

[2021 Gib LR 477]

**R. v. MESMOUDI**

SUPREME COURT (Dudley, C.J.): September 24th, 2020

*Evidence—character—defendant’s bad character—evidence of defendant’s previous abusive behaviour towards complainant admitted at trial for grievous bodily harm*

The defendant was charged with causing grievous bodily harm.

The defendant was charged with one count of causing grievous bodily harm with intent, contrary to s.166 of the Crimes Act, and an alternative count of inflicting grievous bodily harm, contrary to s.167. The complainant was the defendant’s then partner. The prosecution case was that, following a disagreement, the defendant punched the complainant repeatedly, fracturing her jaw. The prosecution alleged that the assault had to be seen in the context of an abusive relationship during which there were multiple incidents of domestic violence.

The prosecution sought a special measures direction preventing the complainant from seeing the defendant when giving evidence, which application was not opposed by the defendant.

The prosecution also sought to introduce evidence of the defendant’s bad character:

1. The defendant slapped the complainant following an argument, six months after they started their relationship. This took place at her grandmother’s house.
2. The defendant would push, kick and spit at the complainant.
3. On a Friday, around the time she provided her statement to the police, the defendant hit the complainant. This took place by the stairs next to the Care Agency and he then ran off.
4. The defendant hit the complainant regularly during their relationship.
5. He bit her hand and hit her ear.
6. The defendant choked the complainant in the area known as La Calle Comedia and she almost collapsed.
7. The last time the defendant hit the complainant was around 2½ weeks before she provided her statement to the police.
8. The defendant hit the right side of the complainant’s face with his open hand and then punched her bicep area whilst she was in a car with her brother.

9. About 1½ years ago, the defendant kicked the complainant whilst in the house standing by the window and her brother was present.
10. The complainant and the defendant were thrown out of her grandparent's house for arguing and the defendant punched her as they were walking out.
11. The defendant was seen grabbing the complainant's hand and pulling her back aggressively.
12. The complainant had marks on her wrists and arms caused by the defendant, who hurt her.

The prosecution sought to have the bad character evidence admitted under two gateways in s.369(1) of the Criminal Procedure and Evidence Act, namely gateway (c) ("important explanatory evidence") and gateway (d) (evidence "relevant to an important matter in issue between the defendant and the prosecution").

The defendant submitted that the prosecution could not rely on gateway (c) because it was perfectly possible for a jury to understand the complainant's allegation, limited to the alleged events that took place on that day. In addition, the defendant sought the exclusion of the bad character evidence under s.396(3) on the basis that the evidence would have such an adverse effect on the fairness of the proceedings that the court should not admit it.

**Held,** ruling as follows:

(1) Given the circumstances of this case, it would be wholly appropriate that the complainant, when testifying, be prevented from seeing the defendant by means of a screen (para. 5).

(2) Items 1–11 of the allegations of misconduct were undoubtedly evidence of bad character. Pursuant to s.377 of the Criminal Procedure and Evidence Act, when considering relevance or probative value, the court must do so on the assumption that the evidence was true, unless it appeared to the court that its falsity was obvious. There was no suggestion that the falsity of any of the allegations was obvious. Aspects of item 12 were hearsay. No notice to introduce hearsay evidence had been provided by the prosecution. In the circumstances, it was not appropriate for the prosecution to adduce that evidence under the guise of bad character (paras. 7–8).

(3) The allegations of misconduct numbered 1–11 met the statutory criteria of gateway (c) and (d). In respect of gateway (c), when considering the offence with which the defendant was charged, not to admit the evidence of bad character would result in the jury having a wholly incomplete picture. The jury would have before it a random instance of serious violence, as opposed to an allegation of a serious assault in the context of an abusive relationship. In respect of gateway (d), the nature of the relationship between the defendant and the complainant was a matter in issue. In addition, items 1–11 evidenced a propensity on the part of the defendant to assault the complainant. Given the nature of the allegations and the identity of the complainant, there was a very significant degree of

similarity between the allegations in 1–11 and the offence with which the defendant was charged. The allegations in 1–11 would not be excluded under s.369(3) as the court was not persuaded that admission would have an adverse effect on the fairness of the proceedings. Subject to the appropriate directions being given to the jury, the fairness of the proceedings would not be compromised by having the evidence of bad character in items 1–11 admitted (paras. 12–19).

