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THE CROWN COURT IN NORTHERN IRELAND

SITTING IN ANTRIM - COURT 1

THE QUEEN

-V-

MR DESMOND PAUL McCAUGHERN

Before: His Honour Judge Marrinan

APPEARANCES

COUNSEL FOR THE PROSECUTION: MR CONNOR, QC, MR CHESNEY, BL

COUNSEL FOR THE DEFENDANT: MR McCREANOR, QC, MR THOMPSON, BL

RULING

HH JUDGE MARRINAN:

Introduction

[1] This is the ruling on bad character.

This ruling determines the contentious issue of whether the prosecution should be permitted to adduce certain bad character evidence relating to the defendant, Desmond Paul McCaughern.

Time

[2] No issue arises in respect of this issue. The prosecution lodged its application on the 10th March 2015. In that application it argued that the question of propensity was an issue and relied on the gateway provided by Article 6.1(d) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (the 2004 Order). It sought leave to amend its said application on the 20th April 2016, the third day of the trial, to raise the question of a matter in issue between the prosecution and the defendant namely whether or not the defendant held an honest belief that the complainant, hereafter called C, was aged 17 years or over at the time of the alleged offence. I acceded to the Crown application to extend time without objection by the defence on the ground that the issue giving rise to the amendment was raised in evidence for the first time during cross-examination of C by defence counsel during the trial on the 20th April 2016.

[3] I was satisfied therefore in those circumstances that the application was made at the earliest opportunity and that there was no unfairness to the defendant.

The statutory framework

[4] Applications of this kind are regulated by the statutory regime established by the 2004 Order. The cornerstones of this legislation are ascertainable in two of its provisions. First, Article 3 bearing the title "Bad Character" provides that "… references in this Part to evidence of a person's bad character are to evidence of, or a disposition towards, misconduct on his part other than evidence which (a) has to do with the alleged facts of the offence with which the defendant is charged or (b) is evidence of misconduct in connection with the investigation or prosecution of that offence. This is followed by Article 4 which is in these terms:

(1) The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished;

(2) Paragraph (1) is subject to Article 22.1 in so far as it preserves the rule under which in criminal proceedings a person's reputation is admissible for the purposes of proving his bad character.

[5] Thus a significant reform effected by this legislation is broadcast early in its opening provisions. Consistent with the abolition of the former common law rules enshrined in Article 4.1, Article 6 specifies the conditions under which evidence of a defendant's bad character is admissible:

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

(a) all parties to the proceedings agree to the evidence being admissible;

(b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it.

(c) it is important explanatory evidence.

(d) it is relevant to an important matter in issue between the defendant and the prosecution,

(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,

(f) it is evidence to correct a false impression given by the defendant, or

(g) the defendant has made an attack on another person's character.

(2) Articles 7 to 11 contain provisions supplementing paragraph (1).

(3) The court must not admit evidence under paragraph 1 (d) or (g) if, on 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.

[6] Article 7 elaborates on the concept of "important explanatory evidence". The subject matter of Article 8 is "matter in issue between the defendant and the prosecution" and it provides:

(1) For the purposes of Article 6(1)(d) the matters in issue between the defendant and the prosecution include "(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence, (b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect."

(2) Where paragraph (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of

doing so) be established by evidence that he has been convicted of - (a) an offence of the same description as the one with which he is charged or (b) an offence of the same category as the one with which he is charged.

(3) Paragraph (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any reason, that it would be unjust for it to apply in his case.

(4) For the purposes of paragraph (2) - (a) two offences are of the same description as each other if the statement of the offence in a complaint or indictment would, in each case, be in the same terms; (b) two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this Article by an order made by the Secretary of State.

(5) A category prescribed by an order under paragraph (4)(b) must consist of offences of the same type.

(6) Only prosecution evidence is admissible under Article 6(1)(d).

