[2017 Gib LR 26]

R. v. PRESCOTT

SUPREME COURT (Ramagge Prescott, J.): February 7th, 2017

Evidence—character—victim's bad character—defence to apply under Criminal Procedure Rules 2015, Part 21 to adduce evidence of victim's alleged bad character—where bad character evidence (of victim's previous relationships with local troublemakers) adduced without application, retrial ordered if cannot be remedied by judicial direction and unsafe to continue

The defendant was charged with wounding with intent.

The defendant was alleged to have attacked the victim, his partner at the time, with a cordless electric drill, causing her two puncture wounds, and to have kicked and punched her.

The victim gave evidence at the defendant's trial and was subsequently cross-examined. During cross-examination, defence counsel questioned the victim as to previous relationships she had had with men whom counsel named and who were known in the community for being of bad character, which the victim confirmed. Defence counsel suggested to the victim that she had a drinking problem; that she had been banned from various licensed premises; and that she had drunk excessively and smoked cannabis whilst pregnant. She denied the allegations other than admitting that she had been banned from one licensed premises.

It was apparent that the defence was attempting to introduce the bad character of the victim without permission. Part 21 of the Criminal Procedure Rules 2015 dealt with bad character applications in respect of non-defendants and required an application to introduce such evidence.

The judge stopped the proceedings, dismissed the jury for the day and heard from counsel as to the defence questioning. The defence purported to apply for permission to introduce evidence of the victim's bad character.

Defence counsel claimed that he could not properly defend the charge without putting the victim's character in issue, as it was the defence case that the victim was unstable, prone to fits of violence, abused drink and drugs, and was responsible for the infliction of some of her own injuries. He offered no sensible explanation for his failure to make an application under the Criminal Procedure Rules 2015 although he suggested that the prosecution should have been aware from the content of the defence statement that it was intended to put the victim's character in evidence.

Held, discharging the jury and ordering a retrial:

(1) In the circumstances it would be unfair to the victim to allow the trial to continue. The trial would therefore be stopped, the jury discharged and a retrial ordered. Evidence as to a victim's alleged bad character should not be adduced unless the correct procedure had been followed and an application made under Part 21 of the Criminal Procedure Rules. The court had a discretion under r.21.6 to allow late applications but r.21.6 did not allow for an application to be made after the bad character evidence had been adduced. At least some of the questions put to the victim had not been admissible, particularly those concerning her previous relationships with specified men who were recognizable in this small community as persons of bad character. That line of questioning had been irrelevant; its only purpose had been to undermine the victim's creditworthiness and to cast her in a bad light. As the jury had heard the evidence, it would be unsafe to allow the trial to continue. There was a very real possibility that the matters improperly raised by defence counsel before the jury could not be put right by a direction. The court had a duty to ensure a fair trial process for the defendant and also for the victim. The fairness of the present proceedings could no longer be ensured. In deciding to stop the trial, discharge the jury and order a retrial, the court had had regard to (a) the important issues in the case; (b) the nature and impact of the improperly disclosed material on those issues (noting that it was the defendant's word against the victim's); (c) the manner and circumstances of its disclosure; and (d) the extent to which it was remediable by judicial direction (paras. 10–24).

(2) It was fanciful to suggest that the prosecution should have been aware from the contents of the defence statement that the defence intended to put the victim's character in issue. One side could not be expected to deduce from a particular document any applications that might arise from it, and react and respond to those absent but supposedly predictable applications. Even if the defence statement had been drafted, served and filed according to the Rules, the requirements of Part 21 would not thereby have been circumvented (paras. 6–7).

Cases cited:
(1) *R.* v. *Butler*, [1999] Crim. L.R. 835, referred to.
(2) *R.* v. *Docherty*, [1999] 1 Cr. App. R. 274, followed.
(3) *R.* v. *Edwards*, [2005] EWCA Crim 3244; [2006] 1 W.L.R. 1524; [2006] 3 All E.R. 882; [2006] 2 Cr. App. R. 4; [2006] Crim. L.R. 531, referred to.

Legislation construed:
Criminal Procedure Rules 2015 (S.I. 2015 No. 1490), r.21.2: The relevant terms of this rule are set out at para. 3.
r.21.3: The relevant terms of this rule are set out at para. 3.
r.21.6: The relevant terms of this rule are set out at para. 12.

M. Zammit for the prosecution;
J. Phillip for the defence.

1 **RAMAGGE PRESCOTT, J.:** In this case the defendant is charged with one count of wounding with intent. The allegation is a serious one, although it is fortuitous that the resultant injury was not serious. It is alleged that he attacked his then partner with a cordless electric drill and, in doing so, caused her to suffer two puncture wounds: one to the back of the head and one to the shin. In addition, it is alleged he kicked and punched her, causing bruises and abrasions to the face.

