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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

CYRIL HAMILTON

Morgan LCJ, Higgins LJ and Girvan LJ

GIRVAN LJ (delivering the judgment of the Court)

Introduction

[1] This an application for leave to appeal against conviction the single judge having refused leave. The applicant following a trial before His Honour Judge Babington and a jury at Antrim Crown Court, on the unanimous verdict of the jury was convicted on 18 June 2010 on a single count of attempted murder.

[2] On the first day of trial the applicant asked to be re-arraigned and he pleaded not guilty to the charge of attempted murder but guilty to the lesser offence of inflicting grievous bodily harm with intent contrary to Section 18 of the Offences against the Person Act 1861. The Crown refused to accept such a plea and the trial continued, the issue thus being whether the applicant carried out the assault with a murderous intent.

[3] The grounds of appeal relied on by the applicant are, firstly, that the trial judge wrongly admitted evidence of the applicant's previous convictions for violence and possession of offensive weapons (in reliance on Article 6(1)(f) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order")) and, secondly, that his direction to the jury on the bad character evidence was inadequate.

The factual background

[4] The charge of attempted murder arose out of the applicant's unprovoked stabbing with a knife of Samuel Mitchell ("the complainant") on 18 August 2009. The applicant and the complainant had known each other from childhood. They had met on the evening of 18 August 2009 and the complainant was invited to visit the applicant at the latter's girlfriend's flat. During that evening all three had consumed a considerable quantity of alcohol. In the early hours of the morning the complainant having stood up to make his way to the kitchen to get some more drink was stabbed by the applicant with a knife while the applicant was walking from the kitchen towards the complainant. The complainant said that the applicant swung his hand towards his neck, he felt a pain and he placed his hand on his neck to discover that he was bleeding. He ran from the flat to try and find help in neighbouring houses. Nothing had been said before the attack and there was no evidence of any prior arguments or disagreements between the applicant and the complainant. The complainant received a 3cm stab wound in the neck in the area behind the left ear. As a consequence of the stab the complainant sustained a fracture to the vertebrae facet joints. Dr Fitzpatrick, an Accident and Emergency Consultant at Antrim Hospital who gave evidence about the injury, stated that it would take "a lot to cause such a break in vertebrae".

[5] In the course of the trial the Crown called as a witness David Fleming who was a taxi driver in Ballymena. He gave evidence that he had picked up the applicant and his girlfriend from close to the Phoenix Filling Station on the Antrim Road, Ballymena. He described them both as quite well intoxicated. He drove them to close to the applicant's house at 58 Galgorm Road. The applicant gave the taxi driver the impression that he was going home to look for more drink. He picked up the two again some 15 minutes later and dropped them close to the applicant's brother's house. In cross-examination the witness accepted that he had picked up the applicant in his taxi on quite a few occasions. In the majority of the cases the applicant had been drinking. He stated that he had never had trouble with the applicant. He said that he had never been aggressive nor had he seen anything bad with him. On the night in question the applicant seemed to the witness to have had quite a lot of alcohol to drink. He did not appear agitated or aggressive: "just the normal sort of self".

[6] The Crown sought to adduce evidence of the applicant's previous convictions for assaults and possession of offensive weapons. It sought to do so under Articles 6(1)(c) (as important explanatory evidence), Article 6(1)(d) (as evidence relevant to an important issue between the defence and the prosecution) and Article 6(1)(f) (to correct a false impression given by the applicant).

The ruling on the admission of the evidence

[7] The trial judge in his ruling on 17 June 2010 rejected the Crown's argument that the evidence should be admitted under Article 6(1)(c) and 6(1)(d) of the 2004 Order. He noted that the applicant had effectively pleaded guilty to intentional assault and thus admitted having committed the act of stabbing the injured party. The trial judge stated:

> "I take the view that a court when dealing with such a delicate matter as the specific intent required for attempted murder has to be very very careful in handling such an application as this. I do not feel that the previous convictions as set out do relate to an important issue between the defendant and the prosecution and I, therefore, refuse the application."

