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IN THE CROWN COURT IN NORTHERN IRELAND
SITTING AT LAGANSIDE

THE KING

v

JAMES STEWART SMYTH

Mr C Murphy KC with Mr D Russell and Ms N Pinkerton (instructed by the PPS) for the Prosecution
Mr M Borelli KC with Mr P Bacon (instructed by Reavey Solicitors) for the Defendant

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RULING ON APPLICATION TO ADMIT BAD CHARACTER EVIDENCE

O'HARA J

Introduction

[1] This ruling deals with an application by the prosecution to have evidence admitted of the defendant's bad character. The application is made under Article 6 of the Criminal Justice (Evidence) (NI) Order 2004 ("the 2004 Order") and is resisted by the defendant.

[2] The defendant faces five counts, all relating to events on 17 May 1994:

(i) The murder of Gary Convie.

(ii) The murder of Eamon Fox.

(iii) The attempted murder of Witness A.

(iv) Possession of a firearm and ammunition with intent to endanger life, namely a Sten submachine gun and a quantity of ammunition suitable for use therewith.

(v) Belonging to a proscribed organisation, namely the Ulster Volunteer Force.

[3] The circumstances of the offences are that on Tuesday 17 May 1994, Mr Convie, Mr Fox and Witness A were working on a building site off North Queen Street in Belfast, just inside an area known as Tiger's Bay. It is alleged that as they sat eating their lunch in Mr Convie's car, with Mr Fox in the front passenger seat and Witness A in the back seat, the defendant approached the car and opened fire with the Sten submachine gun. He fired through railings and killed the two men in the front seat, but Witness A survived. As the gunman ran away, he is alleged to have shouted "Up the UVF."

[4] The prosecution case is that this was a nakedly sectarian attack on the three men who were easy targets, and that the defendant was the man who murdered them, with the submachine gun. That gun was found 11 days later, on 28 May 1994, in a semi-derelict house near the murder scene. Forensic evidence ties it to the attack. It was the only weapon used in the murders.

[5] The prosecution case is that there are various strands of evidence which prove the defendant committed the offences with which he is charged. In broad terms those strands are:

(i) The oral evidence of Gary Haggarty, formerly a police informer and now an assisting offender, who himself was part of the murder gang and pleaded guilty to these crimes.

(ii) Evidence that the defendant's DNA was found on the inside collar of a jacket which was in a bag with the murder weapon on 28 May 1994.

In addition, there are other elements of the evidence which it was emphasised to me should be taken into account so that the prosecution evidence at this stage is assessed in its totality.

[6] The bad character evidence which the prosecution seeks to introduce against the defendant is that just three and a half months before the North Queen Street murders he committed another sectarian murder of which he was convicted in 1995 with the conviction being affirmed by the Court of Appeal in 1996. On that occasion the defendant acted as a gunman who murdered a Catholic man in Ballymena and attempted to murder his wife as she tried to protect her husband. The prosecution want to introduce the fact of the convictions together with the judgment of Nicholson LJ in the Court of Appeal.

The legislation

[7] Article 6 of the 2004 Order provides:

"**Defendant's bad character**

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

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

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

(c) it is important explanatory evidence,

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

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

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

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

(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 an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(4) On an application to exclude evidence under paragraph (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged."

[8] The prosecution relies in particular on paragraph 1(d) ie that the bad character evidence is relevant to an important matter in issue between the defendant and the prosecution.

[9] Article 8 of the 2004 Order explains what is meant by the term "matter in issue" and provides as follows:

> "**Matter in issue between the defendant and the prosecution**"
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> 8.—(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 other 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;
>
> …"

Submissions

[10] For the prosecution, Mr Russell submitted that the important matters in issue to which the 1995 convictions are relevant are:

(a) The identity of the offender.

(b) Whether at the relevant time the defendant had a propensity to commit offences of the type charged or offences of the same category of that charged.

[11] In developing that submission Mr Russell highlighted the following main points:

- The 1996 Court of Appeal judgment shows that the January 1994 attack had all the hallmarks of a sectarian murder attack.

