

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C. Cr. No 70/07

**THE STATE**

V

**SAMUEL DUKE**

Before the Hon. Mr Justice Rajiv Persad.

**Appearances:**

Mr. Quincy Marshall for the State.

Mr. Joseph George for the Accused.

**RULING**

**Introduction:**

The Applicant is before the court upon an indictment charged with one count of Incest and one count of Serious Indecency arising out of an allegation by the Virtual Complainant that her father the accused had sex with her on the 15<sup>th</sup> October 1999.

The Prosecution has applied to the court to have tendered before the jury evidence of the Accused's bad character in the form of other evidence from the Virtual Complainant that the accused on a number of other occasions (not being the subject matter of the indictment) had unlawful sex with her during the month of December 1999 and January 2000 as well as another act of serious indecency prior to October 1999.

In making this application the prosecution relies upon Section 15 N 1 (c) and 15 N 1 (g) of the Evidence (Amendment) 2009 Act. The Prosecution's application in a nutshell is that this bad character evidence should be allowed on the basis that it is important explanatory evidence or in the alternative that it should be allowed since the accused has attacked the character of a prosecution witness.

It is important to note that in December of 2009 the Evidence (Amendment) 2009 Act <sup>1</sup> was passed in Parliament and in January of 2010 the Act was proclaimed and came into force.

Among the many amendments made to this Act was the abolition of the common law rules relating to bad character and the creation of a new statutory regime to deal with the admission of bad character evidence.

These amendments to the Evidence Act 2009 are almost identical to amendments made in the United Kingdom via the Criminal Justice Act 2003.

The position under the common law is summarized by **Richard May on Evidence** where at page 135 he states as follows:-

According to common law rules, character meant general reputation, i.e. the general reputation which a man or woman bears. However, under s.1 of the Criminal Evidence Act 1898 the word was said to combine both the concept of reputation and the concept of disposition i.e. a disposition to act or think in a particular way.

The former general rule was that evidence of a person's disposition or reputation was generally inadmissible. In particular, evidence that the accused had been

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<sup>1</sup> Act 16 of 2009

guilty of misconduct other than that charged or had a disposition to commit the kind of offence charged (or crimes in general) was inadmissible for the purpose of showing that he committed the offence charged. Two reasons were usually given for this exclusionary rule: (a) evidence of previous misconduct is generally irrelevant; and (b) such evidence is so prejudicial that a fair trial is impossible.

The effect of the exclusionary rule was that evidence of a defendant's disposition was normally inadmissible and the prosecution was not permitted to adduce evidence of the bad character of the defendant, i.e. evidence of his bad reputation, disposition and previous misconduct. However, there were numerous exceptions to the rule. The common law, for instance, developed a rule known as the "similar fact" rule which permitted evidence of the disposition and previous misconduct of an accused to be given if sufficiently relevant to an issue in the case to outweigh its prejudicial effect. The antithesis received its most famous expression in **Makin v Att-Gen**<sup>2</sup>.

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered in the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question of whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

Likewise the Criminal Evidence Act 1898, s.1 permitted the accused to be cross-examined as to his character in certain prescribed circumstances.

Both of these exceptions created a great deal of case law which became increasingly complex and convoluted. The complications and seeming illogicality of the law led to calls for reform.

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<sup>2</sup> [1894] AC 57

The reforms referred to in the above-mentioned extract manifested themselves in the 2003 Criminal Justice Act in the United Kingdom which provided the model for the amendments to the Evidence (Amendment) 2009 Act.

A useful introduction to the provisions of the 2003 Criminal Justice Act on Bad Character is to be found on the **UK's Crown Prosecution Service's Website** which outlines as follows:-

The Criminal Justice Act 2003 (the 2003 Act) introduces a new statutory scheme and a radical new approach in relation to the admissibility of bad character evidence relating to non-defendants and defendants.