[7] Article 6.1(d) and Article 8 are to be considered in conjunction with Article 17.1 which defines the words "important matter" as "*a matter of substantial importance in the context of the case as a whole.*"

[8] The defendant is charged on Count 1 with the rape of C, a female person under the age of 17 on a date between the 31st December 2007 and the 3rd January 2008. He is charged further on Count 2 with indecent assault on a female person under the age of 17, under Section 52 of the Offences Against the Person Act 1861. In so far as the question of propensity is concerned the requirements of Article 8.2 and 8.4 of the 2004 Order are made out in that both offences are in the same category of offences as prescribed by Part 2 of Schedule 1 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (Categories of Offences) Order 2006.

[9] It is to be noted that, given the age of C at the time of the alleged offence, if the jury acquit the defendant of rape on count 1 they should go on to consider whether or not they should convict the defendant of an offence of indecent assault on a female person under the age of 17. As regards this no issue of consent arises. The defendant relies on the defence of honest belief that she was aged 17 or over. (See R v K 2001 UK HL page 41.)

[10] Count 2 of the indictment alleges a specific incident of indecent assault said to have happened at the same place and time as the alleged rape.

The Present Application

[11] In seeking to adduce the evidence in question the notice as amended expresses an intention to adduce evidence of the following:

"*two relevant convictions for unlawful carnal knowledge of a girl under 17 years at Ballymena Crown Court on the 15th May 1987. A redacted copy of the relevant entries in the criminal record of the accused is attached hereto.*"

[12] However, when the issues were explored thoroughly at the hearing it was clear that the prosecution sought not only to adduce evidence of the convictions themselves but also the facts surrounding same in so far as they were relevant. Without objection by the defence the court was given a small bundle of papers consisting of the police officer's report on the matter together with a written statement of Detective Constable Trevor Boyce who interviewed the defendant on the 23rd November 1986 and a statement after caution made by the defendant on the same date. This statement was recorded by Detective Sergeant David Armstrong. Arising from questions raised by the court a further document was received during the course of argument without defence objection. This was the written statement of Detective Sergeant Armstrong made on the 21st January 1987. The result of this is that it was made clear, albeit at a late stage, that the notice, in effect, expresses an intention to adduce evidence not only of the said two previous convictions of the defendant for unlawful carnal knowledge of a girl under 17 years but also the facts surrounding same in so far as they were relevant.

[13] Both prosecution and defence counsel argued their case on this basis and it is on this basis that I make this ruling. I do not propose here to set out all the circumstances of the matter which led to the defendant's pleas of guilty at Ballymena Crown Court on the 15th May 1987. The relevant facts surrounding the convictions appear to me to be:

(1) the offences were committed against the same girl in Kells, County Antrim on the night of the 22nd/23rd November 1986;

(2) both offences were committed within a short time of each other, one in a car and the other in a house of a friend of the defendant;

(3) the victim was a 15 year old school girl. The defendant was then 22 years old;

(4) the victim had consumed alcohol in the defendant's presence from a ten glass bottle of Vodka which he was drinking from and which belonged to him. The defendant stated that she had had a lot of drink;

(5) in the police interviews the defendant initially denied any sexual intercourse between himself and the girl;

(6) later, he admitted that sexual intercourse had taken place.

(7) in doing so he put forward a claim of his honest belief, that the girl was 17 years or over at the time of the offences. Furthermore (a) he knew the girl for about seven years before the incident; (b) in initial interviews he claimed not to know her age but thought she might be 16 or 17; (c) he thought she might still be at school; (d) when he admitted having had sexual intercourse with the girl he stated that he took her for 17 years at least and that he never thought for a minute he was doing any wrong. When asked did he understand what the offence of unlawful carnal knowledge was he replied that it was "*having sex with someone under age*".

The prosecution case in the present matter

[14] I do not propose to set out the case in detail. The substantive allegations are:

(1) The complainant C in this case was 15 years and four months at the time of the alleged rape and indecent assault on or about the 1st January 2008. The defendant was 43 at the time.