- A series of Northern Ireland cases show that in this jurisdiction the courts have repeatedly accepted that historic terrorist convictions can be relied on as bad character evidence in later prosecutions in a way which is unlikely to be mirrored elsewhere in the United Kingdom.

- In this context, Mr Russell referred to the cases of *R v Rodgers* [2013] NICA 71, *R v Clarke* [2012] NICA 2 and *R v Kearney* [2014] NICA 21.

- These judgments show, inter alia, that propensity within the meaning of Article 8(1)(a) can be established by one previous episode and does not require a series of episodes.

- The present case is not one in which the prosecution is so weak that the bad character evidence should be excluded because it is effectively being relied on to make a case which does not otherwise exist.

[12] In response Mr Borelli KC contended:

- The prosecution has conceded in writing that Mr Haggarty's evidence cannot be relied on without corroboration because he is a flawed witness who has repeatedly lied and has been proved to be dishonest in multiple respects. The prosecution's concessions go significantly further than would be the norm in a case in which reliance is typically placed on an assisting offender.

- The prosecution cannot be allowed to rely on the proposed bad character evidence as the corroboration which is essential for a conviction in order to bolster Haggarty's evidence.

- Properly analysed the three Northern Ireland Court of Appeal decisions relied on by the prosecution show a more direct link between the convictions relied on as bad character evidence and the crimes for which the defendant was on trial.

- In the present case there is no reliable evidence that the jacket on which the defendant's DNA was found 11 days later was worn during the murders, nor is there any evidence at all as to who else had worn it or where it had been between 17 and 28 May 1994. Indeed there is an issue as to whether it was worn by the gunman during the gun attack.

- This is a prosecution in which the case is weak in the extreme and the prosecution should not be allowed to bolster it in an unjustifiable manner by introducing evidence of the January 1994 murder.

- To the extent that there is eyewitness evidence, that evidence is inconsistent and on one interpretation it may point away from the defendant, rather than towards him.

- For no reason which has been explained satisfactorily, there appears to have been no testing for cartridge discharge residue ("CDR") of either Haggarty or another informer (Mark Haddock) each of whom was arrested within approximately 30 minutes of the murders. Apart therefore from the evidence presented being challenged, there is an issue about the absence of evidence which one might expect to be before the court.

The authorities

[13] This is definitively not the stage in the trial when I scrutinise each aspect of the prosecution case and form a concluded view of it. That stage comes later. During counsel's submissions I raised the question of what test I should apply to decide whether this is such a weak case that the bad character evidence should be excluded. The point here is that as a matter of principle the prosecution should not be allowed to rely on bad character evidence in the form of previous convictions in cases in which there is no other evidence of substance. Or to put it more bluntly, the prosecution should not be allowed to throw the previous convictions into evidence and say that as a result the defendant must be guilty of the crimes with which he is presently charged.

[14] It was accepted by counsel that the test cannot be that there is a case for the defendant to answer. To set the bar that high would be too demanding. The change to the law which the 2004 Order undoubtedly brought about would be reduced significantly if such a test was applied. The issue is considered in the following manner in Archbold at 13.72:

> "Admitting evidence of the defendant's bad character where there is no other serious evidence of guilt risks miscarriages of justice, and it was with this in mind that the Court of Appeal in *Hanson* said "evidence of bad character cannot be used simply to bolster a weak case or to prejudice the minds of a jury against a defendant,' a dictum that has been invoked on behalf of many defendants since. As to what constitutes a 'weak case', one possible view is that it means a body of other evidence, which on its own would not survive a submission of no case to answer. But this is questionable because occasionally – if exceptionally – bad character evidence would be sufficiently compelling to constitute a case to answer on its own …
>
> So a better view, it is suggested, is that a 'weak case' in this context means other evidence all of which is material, that the courts always treat with caution: such as fleeting glance identification or alleged 'cell confessions.' …"

[15] The authors continue at 13.72 by highlighting the fact that the Court of Appeal (in England & Wales) has shown "no obvious willingness to label any particular type of other evidence, for these purposes, as by definition weak."