The Law Commissions Report No 273 and the Review of the Criminal Courts of England and Wales conducted by Lord Justice Auld highlighted defects with the previous law and recommended changes. There were a number of defects with the previous law, such as witnesses were often exposed to gratuitous and humiliating exposure of irrelevant misconduct and the defendant did not lose his shield where he did not testify. In the light of the Law Commissions Report and the Auld Review and the Government's objective of rebalancing the criminal justice system in favour of victims and witnesses, the 2003 Act was passed.

Part 11 of the 2003 Act provides a statutory scheme which deals comprehensively with evidence of bad character. It abolishes the common law rules of admissibility of evidence of misconduct, as well as exceptions to that prohibition. The 2003 Act also repeals some of the previous statutory provisions relating to bad character.

The 2003 Act adopts a different approach to non-defendants and defendants bad character. Non-defendants are given protection in statute for the first time against their bad character being exposed unless the substantial probative value test (enhanced relevance test) is satisfied.

On the other hand the 2003 Act has an inclusionary approach rather than an exclusionary approach to bad character of a defendant. A defendant's bad

character evidence is not subject to the enhanced relevance test but is admissible if it is relevant to an important matter in issue subject to the courts discretion to exclude.

The effect of these provisions will mean that non-defendants will be better protected from attacks on their character than previously. In relation to a defendants bad character, such evidence is likely to play a greater part in the investigation and prosecution of cases and may form an essential part of the evidence against a defendant. This means that police and prosecutors will need to know the details of the defendants previous misconduct at the earliest opportunity in order to assess whether such evidence should be used as part of the prosecution case.

It is also interesting to note the comments of the Court of Appeal in **R v Hanson**<sup>3</sup>, where the Court emphasized that:

“The purpose of the legislation was to assist in the evidence based conviction of the guilty, without putting those who were not guilty at risk of conviction by prejudice. Accordingly, prosecution applications to adduce evidence of bad character were not to be made routinely, simply because a defendant had previous convictions, but were to be based on the particular circumstances of each case.

### **Overview of the legislative scheme relating to Bad Character:**

As noted above the Evidence (Amendment) 2009 Act adopts a different approach in implementing a new regime. The Act distinguishes between adducing evidence of an accused’s bad character and that of a person other than the accused.

In the instant matter the application by the prosecution is to adduce bad character evidence of the accused. Accordingly the court in this

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<sup>3</sup> [2005] EWCA Crim 824

application is concerned with the provisions outlined at Section 15N of the Amendment Act.

How is the Court to approach any application made under Section 15N of the Evidence Amendment Act? Having reviewed the legislation it is possible to summarise the procedure into several stages.

The first step that the court is required to do is determine whether the evidence that the applicant is seeking to adduce constitutes “bad character” evidence. In determining whether material amounts to “bad character” the court has to ask the following questions, does the material amount to evidence of misconduct or does the material amount to a disposition towards misconduct?

If the answer is no the evidence falls outside the definition of “bad character” the court can only admit it if it is otherwise relevant to an issue in the case.

On the other hand if the evidence falls within the definition of the Act then the material amounts to evidence of “bad character” and the court goes on to ask two further questions.

Does the evidence have to do with either the alleged offence with which the accused is charged or does the material amount to evidence of misconduct in connection with the investigation or prosecution of that offence ?

If the answer to either of these two questions is yes then such evidence is not “bad character” evidence (within the meaning of the Act).

If the answer to either question is no then the evidence is “bad character” evidence and this evidence is admissible **if and only if** it can be adduced through one of the gateways under Section 15N.

It is then for the Court to consider whether the relevant gateway is open? The effect of Section 15N is that evidence of an accused’s bad character is admissible “if but only if” the circumstances outlined in the gateways of 15 N (1) apply.

If they do not apply such evidence is not admissible.

The Court in determining whether a particular gateway applies will have regard to the supplemental provisions outlined in Sections 15 O to 15 S of the Evidence (Amendment) 2009 Act.

Once the Court finds that the relevant gateway is open, then the evidence is admissible subject to the exclusionary discretion of the court which is triggered by an application by the defence<sup>4</sup>.

Accordingly the final stage of the process is balancing exercise to determine whether the evidence of bad character would have an adverse effect on the fairness of the proceedings.