2 The trial in this matter began yesterday. The last witness of the day was the victim, Ms. Parry. During the course of his cross-examination, defence counsel put it to the victim that whilst she was in Gibraltar she had had relations with multiple men, and he proceeded to name each man in turn; Ms. Parry confirmed this. These questions came as somewhat of a surprise—I could not at that time see their relevance—but, given that the victim had answered and counsel for the prosecution had taken no objection, I did not interrupt the proceedings. However, defence counsel went on to suggest to the victim that she had an excessive drinking problem, that she had been banned from various licensed premises, that she had drunk excessively whilst pregnant, and that she had smoked cannabis whilst pregnant. Other than admitting that she had been banned from one licensed premises for the reason defence counsel suggested, Ms. Parry denied the other allegations. These last questions, taken in conjunction with the earlier questions in relation to multiple relationships with specified named men who are well known in this community for being of bad character, made it apparent that the defence was attempting to introduce the bad character of the victim without permission. At that point, I stopped the proceedings, dismissed the jury for the day, and heard from counsel as to the line of questioning Mr. Phillips was pursuing.

The law

3 The Criminal Procedure Rules 2015 ("the Rules"), Part 21 deals with bad character application in respect of non-defendants:

"**21.2.**—(1) A party who wants to introduce evidence of bad character must—

(a) make an application under rule 21.3, where it is evidence of a non-defendant's bad character;

(b) . . .

(2) An application or notice must—

(a) set out the facts of the misconduct on which that party relies,

(b) explain how that party will prove those facts (whether by certificate of conviction, other official record, or other evidence), if another party disputes them, and

(c) explain why the evidence is admissible.

21.3.—(1) This rule applies where a party wants to introduce evidence of the bad character of a person other than the defendant.

(2) That party must serve an application to do so on—

(a) the court officer; and

(b) each other party.

(3) The applicant must serve the application—

(a) as soon as reasonably practicable; and in any event

(b) not more than 14 days after the prosecutor discloses material on which the application is based (if the prosecutor is not the applicant).

(4) . . .

(5) The court—

(a) may determine an application—

(i) at a hearing, in public or in private, or

(ii) without a hearing;

(b) must not determine the application unless each party other than the applicant—

(i) is present, or

(ii) has had at least 14 days in which to serve a notice of objection;

(c) may adjourn the application; and

(d) may discharge or vary a determination where it can do so under—

(i) section 8B of the Magistrates' Courts Act 1980 (ruling at pre-trial hearing in a magistrates' court), or

(ii) section 9 of the Criminal Justice Act 1987, or section 31 or 40 of the Criminal Procedure and Investigations Act 1996 (ruling at preparatory or other pre-trial hearing in the Crown Court)."

4 It is not in dispute that, in breach of the Rules, Mr. Phillips for the defendant had (prior to yesterday) made no such application. In fact, had I not stopped the trial when I did, I imagine he would not have made any sort of application at all. As it was, he purported to make his application at that point. He then revealed that the defendant's case is that Ms. Parry is unstable, prone to fits of violence, abuses drink and drugs, and was responsible for the infliction of some of her own injuries. Mr. Phillips submits that he cannot conduct his case without putting the victim's character in issue.

5 It seems to me that, if Mr. Phillips was, as he claims, intending to run this defence all along, he ought to have made the appropriate application, in the prescribed way, and within the prescribed time. To his credit, he concedes this and can offer no sensible explanation as to why this was not done, other than that he drafted a defence statement and served this on the prosecution, and therefore the prosecution should have been aware from the contents of that statement that the defendant intended to put the victim's character in issue.

6 To my mind this is fanciful. One side cannot be expected to deduce from a particular document any applications which might arise from it, and react and respond to those absent but supposedly predictable applications.

7 For the prosecution, it was said that the defence statement was not in the prescribed form and in any event was served on the prosecution out of time. It has not been filed in court at all to my knowledge and I have not seen it. That said, even if the defence statement had been drafted, served and filed according to the Rules, not because of that would the requirements of Part 21 have been circumvented.

8 The Rules are there, *inter alia*, to promote transparency and to protect against the very mischief displayed by the defence yesterday, seeking to introduce bad character without notice and without having satisfied the court that it is admissible.

9 Part 21 makes extensive use of the word "must":

(a) In r.21.2(1), in order to introduce evidence of bad character, a party "must" make an application under r.21.3. It is clear that the intention of statute is to regulate these types of applications.

(b) In r.21.2(2), the application or notice "must" be made in the prescribed way and a party who objects "must" serve notice.

(c) Rule 21.3(5)(b) is of particular importance. It begins by saying that the court "may" determine the application in public or private or without a hearing but then, in stark contrast, it specifically states that—

> "[the court] must not determine the application unless each party other than the applicant—
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> . . .
>
> (ii) has had at least 14 days in which to serve a notice of objection."

The wording is unambiguous: the court "must not" in this section. There is no discretion to be read into that provision; on the face of it there is a prohibition placed upon the court in determining these applications if the prescribed period of notice has not been adhered to.

10 To my mind there is a good reason why those Rules are so strict. Adducing bad character should never be taken lightly—a person's good name and integrity are being challenged and there must be a proper basis for that—the application must be vetted and assessed by the court before the allegations are made, particularly in the case of an alleged victim who has had the courage to come to court, make accusations in the public eye, and submit to cross-examination.

