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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

THOMAS CHRISTOPHER CHARLES WARD

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Before: Morgan LCJ, Higgins LJ and Coghlin LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] The applicant seeks leave to appeal against his conviction at Dungannon Crown Court for the sexual assault of a female at Orritor Road, Cookstown in the early evening of 1 February 2011 and further renews his application to appeal against the indeterminate custodial sentence with a minimum term of 2 years imposed on him. Mr O'Donoghue QC appeared with Mr O'Neill for the applicant and Mr Reid appeared for the prosecution. We are grateful to counsel for their helpful oral and written submissions.

Background

[2] The complainant, a 44 year old lady, left home on 1 February 2011 at approximately 4:55 pm to go jogging. Shortly afterwards she passed a filling station on the Morgan's Hill Road, Cookstown. She noticed a male standing on the pavement looking out towards the road. The male was standing on the Lissan Road just up from the filling station. The complainant stated that he was wearing a grey hoodie with white stripes running down the arms. The applicant accepted in police interview that he was there at that time and that he saw a lady jogging. CCTV images from a Spar shop on Morgan's Hill Road showed the applicant buying cigarettes at around 5 pm and then walking in the direction of the location where the complainant had observed the male standing. The applicant was arrested at 8:02 pm that evening and at the time of his arrest was wearing a grey hoodie with yellow stripes and light blue jeans.

[3] CCTV evidence establishes that about 20 seconds after the complainant passed RT Autos further along Morgan's Hill Road the applicant was seen walking in the same direction behind her. About 175 yards further along the road CCTV evidence shows the complainant running through the forecourt of a petrol station. A male whom the prosecution said was the applicant can be seen running behind her. In his initial police interviews the applicant did not disclose that he had been running at any time.

[4] The complainant continued countrywards and left the street lit area as the light was fading. She thought this was around 5.30 pm. She heard footsteps, turned and saw a man in a grey hooded top and light coloured jeans and, believing that it was the man she had seen earlier, concluded she had been followed. She said he was a couple of yards behind her. She turned to run past him along the footpath. As she passed he leaned over with his left hand and grabbed her between the legs with some force. She looked back and saw the man running after her. She shouted and screamed and as she was running, made phone contact with her partner. As she approached the first house she came to she turned and saw the man running away. She went to another nearby house belonging to someone she knew and phoned the police. The call came through to police at 5.40 p.m.

[5] CCTV images indicated that at about 6.30 p.m. the applicant was in a Supervalu store in the vicinity and at 7.48 p.m. in the local Tesco store. He was arrested at 8.02 p.m. He indicated to police that he had come into Cookstown at 3.30 p.m. to collect benefits but was unable to find the Social Security Office. He denied following the complainant and assaulting her. He admitted being present on the Morgan's Hill Road but said that at some point he turned off it.

Admission of bad character evidence

[6] The prosecution made a pre-trial application to introduce previous convictions for indecent assault, false imprisonment and assault occasioning actual bodily harm which arose from an incident on St Patrick's night 2006. The injured party was a 44-year-old woman who was walking along the Dungannon Road, Coalisland. The defendant who was then 18 years old stopped his car and offered her a lift. Once she got into the car he locked the doors and at one stage asked her "Do you like a fucking dick?". The applicant tried to get her pants and trousers down and the victim hit him. As a result of the struggle the victim lost a number of teeth but eventually managed to open the door and get away.

[7] It was submitted that this evidence was admissible as evidence of propensity pursuant to Article 6(1)(d) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("2004 Order"). The judge noted certain similarities between the matters in respect of which the applicant had been convicted and the subject offence. In both cases the victims were middle-aged women on their own at night. In each case the victim was a stranger to the assailant who had come upon each of them under cover

of darkness. There was, therefore, a predatory aspect to both attacks. The focus of the assault was to the genital area. In each case there was a degree of persistence and in each case the attack occurred in the public street.

[8] The judge concluded that the similarities between this incident and his previous conviction were such as to establish a propensity to commit offences of this kind which made it more likely that he had committed the offence charged. He rejected a submission under Article 6(3) of the 2004 Order 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 and also rejected the submission that by reason of the passage of time it would now be unjust to rely upon the conviction.