### **The Applications by the State**

In the case at bar, the prosecution argues that evidence relating to the commission of other similar offences in relation to the virtual

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<sup>4</sup> See Section 15N(3) - The Court shall not admit evidence under subsection (1) if, on an application by the accused to exclude it, it appears to the Court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.

complainant should be admitted as bad character evidence of the Accused under Section 15 N 1(c) and 15 N 1(g) of the Evidence Amendment Act 2009.

Section 15 N states as follows:-

15N. (1) In criminal proceedings evidence of the accused's bad character is admissible where—

*(c)* it is important explanatory evidence;

*(g)* the accused has made an attack on another person's character.

**Application under Section 15N 1(c) – important explanatory evidence:-**

Section 15N 1(c) is supplemented by Section 15O which states as follows:-

For the purpose of section 15N(1)(c), evidence is important explanatory evidence if—

*(a)* without it, the Court or jury would find it impossible or difficult to understand other evidence in the case; and

*(b)* its value in understanding the case as a whole is substantial.

The applicant seeks to adduce this evidence on the basis that this evidence of other allegations of interference with the virtual complainant is important explanatory evidence, and without it, the jury would find it difficult to understand the evidence in the case.

State Counsel contended the evidence of other occasions of interference was relevant to two issues. He submits that on the case so far before the jury evidence has unfolded from the prosecution witnesses that several months after the incident which is the subject matter of the indictment the Virtual Complainant ran away from home on the evening of the 17<sup>th</sup> March 2000 and upon returning home the next day, a confrontation took place between her and her mother in which she indicates a number of things which leads to her mother taking her to the police where she gives a statement that culminates in the accused being arrested and charged for the offences before this court.

It turns out that in the Statement of the Virtual Complainant which was disclosed to the Court as part of this application, the accused is alleged to have interfered with the Virtual Complainant on at least two other occasions after the subject matter of the indictment and possibly once before the 15<sup>th</sup> October 1999.

The Accused is also alleged to have spoken to the virtual complainant and indicated that he wished for her to visit him on or about the 18<sup>th</sup> March 2000. It was against that background that the State contends that this evidence is necessary to explain (1) the reason why the Virtual Complainant ran away on the 17<sup>th</sup> March 2000 and (2) why the virtual complainant reported the incident of the 15<sup>th</sup> October 1999 in March of 2000.

The Accused through his counsel contends that the evidence of the Accused's bad character specifically (the reference to the commission of other offences) does not of itself amount to explanatory evidence.

The fact that the Virtual Complainant ran away and later made the report in March 2000 was more a result of the fact that the Accused was

alleged to have wanted to meet with the Virtual Complainant in March and that this fact coupled with the allegation of the incident in October 1999 was sufficient to explain the evidence.

In any event he invited the Court to exercise its discretion under the Act against the admission of the evidence as it would have an adverse effect on the fairness of the proceedings.

In determining whether this evidence should be admitted before the jury as bad character evidence it is necessary to analyse the various steps as outlined above.

### **Is the material, evidence of Bad Character ?**

Section 15K of the Evidence (Amendment) 2009 Act defines the term “bad character” as follows:-

15K.

(1) Reference to evidence of a person’s bad character is to evidence of, or a disposition towards, misconduct on his part, other than evidence which—

*(a)* has to do with the alleged facts of the offence with which the accused is charged; or

*(b)* is evidence of misconduct in connection with the investigation or prosecution of that offence.

(2) For the purpose of this section and sections 15L to 15W, “misconduct” includes the commission of an offence or other reprehensible behavior.

This definition is identical to the definition contained at Section 98 of the Criminal Justice Act 2003, according to Richard May's **Criminal Evidence**<sup>5</sup>:-

Section 98 thus provides that references to evidence of a “person’s bad character” in Chapter 1 of Pt II of the Act “are to evidence of, or of a disposition towards, misconduct on his part”.

The first issue for the court to determine, then, is whether there is evidence of misconduct in the sense of commission of an offence.