[8] The trial judge, however, did consider that Article 6(1)(f) was in play. He rejected the argument made by counsel for the applicant that the whole subject matter of David Fleming's evidence that the applicant was not agitated or aggressive and was just his normal self was brought up by the prosecution. He concluded that while the prosecution asked about his manner on the night in question it was the applicant through counsel who adduced answers relating to his routine behaviour in the past as well as what happened in the early hours of that morning. He considered that the jury may have been led to believe that the applicant was really a harmless drunk who was never aggressive. He acceded to the Crown application to adduce evidence of previous convictions and stated that he would discuss with counsel how and what evidence should be adduced and in what form bearing in mind that under Article 10(6) the evidence to be adduced should go no further than is necessary to correct the false impression.

The judge's summing up

[9] In his summing up the trial judge dealt with the evidence of the applicant's previous convictions in two portions of his directions to the jury. Before considering the evidence relating to the evidence of previous convictions the judge stated:

> "You have also heard about the defendant's previous record, or bad character as we call it, that is because you may have gained a false impression about the defendant after hearing evidence in cross-examination from the taxi driver Mr Fleming. After hearing his evidence it is possible that you may have concluded that he was nothing

> more than a harmless drunk whereas, in fact, he has a record for violence and the possession of offensive weapons and you have heard details of those convictions. However you must not assume the defendant is guilty solely because he has previous convictions nor should you place undue reliance on them. Additionally, do not use them to bolster up the evidence if you feel the prosecution case is weak."

Later at the end of his summing up the judge said:

> "You also heard evidence regarding the defendant's previous record. Detective Constable Lucas gave you details. Now that should be fresh in your mind, I don't intend to go over every part of it but effectively in summary between 1982 and 2006 he had been convicted on six separate occasions of what is called Section 20; that is inflicting grievous bodily harm on a person. That does not require a specific intent, unlike Section 18 which is more serious. He was also convicted on another occasion of Section 18. He also has a conviction for assault occasioning actual bodily harm and has convictions on two occasions for possessing an offensive weapon. Now those offences, as you have heard, occurred both in Northern Ireland … principally in Northern Ireland but there were also two of those convictions occurred at the Crown Court in Southampton in the south of England."

Counsel's arguments

[10] Mr Barlow, who appeared with Mr Stanbury for the applicant, argued that the judge was wrong to allow the prosecution to adduce evidence of the previous convictions of offences of violence and possession of offensive weapons. The cross-examination of David Fleming, he argued, did no more than establish that the applicant was no more aggressive on this occasion than on any other occasions he had been in his taxi. The convictions for possession of offensive weapons were irrelevant to the purported false impression that the applicant was a harmless drunk. Since the applicant had pleaded guilty to the assault with intent to cause really serious injury the jury could not have been misled by any false impression. The defence was not claiming that the applicant had never been violent. The jury had heard no evidence that previous offences were committed when he was drunk. The issue was

whether the applicant had a murderous intent. The evidence of previous convictions had no probative value and only a real and substantial effect on the fairness of the trial process.

[11] Counsel further argued that the judge's summing up to the jury was terse and unbalanced. The jury should have been directed to consider firstly whether the accused did attempt to give a false impression to the jury. If the jury did not consider that the accused had created a false impression then those convictions were irrelevant. Considerable care was needed in summing up because the jury would have to be warned that the evidence was not capable of being used as evidence of propensity (see R v D, P& U [2011] EWCA Crim 1474). The trial judge had failed to do that and the conviction was unsafe because the jury may have wrongly concluded that because he had many convictions for violence and possession of offensive weapons he would have intended to kill because he had a propensity for such crimes.