[9] The applicant accepts that the prosecution gave notice of its intention to introduce the three previous convictions for indecent assault, false imprisonment and assault occasioning actual bodily harm arising out of the incident. The summary of the incident put forward by the prosecution in argument referred to the circumstances of all three convictions and it was indicated that it was intended to produce a summary of the circumstances for agreement as recommended in R v Hanson [2005] 2 Cr App R 21.

[10] In his ruling on the application the judge described the prosecution's application as relating to a previous conviction dating from 2006 and relating to an attack upon a middle-aged woman at night. He referred to the fact that the applicant was driving a car, pulled up beside the woman and offered her a lift. He then locked the doors, drove off and sexually assaulted her. The point made by Mr O'Donoghue is that there is no mention of the circumstances surrounding the conviction for assault occasioning actual bodily harm. At a later point in his ruling the trial judge refers to the fact that there was only one previous relevant conviction when looking at the issue of propensity. It was submitted, therefore, that the judge's ruling did not authorise the introduction of all three convictions.

[11] We do not accept that submission. We accept that the judge referred to the previous conviction that the Crown sought to have adduced but it is common case that the Crown sought to adduce three convictions. Secondly, it is accepted that in the next sentence the judge refers to both the sexual assault and false imprisonment. That was inconsistent with the suggestion that he intended to allow the prosecution's application in respect of one conviction only. Thirdly, although he asserts that there was only one previous relevant conviction, he then goes in the same sentence to refer to "one instance". On any fair reading the inference is that he was considering the three convictions arising from the same incident. Fourthly, no attempt was made in the applicant’s submissions at the trial to draw a distinction between the three convictions. Fifthly, if it was the intention of the judge to allow only one or more of the three convictions to be introduced he would have said so. In any event it appears that a summary of the incident referring to all three convictions was introduced at the trial without objection.

[12] The applicant accepts that the judge was entitled to consider that this was not a weak prosecution case. There was clearly sufficient circumstantial evidence to ensure that the case should be left to the jury without the bad character evidence and the CCTV evidence supported the prosecution case that this was an attack which involved the pursuit of a vulnerable woman over a sustained period. The applicant took issue with the extent of the reasoning advanced within the ruling, which was delivered by the judge on the following day, and, in particular, the absence of sufficient explanation as to why he concluded that the convictions or the evidence underpinning them could be used as evidence of propensity. It is, however, impossible to isolate the *extempore* ruling given on 15 November 2012 from the comments of the judge in the course of the argument on 14 November 2012. On the former date the judge dealt at some length in discussion with the applicant's counsel on the similarities between the attacks. These included the fact that both attacks were launched on single middle-aged ladies unknown to the offender at night. Both were focussed on the genital area. In particular he noted that the attack in the first case was sustained and pointed out that in this case the attacker followed the victim for a considerable distance and then pursued her after making the initial attack.

[13] We consider, therefore, that in his comments and ruling the judge gave clear reasons for his conclusion that the similarities arising from the single incident in 2006 were sufficient to demonstrate propensity. In looking at the adverse effect upon fairness the judge took into account that the earlier incident was five years old, that it was a single incident and that the applicant was 18 years old at the time. We do not accept that the judge failed to properly evaluate these matters. His decision was well within the area of judgment open to him.

The learned trial judge's charge

[14] The applicant complained that the learned trial judge's charge described this as a recognition case whereas in fact it was a circumstantial case. In his charge to the jury the judge indicated that in light of the undisputed evidence of the complainant about the manner in which she was attacked they might come to the conclusion that she was the victim of a sexual assault. The more crucial aspect of the case was whether the person assaulting her was the applicant.

[15] The judge reminded the jury that the complainant had noted a man standing at the Lissan Road wearing a light grey hooded top with white stripes. She described him wearing light coloured jeans and said that he was of average height and build. She also noted that he possibly had a cigarette in his right hand. This was a description that she provided before she had access to any CCTV. The judge reminded the jury that the applicant had been identified on CCTV in close proximity to that location at the relevant time having just bought cigarettes and wearing similar clothing. He then reminded the jury about the two further CCTV images showing the complainant jogging and the male person that the prosecution said was the applicant apparently following. He reminded the jury that the applicant's case

was that he had gone some distance along this road but at some stage had turned off.