Evidence that a person has committed an offence may take a number of forms. The first and most common way is by proof of a previous conviction. If the person has a conviction for an offence it plainly shows that he committed the offence and is evidence of bad character under the Act. There is little difficulty in admitting this sort of evidence. In practice, the vast majority of instances of bad character have been proved in the past in this way and will no doubt continue to be so.

However, this is not the only evidence that a person has committed an offence. Evidence which suggests that a person has committed an offence, even if there has been no charge or conviction, may also be admissible. This would include cases where a person has been acquitted (thus retaining the rule Z), provided that the evidence is otherwise admissible. Evidence, therefore, that an accused had been implicated in a series of rapes would not necessarily be inadmissible in a subsequent rape charge on the grounds that he had been acquitted of the earlier rapes. It will be a matter of establishing the relevance of the earlier rapes to the subsequent charge.

The second part of the definition relates to evidence of a disposition on the part of a person towards misconduct, *i.e.* the commission of offences or other reprehensible behaviour, on his part. This sort of evidence was formerly covered by the “similar fact” rule, now abolished. Deciding what is reprehensible

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<sup>5</sup> 5<sup>th</sup> Edition at page 151

behaviour these days may not be as entirely a straightforward proposition as it once was.

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The danger of the present law lies in its potential breadth. A further danger is that in admitting evidence of such past misbehavior there is a danger that juries will be diverted from consideration of the main issue with regard to the offence charged. It will require careful supervision by the courts to meet the concerns expressed above.

It is clear from the above extract that the definition of bad character is very wide and encompasses among other things, evidence which suggests that a person has committed an offence, even if there has been no charge or conviction. On this analysis the alleged conduct the prosecution proposes to rely upon in relation to the accused would constitute evidence of bad character.

The next step is to determine whether the material is excluded by virtue of Section 15K 1(a) and (b). It is clear that the material being tendered by the State does not relate to the alleged facts of the offence with which the accused is charged or in connection with the investigation or prosecution of that offence. Accordingly this evidence complies with the requirements of the Act.

**Is this material admissible under the Gateway 15N 1(c) ?**

The next question for consideration is whether the gateway relied upon by the Prosecution applies?

According to **Tom Bayliss QC**, in his presentation on the **Bad Character provisions of the Criminal Justice Act 2003**.

This “gateway” adds nothing to the pre existing common law position. It merely restates the principle, set out in *Pettman*, to the effect that “where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence.” (per Purchas LJ).

The test under the statute is whether the evidence amounts to important explanatory evidence, that is either without it, the Court or jury would find it impossible or difficult to understand other evidence in the case and its value in understanding the case as a whole is substantial.

In this matter the issue appears to be whether without the admission of the evidence of the allegations of other instances of interference (both prior to and after the incident before the court) the jury would find it difficult to understand the evidence in the case before the court.

It appears to the court from the material provided in the Statement of the virtual complainant that the explanatory evidence that goes to the issue of why the virtual complainant ran away on the 17<sup>th</sup> March 2000 and subsequently reported to the Police the events of October 15<sup>th</sup> 1999 in March 2000 turned more on the fact that the accused having allegedly interfered with the virtual complainant before in October 1999 was pressing for her to come and spend time with him. Her reaction to this was to run away, which led to the mother confronting her and her revealing the events of October 15<sup>th</sup> 1999 to the police.

The court is not satisfied to the requisite standard that without the specific evidence of the other allegations prior to and after the subject

matter of this indictment that the jury would find it impossible or difficult to understand the other evidence in the case.

The court accordingly finds that this gateway is not open to the Prosecution to adduce the evidence and accordingly refuses the prosecution's application under Section 15N 1(C).

**Application under Section 15N 1(g) – attack on another persons character:-**

Section 15 N states as follows:-

15N. (1) In criminal proceedings evidence of the accused's bad character is admissible where—

*(g)* the accused has made an attack on another person's character.

The Prosecution contend that the evidence of the Accused's bad character should now be allowed into evidence because he through his Counsel has made an attack on the Virtual Complainant's character and accordingly by virtue of Section 15N 1(g) as well as 15 S (1) they, the prosecution, are now entitled to lead this evidence subject to the exclusionary jurisdiction of the court.