(2) The defendant paid for C to have two or three alcoholic drinks in the restaurant/bar of a golf club ("the Golf Club") where he was a customer and a member of the club and she was working for a few months part-time as a waitress. This was on or about the evening of the 1st January 2008. It is alleged that he invited her to join him and two friends for a few drinks in a nearby hotel ("the Hotel"), where he bought her two further glasses of rosé wine at the bar of the hotel. It is said that she consumed the drinks in the the Golf Club although in the Hotel she only sipped from a second glass of rosé wine. She said that she was neither tipsy nor drunk.

(3) Sexual intercourse alleged to be rape but including acts of indecent assault were committed by the defendant against C in a bedroom of the Hotel on the same evening. It is claimed that D booked room 101 for this purpose, paying a rack rate of £90. He did not stay the night and went back to the Golf Club with C.

(4) After a complaint regarding the matter was made to the police in 2011 the defendant in interviews in May 2012 denied that any sexual intercourse or any sexual activity of any kind had ever happened so far as he and C were concerned. He said he did not find the girl attractive. She was merely a friend. In the course of these denials he said (a) he knew C for about five to six months as she was a waitress in the Golf Club. He was a member who regularly used the restaurant bar belonging to the Golf Club; (b) he had never invited C to go to the Hotel nor had he ever bought her any drinks there; (c) he said that he had not a clue as to C's age at the time of the alleged incident. He later said that he had "no" idea, definitely "not", as to her age. Asked to

give a guess he said probably 19 or 20. He said he was not aware that she was a school girl; (d) he claimed that C had been in the Hotel on the night in question but that it was a chance meeting. Both of them had gone independently to the Hotel according to the defendant. He agreed that he had been drinking in the Golf Club bar earlier that day and drinking most of the day. The defendant agreed that he had paid for a room in the hotel booking it that night because he knew he had too much drink and he did not want to go home to his wife and children in that condition.

(e) He claimed that C had followed him uninvited up the stairs when he was going to retire to the room and that she had probably overheard him talking to the bar man about booking a room. He said that he told her not to follow him up the stairs or come to the room with him. She accepted this and went away. He described her as "*a wee girl*". He decided within 15 minutes of being in the room not to stay the night and in fact went home, he thought by taxi. He suggested that when C came over to him in the bar of the Hotel she tried to give the impression that they were a couple by touching him probably on the shoulder and doing other "*silly things.*" He felt she was "*slightly intoxicated.*"

(f) He said that he might have bought her a drink at the Golf Club but this was no more or less than he did for other members of staff but certainly would not have bought her two or three drinks on the same night. C had alleged that he reassured her during the act of rape that she would not get pregnant because he had had a vasectomy. The defendant agreed that he had had a vasectomy but said this was common knowledge and that he was bantered about it among his friends at the Golf Club bar. He described her complaints as total fabrication.

[15] The first defence statement was lodged on the 3rd February 2015. In it the defendant denies all allegations. The first amended defence statement was lodged on the 2nd June 2015 and signed by the defendant shortly before the case was first due to be heard. In this document the defendant agrees at paragraph four that sexual intercourse with C did occur between the 31st December 2007 and 3rd January 2008 but that it was consensual. Finally, in a further addendum, the defence statement of the 21st April 2016 i.e on the fourth day of the trial, the defendant asserts that, as regards the count of indecent assault, at all times he held an honest belief that C was a girl over the age of 17. The matter had been first flagged up in the absence of the jury on the first day of trial and first put to the complainant at the end of her cross-examination.

[16] At paragraph six of this further amended defence, he says that he found C to be very attractive, describing her as tall with a good figure. Finally, in terms of these amendments the defendant admits effectively that much of what he told the police in the number of interviews in May 2012 was untruthful, particularly when he stated that nothing of a sexual nature occurred and that he did not find C attractive.