11 It is vital that they receive the benefit of the protection afforded by the sifting process envisaged by the Rules. That exercise, however, cannot be conducted unless the precise nature of the bad character which it is sought to adduce is disclosed as well as the facts upon which it is based and the means of proving it. If a victim or her behaviour is to be portrayed to the jury as reprehensible, the correct procedure should be followed to ensure that portrayal is justified. Needless to say, a part of that procedure is also ensuring that the other side has sufficient time within which to consider the application and make representations.

12 That said, the emphatic nature of r.21.3(5)(b) is tempered by r.21.6, which makes provision for the court to hear such applications out of time and even when not made in the prescribed form. It provides:

> "**21.6.**—(1) The court may—
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> (a) shorten or extend (even after it has expired) a time limit under this Part;

(b) allow an application or notice to be in a different form to one set out in the Practice Direction, or to be made or given orally;

(c) dispense with a requirement for notice to introduce evidence of a defendant's bad character.

(2) A party who wants an extension of time must—

(a) apply when serving the application or notice for which it is needed; and

(b) explain the delay."

13 This bestows upon the court a discretion essentially to allow late applications. The court could adjourn to allow the prosecution time to respond to the application. Rule 21.6 allows for a practical application of the principles; what it does not allow for is an application to be made after the bad character evidence has been adduced. There is a material difference between making a late application and making one after you have adduced the evidence you are seeking permission to adduce, in that instance the application becomes a nonsense.

14 The jury has already heard about the victim's bad character; they will have no doubt already formed an impression of the victim's character. An application at this stage essentially forces the court to allow, in retrospect, each and every question relating to bad character that has already been put to the victim. More importantly, if this application were to be allowed, given that the bad character evidence has already been adduced, the court would be allowing the defence to adduce bad character evidence without having disclosed why it is relevant, and without it having been scrutinized first by the court and indeed by the prosecution.

15 Before any judgment can be made about the admissibility of evidence which goes to the bad character of a victim, it is vital that there should be a proper appreciation of what the evidence is and why it is submitted it is necessary to adduce it. The fact that the defence argues now that it is necessary to make these allegations in order to conduct their defence is relevant only to the exercise by me of my exclusionary discretion.

16 It is impossible for me to exercise any sort of discretion if the evidence is already before the jury.

17 In my view, at least some of the questions put to the victim are not admissible: I refer particularly to the questions put to the victim about previous relationships with specified men. Defence counsel read out those names one by one; to many people in this small community those names are recognizable as previous offenders who are often in trouble with the law.

18 The Court of Appeal has ruled on various occasions, *R.* v. *Edwards* (3) (Archbold, *Criminal Pleading, Evidence & Practice*, para. 13–30, at 1641 (2017 ed.)), that evidence as to motive has to be evidence that "has to do with the alleged facts of the offence" ([2006] 1 W.L.R. 1524, at para. 1). I substitute the word "motive" for defence counsel's word "disposition" in this case.

19 The line of questioning I have identified is irrelevant; it has no probative value and no bearing upon whether the defendant assaulted the victim on the day in question. Its only purpose is to undermine the creditworthiness of the victim and cast her in a bad light.

20 It is unfortunate that defence counsel made no attempt to present an agreed background of the victim. In *R.* v. *Butler* (1), the court held that in the event of an issue arising as to the admissibility of evidence which it is submitted is important explanatory evidence, counsel should attempt to agree an account of the background, so as not to distract the jury's attention from the central issue. Failing agreement, there should be a fuller analysis of the situation in the absence of the jury. Of course, that is impossible because, as I have said, the evidence is already before the jury.

21 In my view, the jury has been contaminated as it were, and it would be unsafe to allow the case to continue—there is a very real possibility that the matters raised by defence counsel before the jury could not be put right by a direction from me, no matter how robust.

22 The court has a duty to ensure a fair trial process, and that means fair not only to the defendant but also to the victim. In my view, the fairness of the proceedings can no longer be ensured.

23 For these reasons I have no option but to stop the trial, discharge the jury, and order a re-trial. In making that decision I have regard, as my reasons and evidence, to *R.* v. *Docherty* (2) and to—

(a) the important issues in this case;

(b) the nature and impact of improperly disclosed material on those issues having regard, *inter alia*, to the respective strengths and weaknesses of the prosecution and defence cases (I note in this case it is the defendant's word against the victim's, so that the strength or weaknesses of the case will depend on what the jury makes of their evidence);

(c) the manner and circumstances of its disclosure; and

(d) the extent to which it is remediable by judicial direction.

24 Defence counsel emphasizes that it was not his intention to mislead the court or to attempt to purposely circumvent rules. I believe him. Had I found his intention to be otherwise, I would have had no option but to refer his behaviour to the Admissions and Disciplinary Committee. As it

is, I merely say that it is unfortunate that a case will have to be re-tried because of counsel's failure to adhere to the Rules.

Ordering accordingly.
