

REPUBLIC OF TRINIDAD AND TOBAGO



Crs 79 of 2012

IN THE HIGH COURT OF JUSTICE

THE STATE

v.

ANTHONY EMRIT

Before the Hon. Madame Justice Althea Alexis-Windsor.

**Appearances:**

Ms. Anju Bhola for the State

Mr. Colin Selvon for the Accused

Dated 1<sup>st</sup> November 2017

H.C. Crs. 79/2012 The State v Emrit, A.

## **Ruling on the admission of bad character of the Accused**

1. Anthony Emrit is before the court on a five count indictment, that is- kidnapping, false imprisonment, grievous sexual assault and two counts of rape.
2. The State submitted that it should be permitted to lead the evidence that there was a protection order which the virtual complainant obtained against the accused as well as select beatings and violent behaviour to the virtual complainant before and after the grant of the protection order.
3. The State founded its submission on two sections of the bad character legislation, namely gateway C and D of section 15 (N) of the Evidence (Amendment) Act No. 16 of 2009. The nub of the State's submission is that the proposed bad character is admissible both because it is important explanatory evidence and because it establishes a propensity on the part of the accused to commit acts of violence, behave aggressively to and use force against the virtual complainant.
4. In response, the Defence argued that it would be prejudicial to the accused to admit the bad character evidence so that even if the Court finds that the proposed evidence meets the criteria of admissibility, the Court should exercise its discretion to refuse to admit it. In further submissions, Counsel for the accused stated that even if the fact that there was a protection order is admitted,

under gateway C the actual physical protection order should not be admitted as this would be unfair to the accused. Counsel remained opposed to the admission of any bad character evidence via gateway D.

5. This then is the ruling of the Court. I find that the evidence of the fact that there was a protection order and the allegations of the prior conduct of the accused, before and after the grant of the protection order amount to reprehensible conduct which should be placed before the jury. They are admissible under both gateways C and D of section 15 of the Evidence Act<sup>1</sup>. In this decision, I will set out the rationale for my findings, starting with gateway C and then gateway D.

**Important explanatory evidence.**

6. Gateway C confers upon a Court the discretion to admit allegations of reprehensible conduct if they are both important and explanatory. It must be evidence without which the jury would find it difficult to understand other evidence in the case. There is no requirement that the evidence in prospect be of enhanced probative value as long as it relevant to a fact in issue.
7. This gateway in some ways reflects the common law position and therefore the old cases are still useful in the determination of when

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<sup>1</sup> If already adjudged to be reprehensible conduct and therefore falling capable of admissibility, a piece of evidence can be admitted via more than one gateway. See Davis (2008) EWCA Crim 1156.

evidence is both important and explanatory and thus should be admitted. It is difficult to state the rationale for the admissibility of this genus of bad character evidence better than Purchas LJ did in *Pettman*<sup>2</sup>:

<sup>3</sup>“where it is necessary to place before the jury evidence 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”.

8. A case decided along the same rationale is *Dolan*<sup>4</sup> where the court approved the basis for admitting background evidence where it was said that it is helpful to have it and difficult for the jury to do their job if events are viewed in total isolation from their history”. Similarly, in *Fulcher*<sup>5</sup>, evidence was admitted of the defendant’s previous acts of violence towards the victim. In *Sidhu*<sup>6</sup>, a case in which the defendant was being tried for terrorist acts in England,

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<sup>2</sup> Pettman, Court of Appeal, 5 May 1985, CA No. 5048/C/82.

<sup>4</sup> Dolan (2003) 1 Cr App R. 281

<sup>5</sup> Fulcher (1995) 2 Criminal Appeal Report 251.

<sup>6</sup> R v. Sidhu (1994) 98 Criminal App R. 59.

the bad character evidence of his activities in Pakistan was admitted to show the motive for the criminal activities in England.