[16] The point which emerges from a brief analysis of the cases is that admissibility decisions on bad character evidence are generally seen as "fact specific."

[17] Before turning to the evidence which has been presented in this case by the prosecution, it is necessary to refer to the three Northern Ireland Court of Appeal cases relied on by the prosecution and to one introduced for the defendant from England & Wales by Mr Borelli.

[18] In *R v Rodgers* [2013] NICA 71, the defendant was convicted in 2013 of a sectarian committed in September 1973, forty years earlier. The trial judge admitted bad character evidence that the defendant had pleaded guilty in 1975 to a sectarian murder committed in September 1974. On appeal, the defendant challenged the admissibility of the bad character evidence under the Article 6(1)(d) gateway in the 2004 Order. He contended that the 1975 murder was not sufficient to either identity the appellant as the murderer nor establish that he had a propensity to commit offences of the same kind. In addition, he contended that the sole purpose of the bad character evidence was to bolster an otherwise weak prosecution case so that the trial judge should have excluded it under Article 6(3) on the ground that it had an adverse effect on the fairness of the trial.

[19] On the question of propensity, the Court of Appeal referred to the case of *R v Hanson* [2005] EWCA Crim 824, at para [7] of which that court set out the questions which had to be considered:

> "1. Does the history of conviction(s) 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?"

[20] The Court of Appeal's conclusion on propensity then followed at para [31]:

> "This was an attack which had all the hallmarks of a sectarian murder in which the aim was to kill a Roman Catholic. The murder committed in 1974 was carried out for exactly the same reason. Although the alleged role of the appellant and the type of weapon were different the tendency to unusual behaviour consisted of active participation in a sectarian attack close in time to the murder with which this appeal is concerned. That was sufficient to establish that the conviction in 1975 illustrated a propensity to commit a sectarian murder of this kind."

[21] In *R v Clarke* [2012] NICA 2 the defendant was convicted in 2011 of a sectarian murder committed in February 1973. In that case the trial judge admitted bad character evidence that in 1976 the defendant had pleaded guilty to a number of offences committed in June 1975 including murder and attempted murder. The Court of Appeal upheld the 2011 conviction. At para [9] of its judgment it referred to the ruling of the trial judge, Hart J, on the three essential questions which have been identified in *R v Hanson* in the following terms:

> "(1) Does the history of 1975 involving as it did a Sterling sub-machine gun establish that Clarke had a propensity to commit the sectarian murder of Mr Fusco, a murder in which a Sterling was also used although the murder weapon was probably a Webley .455? I have no doubt that the answer to that question is yes.
>
> (2) Does that propensity make it more likely that Clarke was the gunman who shot Mr Fusco? Again, I

have no doubt that the answer is yes, because it is highly relevant;

(a) To his willingness to take part in such an attack;

(b) To his willingness to press the attack home; and

(c) To show that he was physically capable of firing a weapon in 1973 despite his physical disability.

(3) Is it unjust to rely on the 1975 convictions and will the proceedings be unfair if they are admitted? I am quite satisfied that it is not unjust to admit the evidence relating to each of the convictions relating to the 1975 murder, nor will the proceedings be unfair if they are admitted because for the reasons given at (2) above they are highly probative."

[22] In *R v Kearney* [2014] NICA 21 the defendant was convicted in 2013 of the murder in September 1981 of a police constable who was shot dead in a hospital car park. The evidence was that along with 13 spent bullet cases, the police found two cigarette butts. In 2009, with forensic science having advanced, one of these butts was tested and yielded a full DNA profile which matched the defendant. In November 1982 the defendant had been arrested in the vicinity of a gun attack on a UDR patrol and was convicted in 1984 of attempted murder as well as possession with intent to endanger life of two weapons, one of which was the weapon used in the 1981 murder of the police officer.