[17] In the particular circumstances, with the agreement of counsel, I formed the view that the court should defer its ruling on whether the bad character evidence should be adduced until the prosecution's case had reached an advanced stage. I considered that this would enable the court to make a ruling on a more fully informed basis and, in particular, to evaluate any potential unfairness to the defendant. I was prompted to adopt this course by virtue of the matters highlighted in argument relating to alleged frailties and discrepancies in relation to the evidence of C. In adopting this approach I was influenced by decisions such as the Queen v Gyima and another 2007 EWCA Crim 429.

[18] In determining the present matter the Court in my view must address the following questions:

(a) is the bad character evidence in play relevant to an important matter in issue between the prosecution and the defendant?;

(b) what is the issue or what are the issues in questions?;

(c) in particular does the bad character evidence give rise to a propensity on the part of the defendant to commit the offence of indecent assault as alleged by the prosecution?;

(d) if the propensity threshold is overcome does the bad character evidence make it more likely that the defendant committed the indecent assaults?;

(e) if the threshold requirements outlined above are satisfied, would it be unjust to permit the evidence to be adduced and, in any event, will the defendant's trial be rendered unfair if this evidence is presented to the jury?

[19] The first issue on which the bad character evidence could have a bearing is that of the defendant's claimed honest belief that C was 17 years or more. One bears in mind that this was an issue never raised with the police nor raised at any time right up until the trial in April 2016. Of course, it is only relevant in relation to the alternative lesser count of indecent assault on a girl under 17 in relation to count one and in relation to count two.

[20] This is a highly contested issue. Secondly, and relatedly, the question of propensity falls to be considered. In that respect the Court must first be satisfied that the bad character evidence gives rise to a propensity on the part of the defendant to commit an offence of the kind with which he is charged. Secondly, if thus satisfied, the Court must further be satisfied that this renders him more likely to be guilty of such an offence. Thirdly, the Court must be satisfied that these considerations constitute an important matter in issue between the defendant and the prosecution. Fourthly, the

Court must be satisfied that the contentious evidence is relevant to this issue and in determining these questions the Courts bears in mind that if the evidence in question is admitted the jury will be the ultimate arbiter of whether it in fact establishes (a) a propensity on the part of the defendant to commit the offence alleged and (b) a greater likelihood that he did so.

[21] The next question of whether the admission of the contentious evidence would have such an adverse effect on the fairness of the proceedings such that the court ought not to admit it, falls to be considered only when those threshold requirements are overcome. Further, by virtue of Article 6.4 the court is enjoined to take into account particularly the lapse of time between the earlier event or events and the date of the subject offence. The rationale underlying this discreet provision is that the more distant in time the previous conduct the less likely it is to be indicative of propensity and likelihood in the terms in which these concepts are explained in the legislation. It is to be remembered too that the prosecution's position as clarified in argument is that they accept that the two 1987 convictions for unlawful carnal knowledge were effectively, one event or two events within a very short period of time and are not relied on to prove the matter in issue between the prosecution and the defence in respect to the count of rape. They are only relied on in respect of the alternative charge of indecent assault if the jury acquits the defendant on the more serious charge of rape in Count 1 and of course in respect of count 2 itself.

20. The defence argue that to admit such evidence relating to lesser counts could well prejudice the defendant in the eyes of the jury on the more important count. These considerations were addressed extensively in the Queen v Hanson & Others 2005 EWCA Crim 824. Propensity is not defined by the legislation. The Oxford English Dictionary defines it as "*an inclination or natural tendency to behave in a particular way.*" In the present case the prosecution argue that the defendant's criminal behaviour in having sexual intercourse in 1986 with a 15 year old girl together with the circumstances of this case where he now admits sexual intercourse with a 15 year old girl, fulfils the test for propensity. They readily agree that if one was looking at two burglaries, for example, separated in time by 21 years no such application would succeed except in the most exceptional of circumstances.