Section 15 S (1) of the 2009 Evidence Amendment Act states as follows:-

For the purpose of section 15N (1) *(g)*, an accused makes an attack on another person's character where—

*(a)* he adduces evidence attacking the other person's character;

(b) he, or by his attorney-at-law, asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so; or

(c) evidence is given of an imputation about the other person which is made by the accused—

(i) on being questioned under caution, before charge, about the offence with which he is charged; or

(ii) on being charged with the offence or officially informed that he might be prosecuted for it.

(2) In subsection (1)— “evidence attacking the other person’s character” means evidence to the effect that the other person—

(a) has committed an offence,(whether a different offence from the one with which the accused is charged or the same one); or

(b) has behaved, or is disposed to behave, in a reprehensible way;  
“imputation about the other person” means an assertion to that effect.

(3) Only prosecution evidence is admissible under section 15 N(1)(g).

In supporting their application the Prosecution relies upon the line of cross examination adopted by Counsel for the Accused in which it has been suggested to the prosecution witnesses that the Virtual Complainant at age 15 had been suspended from school, that she had ran away from home and that her mother had to go looking for her in pubs and bars. The prosecution contends this line of cross examination suggests that the virtual complainant has behaved, or is disposed to behave, in a reprehensible way.

Once again in determining whether the evidence should be admitted before the jury as bad character evidence it is necessary to analyse the various steps outlined above.

### **Is the material, evidence of Bad Character ?**

The court will rely on its analysis outlined above to the effect that the other allegations in relation to the accused's acts of interference with the virtual complainant does come within the very broad definition of "bad character evidence". Further it is clear that the material being tendered by the State does not relate to the alleged facts of the offence with which the accused is charged or in connection with the investigation or prosecution of that offence. Accordingly this evidence complies with the requirements of the Act.

The next question for determination is whether the gateway under Section 15 N (1)g applies.

### **Is this material admissible under the Gateway 15N 1(g) ?**

David Ormerod <sup>6</sup> in his paper on the **Criminal Justice Act 2003 – Evidence of Bad Character**<sup>7</sup> in reviewing Section 101(1)(g) of the 2003 Act <sup>8</sup> noted as follows:-

This provision, broadly speaking, replaces the second limb of s. 1(3)(b) CEA 1898, which permitted the cross-examination of a defendant on his bad character if he cast imputations on a relevant person – not just the prosecutor.

Section 101(1)(g) allows relevant evidence to be adduced *whether or not D testifies*. This reverses **Butterwasser** whereby a defendant who attacked the

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<sup>6</sup> Professor of Criminal Justice at Queen Mary College

<sup>7</sup> This paper was presented by Nigel Lickley QC to the Trinidad and Tobago Bar On the 9<sup>th</sup> April 2009 under the auspices of the Law Association and Criminal Bar Association.

<sup>8</sup> This section is identical to our Section 15N 1(g) of the 2009 Evidence Amendment Act

character of another person did not risk their own character being put in evidence if they themselves did not testify.

Further **JR Spencer** in his **Evidence of Bad Character**<sup>9</sup> provides assistance in understanding Section 106(2) which mirrors Section 15 S (1) of the 2009 Evidence Amendment Act. At paragraph 4.121 he outlines as follows:-

Indeed, section 106(2) expressly states that an attack on another person's character 'means evidence to the effect that the other person (a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or (b) has behaved, or is disposed to behave, in a reprehensible way.'

So, in **Hanson**<sup>10</sup>, the Court of Appeal said that the pre-Act authorities 'will continue to apply when assessing whether an attack has been made on another person's character, to the extent that they are compatible with s106.

Like the previous law, the new provision potentially applies not only where the defendant accuses someone else of having committed a criminal offence, but also where he accuses him of misbehaviour that falls outside the scope of the criminal law. This is expressly provided for by section 106(2)(b), which defines 'evidence attacking the other person's character' as including evidence that the other person 'has behaved, or is disposed to behave, in a reprehensible way'.

On the above analysis the question for the court to determine is whether the accused has made an attack on another person's character. In determining this issue the court will have regard to the guidance outlined in Section 15 S (1).