[23] The Court of Appeal endorsed the admission by the trial judge of the 1984 convictions as bad character evidence. It referred at para [44] to the *Hanson* judgment in which that court had said:

"18. Our final general observation is that in any case in which evidence of bad character is admitted to show propensity, whether to commit offences or to be untruthful, the judge in summing-up should warn the jury clearly against placing undue reliance on previous convictions. Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant. In particular, the jury should be directed; that they should not conclude that the defendant is guilty or untruthful merely because he has these convictions. That, although the convictions may show a propensity, this does not mean that he has committed this offence or been untruthful in this case; that whether they in fact show a propensity is for them to

> decide; that they must take into account what the defendant has said about his previous convictions; and that, although they are entitled, if they find propensity as shown, to take this into account when determining guilt, propensity is only one relevant factor and they must assess its significance in the light of all the other evidence in the case."

[24] In *Kearney* the Court of Appeal went on at para [45] to state:

> "[45] In stating that evidence of bad character cannot be used to simply bolster a weak case or to prejudice the minds of a jury against the defendant the court was stating a general observation in relation to evidence of bad character admitted to show propensity in the context of the trial judge summing up to the jury and warning the jury against placing undue reliance on previous convictions. It seeks to ensure that by appropriate directions the judge will put the bad character evidence in its proper setting and achieve a proper balance between the significance of the propensity as shown and the other evidence adduced in the case in reaching a conclusion as to the guilt or otherwise of the defendant."

The court continued at para [46] in the following terms:

> "[46] Of course the same approach applies to a trial conducted without a jury. The trial judge was clearly alert to this consideration. Evidence of propensity does not of itself establish guilt. The totality of the evidence must establish beyond reasonable doubt against the defendant the ingredients of the offences charged. We agree with the trial judge that the present case could not be described as weak or speculative. We agree with the reasons given by the trial judge for the admission in evidence of the 1984 convictions. The convictions demonstrated probative force in relation to the offences charged. Having regard to the circumstances, including the length of time between the two incidents, the trial judge was correct not to exclude the bad character evidence as having an adverse effect on the fairness of the proceedings. Further, the trial judge was correct to find that it would not be unjust to admit the evidence to establish propensity, whether by reason of the length of time since the convictions or for any other reason."

[25] Mr Borelli helpfully referred me to the case of *R v Belhaj-Farhat* [2022] EWCA Crim 115. The case involved a burglary in the course of which a rolled-up cigarette was left inside the burgled flat, the flat having been empty for only approximately 45 minutes. The defendant's DNA was found on the cigarette. His previous convictions for burglary were admitted as bad character evidence. In its judgment, the Court of Appeal accepted that the DNA evidence was strong because the cigarette was left inside the flat during a limited time period which militated against any innocent explanation for its presence. The criminal record for burglaries went to prove propensity. This consideration made it safe to admit the bad character evidence.

Discussion

[26] The judgment of the Court of Appeal in *R v Hanson* sets out three questions which are to be considered by any judge who is asked to admit bad character evidence. In the present case no real issue was taken in connection with the first two questions, and rightly so.

[27] The first question is whether the history of convictions establishes a propensity to commit offences of the kind charged in the present case. There can only be one answer to that, a positive answer. The defendant was one of two gunmen involved in a sectarian murder and attempted murder in January 1994. This establishes a propensity to commit crimes of the type alleged in the present case – a double sectarian murder and attempted sectarian murder on behalf of the UVF. Moreover, the offending is all alleged to have been committed within the same timescale, a shorter timescale than in any of the three Northern Ireland cases cited.

[28] The second question is whether that propensity makes it more likely that he was the gunman as alleged by Haggarty in May 1994. Again, the answer is yes, because it is highly relevant to his willingness to take part in such an attack and to be the actual gunman. Since he was willing to enter the home of Catholics in Ballymena to commit sectarian murder in January 1994, there is every reason to believe that he would have a propensity to fire through a fence in Belfast for the same purpose just a few months later.

[29] The third question is the one which the defence focused upon. As phrased in *Hanson*:

> "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?