**Cases cited:**

- (1) *McKenzie v. R.*, [2008] EWCA Crim 758, considered.
- (2) *O’Dowd v. R.*, [2009] EWCA Crim 905; [2009] Crim. L.R. 827; [2009] 2 Cr. App. R. 16, considered.
- (3) *R. v. Mitchell*, [2016] UKSC 55; [2017] A.C. 571; [2016] 3 W.L.R. 1405; [2017] 1 All E.R. 1037; [2017] Crim. L.R. 310, considered.
- (4) *R. v. P.*, [2006] EWCA Crim 2517, considered.

**Legislation construed:**

Criminal Procedure and Evidence Act 2011, s.332(1): The relevant terms of this subsection are set out at para. 16.  
 s.369(1): The relevant terms of this subsection are set out at para. 9.  
 s.370: The relevant terms of this section are set out at para. 10.  
 s.396(3): The relevant terms of this subsection are set out at para. 14.

*K. Drago* for the Crown;

*O. Smith* (instructed by TSN Law) for the defendant.

1 **DUDLEY, C.J.:** The defendant is charged with one count of causing grievous bodily harm with intent, contrary to s.166 of the Crimes Act, and an alternative count of inflicting grievous bodily harm contrary to s.167. Although charged by the Royal Gibraltar Police on September 11th, 2019, the alleged assault upon his then partner, “DM,” dates back to July 14th, 2016.

2 In respect of the offences with which he is charged, the prosecution case is that on July 14th, 2016 the defendant and DM were at the London Bar, when some time after 9 p.m. they had a disagreement and the defendant left. DM followed him and in the area of Johnstone’s Passage the defendant punched her repeatedly including a blow to her jaw. The next day at A&E she was diagnosed with a fractured mandible which required surgery and the jaw was fixated with a plate and four screws.

3 When DM was at A&E, the nursing staff considered her to be a vulnerable minor and a social worker was called. According to the social worker’s statement, DM told her that she had fallen down the stairs at her boyfriend’s block, that she had been running and tripped. In her statement to the police for the purposes of this prosecution, DM’s explanation for not having reported the matter at the time was that she “was scared at the

moment so I did not press charges and I was really overprotective of him and did not want him to get into trouble.”

4 The prosecution case is that the serious assault which is the subject of the charges must be seen in the context of an abusive relationship during which there were multiple incidents of domestic violence.

5 Against that background, the prosecution seeks a special measures direction preventing DM from seeing the defendant when giving evidence. Mr. Smith, quite properly, does not oppose the application. In my judgment, given the circumstances of this case, it is wholly appropriate that DM when testifying, be prevented from seeing the defendant by means of a screen.

6 The more substantive issue that arises relates to the prosecution’s notice to introduce evidence of the defendant’s bad character which the defendant seeks to have excluded. The allegations of misconduct that the prosecution seeks to rely upon are set out in their notice and are as follows:

1. The defendant slapped the complainant following an argument, six months after they started their relationship. This took place at her grandmother’s house.

2. The defendant would push, kick and spit at the complainant.

3. On a Friday, around the time she provided her statement to police, the defendant hit the complainant. This took place by the stairs next to the Care Agency and he then ran off.

4. The defendant hit the complainant regularly during their relationship.

5. He bit her hand and hit her ear.

6. The defendant choked the complainant in the area known as La Calle Comedia and she almost collapsed.

7. The last time the defendant hit the complainant was around 2½ weeks before she provided her statement to police.

8. The defendant hit the right side of the complainant’s face with his open hand and then punched her bicep area whilst she was in a car with her brother.

9. About 1½ years ago, the defendant kicked the complainant whilst in the house standing by the window and her brother was present.

10. The complainant and the defendant were thrown out of her grandparent’s house for arguing and the defendant punched her as they were walking out.

11. The defendant was seen grabbing the complainant’s hand and pulling her back aggressively.

12. The complainant had marks on her wrists and arms caused by the defendant, who hurt her.

7 Items 1 to 11 are undoubtedly evidence of bad character. By virtue of s.377 of the Criminal Procedure and Evidence Act (“CPEA”) when considering its relevance or probative value, the court must do so on the assumption that the evidence is true, unless it appears to the court, on the basis of any material before it, that “its falsity is obvious” (Archbold, *Criminal Pleading, Evidence & Practice*, para. 13.73, at 1832 (2020)). It is not suggested that the falsity of any of the allegations is obvious.