[22] In Hanson the Vice-President, Rose LJ, sets out the relevant principles (beginning at paragraph 7) "*where propensity to commit the offence is relied upon there are thus essentially three questions to be considered.*

(1) one, does the history of convictions establish a propensity to commit offences of the kind charged?

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

(3) is it unjust to rely on the conviction(s) of the same description or category; and, in any event, will the proceedings be unfair if they are admitted?"

8. In referring to offences of the same description or category, "*Section 103(2) is not exhaustive of the types of conviction which might be relied upon to show evidence of propensity to commit offences of the kind charged, Nor however is it necessarily sufficient in order to show such propensity that a conviction should be of the same description or category as that charged.*

9. *There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity, but it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged (Compare DPPV P {1991} 2AC 447 at 460E to 461A). Child sexual abuse or fire setting are comparatively clear examples of such unusual behaviour but we attempt no exhaustive list. Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction for shop lifting, will not, without more, be admissible to show propensity to steal. But if the modus operandi has significant features shared by the offence charged it may show propensity.*

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

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

12. It will often be necessary, before determining admissibility and even when considering offences of the same description or category, to examine each individual conviction rather than merely to look at the name of the offence or at the defendant's record as a whole. The sentence

passed will not normally be probative or admissible at the behest of the Crown, though it may be at the behest of the defence. Where past events are disputed the judge must take care and not to permit the trial unreasonably to be diverted into an investigation of matters not charged on the indictment."

[23] I have sought to examine the individual circumstances of the 1986 incidents. The prosecution argue that the previous convictions demonstrate a tendency to unusual behavior, in that for a grown man to have sexual intercourse with a child of 15 is just such unusual behavior, indulged in by a miniscule proportion of the population and is therefore unusual in the sense that that word is used in the Queen v Hanson. It is behavior abhorrent to the vast majority of the population.

[24] In the Queen v Cox 2007 EWCA Crim 3365, beginning at paragraph 21, *Hughes L J noted:*

*"… Mr Sweeney further contends that the previous incidents which gave rise to the convictions in 1981 involved, first of all, consensual behaviour between the defendant and the girl; secondly, what he described as an actual relationship; thirdly, one in which the defendant believed that the girl in question was 16." (*Sixteen being the appropriate statutory age of consent in England at that time). *"It is right to say that the defendant told the police in interview about these previous events, that he had never known the true age of the girl, even after he had been prosecuted for offences in relation to her. However that may be, we are satisfied that they were not powerfully distinguishing features as between the earlier case and the present allegation but rather that the similarities significantly outweigh any differences. It may well be that the events which gave rise to the convictions in 1981 had been events which took place with the consent of the child but the present allegation was not an allegation of a hostile touching. It rather has the appearance of a touching which hoped for acquiescence and if it had succeeded would have been likely to lead to consensual behaviour.*

22. *As to the suggestion that the previous incident involved a genuine relationship it needs to be observed that at the time of the offences in 1980 or 1981 the child victim was 12 and the defendant was 33. If it had been a case of a teenage affectionate and experimental relationship in which the female party happened to be under the age of consent then we can well see that there would have been greater foundation for the argument that the circumstances significantly differed from the present allegation. But a sexual interest by a grown man, properly developed with no handicaps, in his 30's, for a child of 12 is a different proposition altogether.*

23. The allegation in the present case was that the defendant had displayed a similar sexual interest in a child of essentially the same age, a pubescent girl.

27. We are quite satisfied that in neither Hanson nor M [2006] EWCA Crim 3408 was the Court purporting to lay down any rule as to when previous conduct many years ago or otherwise is capable of establishing propensity to offend as now charged. Indeed, we observe that in the judgment in M, Lord Justice Keene, giving the judgment of the Court, specifically averted

to the fact that there are no hard and fast rules applicable in this area of law. The Court in that case did not have to consider the question of whether a demonstrative abuse of a child of 12, 20 years or thereabouts before an allegation of similar abuse was capable of establishing a propensity to offend as charged or not. It referred, by way of example, to highly unusual forms of sexual activity. It does not seem to us to purport to lay down a rule for an offence which the Court was not having to consider.