[30] The defence submission is that is that it would be unjust and unfair because the prosecution is seeking to use the convictions (and the Court of Appeal judgment) to bolster a case which is so weak as to be fundamentally flawed. In considering this submission I refer back to Archbold, cited at para [14] above, from which it is clear

that each analysis of an allegedly weak case is fact specific with the Court of Appeal repeatedly declining to lay down any specific guidelines. I also approach the question on the basis that it is premature for me to form a view that a prima facie case has been established without the bad character evidence. For the reasons already referred to, that cannot be the test.

[31] For the defendant, Mr Borelli submits that this is a weak case because Haggarty's deeply flawed evidence needs corroboration, on the prosecution's own admission. He questioned whether that corroboration could possibly come from the evidence that the defendant's DNA was found on the jacket which was discovered in a bag with the murder weapon 11 days later. Specifically, he contrasted this DNA evidence with the DNA evidence in the cases such as *R v Kearney* (cigarettes butts at the scene of the murder) and *R v Belhaj-Farhat* (cigarette butt inside the burgled flat). There is some force in that contention – as Mr Borelli put it, DNA evidence at the fence through which the Sten gun was fired would have been more damning than DNA evidence found on a jacket some time later, especially if there is uncertainty that the jacket in question was actually worn during the course of the murders.

[32] Mr Borelli also emphasised the lack of weight which should be attributed to eyewitness evidence and the weight which should be attached to the apparent lack of testing of Haggarty and Haddock for CDR.

[33] While I acknowledge the points made on behalf of the defendant, in my judgment, the prosecution case is stronger than was acknowledged by the defence. I have taken the course urged upon me by Mr Russell, to look at the totality of the prosecution evidence. On doing so, I have concluded that for the reasons which are summarised below this is not a weak prosecution case. While this is not intended to be a comprehensive analysis of the evidence to date, the prosecution case includes the following aspects which form more than a weak case when taken together:

(a) While Haggarty is undoubtedly a flawed witness in very many ways, a witness whose evidence certainly needs corroboration, his version of events is much more than a vague general allegation without detail. In his evidence he has explained why the murder weapon and the jacket ended up in the bag together. He has described the plan whereby the defendant was given the Sten gun to commit the murders in the home of a man called Marsden in Alexandra Park Avenue, near the murder scene. He was also given the jacket to wear and to hide the gun underneath. The arrangement, according to Haggarty, was that after the shooting the defendant would run back towards Marsden, meet him on the route as he did so, hand over the gun and the jacket to Marsden and then flee. Marsden was to take the gun and jacket and secrete them.

(b) The bag containing the gun and jacket was found in a derelict house adjacent to Marsden's in Alexandra Park Avenue, 11 days later.

(c) Marsden himself was convicted of these murders for the part which he played, and which is described above.

(d) When the May 1994 murders were committed the defendant was said by Haggarty to be on the run because the police suspected him of murder. Haggarty's evidence that the defendant was on the run and was wanted for murder was not challenged by the defence, though it was submitted that it did not follow that he was wanted for the particular murder in Ballymena in January 1994.

(e) The presence of the defendant's DNA on the inside of the jacket collar has not been challenged by the defendant and no innocent explanation has been suggested for its presence.

[34] I accept that the DNA evidence is not as direct and contemporaneous as in the other cases to which I have been referred. However, when one considers that evidence and includes the other factors which are detailed above, it is my judgment that the prosecution case cannot possibly be described as weak. That being so, I conclude that the answer to the third question posed in *Hanson*, which reframes Article 6(3) of the 2004 Order, must be negative i.e. it does not appear to me that the admission of the bad character evidence would have such an adverse effect on the fairness of the proceedings that I ought not to admit it.

[35] In the circumstances, I admit the evidence of the defendant's convictions for murder, attempted murder and possession with intent to endanger life of the firearm and ammunition used in the murder and attempted murder in January 1994. I also admit in evidence the Court of Appeal judgment dismissing his appeal against those convictions. Just how far they take the prosecution case, if they take it anywhere, is a matter for another day.