9. A more recent exposition on the admissibility of this category of evidence under the common law is *Phillip v. The Director of Public Prosecutions of St Christopher and Nevis*<sup>7</sup>. In adjudging whether bad character evidence was properly admitted under the common law, the Privy Council found that the evidence had been properly admitted in these circumstances. The appellant was convicted of killing his wife. At trial, the judge admitted evidence that over the years the accused had exhibited physical aggression and possessiveness towards the deceased. The Privy Council held that this category of evidence was always admissible under the common law. It was not evidence that the appellant is generally a violent person given to violent outbursts of temper in general. It is evidence that the appellant exhibited persistent hostility towards the deceased in particular, which he expressed in violence towards her<sup>8</sup>. The Board further enunciated that there is nothing unfair about proving that the accused has an animus against the particular victim whom he is charged with injuring<sup>9</sup>.

10. A review of relevant authorities under the present legislative structure demonstrates the circumstances under which bad

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<sup>7</sup> *Phillip v. The Director of Public Prosecutions of St Christopher and Nevis*, 2017 UKPC, judgment given on 16 May 2017.

<sup>8</sup> See paragraph 7 of *Phillip*.

<sup>9</sup> See paragraph 10 of *Phillip*.

character evidence has been found to be admissible under gateway. Thus, in *TM*<sup>10</sup>, the defendant's previous offences against the alleged victim and other members of the family were admissible to explain how the offence with which he was charged came to be committed and why the victim did not complain about it. In *Chapman*<sup>11</sup>, evidence of the bad character of the first named defendant was admissible to establish his domination over the second named defendant.

11. In *R v. M*<sup>12</sup>, there was a long history of sexual and physical abuse suffered by M and his sister. The Court of Appeal held that it was rightly admitted as essential background evidence to explain why the virtual complaint had not turned to her parents for help when, as alleged, her brother raped her.

12. The evidence in *R. v. M* was that M was forced to watch the abuse and later made to take part. When he turned 16 he in turn, perpetrated the acts for which he was before the court against his younger sister. The Court of Appeal held that this evidence was admissible as necessary important explanatory evidence to enable the jury to understand what would otherwise have been an incomplete and incomprehensible account. Had this evidence not been admitted, the jury would have wondered why the virtual

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<sup>10</sup> *TM* (2000) 2 Cr App R 266.

<sup>11</sup> *Chapman* (2006) EWCA Crim 2545.

<sup>12</sup> *R v. M.* (2000) 1 WLR 421.

complainant did not turn to other family members for help. Under the new legislative context, it is clear that in order to be admitted, the evidence needs only be relevant and does not have to display enhanced probative relevance.

13. In the extant case, the accused is alleged to have kidnapped the virtual complainant, falsely imprisoned her, twice had sexual intercourse with her without her consent and once perpetrated a grievous sexual assault on her person. The evidence in prospect of the virtual complainant is that on the day in question is, "he started to curse and say how I sending police for him and if I feel the f....g police could ketch he, I lie". In order to understand this evidence, it is important that the members of the jury know that a protection order had been sought and obtained by the virtual complainant against the accused in the earlier part of that same year.

14. The case for the prosecution is that these offences occurred in a particular context. Hitherto, it had been the practice of the accused to commit violent acts on the virtual complainant. He would wait outside her workplace and make violent statements and behave in a violent and threatening way. He had also beaten her in the past and because of this, she had applied for and had been granted a protection order against him. It was in this context that the accused appeared outside the workplace of the virtual complainant on the day in question, 11<sup>th</sup> December 2006 and pushed her into his vehicle.

15. It was in this context that the accused had sex with the virtual complainant. The evidence on deposition is that she did not consent but neither did she actively resist. The case for the prosecution is that it is otherwise impossible for the jury to understand why this was so unless they know about the protection order and the incidents prior to December 11 2006. The proposed evidence of the wider pattern of behavior of the accused is therefore important in that it would enable the jury to understand the evidence of the virtual complainant.

16. I am of the view, that considered as a whole, the fact of the protection order and at least two incidents that occurred before 11 December 2006 are admissible via gateway C. The nature of the defence makes it necessary for the jury to consider the nature of the relationship between the accused and the virtual complainant before 11 December 2006. Indeed, it would be unfair to the prosecution NOT to be allowed to explain why the virtual complainant responded to the accused in the ways that she did between 11- 12 December 2006. Without the evidence in prospect of the past reprehensible conduct of the accused, it would be extremely difficult for the jury to understand the behavior of the virtual complainant. Therefore, the Court finds that the evidence is admissible via gateway C as important explanatory evidence.