8 As Mr. Drago recognizes, distinct issues arise in respect of item 12 in that aspects of it are hearsay evidence. The part of the witness’ statement dealing with that allegation reads:

“I have never seen [the defendant] hit [DM], however I suspected it had happened. [DM] has told me it has happened a lot over the years, and on a couple of occasions showed me marks on her wrists and arms where she said he’d hurt her.”

The evidence of the marks is only relevant if connected to the hearsay and no notice to introduce hearsay evidence has been provided by the prosecution setting out the basis upon which it says it should be admitted. In those circumstances it is not appropriate for the prosecution to adduce that evidence under the guise of bad character.

9 The prosecution seek to have the bad character evidence admitted under two s.369(1) CPEA gateways. Namely, gateway (c), “important explanatory evidence,” and gateway (d), “relevant to an important matter in issue between the defendant and the prosecution.”

#### **Gateway (c)**

10 Section 370 CPEA provides:

“370. For the purposes of section 369(1)(c) evidence is important explanatory evidence if—

- (a) without it, the court or jury 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.”

The basis upon which the prosecution seeks to rely on the bad character evidence under this gateway [and gateway (d)] is set out in some detail in s.3 of their notice but fundamentally comes to this. That according to the interview under caution, the defendant denies the assault and suggests that the allegation is fabricated. That the defendant, whilst accepting that they did not get along and argued frequently (and whilst admitting to having

pushed her), denied ever having hit DM. That the bad character evidence serves to put the assault in context of previous assaults and to show that the relationship was abusive in nature. That that evidence is necessary for the jury to understand why the complainant did not report the matter to the police at the time and denied that the injuries had been inflicted by her then partner.

11 For his part, Mr. Smith in his submissions focuses upon the language of s.370 and the “impossible or difficult properly to understand other evidence” test. In effect, he submits that it is perfectly possible for a jury to understand the complainant’s allegation, limited to the alleged events that took place on July 14th, 2016. As regards English Court of Appeal decisions relied upon by the prosecution, he submits that they are fact specific and cannot necessarily be relied upon for the purposes of principle.

12 The prosecution rely upon the English Court of Appeal decision in *R. v. P* (4) in which identical bad character legislation was considered. That was a case involving an allegation of rape in which complainant and defendant were in a long-standing relationship which was volatile. It is right to say that it is not an authority which necessarily establishes any matter of principle but it is illustrative and therefore provides guidance as to the application of gateway (c) (and (d)) in the context of differing accounts of the nature of a relationship between a complainant and defendant. Latham, L.J. said ([2006] EWCA Crim 2517, at paras. 8 and 9):

“8. In our judgment, the judge was entitled to conclude on the material before him that both section 101(1)(c) and (d) were appropriate gateways for the evidence which the prosecution sought to put before the jury. The fact that the appellant had himself given an account of the nature of the relationship between the parties meant that, unless the complainant was allowed to give her account of the nature of the relationship, the jury would not be able to make a proper assessment of the respective evidence of the two protagonists. It was accordingly necessary material for the jury's consideration, and its importance for the jury was likely to be substantial.

9. We quite accept that the consequence of the admission of that evidence was likely to be prejudicial to the appellant; but he was in no way handicapped in giving to the jury his account of the events themselves. And so far as the evidence itself was concerned, he was in a position to make powerful submissions, which Mr Burns undoubtedly did, about the value in particular of the evidence relating to the sexual incident where the complainant had in fact not made any formal complaint at the time.”

In my judgment, the allegations of misconduct numbered 1 to 11 meet the statutory criteria of gateway (c). When considering the allegation the subject

of the counts, not to admit the evidence of bad character would result in the jury having a wholly incomplete picture. The jury would have before it a random instance of serious violence, as opposed to an allegation of a serious assault in the context of an abusive relationship.

#### **Gateway (d)**

13 The prosecution advances its case in respect of gateway (d) on a dual basis. The first dovetails with the submissions advanced in respect of gateway (c) namely the nature of the relationship. The second basis is propensity.

