

Neutral Citation No: [2019] NICC 19

Ref: McA11078

***Judgment: approved by the Court for handing down
(subject to editorial corrections)****

Delivered: 2/10/2019

IN THE CROWN COURT AT BELFAST

—————
THE QUEEN

-v-

CHRISTOPHER ROBINSON

—————
RULING ON BAD CHARACTER EVIDENCE
—————

McALINDEN J

[1] The Accused Christopher Robinson is charged with the murder of Adrian Ismay, a Prison Officer, in March, 2016. He is also charged with possessing explosives with intent to endanger life and providing property for the purpose of terrorism. The Deceased suffered serious leg injuries when an under-vehicle improvised explosive device exploded under a van he was driving on the morning of 4th March, 2016. Mr Ismay required surgery to debride his leg wounds and initially appeared to make a good recovery. However, on 15th March, 2016, his condition suddenly deteriorated and he died. A post-mortem examination revealed that as a result of the injuries he received at the time of the explosion, he developed a DVT (deep venous thrombosis) with migrated proximally and resulted in the occurrence of a fatal PE (pulmonary embolism).

[2] It is the Crown's case that the Defendant is linked to the bombing by a number of significant strands of circumstantial evidence including CCTV footage of the car which was used to deliver the bomb to the area where it was attached to the underside of the Deceased's van and the presence of traces of RDX in that vehicle. It is the Crown case that the Defendant knew the Deceased through a common interest in the provision of volunteer first aid services.

[3] As part of its circumstantial case against the Defendant, the Crown seeks to rely on a number of pieces of "bad character" evidence which it argues are admissible under the provisions of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. The Defendant seeks to have this evidence excluded. It was agreed by the parties that the admissibility of this evidence should be determined by me once I had heard the entirety of the prosecution case and I now proceed to give

my ruling on the admissibility of this evidence said to constitute evidence of bad character.

[4] With one exception which does not apply in the circumstances of this case, the 2004 Order abolished the common law rules governing the admissibility of evidence of bad character in criminal proceedings in Northern Ireland, replacing these rules with a statutory framework for the admission of such evidence.

[5] Under Article 3 of the Order, “bad character” evidence is evidence of misconduct or a disposition towards misconduct but does not include evidence which has to do with the alleged facts of the offence with which the Defendant is charged or evidence of misconduct in connection with the investigation or prosecution of that offence. “Misconduct” is defined in Article 17 as the commission of an offence or other reprehensible behaviour.

[6] There are a number of gateways for the admission of bad character evidence under the statute but for present purposes, I need only consider two sub-paragraphs of Article 6 (1) of the Order which provide that bad character evidence is admissible if but only if it is important explanatory evidence (sub-paragraph (c)) or is relevant to a matter of substantial importance in the context of the case as a whole which said matter is in issue between the Defendant and the prosecution (sub-paragraph (d)).

[7] For the purposes of Article 6 (1) (c) evidence is important explanatory evidence if without it the Court would find it impossible or difficult properly to understand other evidence in the case and its value for understanding the case as a whole is substantial.

[8] The statute specifically provides that the Court must not admit evidence under Article 6 (1) (d) if the Defendant applies to have the evidence excluded and 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. When considering such an application to exclude evidence of bad character the Court must have regard to, in particular, the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

[9] The prosecution seeks to rely on four categories of evidence as bad character evidence in this case.

These are:

- (1) Material allegedly posted by the Defendant on his Facebook page;
- (2) The internet browser history alleged to have been retrieved from the Defendant’s mobile telephone;
- (3) Items allegedly purchased by the Defendant from the Amazon online shopping site between late January and early March, 2016; and
- (4) The finding of certain items during a search of the Defendant’s home in Dunmurry following his arrest on 6th March, 2016.

[10] I propose to describe the various pieces of evidence which make up each category and then globally consider whether each piece of evidence is admissible as bad character evidence and then consider whether any evidence admissible under Article 6 (1) (d) should be excluded on the basis that its admission would have an adverse impact on the fairness of the proceedings.

[11] Category (1)

Material posted on the Defendant's Facebook page.