Having considered the submissions by both sides the court finds that the line of cross examination embarked upon by the defense does amount to

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<sup>9</sup> 2<sup>nd</sup> Edition

<sup>10</sup> 2005 EWCA Crim 824

an attack upon the character of the virtual complainant in that it is suggestive that the virtual complainant is disposed to behave in a reprehensible way.

Accordingly the court finds that the prosecution has established that the evidence it wishes to adduce is admissible under the gateway provided by Section 15 N (1) g.

As part of their oral response to the written submissions filed by the State, counsel for the accused indicated his intention to ask the Court to exclude the “bad character” evidence on the basis that the admission of this evidence would have such an adverse effect on the fairness of the proceedings. The court will now consider this application:-

### **The Discretion to Exclude under Section 15 N (3)**

Section 15N (3) of the 2009 Evidence Amendment Act provides as follows:-

(3) The Court shall not admit evidence under subsection (1) if, on an application by the accused to exclude it, it appears to the Court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.

(4) On an application to exclude evidence under subsection (3) the Court shall have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

According to the Editors of the **Archbold** 2007 edition at paragraph 13-79:-

Apart from the requirement that the defendant should have made an attack on another person's character within section 106 before evidence of his own bad character can be admitted through gateway (g), any prosecution application under section 101(1)(g) may be opposed under section 101(3) on the ground that the admission of such evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

This confers a discretion on the court to exclude character evidence though the conditions of admissibility are met, and this coincides with the discretion that had been held to exist in relation to the corresponding head of admissibility under the *Criminal Evidence Act 1898* (*viz.* "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or the deceased victim of the alleged crime").

The existence of a discretion to exclude evidence under the 1898 Act, even though admissible in law was clearly established: see ***Selvey v. DPP*** [1970] A.C. 304, HL; ***Noor Mohammed v. R.*** [1949] A.C. 182, PC; ***Maxwell v. DPP*** [1935] A.C. 309 HL; ***Harris v. DPP*** [1952] A.C. 694, HL; ***Jones v DPP*** [1962] A.C. 635, HL; ***R. v. Jenkins***, 31 Cr. App R. 1, CCA; ***R. v. Cook*** [1952] 2 Q.B. 340 43 Cr. App. R. 138, CCA.

There was no general rule for the exercise of such discretion; it depended on the circumstances of the case and the overriding duty of the judge to ensure that the trial was fair.

Where, however, a defendant had a particularly bad or damaging record, a judge was likely to admit only if the imputations made against the prosecution witnesses were correspondingly grave: see ***R. v. Taylor and Goodman*** [1999] 2 Cr. App.R. 163, CA.

JR Spencer in his 2<sup>nd</sup> Edition of **Evidence of Bad Character**<sup>11</sup> provides further assistance in understanding Section 15 N (3) of the 2009 Evidence Amendment Act. At paragraph 1.65 he outlines as follows:-

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<sup>11</sup> See page 25

..... the first principle that courts should apply when exercising their discretion is that evidence of the defendant's bad character ought to be excluded where the rest of the evidence is weak. The point was made judicially, with some force, by the Court of Appeal in **Hanson and others**, the first major case in which it interpreted the new legislation:

[4] The starting point should be for judges and practitioners to bear in mind that Parliament's purpose in the legislation, as we divine it from the terms of the Act, was to assist in the evidence based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice. It is accordingly to be hoped that prosecution applications to adduce such evidence will not be made routinely, simply because a defendant has previous convictions, but will be based on the particular circumstances of each case. ...

[10] [The judge] must always consider the strength of the prosecution case. If there is no or very little other evidence against a defendant, it is unlikely to be just to admit his previous convictions, whatever they are ...

[18] ... Evidence of bad character cannot be used simply to bolster a weak case or to prejudice the minds of a jury against a defendant.

The second major problem with evidence of bad character is the risk that it will give rise to complicated 'satellite issues' which deflect the attention of the tribunal of fact from the central issues in the case, and from properly examining the core evidence that implicates the defendant in the alleged offence directly.