### **Propensity**

17. The prosecution also submits that the past conduct of the accused to the virtual complainant is admissible to establish that he had a propensity NOT to generally act violently but to act in a violent and aggressive manner using force towards THIS virtual complainant. Thus according to the prosecution, evidence of the defendant's bad character falls to be admitted under gateway D. In many ways, this gateway approximates and equates with the similar fact principle at common law. It involves the issue of whether the accused has a propensity to commit the offences of the kind charged, except where his having such a propensity makes it no more likely that he is guilty of the offence.

18. How then is a court to decide whether the impugned evidence should be admitted? In order to decide, two steps are necessary: (1) to identify what the disputed issue is and (2) to identify what light, if any, the evidence of bad character would shed upon it<sup>13</sup>.

19. In this case, the accused is not disputing the entirety of the prosecution's case. His defence is consent. The jury has to determine whether they believe the virtual complainant that she did not consent or they believe the accused that she did. The case of **Cox**<sup>14</sup> sheds light on how this issue should be determined. The defendant was prosecuted for murdering her drinking partner. She admitted that she used a knife to stab him but claimed that it was

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<sup>13</sup> See Evidence of Bad Character, 3<sup>rd</sup> Edition by JR Spencer at page 84.

<sup>14</sup> Cox (2014) EWCA Crim 804.

in self-defence. At trial, the judge admitted her string of convictions for using or threatening to use knives when drunk. The defendant disputed their admissibility on appeal submitting that it was not in issue that she used a knife to stab him because she had already agreed that she had. However, affirming the conviction, the Court of Appeal said that the disputed issue was not whether she had used a knife, but whether she had done so in self-defence and to this issue her record of aggressive violence with knives when drunk was clearly relevant. Likewise, in the case at bar, the fact in issue is whether the virtual complainant gave way although not consenting to the offences or as postulated by the accused, consented- meaning agreement freely given.

20. In my view bad character evidence in this case sheds light upon the issue in dispute. The bad character evidence here has a tendency to show that the accused had a propensity to behave in an aggressive and violently forceful manner towards this virtual complainant. The evidence tends to shed light on the issue by showing that the accused had behaved in ways before December 11-12 2006 that tend to show that he on this occasion used violent, forceful and aggressive conduct against the virtual complainant.

21. How is the Court's discretion to be exercised under this gateway?

In *R. v. Hanson*<sup>15</sup>, the Court of Appeal stated that there are three questions to be considered:

- a. Did the history of the convictions establish a propensity to commit offences of the kind charged?
- b. Did the propensity make it more likely that the defendant had committed the offence charged?
- c. Was it just to rely on the convictions of the same description or category, and, in any event, would the proceedings be unfair if they were admitted?

22. In this case, the accused has been charged with pushing the virtual complainant into his vehicle, thereby kidnapping her, falsely imprisoning her and committing two acts of rape and one act of grievous sexual assault against her. Before December 11 2006, in previous interactions with the virtual complainant, the accused had been aggressive and violent towards her. The evidence in prospect from the virtual complainant is that the accused is a person who hits her and on many occasions before he slapped her and came up on her on work. Two occasions have been highlighted by the prosecution.

23. In my view, the three questions in *Hanson* find affirmative answers in this case. The previous history between the virtual complainant

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<sup>15</sup> R v. Hanson (2005) 2 Cr. App. R. 21

and the accused shows that the accused has a propensity to behave in a violent and aggressive manner towards the virtual complainant. Secondly, this propensity makes it more likely that the accused had committed these acts against the virtual complainant in that the underlying thread of the offences for which he is now before the Court is an element of violence, aggression and force. Thirdly, the allegations founding this application are not for the same offences for which the accused is being tried now. All in all, I find that it would NOT be unfair to admit this evidence under gateway D.

24. On the State's case, in effecting the kidnapping, the accused used obscene language and pushed the virtual complainant into the van. In the van, the accused slapped the virtual complainant's face and her nose started to bleed. Inside the house on December 11 2006, the evidence of the virtual complainant is that when the accused told her he wanted to have sex, she was frightened because he used to hit and slap her on occasions before. The context in which the virtual complainant submitted to having sexual intercourse with the accused and remaining in that house and the next occasion with him is one of violence, fear of violence, aggression and force. Therefore, violence, aggression and force make it more likely that the accused committed these offences.