It is argued by the Crown that this evidence demonstrates that the Defendant supports the use of violence in furtherance of the aims and goals of Irish Republicanism. He is highly critical of those elements of Irish Republicanism who have given up the armed struggle and have embraced the peace process. He has specifically included warnings on his Facebook page that those who provide information to the State about the activities of Irish Republicans involved in the armed struggle will be harshly dealt with. He strongly supports and endorses the views and aims of the Irish Republican Prisoners Welfare Association (IRPWA) including claims that Republican prisoners are being interned by the State and mistreated by Prison Officers. The Crown has produced pages from the IRPWA website and posts from the IRPWA Facebook page and these include a post purportedly made by the IRPWA on 13th November, 2017 in which this grouping welcomed the fact that the Defendant had been released on bail. The Crown also seeks to rely on the fact that in the context of all these posts by the Defendant indicating strong support for armed struggle and those engaged in it, the Defendant chose to place a photograph of himself posing with a realistic modern looking firearm as his Facebook profile picture.

[12] Having considered the material, I note that the specific issues raised in relation to the treatment of Republican prisoners concern the lengthy periods some named individuals were held in custody while on remand (in effect a form of internment) and the performance of strip searches. There are posts critical of Gerry Adams, Sinn Fein and the Andersonstown News, insofar as the newspaper carried a story which portrayed a dissident Republican in a bad light. Gerry Adams is depicted in a PSNI uniform. Another post indicates that Sinn Fein members in general are liars and the party is described as being out of touch. The PSNI is depicted in a post as engaging in the same abuses of citizens as the RUC was regularly accused of engaging in. A clothing company called IRA is liked.

[13] Category (2)

Internet history from the Defendant's mobile telephone.

It is again argued by the Crown that this evidence demonstrates that the Defendant supports the use of violence in furtherance of the aims and goals of Irish Republicanism. It demonstrates an interest in Irish Republican prisoner issues. It demonstrates a very unusual interest in scientific websites relating to the magnetic properties of Aluminium and the periodic table particularly elements used in electrical components.

[14] Having considered the material, the six images relied upon consist of a photograph of an armoured police Landrover taken at night; a poster comprising of an Irish flag and the silhouette of a crowd with their arms raised and writing in the lower section of the poster declaring "I support Irish Unity"; a photograph of a Republican demonstration with men in paramilitary uniforms; a poster showing police officers in riot gear with shields and weapons with writing that declares "End Political Policing Now!"; another photograph of an armoured Landrover and a poster of a young child waving an Irish flag with a print of Bobby Sands' face on the middle panel and writing that declares "Our revenge will be the laughter of our children." It is clear that the internet history on the phone also includes a history of visits to the IRPWA website and Facebook page. The Irish Republican News website was also visited. There are a number of searches in relation to Republican prisoners in Maghaberry Prison. An online version of the periodical table of elements was visited. A number of internet searches were performed concerning certain elements with particular interest being paid to metalloids (semi-conductors) and cobalt and copper. There are a number of search records relating to the magnetic qualities of Aluminium and permeability and electromagnetism. These searches take place on 1st and 2nd March, 2016. One search term is worded as follows: "Why is Iron chosen as the material for the core of a transformer why don't we use Aluminium?"

[15] Category (3)

Purchases made by the Defendant from Amazon between 27th January, 2016 and 2nd March, 2016.

The Crown seeks to adduce evidence that the Defendant bought self-defence gloves which, in effect, protect the wearer from lacerations to the hands if attempting to disarm someone carrying a knife. The Defendant also bought a large box of nitrile gloves which are black single use disposable gloves ordinarily used in a healthcare setting. The Defendant bought a jeweller's head mounted magnifying and illuminating glass. He also purchased 5 balaclavas, a morph mask and an LED flashlight.

[16] It is quite clear from the Defendant's Facebook page that he describes himself as a "Remote Medic at Medicine in Remote Areas, MIRA and EMT at Emergency Medical Technician." I must take this into account when considering whether to admit evidence relating to the purchase of the black nitrile gloves. However, such a declared interest in outdoor first aid would not have any conceivable bearing on the purchase of a head mounted magnifying and illuminating glass.

[17] Category (4)

The finding of two improvised balaclavas, comprising of cut sections of sleeve, with eye holes cut in them and 4 walkie-talkie radio transmitter/receivers during a search of the Defendant's home on 6th March, 2016.

