

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE  
FAMILY AND CHILDREN DIVISION  
CHILDREN COURT**

**C-Tobago-CR-1792-2019-1**

BETWEEN

**JASON PHILLIP (AG.) SGT NO. 13908**

COMPLAINANT

AGAINST

**NA** (a child)

DEFENDANT

Before the Honourable Madame Justice Gonzales

Date of Delivery November 28, 2019

**APPEARANCES:**

Ms. Chinebas for the Prosecution

Mr. Edmund for the Child

**RULING**

1. This is an application by the defence seeking leave to admit the previous convictions of the main prosecution witness AD pursuant to section 15M of the Evidence Act.
2. The evidence sought to be adduced is two convictions of the prosecution's main witness AD in or around 2005 for robbery with violence and 2015 for possession of marijuana. In both instances AD pleaded guilty.

3. The prosecution is objecting to the admission of the bad character evidence on the basis that the two convictions do not meet the enhanced relevance test in that the convictions are of no substantial probative value both to an issue in the case or in the context of the case on the whole.

#### **THE BACKGROUND**

4. A synopsis of the case for the prosecution is that the AD was at a neighbouring house when he observed movements under a house which CT occupies. He moved closer and observed the child holding what appeared to be a piece of cloth and a stove lighter. The stove lighter was lit. The child upon realising he was being observed ran off and AD gave chase until the child reached his home. At the home he confronted the child and his family members. Eventually the police arrived but the house was already destroyed. The child was taken into custody, released and eventually rearrested. He was identified by AD through a group identification as the person who he had seen under the house.

#### **THE LAW**

5. By virtue of section 15K

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.

Section 15 M (1) provides

1) In criminal proceedings evidence of the bad character of a person, other than the accused, is admissible where—

(a) ...

(b) it has substantial probative value in relation to a matter which—

(i) is in issue in the proceedings; and

(ii) is of substantial importance in the context of the case as a whole; or

(c) ...

Section 15M (3) provides

(3) In assessing the probative value of evidence for the purpose of subsection (1)(b), the Court shall have regard, in particular, to the following factors:

(a) the nature and number of the events to which the evidence relates;

(b) when those events are alleged to have happened or existed;

## **ANALYSIS**

6. In support of his argument counsel for the child relied on the case of the **State v Murray Joseph Forde**<sup>1</sup>. I failed to see how that case assisted the defence as in that case the learned Judge found that the conduct was not reprehensible behavior so as to amount to misconduct and therefore the application failed.

7. Counsel for the child also sought to rely on the case of the **State v Anthony Thompson**<sup>2</sup> where the defence was given leave to lead evidence of the bad character of the witness which included convictions for larceny, two breaches of a protection order and a conviction for possession of a cutlass. The convictions were all within a period of four years, the oldest conviction being 6 years on the date the application was made. The witness was the main witness for the state, in a case involving corruption. His credibility would be critical in such a case and the

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<sup>1</sup>Cr No S 28/2004

<sup>2</sup>CR NO 108/2005

state conceded to allow him to be cross-examined on his previous convictions and his drug use. The judge allowed cross examination on his lying about his drug use to the hospital staff.

8. That case was decided on its facts which bear no resemblance to the facts of the case before this court. Even though AD in his Evidence in Chief admits to drug use credibility is not an issue at the forefront of this case. In any event the witness AD never lied about his drug use, having pleaded guilty and having confessed that on the night of the fire he made his observation when he was preparing his thing to smoke.

9. The third case Counsel sought to rely on was the **State v Ramzan Bacha also called Tazmool**<sup>3</sup>. In that case the defence sought to adduce evidence of the bad character of a prosecution witness who had been granted immunity and who had a pending charge for the possession of cocaine for the purpose of trafficking.

10. In that case the witness had been granted immunity in return for him to turn a state witness. Four years later he was charged with possession of cocaine for the purpose of trafficking, which was still pending. The defence was seeking to adduce evidence of his bad character four years later. The judge found that the fact that there was evidence pointing to his participation in the crime his credibility was a matter in issue in the proceedings and granted leave to admit the evidence of the pending matter. Again that case can be distinguished on the facts, with the issue of credibility being front and center of the case.

11. There is no doubt that these convictions amount to bad character evidence under section 15K. The defence has crossed that hurdle. What the court has to now consider is whether the convictions have substantial probative value in relation to a matter which is in issue the proceedings and whether they are of substantial importance in the context of the case as a whole.

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<sup>3</sup>CR NO 29/2004

12. In **Braithwaite**<sup>4</sup> Hughes LJ outlined the approach which a judge should take in assessing bad character evidence of a non-accused referring to section 100 of the Criminal Justice Act 2003 which is akin to section 15M of the Evidence Act:

*“What section 100(1) requires, except where there is agreement between the parties, is not discretion but judgment on the part of the judge. In a case such as the present, where “important explanatory evidence” is not in point, he must assess:*

*a) the issue to which the evidence goes (s 100(1)(b)(i)),*

*b) whether that issue is of substantial importance in the context of the case as a whole (s 100(1)(b)(ii)) and*

*c) whether the evidence has substantial probative value in relation to that issue (s 100(1)(b)).*

*This assessment is, by definition, highly fact-sensitive in each case. It is an assessment of whether the evidence in question substantially goes to show (prove) the point which the applicant wishes to prove on the issue in question. The issue will often, but not always, be either the propensity of the person against whom the application is made to behave in a particular way, or his credibility. The probative value of the evidence advanced falls to be assessed in the context of the case as a whole. That means that it may in some cases be appropriate to consider whether or not it adds significantly to other more probative evidence directed to the same issue.”*