28. There is, it seems to us, force in the proposition which is to be gathered from the case of P, one of those considered in Hanson, that a defendant's sexual mores and motivations are not necessarily affected by the passage of time.

29. In the end, we stand back from the question in the present case, in this matter, and we ask ourselves whether the fact that this defendant had, many years ago, demonstrated a sexual interest in a pubescent girl of 12 made it more likely that he had committed the offence which was now charged. In ordinary common sense, the answer to that is, unhesitatingly yes, it did."

[25] In passing I note some significant similarities in relation to the 1986 matter and the present case. One: the age of the complainant, 15 then, 15 now. Secondly; the use of alcohol, given by the defendant to the child. Thirdly; initial denials of any offending or any sexual activity. Fourthly; later admissions in relation to sexual touching and, in both cases intercourse and, fifthly; a claim made in both cases of honest belief that the young person was aged 17 or over.

[26] The defendant's counsel drew attention to rulings such as the Queen v Benabbou 2012 EWCA Crim 1256. That was a case where the prosecution sought to introduce an earlier conviction for rape in 2002 in order to demonstrate a propensity to commit sexual assault by penetration under the more recent legislation, effectively rape, in 2010. The Court ruled in that case that the rape conviction although technically admissible should not be admitted in evidence because the similarities were limited and there were also some dis-similarities. Following Hanson and comparing the earlier convictions with the circumstances in this case on the issue of indecent assault I am satisfied that the evidence and circumstances of the earlier offences is admissible on the issue of propensity to engage in highly unusual sexual activity. I am also of the opinion that it is admissible in relation to the issue of whether or not in the present case the defendant had an honest belief that C was 17 or over. The defendant's honest belief in this case must arguably be influenced by his Crown Court experience in 1987 and logically therefore should have put him on notice of the importance of a proper examination of the age of the girl in this case.

[27] I am persuaded that the defendant's sexual mores and motivations are not necessarily affected by the passage of time. Of course, this is only a part of the Court's task. The next consideration as to whether or not to admit the evidence arises 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 it in the defendant's case. Furthermore, under Article 6(3) the court must not admit evidence under Section 1(d) if, on 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. The court bears in mind the decision of the House of Lords in the Queen v K [2002] 1AC 462. It dealt with two questions certified for it:

(a) is a defendant entitled to be acquitted of the offence of indecent assault on a complainant under the age of 16 years contrary to Section 14.1 of the Sexual Offences Act 1956 if he may hold an honest belief that the complainant in question was aged 16 years or over?

(b) if, yes, must the belief be held on reasonable grounds?

[28] Lord Bingham observed at paragraph 23(2) "*while a defendant's belief need not be reasonable provided it is honest and genuine, the reasonableness or unreasonableness of the belief is by no means irrelevant. The more unreasonable the belief the less likely it is to be accepted as genuine":* See R v Williams (Gladstone) [1987]3 All ER, 411, 415, and, at subsection (3), "*although properly applied to Section 1 of the 1960 Act and Section 14 of the 1956 Act, the presumption cannot be applied to Sections 5 and 6 of the 1956 Act. Those sections as a pair derived directly from corresponding sections in the 1861 Act, as demonstrated above. The statutory or young man's defence was introduced into what is now Section 6. Its omission from what is now Section 5 is plainly deliberate. A genuine belief that a child three years under the age of consent was over that age would in any event defy credulity. Section 6.3 of the 1956 Act plainly defines the state of knowledge which will exonerate a defendant accused under that section, and this express provision necessarily excludes the more general presumption.*"