14 As I understood Mr. Smith's submissions, he accepted that the nature of the relationship was a matter in issue and gateway (d) to be the appropriate gateway. He did not, however, make a concession in relation to "propensity." In any event he relies upon s.396(3) and seeks the exclusion of the bad character evidence on the basis that "the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

15 As regards propensity, Mr. Smith submits that the evidence of bad character has to be offence specific and by analogy relies upon s.371(2) which deals with establishing propensity by evidence of conviction of an offence of the same description or category. I accept that when considering whether to admit bad character evidence, any such evidence has to be offence specific, in the sense that the alleged bad character must show a propensity to commit the offence with which a defendant is charged. In my judgment, albeit within a spectrum of alleged abusive conduct, items 1 to 11 evidence a propensity on the part of the defendant to assault DM. Given the nature of these allegations and the identity of the complainant, there is a very significant degree of similarity between these and the offence with which the defendant is charged.

#### **Fairness of proceedings**

16 Evidence of a defendant's bad character which is admissible under gateway (d) can be excluded under s.369(3) if the court is persuaded that its admission will have an "adverse effect on the fairness of the proceedings." More generally, s.332(1) CPEA provides:

"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, 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."

17 The submissions advanced on behalf of the defendant in this regard can be summarized as follows:

(i) That reliance upon a substantial amount of disputed evidence on uncharged allegations which advance arguments regarding propensity may result in unfairness so as to justify its exclusion; and

(ii) That admission of the evidence would result in the trial of collateral issues which could have adverse effects on the fairness of the trial.

18 It is evident from the statutory provisions in CPEA that bad character is not restricted to conduct the subject of a conviction. Indeed, the United Kingdom Supreme Court in *R. v. Mitchell* (3) considering near identical legislation in Northern Ireland, in a case in which propensity was sought to be established by disputed evidence, decided as follows ([2017] A.C. 571, at para. 43):

“The proper issue for the jury on the question of propensity in a case such as the *Nguyen* case and the present appeal is whether they are sure that the propensity has been proved. In the *Nguyen* case the only way in which they could be sure was by being convinced that the sole incident said to show propensity had been proved to the criminal standard. That does not mean that in cases where there are several instances of misconduct, all tending to show a propensity, the jury has to be convinced of the truth and accuracy of all aspects of each of those. The jury is entitled to—and should—consider the evidence about propensity in the round. There are two interrelated reasons for this. First the improbability of a number of similar incidents alleged against a defendant being false is a consideration which should naturally inform a jury’s deliberations on whether propensity has been proved. Secondly, obvious similarities in various incidents may constitute mutual corroboration of those incidents. Each incident may thus inform another. The question impelled by the Order is whether, overall, propensity has been proved.”

19 I turn to the second submission. In *R. v. O’Dowd* (2) in the English Court of Appeal, Beatson, J. handing down the judgment of the court adopted the reasoning of Toulson, L.J. in *McKenzie v. R.* (1) as to the three potential difficulties to be considered in cases such as the one before me, summarizing it as follows ([2009] 2 Cr. App. R. 16, at para. 56):

“The first is the need to consider whether admission of such evidence would result in the trial ‘becoming unnecessarily an undesirably complex even if not unfair’ . . . The second is the danger of a trial of collateral issues not only adding to the length and cost of the trial but ‘complicating the issues which the jury has to decide and taking the focus away from the most important issue or issues’ . . . The third is what the court described as the dilemma that ‘. . . if allegations of



previous misconduct are few in number, they may well fail to show propensity even if they are true, but the greater the plethora of collateral allegations, the greater the risk of the trial losing its proper focus.”

Relevant as those considerations are, I am satisfied that in the present case those concerns can be adequately managed. There are nine prosecution witnesses, including the complainant, of which, as I understand the position, only five (including those advancing bad character evidence) will testify. The additional issues are not particularly complex and are likely to make the trial only slightly longer. Indeed, of the eleven allegations that meet the gateway (c) and (d) criteria, seven are advanced by the complainant herself and the evidence in respect of all eleven is relatively short. Counsel for the defendant will no doubt cross-examine in respect of the various allegations and the defendant, if he so chooses, will be able to provide the jury his own version of events. Subject to the appropriate directions being given to the jury, the fairness of the proceedings will not be compromised by having the evidence of bad character admitted.

*Ruling accordingly.*

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