[12] Mr Weir QC, who appeared with Mr Connor for the Crown, argued that evidence of the applicant's previous convictions was of probative value in correcting the false and misleading impression created by the defence. It was not necessary that it was of probative value in relation to the applicant's guilt. He argued that the judge's charge adequately explained the reason for the admission of the evidence. It was difficult to see how the jury could have concluded that because the applicant had convictions for lesser offences of violence involving at most an intention to cause serious harm that on this occasion he was possessed of the intent to kill. The jury was duly warned not to place undue reliance on the previous convictions and assume that the defendant was guilty because of their existence.

Discussion

[13] Two separate but not unconnected questions arise in this application. Firstly, was the trial judge right to have admitted the evidence of the applicant's previous convictions for assaults and possession of offensive weapons? Secondly, such evidence having been admitted did the trial judge in his summing up correctly direct the jury as to how they should deal with that evidence? If the applicant is successful on either or both of those issues we must then consider whether the conviction should be set aside as being unsafe.

[14] As noted the Crown sought to adduce the evidence in question in reliance on Articles 1(c), (d) and (f). So far as material Article 6(1) of the 2004 Order provides:

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

(c) it is important explanatory evidence;
(d) is relevant to an important matter in issue between the defendant and the prosecution;
(f) it is evidence to correct a false impression given by the defendant."

Sub-section 3 provides that –

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

[15] The trial judge in his ruling decided to admit the evidence under Article 6(1)(f) as evidence to correct a false impression given by the defendant. In refusing to admit it under Article 6(1)(c) or (d) he made clear that the previous convictions did not relate to the question of the specific intent required for attempted murder.

[16] Under Article 10(1) of the Order it is provided –

> "For the purposes of Article 6(1)(f) –
>
> (a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;
>
> (b) evidence to correct such an impression is evidence which has probative value in correcting it."

Under 10(2)(d) a defendant is treated as being responsible for the making of an assertion if (inter alia) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so. Under Article 10(6) "evidence is admissible under Article 6(1)(f) only if it goes no further than is necessary to correct the false impression."

[17] It is clear that considerable care needs to be taken by the parties in how they deal with evidence which may create a false impression. The parties and the court must likewise take care in dealing with evidence adduced to correct

a false impression and any application to admit it. While the normal rule is that bad character evidence, once it passes through a gateway, may be used for any purpose for which it is legitimately relevant (Highton [2005] 1 WLR 3472) in the case of evidence submitted under Article 6(1)(f) to correct a false impression, that evidence is limited to evidence correcting the false impression (Article 10(6)). The correcting of the false impression is the only relevant issue to which the evidence can properly be directed.

[18] Faced with an application by the Crown for the admission of evidence under Article 6(1)(f) the court must consider two key issues. Firstly, it must determine whether the defendant has been responsible for giving a false impression by making an express or implied assertion which is apt to mislead the jury about the defendant. Secondly, it must consider the nature of the evidence which the Crown seeks to call to correct the false impression. The court must then decide whether it is necessary to admit the evidence in order to correct the false impression. Article 10(6) imposes a duty on the court to ensure that the evidence to be admitted is no more than is necessary for the purpose. Thus admission of the evidence must be proportionate to the limited purpose.

[19] The Criminal Justice Act 2003 Sections 101 and 105 (which find their equivalents in Article 6 and 10 of the 2004 Order) were the outcome of a legislative process which began with the report of the Law Commission on evidence of bad character in criminal proceedings (Law Commission Report No 273 (2001). It recommended that evidence should be admissible to correct a false or misleading impression given by the accused and much of the elaboration of Section 105 (Article 10) follows the pattern set by the Commission. However, the Commission's proposal would also have required the prosecution to satisfy the court that the evidence had substantial probative value in correcting the impression and that either the evidence was not prejudicial or that if it was the interests of justice required it to be admitted. (See clause 10 of the draft bill annexed to the report). Not all those safeguards were replicated in the statute as enacted. Evidence of bad character is admissible provided only that it has probative value in correcting the false impression. The 2004 Order does provide the accused with some safeguards. The defendant has the option to withdraw or disassociate himself from an assertion which would otherwise permit the admission of bad character evidence in rebuttal and the provisions of Article 10(6), to which we have referred, restrict the relevance of the evidence to correct the false impression. However, Blackstone paragraph F12.40 points out that the court retains a general statutory power to exclude evidence under Section 78 of PACE (Article 76 of the 1989 Order in Northern Ireland) which empowers the court to exclude evidence in the interests of fairness. That provides a framework for such further protection the court may regard as necessary. While Article 6(3) refers to a specific power to exclude evidence falling under Articles 6(1)(d) or (g) if the admission would have such an adverse effect on

