Law Review 963 where the Court of Appeal upheld a conviction where the co-defendant had been allowed to lead material relating to an earlier prosecution even though it had led to an acquittal of the co-defendant whose character was being called into question.

[15] I pause here to reiterate that the evidence of bad character was admissible against Mr Power not only under 6(1)(d) and 6(1)(g) but 6(1)(e) in the context of one defendant necessarily at this stage blaming the other as in the only realistic defence that is left to them, and therefore at common law they would have lost the shield, as it used to be called, which has in any event been removed by the 2004 jurisdiction. However, I note the view expressed by one English Court of Appeal that one should concentrate on the statutory provisions and not look to the old law.

[16] Mr Gavan Duffy in his helpful submissions pointed out that the citation of Rafik there does make reference to Article 6 and the right to a fair trial, but I note that Rafik precedes by two years the decision of the Court of Appeal in Musone. In any event I cannot believe that Article 6 disappears but it is what is left to me as a discretion, if anything, in the light of it that really comes to be decided.

[17] One of the cases cited in Archbold is the older case of Lowery v The Queen [1974] Appeal Cases 85. I think it is helpful as illustrative of how the law has been

for some time, to read the headnote of that decision which was a decision of the Privy Council on appeal from the Supreme Court of Victoria in Australia.

> "The appellant and K were charged with the murder of a young girl which was a sadistic killing and the only explanation put forward for it was that they wanted to see what it was like to 'kill a chick'. The Crown's case was that they had been acting in concert but both the appellant's and K's defence was that the other had killed the girl. The appellant gave evidence of his good character, stressed the unlikelihood of his behaving in such a manner and said that because of his fear of K he had been unable to prevent the murder. K alleged that he had been unable to appreciate what was happening and had been powerless to prevent the appellant killing the girl as he had been under the influence of drugs. Despite the appellant's objection, the defence for K was allowed to call the evidence of a psychologist as to the respective personalities and on that evidence the jury were invited to conclude that the appellant was more likely of the two to have killed the girl. They were both convicted and the appellant unsuccessfully appealed to the full Court on the ground that the psychologist's evidence was inadmissible.
>
> On appeal by the appellant the Judicial Committee held dismissing the appeal that the evidence of the psychologist was relevant in support of K's case to show that his version of the facts was more probably than that put forward by the appellant and the whole substance of the appellant's case placed his admissibility beyond doubt as necessary to negative the appellant's evidence."

[18] I think it's not necessary to go to the judgment of the Judicial Committee in the light of that summary. So if a psychologist's evidence about the character of two defendants is admissible and was admissible 40 years ago, by implication the evidence of actual film recording of an incident is clearly admissible even if I have a discretion.

[19] I think it is not necessary for me to go to the other cases mentioned by Mr Stein. It seems to me that, as Mr Duffy admits, I have no discretion as to the admissibility of the evidence. He refines his argument by saying, yes, but I have a role, a residual role in how the evidence of bad character is produced. It seems to me that that may be right; in any event our own Court of Appeal may take a different view of these matters [the discretion]. So I propose to address the matter as

if I have a residual discretion regarding how the bad character evidence is to be proven.

[20] Pausing there, the two alternatives are, one, the one sought by Mr Stein, i.e. we just play the video for the jury which Mr Power has now seen this morning and will have seen in 2013 and if necessary follow-up questions are asked, or the alternative is that he, Mr Stein, cross-examines out of the video, so to speak, and it's only if Power denies what we can see there or seeks to give a false impression that the video would go in.

[21] Now, I take into account the submissions of counsel. I take into account Mr Duffy's submission and if I run through his arguments in favour of not admitting at all but I don't think he objects to the second course I have just mentioned or does not do so vigorously, the first videotape does not include the start of the incident, that is true. No video evidence is available in relation to Louis Maguire. That is true but the jury were told of his extensive record including aggravated assault on a former partner, wounding with intent, repeated assaults on the police and common assaults, and of course though Mr Duffy chose not to cross-examine him out of his record, he certainly cross-examined him comprehensively and ably with regard to various other weaknesses in his evidence.

[22] Although not raised by counsel, I take into account the fact that I excluded from evidence a remark overheard by a prison officer made by Maguire in the lead up to the trial for the reasons that I gave in my ruling in that regard, but those were very different circumstances.

[23] But against those arguments in favour of keeping out the video there are a series of other points. First of all the evidence is clearly relevant. It does show a propensity to violence. It is of substantive probative value. It is undoubtedly graphic but that graphic nature of it is likely to be of assistance to the jury in addressing the issue of the guilty of the two accused and the quality of the evidence of Mr Power.

[24] As Mr Stein rightly reminds me, this is a jury trial. It is for the jury to decide the truth or reliability of the evidence and to arrive at a safe verdict. Furthermore, it is clear that Mr Duffy no doubt will and I will also warn the jury not to place undue reliance on the video and in particular to be conscious of the fact that it is just by chance that a video is available of Mr Power committing an offence but none is available of Mr Maguire committing an offence.

[25] Next it seems to me right to take into account and to take judicial notice of the prevalence of CCTV in our society at the present time. We have seen earlier CCTV evidence in this case. It has been played showing these men both before and after the murder. So there is nothing exceptional about playing them a further piece of CCTV evidence albeit of a different character.

[26] Furthermore, I note the dicta in Archbold relied on by counsel regarding an inadmissible confession, i.e. the prosecution are not allowed to rely on it [but it] may still be used by a co-defendant as analogous authority for the proposition that even if I have a discretion, I have to bear in mind that I am in a different position there from dealing with a prosecution application. I have taken into account out of an abundance of caution a line of cases beginning with DPP v Conway and I am entirely satisfied that the mere admission of this video of Mr Power could not amount to and does not amount to an abuse of the process of the court.

[26] I take into account in favour of its admission, again the argument by analogy, that this is the best evidence of what happened in regard to that conviction for actual bodily harm. I take into account the circumstances, namely that though we do not know who, or we do not at the moment see who caused the unfortunate Polish gentleman to fly through the air on to the street, but we do see the co-defendant assaulting somebody who is recumbent in the way that Ferguson was here when he was attacked.

[27] I take into account therefore that there is a particular relevance in the images to be seen. There is no issue of satellite litigation. The video is quite short. I take into account a number of cases cited in Archbold showing that the practice certainly across the water, and I have not had my attention drawn to any Northern Ireland cases, is for the court to quite often, it seems, hear detailed evidence about evidence rather than just the mere criminal record of the accused. One can see that at 1366 of Archbold in the cases set out there and I take those cases into account. I take further into account that as I have mentioned already the ABH was very recent, within the year of these offences.

[28] Finally, I take into account that Mr Duffy very properly in the course of his case has drawn attention to video evidence helpful to his client showing him acting in a friendly manner hugging other men including the deceased as giving the impression of a genial and even gentle figure and it seems to be only right that the jury should see that there is another side to his client.

[29] So, even if I have a discretion, and insofar as I have a discretion, I consider that it is properly exercised here by admitting the video.