[16] He then moved on to describe her evidence when she heard the footsteps behind her. She described the clothing which she had noted at Lissan Road. Her immediate thought was that this was the same man and that he had been following her. At one stage the trial judge noted that essentially she said that she recognised this man as being the one that she had seen earlier. He then went on to caution the jury about mistakes that can be made in identification. He was careful, however, to remind them that no facial observation was made and that the complainant relied upon the distinctive clothing to support her observation. He suggested that the jury should treat this with care.

[17] We accept that this case can properly be characterised as a circumstantial case but part of the circumstances related to the inference to be drawn from the correspondence between the description of the person standing at Lissan Road and a description of the person who launched the attack upon the complainant. The learned trial judge's charge invited the jury to examine that correspondence carefully in the context of the CCTV evidence identifying the applicant at the relevant time and showing the pattern of his movements behind the complainant. In our view this was an entirely appropriate invitation to the jury to examine the prosecution case and the judge was careful to ensure that the defence case was also put before the jury.

[18] The second criticism of the charge related to the treatment of the bad character evidence. The judge directed the jury on the bad character convictions in the following terms.

> "Now, up until recently juries were usually not told about a defendant's previous conviction. This was because of the fear that such information would prejudice the jury against the defendant and they would give it more weight than it deserved. Today such evidence is often admitted because a jury, understandably, want to know whether what the defendant is alleged to have done is out of character or whether he has behaved in a similar way before. Of course, a defendant's previous convictions are only background, they did not tell you whether he has committed the offence with which he is charged. In this case what really matters is the evidence that you have heard in relation to this offence, that is the evidence on 1 February 2011 and what happened on that day. So be careful not to be unfairly prejudiced

> against the defendant by what you have heard about his previous convictions.
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> The allegation, as you know, is that in this case he followed the complainant and sexually assaulted her. The defendant in response to that says, yes, he followed for some part of the way, he followed the same route as the complainant, but was not following her. And in particular he did not follow her and her route countrywards along the Orritor Road.
>
> In order to convict the defendant you must be satisfied beyond reasonable doubt that he sexually assaulted her. When considering that you may consider it relevant that the defendant has been convicted of indecent assault, and that was an equivalent offence at that time, false imprisonment and a physical assault in the manner that you have heard. This is set out in the document that was read out to you at the beginning of the trial. You have that document, I am not going to repeat the details, you can read it again at your leisure.
>
> The prosecution say that the defendant has a tendency to target middle-aged women alone on the street and then sexually assault them, and this supports the prosecution case that he sexually assaulted the complainant on this occasion. The defendant says that whatever he did in the past these allegations are untrue. It is for you to decide the extent to which, if at all, the defendant's previous convictions assist you in deciding whether the defendant has committed this offence."

[19] Guidance on the manner in which the jury should be directed in a case where bad character evidence is admitted to show propensity was initially given by Rose LJ in <u>R v Hanson and others</u> [2005] EWCA Crim 824 at paragraph [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. We do not purport to frame a specimen direction but the Judicial Studies Board may wish to consider these observations in relation to their helpful specimen direction No 24 on bad character."

[20] This was followed shortly afterwards by further observations from Rose LJ in R v Edwards and others [2005] EWCA Crim 1813 at paragraph [3].

> "The guidance proffered in para.[18] of Hanson as to what a summing-up should contain was, as is apparent from the last sentence of the paragraph, not intended to provide a blueprint, departure from which will result in the quashing of a conviction. What the summing-up must contain is a clear warning to the jury against placing undue reliance on previous convictions, which cannot, by themselves, prove guilt. It should be explained why the jury has heard the evidence and the ways in which it is relevant to and may help their decision, bearing in mind that relevance will depend primarily, though not always exclusively, on the gateway in s.101(1) of the Criminal Justice Act 2003, through which the evidence has been admitted."