the fairness of the proceedings that the court ought not to admit it, that express power cannot be interpreted as limiting the general statutory power under Article 76 to exclude unfairly prejudicial evidence if the interests of justice require its exclusion.

[20] When dealing with the Crown's application to admit evidence under Article 6(1)(f) the judge was clearly conscious of the requirements of Article 10(6) and of the delicacy of the question of the relevance of the record of the applicant to the question of the intent of the applicant in the attempted murder charge. In his ruling he considered that the jury might have been misled by the evidence adduced by the cross-examination of David Fleming. He granted the Crown's application and indicated he would discuss with counsel how and what evidence should be adduced and in what form. In so indicating the judge correctly identified the need for a careful analysis of the proposed evidence to ensure that it was admitted only so far as was necessary to rebut the false impression.

[21] However, counsel in their submissions appeared to accept that the judge received no further assistance in relation to the form of the evidence to be adduced to correct the false impression and it appears that by agreement between counsel evidence of the convictions was led without further debate. It does not appear that the judge was asked to give any further consideration to the implications of Article 10(6) in relation to the evidence to be adduced. However, as we have noted the trial judge must proceed with care in relation to deciding the best way forward in such a situation. In the words of Mr Weir QC, the evidence of the convictions could appear to have been "damning evidence". In this case the trial judge would have benefited from a more careful analysis of the precise form in which evidence to rebut the false impression should be laid before the jury. The parties did not, and as a result neither did the court, consider the question whether the false impression could have been corrected by, for example, the Crown re-examining the witness to demonstrate the potential misleading nature of the evidence. It did not consider whether faced with the real possibility of the admission of rebuttal bad character evidence being so detrimental to the interests of the defendant, the defendant might have considered withdrawing the implied assertion or whether the evidence of past violence might have been put before the jury in a less emotive way. Nor at the stage of the decision to admit the character conviction evidence was consideration given to the question of how the jury could be fairly and meaningfully directed in relation to the limited relevance and purpose of the evidence if admitted and how the potentially very prejudicial ("damning") impact of the evidence could be fairly dealt with in the context of the relatively marginal relevance of the evidence. Because of the way in which the matter was presented the court did not carry out a balancing exercise of weighing the prejudicial effect of the evidence against the relevance of and importance of the evidence in the context of the overall case. In the context of the case a decision by the trial judge to exclude the

evidence in the interests of overall fairness was one that might well have been open to him.

[22] Whatever might be said about the decision to admit the evidence if one assumes that the trial judge's decision was not in error to admit it we must consider in the light of guidance provided by the Court of Appeal in R v D, P & U [2011] EWCA Crim 1474 whether the judge's summing up on the issue of bad character evidence was inadequate. In fairness to the trial judge and to counsel we note that that helpful authority post-dated the trial in this case.

[23] We conclude that the summing up failed to adequately deal with three points –

(a) The evidence relating to the convictions was relevant only to the correcting of any false impression created by the evidence of David Fleming. While the judge did explain why the evidence had come to be laid before the jury he did not make clear to the jury that the evidence related only to the issue of false impression.