I am satisfied that some of the evidence set out above is evidence which has to do with the alleged facts of the offence with which the Defendant is charged and therefore is excluded from the definition of bad character evidence under the provisions of Article 3 (a) of the Order. The evidence of internet searching in relation

to the periodic table, metalloids and the magnetic qualities and permeability of Aluminium in the days immediately before this incident which it must be remembered involved the attachment of an improvised explosive device to the undersurface of Mr Ismay's van probably using a magnet is excluded from the definition of bad character evidence by reason of this provision. If this evidence is relevant at all, its relevance is that it might suggest that the Defendant in this case knew of the plan to attach an improvised explosive device to the underside of Mr Ismay's car in the days immediately prior to the attack and was researching a subject which has a direct bearing on whether the device would magnetically attach a metal commonly used in the manufacture of some types of vehicle.

[18] In relation to the remaining evidence which does not have anything to do with the alleged facts of the offence with which the Defendant is charged, the Crown argues that this evidence is relevant and admissible by virtue of Article 6 (1) (c) of the 2004 Order as important explanatory evidence of motive and also through the gateway provided by Article 6 (1) (d) as it is relevant to an important matter in issue between the Defendant and the prosecution, namely whether he committed the offences with which he is charged.

[19] I do not consider that the prosecution in this case can avail of the statutory gateway provided by Article 6 (1) (c) because of the fleshed out definition of "important explanatory evidence" set out in Article 7 of the 2004 Order. Under Article 7, evidence is "important explanatory evidence" if (a) "without it, the Court...would find it impossible or difficult properly to understand other evidence in the case, and (b) its value for understanding the case as a whole is substantial." Having heard and considered all the prosecution evidence in the case, I have no difficulty in properly understanding any aspect of the other evidence adduced by the prosecution and as I have no such difficulty, this gateway is closed to the admission of bad character evidence under Article 6 (1) (c). If this evidence is to be admitted it must be admissible through the gateway provided by Article 6 (1) (d) of the 2004 Order.

[20] The prosecution argues that evidence of support for (or affiliation to) an unlawful organisation or gang has been held to be admissible in a number of appellate decisions. In *R v Elliott* [2010] EWCA 2378, evidence of gang membership was admitted to assist the jury in deciding whether the Defendant was knowingly in possession of drugs and guns found at his address. In *R v Myers* [2015] 3 WLR 1145, the Privy Council held that such evidence could be admissible, even under the common law, as evidence of motive which:

"contributed to the proposition that it was the Defendant who had done it, by supporting the other evidence that it was he who was responsible." (See para 44).

[21] The prosecution argues that following on from this judgment, such evidence can operate as a further strand of a circumstantial case: see paras 44 to 49. The prosecution also relies on the case of *R v Awoyemi* [2016] 4 WLR 114, in which the incident giving rise to the charge faced by the Defendant "bore all the hallmarks of

gang related violence". Evidence of gang membership was admissible to establish a possible motive for a shooting, an association with firearms and lethal violence and could negative innocent presence and association. (See conclusion at para 33). The prosecution also relies on *R v Lewis* [2014] EWCA Crim 48, at paragraphs 76-129; and *R v Mullings* [2011] 2 Cr App R 2.

[22] The prosecution argues that as in *R v Awoyemi*, the incident giving rise to the charges faced by the present Defendant bears all the hallmarks of having been undertaken by a terrorist organisation. The prosecution submits that the evidence detailed above, taken in the round, is relevant to show a possible motive to murder a prison officer by the use of a UVIED given the animosity of supporters of violent Irish Republicanism towards that body of people. The prosecution also argues that the evidence is relevant to assist the tribunal of fact in deciding whether the Defendant was knowingly involved in the incident. The prosecution argues that it is capable, in the context of all the other evidence against the Defendant, of casting light upon the nature of his involvement and negating any suggestion of an innocent or unwitting involvement and association.

[23] In relation to the material alleged to constitute incriminating articles, the prosecution argues that the material which cannot be said to have anything to do with the offence is nevertheless admissible through the gateway provided by Article 6 (1) (d) as it is relevant to an important matter in issue, namely whether the Defendant committed the offence. The purchases made from Amazon and the presence of the balaclavas and walkie-talkies at the Defendant's home address are, the prosecution submits, relevant to whether he was involved in the murder of Adrian Ismay. It is argued that this evidence, viewed in the round and in the context of the other evidence in the case, in the absence of any innocent explanation, suggests involvement in terrorist activity to include the preparation of improvised explosive devices. The prosecution relies on the case of *R v Clarke* [1995] 2 Cr App R 425, CA, a case decided before the 2004 Order, in which the Court of Appeal held that evidence of a robber's kit, a gun and ammunition in the boot of a car driven by the Defendant, was admissible on his trial for a bank robbery, even though none of the items could have been connected to the robbery.