As the Court of Appeal said in **Smith**, 'We do, however, give a word of caution for the future about the general undesirability of the jury being required to explore satellite issues one stage removed from the charges they are trying unless this is really necessary.'

.....the second guiding principle for the courts when exercising their discretion to exclude bad character evidence is that they should exclude evidence the hearing of which is likely to take up a disproportionate amount of time and

distract the attention of the fact-finders from the evidence which bears directly on the central issues.

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In principle, of course, evidence does not cease to be admissible because the defendant disputes it: and where he does, its truth or falsity is a matter for the jury to decide. However, if the disputed evidence is flimsy, the judge might properly decide to exclude it in his discretion – both in fairness to the defendant, and in order to avoid a prolonged investigation of ‘satellite issues’ which are of secondary importance.

There are a number of matters that are of concern to this Court.

First is the fact that upon making this application the Prosecution indicated that the material it was relying upon was the allegations contained in the Virtual Complainants statement of the 18<sup>th</sup> March 2000.

Both sides were allowed an adjournment of one week in the course of the trial to make their applications, file skeleton arguments and disclose all relevant material, in support of their application. When the matter came up for oral submissions, the court was informed by the defence that Mr Duke indicated that he had been charged for other matters but neither counsel for Mr Duke nor Mr Duke was able to say what the charges were for and what happened to them.

What is clear from the depositions before the court is that the accused was charged with an information relative to the incident on the 15<sup>th</sup> October 1999 and after committal proceedings in relation to that incident was completed, the accused was committed to the High Court to be later indicted on two counts relative to the incident of the 15<sup>th</sup> October 1999.

On the depositions before this court there is no mention of any other charges, all the evidence led relate to one incident only and there is no mention of any other allegations in the course of the evidence given below.

The Prosecution is unable to assist, the file that the prosecutor relies upon reveals nothing of other charges and there are no statements in the possession of the prosecution on their file to explain whether other charges were laid.

If other charges were laid it is unclear whether they were determined in the accused favor or to explain whether the other allegations if culminating in charges were pursued over the past ten years.

If charges were not laid, why did the police only pursue one allegation out of four arising on the statement by the Virtual Complainant of the 18<sup>th</sup> March 2000, was it that those allegations were investigated and a decision not to pursue those allegations made.

These matters are relevant since the accused has through his counsel indicated that if the court is minded to allow the evidence of the other allegations (outside of the subject matter of the indictment) before the jury then he/they will be disputing these allegations and the accused will be prejudiced by the absence of material on the investigations. Moreover the defence will need time to take instructions on the allegations and would need an adjournment to investigate these allegations further.

In addition the court is also concerned that the nature of the “bad character evidence” being tendered by the State is particularly prejudicial by its very nature, since it relates to other allegations of similar conduct

in relation to the same virtual complainant. The court is also equally mindful that there is a need to balance the gravity of the imputation against the prosecution witness against the nature of the bad character evidence.

Having considered all the matters raised, and particularly mindful of the purpose of the new legislation, this court is minded to exclude the bad character evidence under its discretion afforded by Section 15N (3) of the 2009 Evidence (Amendment) Act.

In exercising its discretion the court is particularly concerned that the evidence of other allegations arising out of the Virtual Complainant's statement is to be disputed by the defence and that in this process there is likely to arise a number of satellite issues that will deflect the jury's attention and cause further delay in the matter.

Some ten years have now elapsed since these allegations were first made and it appears that the defence will be put in a difficult position to now mid trial seek to explore these issues.

Thirdly the court is concerned with the fact that when one compares the gravity of the imputations made against the virtual complainant with the prejudicial nature of the "bad character evidence" which the prosecution wishes to tender the court is not satisfied to the requisite standard that such prejudicial evidence should be admitted particularly having regard to the strengths of the prosecution's case which is a basic credibility case between the evidence of the virtual complainant and the accused.

The court is satisfied that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court should

exclude it. The prosecutions' application under 15N 1 (g) is accordingly refused.

Dated this Monday 8<sup>th</sup> March 2010

Rajiv Persad  
Judge