25. In the case at bar, the defence of the accused is consent. So the accused is not denying that he had sexual intercourse with the

virtual complainant at the location as alleged by the prosecution. However, his case is that she went willingly, there was no aspect of force and while there she consented to the sexual intercourse and oral sex.

26. Further, even at common law, evidence which amounts to evidence of bad character was admissible to rebut the defence of the accused. Thus in *Bond*<sup>16</sup>, the defendant, a doctor was charged with performing a surgical operation on a young woman who was pregnant with his child in order to secure thereby the miscarriage of the pregnancy. His defence was that he was carrying out a lawful medical examination of the girl. The Court permitted the prosecution, (and held to have correctly done so) to rebut this defence with the evidence of another girl who claimed that nine months previously the defendant had operated on her because she was pregnant by him, with the intention of terminating her pregnancy. In the case at bar the evidence of his previous conduct serves to rebut the defence of consent.

27. In *M (Donald Gordon)*<sup>17</sup>, the defendant was accused of raping his daughter. He admitted to having slept on the same bed with her but denied anything untoward had occurred. The prosecution was allowed to lead evidence of previous incidents which clearly showed

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<sup>16</sup> Bond (1906) 2 KB 389.

<sup>17</sup> M (Donald Gordon) (2006) EWCA Crim 3388.

he had an inappropriate interest in her. In *Crandle*<sup>18</sup>, the defendant had been found sitting, with bloodstained hands, in a car in which a badly beaten man was in the boot. His explanation was that he he was helping to transport the victim to the hospital after he had been badly beaten by another person. The prosecution was allowed to lead evidence to rebut this defence, that he had previous convictions for violence.

28. There are also several cases from which the principle can be drawn that it is good law to admit under gateway D, in cases where accused persons were accused of acts of domestic violence to admit evidence not only of the accused's previous acts of violence toward this particular person but even similar acts committed against previous spouses or partners. In *Campbell*<sup>19</sup>, where the defendant was convicted of false imprisonment and assault occasioning actual bodily harm to his current girl-friend, the Court of Appeal held that evidence had been properly admitted of his conviction for assault occasioning actual bodily harm to one previous girl-friend and the battery of another. In *Williams*<sup>20</sup>, the defendant's attempt to strangle a previous partner was rightly admitted when in the current trial, the defendant had murdered his current partner by strangulation.

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<sup>18</sup> *Crandle* (2006) EWCA Crim 2663.

<sup>19</sup> *Campbell* (2007) EWCA Crim 706.

<sup>20</sup> *Williams* (2006) EWCA Crim 2052.

29. In all of these cases, the proposed bad character evidence is admissible because it sheds light upon the case for the prosecution in relation to the case for the accused. The defence in the case at bar is consent. The relevant question is was the nature of the past association between the virtual complainant and the accused such that it is more likely that she consented to the sexual acts and had willingly gone with the accused? As the members of the jury seek to answer this question, the evidence of the past behavior of the accused towards the virtual complainant and the protection order will greatly assist the jury in the determination of the core issues in the case.

30. The bad character incidents are before April 2006 and between April and December 2006. They are not long before December 2006. It is not unfair to have the evidence admitted because of the length of time between the incidents and December 11 2006.

31. Therefore, in all the circumstances, the Court finds that the proposed bad character evidence is admissible through gateway D in that it demonstrates a propensity to be violent and aggressive and to use force toward the virtual complainant.

## **Conclusion**

32. What then is the conclusion of the matter? The allegations of the bad character of the accused are admissible under both gateway C

and D. Therefore, the Court finds that the evidence of the protection order and the instances before and after the date in question when the accused is alleged to have used violence, aggressive behavior and force towards the virtual complainant are admissible under both gateway C and D.

33. The Court will hear the parties on the exact parameters of what should go before the jury to ensure that the trial is not bogged down by satellite issues.

Dated this 1<sup>st</sup> day of November 2017

Althea Alexis-Windsor

Judge.