[24] The prosecution relies on two passages from the judgment of Steyn LJ. Referring firstly to pages 433B to 435B, it is suggested by the prosecution that the Judge was attempting to demystify the law relating to the admissibility of evidence of bad character by endorsing the conclusion in *DPP v P* (1991) 93 Cr App R 267 and commenting on Lord Hoffman's article "Similar Facts after Boardman" (1975) 91 LQR 193 by stating:

"the balancing process which the court must perform is the same in any case, civil or criminal in which it is required to decide whether evidence is sufficiently relevant to be admissible. *Boardman* has therefore done more than clarify what might be called the special theory of similar fact evidence. It has shown

that the whole subject can be accommodated within the general theory of relevance.”

[25] The second passage of the judgment of Steyn LJ relied upon by the prosecution is at 434G where he stated that it is:

“always essential for the Court, in considering a disputed issue as the admissibility of similar fact evidence, to consider the question not in the abstract but in the light of all the other evidence and the particular issue in respect of which the evidence is tendered.”

[26] The prosecution also relies on the decision of Hart J In *R v McKenna, McConville and Toman* [2009] NICC 41, where, at paragraphs 14 onwards, the Judge considered the relevance of the presence of traces of an explosive substance (PETN) which differed from the explosive used in the mortar bomb which was the subject of the indictment, and concluded at paragraph [18] that it could properly be admitted as evidence:

“because it strengthens the inference to be drawn from the other evidence that they had contact with and therefore possession of, the explosive device and its ingredients. It is therefore relevant and of considerable probative value.”

[26] The prosecution relies on paragraph [24] of this decision where Hart J summarised his reasoning in the following terms:

“Put simply, the presence of indications that two of the three Defendants and two of the four occupants of the same car had on a previous occasion contact with the same type of explosive substance as one of the two types of explosive substances which comprised the device of which they are alleged to have had possession, taken in conjunction with the other forensic evidence, the evidence as to the condition of their clothing and the other items found in the vehicle, is capable of providing a significant element in the circumstantial case alleged by the prosecution that all three defendants were acting in concert.”

[27] The prosecution accepts that both these cases considered admissibility in the context of ‘similar fact’ evidence but it is argued that now, under the 2004 Order the test is simply *relevance* rather than any enhanced relevance required under the common law. The prosecution relies on the case of *R v Weir and others* [2006] 1 WLR 1885, in which the Court of Appeal pointed out that the common law rules on the admissibility of evidence of bad character had been abolished, saying at paragraph [35]:

"The 2003 Act completely reverses the pre-existing general rule. Evidence of bad character is now admissible if it satisfies certain criteria (see Section 101(1)), and the approach is no longer one of inadmissibility subject to exceptions (see also para 358 of the explanatory notes to the Act and the observations of Professor Sir John Spencer in his paper for the Judicial Studies Board, at paras 37 and 143). The Act does not say anything about "enhanced probative value" or "enhanced relevance" (the words used in *R v Edwards*). Para 363 of the explanatory notes does refer to an "enhanced relevance test" but only in relation to Section 100 of the Act. The terms of that section clearly impose a higher test in respect of the introduction of a non-defendant's bad character than the test for the introduction of a Defendant's bad character. If the evidence of a Defendant's bad character is relevant to an important issue between the prosecution and the defence (Section 101(1)(d)), then, unless there is an application to exclude the evidence, it is admissible. Leave is not required. So the pre-existing one stage test which balanced probative value against prejudicial effect is obsolete: see also Section 99(1)."

[28] Mr Harvey QC for the Defendant in this case urges me to view the cases relied upon by the prosecution as cases which were decided on their own particular facts. He urges me to decide this present case on its own particular facts, paying close regard to the clear statutory language. He urges me not to lose sight of the principles expounded by Lord Morris in *McGreevy v DPP* [1973] 1 All ER 503 in relation to the approach to be adopted to the evidence when dealing with a case which is largely or wholly based on circumstantial evidence.