[21] The issue was addressed again in R v Campbell [2007] EWCA Crim 1472. That was a case in which bad character evidence was admitted to establish propensity of the applicant for violence but the learned trial judge went on to rely upon it as evidence of untruthfulness. The court concluded that evidence of violence was normally of limited assistance in assessing whether the defendant was telling the truth in respect of a further allegation of violence. The court took some time,

however, to review the specimen direction in England and Wales and made the following observations.

> "37. They direct the judge to identify the gateway or gateways through which the bad character has been admitted by reference to the wording of the Act. We question the desirability of this. It is right that in Edwards the Vice-President said that 'it should be explained why the jury has heard the evidence' but we think that reciting to the jury the statutory wording in relation to the relevant gateway is likely to be unhelpful. It cannot assist the jury to be told 'this evidence has been admitted because it may help you to resolve an issue between the defendant and the prosecution namely whether the defendant has a propensity to commit offences of the kind with which he is charged'. Nor is that part of the specimen direction that relates to gateway (f) likely to assist the jury.
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> 38. If the jury is told in simple language and with reference, where appropriate, to the particular facts of the case, why the bad character evidence may be relevant, this will necessarily encompass the gateway by which the evidence was admitted."

[22] The final case to which we wish to refer is R v D and others [2011] EWCA Crim 1474. That was a propensity case in which the issue was whether evidence that the defendant had viewed or made indecent photographs of children was capable of being relevant to charges of sexual abuse against children. At paragraph 3 of his judgement Hughes LJ dealt with the approach that should be taken where bad character evidence admissible under one gateway is sought to be used for different purposes.

> "In all the cases a number of different possible bases of admissibility were advanced on behalf of the Crown. 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 101(1) of the 2003 Act. 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 [2005] 1 WLR 3472 , para 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. 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 or ways in which the evidence can legitimately be used, that is to say the issues to which it is relevant. As R v 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 on any issue to which it is legitimately relevant but not otherwise."

[23] The applicant submitted that the direction to the jury must contain the elements identified in the passage from R v Edwards set out above. Although it was accepted that the learned trial judge provided the jury with a clear warning against placing undue reliance on previous convictions as proof of guilt, it was submitted that he had not explained why the jury had heard the evidence and the ways in which it was relevant to their decision. The prosecution argued that the direction was sufficient to comply with the guidance in Edwards but submitted that in any event the Court Of Appeal in Campbell only required the jury to be told in simple language why the bad character may be relevant.

[24] We consider that it is necessary to understand the context within which the remarks at paragraph 38 of Campbell were made. The first issue for a court faced with a bad character application is to identify the gateways if any through which the material may be admitted. Depending upon the gateway there are various protections contained within the statute. An accused is also entitled to the overall protection given by Article 78 of PACE. It is to that process that the remarks at paragraph 3 of R v D and others are directed. A court considering the admissibility of bad character evidence under one gateway needs to be alert to the possibility that the evidence may be relevant for another reason. If so that may give rise to consideration of whether the admission of the evidence would for that reason result in the circumvention of some of the statutory protections. In those circumstances the court will need to carefully consider, firstly, whether the evidence should be admitted taking into account the possibility of the absence of any statutory protection and, secondly, if so, how the jury should be directed in relation to it.

[25] The remarks in Campbell set out above do not bear on this process at all. They are concerned with the manner in which the jury should be assisted once the admissibility decision is made. The jury must be directed so that they can properly

understand how the bad character evidence may be relevant and how they can legitimately use it. Both Campbell and Edwards make precisely the same point on that issue. The passage in Edwards noting that relevance will depend primarily on the gateway through which the evidence has been admitted is plainly directed towards the admissibility issue.