[29] It cannot be suggested in this case that the introduction of the evidence that the prosecution seeks to have introduced is sought to be adduced to support a case that is otherwise extremely weak. This is not a case where the principles in the Queen v Galbraith apply. Defence counsel acknowledge this. Nor has it been suggested that the defendant would have difficulty in recalling the earlier events, for example, his decision to plead guilty after raising the issue of honest belief. The most substantive issue on which I have reflected carefully is the defence's contention that the bad character evidence of what happened in 1986 has no bearing whatsoever on the principal count 1 in the present case- that is the count of rape. Although clearly telling untruths to the police in interview the defendant is now making a case that he believed that C was consenting to sexual intercourse and that such belief was reasonable. Even on the basis that the bad character evidence is admissible on the issue of propensity and on the matter in issue of honest belief, the defence say that it says nothing as to the most significant allegation in this case, that the defendant raped the complainant and that this is a very different situation to that which might pertain where the prosecution had confined itself to charges of indecent assault only. Once the evidence of bad character

goes in, it is argued, the jury may well rely on it to some extent when considering whether or not they are satisfied that there was no consent in relation to the charge of rape. It is suggested that the indecent assault on a child under 17 as an alternative to rape and free standing on count two are significantly less serious and the balance would be much better struck by allowing the jury to consider the more serious allegation of rape without the potentially dangerous distraction of knowing of the alleged propensity to have sex with underage girls.

[30] The maximum sentence for rape is life imprisonment. At the time of the events in 1986 the maximum sentence for unlawful carnal knowledge was two years but I also note that within a year of that conviction Parliament saw fit to raise the maximum sentence for that type of offending i.e. indecent assault on an underage child, to ten years which is not an insignificant matter. This is not like comparing a serious charge with a trivial charge in my view.

[31] Having considered the matter I am of the view that the admission of this evidence would not have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it. I have also had close regard to the length of time between the two events, that is between 1986 and 2007 and the date of the trial in 2016. I have also had regard to the defendant's right to a fair trial under Article 6 of the Convention and under the relevant provisions of the Police and Criminal Evidence (Northern Ireland) Order 1989. I conclude that the bad character evidence under consideration is plainly relevant to the issue of propensity as earlier described in the cases. The defendant now belatedly accepts that he had sexual intercourse with a 15 year old girl and the defence are right in saying that that in itself is no longer a matter in issue between the parties but the question of whether or not he may have had an honest belief as to her age is very much a live issue and a crucial one for, without that defence, the defendant would have no defence to those charges. I consider that the similarities between the two incidents are such that this evidence may well go to establish a propensity on the part of the defendant to commit the crime of indecent assault on an underage girl. Furthermore, such propensity if accepted by the jury, renders him more likely to be found guilty of the offence.

[32] The jury will be the ultimate arbiter of these issues. This is clearly, in the language of Article 6.1 (d), an important matter in issue between the defendant and the prosecution. Having regard to the substance of the evidence which it is proposed to adduce I consider that it would not be unjust to admit it. The reception of this evidence should not have any disproportionate effect or any effect on the trial if it is of a focused and self-contained nature and will not give rise to any inappropriate diversion or distraction for the Jury. I consider further that it does not have the potential to mislead the jury. There is no suggestion that the defendant is in any way unable to deal with this evidence. Accordingly, there will not be any adverse impact upon the fairness of his trial. I will also give the jury clear and unambiguous guidance on the use that may

properly be made of this evidence and, of rather more importance, in considering their verdict on the question of rape, the prohibition of relying on such evidence in their consideration on that count. There is no reason for doubting the jury's ability to take proper and robust direction from the Court or for doubting the jury's ability to evaluate the evidence and give it such rational, relevant and proportionate weight, if any, as they consider appropriate should they need to consider an alternative count of indecent assault on a child under the age of 17 on Count 1 or in their verdict on Count 2. Accordingly, I accede to the application.