13. It is clear that applications must be determined on the facts of the particular case. In any event the starting point is, as was stated by the prosecution relying on dicta in **Brewster and Cromwell**<sup>5</sup>

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<sup>4</sup> [2010]EWCA Crim 1082

<sup>5</sup> [2010]EWCA Crim 1194

*“the first question for the trial judge under section 100 is whether creditworthiness is a matter in issue which is of substantial importance in the context of the case as a whole. This is a significant hurdle. Just because a witness has convictions does not mean that the opposing party is entitled to attack the witnesses’ credibility... If it is shown that creditworthiness is an issue of substantial importance, the second question is whether the bad character relied upon is of substantial value in relation to that issue. Whether convictions have persuasive value of the issue of creditworthiness will...depend principally on the nature and age of the convictions.”* His Lordship went on to say that to qualify for admission into evidence it was not necessary that the conviction be for dishonesty.

14. The issue of the credibility of the witness AD is not patent from the case as advanced by the prosecution. However, the defence has brought it into focus by saying that the prosecution witness should not be believed because he is not creditworthy. There is nothing from the evidence for the prosecution thus far to manifestly suggest that the witness should not be believed.

15. The court is not quite sure what the defence is at this time and it was not disclosed when counsel made his submission to the Court. However, based on the defence statement there appears to be an issue of lack of credibility on the part of the main prosecution witness AD. In other words, the defence is contending or will contend AD is not being truthful when he says that the child was the person who set fire to the house. In this regard AD’s credibility becomes a matter in issue between the prosecution and the defence and a matter in issue in the context of the case as a whole.

16. The defence is arguing that the bad character evidence should be admitted as it relates to propensity and credibility. The defence has advanced no reason why the bad character should be admitted for propensity. The defence is not alleging any misconduct on the part of the witness as an issue between the prosecution and defence that the bad character evidence would help to prove. The fact that the witness smokes marijuana or that he has a violent past is not an issue in dispute between the prosecution and the defence. No issue of propensity to smoke marijuana or to be violent therefore arises as a matter between the prosecution and defence neither does it

arise in the context of the case as a whole. I am satisfied that the bad character evidence does not go towards propensity.

17. The purpose of the enactment provides some guidance. Professor Spence in his treatise **JR Spencer Evidence of Bad Character**<sup>6</sup> noted the purpose of section 100 of the Criminal Justice Act 2003 (UK) which is similar to our section 15M was to protect witnesses from needlessly offensive cross-examination.

18. I will now turn to consider whether the two convictions has substantial probative value in relation to the credibility of the witness, as is required by section 15M(3).

19. Is the issue of credibility a substantial issue in the context of the case as a whole? The defence is purportedly raising an alibi and intends to call five witnesses to support the alibi. In these circumstances it cannot be said that the issue of credibility is a substantial issue in the case as a whole as the more important issue may very well be whether the witness was mistaken.

20. In any event if the court were to find that the issue of credibility is a substantial issue in the case as a whole, I do not find that the evidence of bad character of AD is of substantive probative value with regards to his credibility. What is substantial probative value? In **Braithwaite** a case relied upon by the prosecution “substantial” was said to bear its ordinary meaning. Other leading cases have equated 'substantial' probative value with 'an enhanced capability' of proving or disproving a matter in issue in order to emphasise the point<sup>7</sup>. I am of the view that given the nature and age of the convictions the bad character evidence does not go towards proving that AD is not a credible witness.

21. There are two convictions one for robbery and the other for possession of marijuana. I note that the offence of robbery does carry an element of dishonesty, and I directed myself that the witness need not be convicted of an offence involving dishonesty for a conviction to be probative. I am also aware that once the conditions of 15M (3) are met I have no residual discretion to refuse leave to admit the evidence, as in the case of bad character of an accused.

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<sup>6</sup> JR Spencer Evidence of Bad Character para 3

<sup>7</sup> Phillips [2011]EWCA Crim 2935

22. AD pleaded guilty to both offences, which would in my view decrease the notion that he is not creditworthy. The first conviction was over 14 years ago, when the witness was a child. People change with time, they mature and develop and one cannot rely on judgement exercised when a child, to say that the man, the child has grown up to be, is likely to exercise the same kind of judgement. What I had to consider was whether the conviction of the witness in one case over 13 years ago and in the other over 4 years ago would affect his standing as a credible witness. I think not.

23. In this regard I relied on the authorities submitted by the prosecution namely **R v Berry**<sup>8</sup> and **R v Garnharm**<sup>9</sup>, in **Berry** the Court of Appeal upheld the judge's decision to refuse to admit evidence of four previous convictions which were over 10 years old. In this case the second conviction was almost 10 years after the first, and it appeared to me to be an isolated incident and was a relatively minor offence. I found that these two offences had no enhanced probative value on the issue of AD's credibility.

24. The defence has failed to satisfy me that evidence of these two convictions have enhanced probative value in relation to an issue in the proceedings (i.e. propensity and credibility) and they have also failed to satisfy me that the bad character evidence is of substantial importance in the context of the case as a whole.

25. I therefore refuse leave to admit the evidence of the convictions.

G Gonzales

Judge

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<sup>8</sup> (2009)EWCA 39

<sup>9</sup> (2008) EWCA 266