(b) While the judge had admitted the evidence having ruled that the evidence of David Fleming was apt to create a false impression, he did not make clear to the jury that it was for them to decide whether the defendant was trying to create a false impression of himself and the trial judge should have told the jury that the evidence was of no assistance on that issue if they were not sure that he was trying to create a false impression.

(c) Since there was a real risk that the jury could have misdirected themselves on the significance and purpose of the evidence in the absence of clear guidance the trial judge should have warned the jury that it was not evidence of propensity and that in particular it did not provide evidence of a propensity to carry out assaults with murderous intent.

[24] In R v. Renda [2005] EWCA Crim 2826 the trial judge admitted in evidence material called to demonstrate that the appellant was seeking to convey a misleading impression about his life and history. The Court of Appeal commended the judge for explaining to the jury that the relevance of the evidence in that case was confined to helping the jury to decide whether the appellant was trying to present himself in a better light than he should have done and whether he was, in truth, as the jury might consider, seeking to convey that he was deserving of sympathy. If they were sure that he had lied to give a false impression about himself then the jury was entitled to see how it affected the way in which they approached the evidence about the

relevant events. This decision which remains good law makes clear how the jury should be directed and indicates to the jury that it is for them to decide whether they were of the view that the defendant was trying to give a false impression. The current edition of the English Crown Court Bench Book in its specimen directions follows and adopts the effect of R v. Renda in respect of an appropriate direction to the jury in such a case.

[25] In R v. D, P & U [2011] EWCA Crim 1474 Hughes LJ, Vice President, giving the judgment of the court, in paragraph 3 stated:

> "We emphasise that it is necessary to address separately the different possible gateways for the admission of bad character evidence to be found set out in Section 110(1). It is, of course, true that if evidence is admissible through any gateway it may then be considered by the jury in any way to which it is legitimately relevant whether it has primarily been admitted on that basis or not – see R v. Highton & Others [2006] 1 Criminal Appeal Reports at 125, paragraph 10. That, however, does not relieve the court of the duty of establishing which gateway or gateways are applicable. That exercise must be undertaken. It must be undertaken, first, in order to ensure that bad character evidence is only admitted when the statute allows. It must be undertaken, secondly, because the decision as to the relevant gateway or gateways will normally be of great help in identifying the way and ways in which the evidence can legitimately be used – that is to say the issues to which it is relevant. As Highton itself makes clear it is not law that once bad character evidence is admitted, having by definition passed at least one gateway, it can thereupon be used by the jury in any way the jury chooses. On the contrary, it may be used in any issue to which it is legitimately relevant but not otherwise."

[26] Dealing with the admission of evidence to correct a false impression under gateway (f) the court at para 21 cautioned that:

> "If evidence is admissible only under gateway (f) and not also under gateway (d) considerable care should be required in summing up because the jury would have to be warned that the evidence is not capable of being used as evidence of propensity."

[27] In his summing up the trial judge did explain to the jury that the evidence of the previous convictions was to deal with the possibility of the jury gaining the false impression of the applicant having heard the taxi driver's evidence. However, he did not make clear that it was for the jury to determine whether they concluded that the defendant was seeking to give a distorted impression of himself nor did he make clear the restrictive purpose of the evidence. There was a real danger that without clear and proper guidance the jury might misinterpret the evidence which was prejudicial to the applicant. The trial judge did not explain that it could not be interpreted as evidence of propensity or as evidence showing a propensity to assault with a murderous intent. Nor did he put the convictions in context when he concluded his summing up by reminding the jury of the details of those convictions at the end of his charge, something which in itself might have given the jury a heightened impression of the importance of the evidence.

[28] We conclude, accordingly, that there was a material misdirection which undermines the safety of the conviction and thus we grant leave to appeal and quash the conviction. We shall hear counsel on the question of a retrial.

[29] In conclusion we note that the Crown Bench Book in Northern Ireland does not follow the format of the guidance provided by the English Bench Book. The Northern Ireland Bench Book could be usefully adjusted to take account of the guidance provided by R v. D R& U and this judgment.