[26] The learned trial judge's charge alerted the jury to the circumstances of the earlier offending and advised them that the reason for the introduction of that evidence was to support the prosecution's argument that the applicant had a tendency to target middle-aged women alone on the street and then sexually assault them. Secondly, he identified the issue as to whether such a tendency supported the prosecution case that the complainant was sexually assaulted by the applicant on this occasion. We agree that it would have been open to him to rehearse in detail the similarities and dissimilarities between the earlier convictions and the allegations in this case and to expressly remind them that it was for them to decide if the convictions established the propensity and whether the propensity made it more likely that the applicant was the offender. In the context of this two-day trial where the issues particularly relating to the similarities were clear we do not consider that the failure to do so rendered this conviction unsafe. We accept, however, that there will be many cases where it will be necessary to identify the similarities and dissimilarities and to direct the jury that it is for them to decide if the propensity is established by the evidence and whether the propensity makes it more likely that the accused is the offender.

[27] We note that in R v Suleman [2012] 2 Cr App R 30 the Court of Appeal in England and Wales considered it essential that the judge and advocates give explicit attention to appropriate directions to the jury, preferably before speeches, in order to eliminate misunderstandings as to the issues to which bad character evidence may be relevant and to ensure that the jury understand the purpose for which the evidence has been admitted. We consider that such a practice is appropriate in this jurisdiction. In a complicated case it may be appropriate to consider a draft of the written direction on which the judge may wish to have the assistance of counsel.

Sentence

[28] The learned trial judge imposed an indeterminate custodial sentence with a tariff period of two years. No issue was taken with the finding that the applicant was a dangerous offender. That was plainly a correct assessment having regard to his previous convictions as discussed earlier, his breach of a custody probation order which was imposed in relation to those convictions and his subsequent five breaches of Sex Offences Prevention Orders. At the time of the commission of this offence he was subject to a probation order and a suspended sentence. It is submitted on behalf of the applicant that the judge erred in failing to impose an extended custodial sentence.

[29] The relevant statutory provisions are found in the Criminal Justice (Northern Ireland) Order 2008.

> "13.—(1) This Article applies where—
>
> (a) a person is convicted on indictment of a serious offence committed after15th May 2008; and
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> (b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences.
>
> (2) If—
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> (a) the offence is one in respect of which the offender would apart from this Article be liable to a life sentence, and
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> (b) the court is of the opinion that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of such a sentence,
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> the court shall impose a life sentence.
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> (3) If, in a case not falling within paragraph (2), the court considers that an extended custodial sentence would not be adequate for the purpose of protecting the public from serious harm occasioned by the commission by the offender of further specified offences, the court shall—
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> (a) impose an indeterminate custodial sentence; and
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> (b) specify a period of at least 2 years as the minimum period for the purposes of Article 18, being such period as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it.

> 14.—(1) This Article applies where—
>
> (a) a person is convicted on indictment of a specified offence committed after 15th May 2008; and
>
> (b) the court is of the opinion—
>
> (i) that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences; and
>
> (ii) where the specified offence is a serious offence, that the case is not one in which the court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence.
>
> (2) The court shall impose on the offender an extended custodial sentence."

[30] We accept the applicant's submission that when a court concludes that the offender represents a significant risk of serious harm it should first consider the imposition of an extended custodial sentence. We also accept that a court which determines that an extended custodial sentence would not be adequate for the purpose of protecting the public from serious harm should give reasons in the sentencing remarks for that decision.

[31] We consider, however, that the learned trial judge adequately explained his reasons for imposing an indeterminate custodial sentence in this case. He noted that the applicant had failed to avail of the many rehabilitative schemes that were open to him both within the Young Offenders Centre and while on probation. Despite the sentence of four years' imprisonment imposed as a result of the earlier conviction the applicant has persistently breached the Sexual Offences Prevention Orders imposed upon him. His repeated convictions for driving while disqualified demonstrate that he has little regard for court orders. All of this demonstrates that he would have difficulty responding to the requirements and restrictions placed upon him during any licensing period.

[32] In light of that background the learned trial judge also noted that it was unlikely that the applicant would complete either the Sex Offenders Treatment Programme or the Enhanced Thinking Skills Course which Dr East, the psychiatrist,

considered would offer the best outcome in terms of reducing further offending. Those are entirely adequate reasons for the imposition of the indeterminate custodial sentence in this case.

Conclusion

[33] We grant leave to appeal in light of the issues raised but dismiss the appeals against conviction and sentence for the reasons set out above.