[29] Turning then to the facts and circumstances of this particular case and examining each individual piece of evidence and considering each piece of evidence in the context of all the various pieces of evidence viewed as a whole, I have reached the following conclusions on admissibility.

[30] The impassioned public expression of extreme political beliefs such as the achievement of a united Irish Republic by means of force of arms or the public expression of support for a group or organisation which claims to have an interest in promoting the welfare of prisoners who have either been convicted of Irish Republican terrorist offences or individuals who are in custody on remand in respect of such offences, whether it be on the internet, social media or by taking part in public demonstrations, having regard to the importance of the right of freedom of expression, should not ordinarily give rise to a situation where such expressions of support are utilised in the criminal process as evidence of bad character admissible

under Article 6 (1) (d) of the 2004 Order. But each case depends on its own particular facts. In this case, the posts on the Defendant's Facebook page and the contents of his mobile telephone internet search history insofar as they can be interpreted as giving an insight into the Defendant's political leanings and sympathies in my opinion would not, in isolation, constitute evidence of a disposition towards the commission of an offence or other reprehensible behaviour.

[31] However, it is impossible in this case and, indeed, it would be an affront to common sense, to look at this evidence in isolation, ignoring the other evidence which cries out to be considered as part of a coherent whole. The online public expression of political beliefs and support for a cause which sanctions the goal of achieving political change by violent means and the support for an organisation that promotes the welfare of those allegedly involved in achieving political change by violent means when combined with and supplemented by an image depicting the holder of those beliefs and expressions of support carrying and posing with a realistic looking, modern firearm, when viewed in the context of a find of balaclavas and walkie-talkies in the house of the individual holding those beliefs and expressions of support, and in the context of the holder of those beliefs and expressions of support purchasing self-defence gloves, a morph mask and balaclavas on the internet in the period leading up to the date of the offences with which he is charged, are matters which are clearly capable of constituting evidence of a disposition towards the commission of an offence or other reprehensible behaviour. By its nature, this evidence is clearly relevant to an important matter in issue between the Defendant and the prosecution, namely the involvement of the Defendant in the operation to attach an improvised explosive device to the underside of the van of the Deceased. I do not consider that the purchase of a jeweller's head mounted magnifying and illuminating glass or an LED torch constitute bad character evidence in the context of this case nor do I consider that the purchase of nitrile gloves constitutes bad character evidence in light of the Defendant's prominent declaration of his interest in first aid. The prosecution, in oral submissions, conceded that it was not seeking to rely on the purchase of the personal attack alarms or the cable ties as evidence of bad character. The general expression of support by the IRPWA for the release of the Defendant on bail in respect of the charges which he faces does not in my opinion constitute evidence of bad character and even if it did I would be strongly minded to exclude such evidence under Article 6 (3) on the basis that its admission could very well have an adverse effect on the fairness of the proceedings having regard to the fact that the motivation for making such a public statement of support is very much open to question.

[32] Having carefully considered all the various strands of bad character evidence both in isolation and globally, I do not consider that the bad character evidence in this case which is admissible under Article 6 (1) (d) should be excluded on the basis that the admission of any of the individual strands of this evidence or the admission of this evidence globally will have an adverse effect on the fairness of the proceedings. The weight if any to be attached to this evidence will not finally be determined until all the evidence in this case has been given and closing submissions have been carefully considered.

[33] In summary, therefore, the evidence in category (1) is admissible bad character evidence apart from the evidence emanating from the IRPWA website or Facebook page consisting of a post welcoming the release on bail of the Defendant. The evidence in category (2) is admissible bad character evidence apart from the searches relating to the periodic table, metalloids, Cobalt, Copper and Aluminium but this evidence is admissible at common law. The evidence in category (3) is admissible bad character evidence apart from the nitrile gloves, the jeweller's head mounted magnifying and illuminating glass, the cable ties, the 15 personal attack alarms and an LED flash light. The evidence in category (4) is admissible bad character evidence. Consideration of all the evidence as a whole does not cause me to exclude any of this evidence under Article 6 (3) although if it had been admissible under Article 6 (1) (d) I would have excluded the evidence of the "welcome" from the IRPWA under Article 6 (3).