Case No: 2005/01956/C4, 2005/03314/C1, 2005 /02337/C3,
2005/02524/D2, 2005/01877/C2 and 2005/01975/C2

Neutral Citation Number: [2005] EWCA Crim 2866
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)

Strand, London, WC2A 2LL

Friday, 11 November 2005

Before :

LORD JUSTICE KENNEDY
MR JUSTICE BELL
and
MRS JUSTICE DOBBS

- -

Between :

R
- v -
Antony Albert Weir, Ramanathan Somanathan,
Stephen Yaxley-Lennon, Simon Manister,
Hong Qiang He and De Qun He

- -

Mr S. James for the **appellant Weir**
Mr R.Vardon for the **Crown in Weir**
Mr R. Kovalevsky and Mr P. Mylaganam for **Somanathan**
Miss G. Etherton for the **Crown in Somanathan**
Mr A.R.H. Urquart for **Yaxley-Lennon**
Mr N. Lobbenberg for the **Crown in Yaxley-Lennon**
Mr F. Chamberlain for **Manister**
Mrs A. Vigars for the **Crown in Manister**
Mr D. Kapur for **Hong Qiang He**
Mr A. Dalgleish for **De Qun He**
Mr L. Mabley for the **Crown in He & He**

- -

Judgment
As Approved by the Court

Lord Justice Kennedy:

Introduction

1. We heard these five appeals consecutively on 20th and 21st September 2005. They were listed together because they raised points in relation to the Bad Character provisions of the Criminal Justice Act 2003 which have not previously been considered by the Court of Appeal, but the points raised are different in each case. There is no overlap. We therefore deal with the appeals separately in judgments to which all three members of the court have contributed, but it is convenient to begin by setting out those parts of the Act which are relevant in relation to one or more of the appeals.

2. **The 2003 Act**

98 Bad character

"References in this Chapter to evidence of a person's 'bad character' are to evidence of, or of a disposition towards, misconduct on his part, other then evidence which –

a) has to do with the alleged facts of the offence with which the defendant is charged, or

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

99 Abolition of common law rules

(1) the common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished.

(2) ……

100 Non-defendant's bad character

(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if –

(a) it is important explanatory evidence,

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

(i) is a matter in issue in the proceedings, and

(ii) is of substantial importance in the context of the case as a whole,….

……..

101 Defendant's bad character

(1) In criminal proceedings evidence of the defendant's bad character is admissible if, and only if –

(c) it is important explanatory evidence,

(d) it is relevant to an important matter in issue between the defendant and the prosecution,

(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,

(f) it is evidence to correct a false impression given by the defendant, or

(g) the defendant has made an attack on another person's character

(3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant 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 must 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.

102 "Important explanatory evidence"

For the purposes of section 101(1) 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.

103 "Matter is issue between the defendant and the prosecution"

(1) For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include –

(a)the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;

(b)the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect.

(2) Where subsection (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of

(a) an offence of the same description as the one with which he is charged, or

(b) an offence of the same category as the one with which he is charged.

(4) For the purposes of subsection (2) –

(a)two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms;

(b)two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this section by an order made by the Secretary of State.

104 "Evidence to correct a false impression.

(5) Evidence is admissible under section 101(1)(f) only if it goes no further than is necessary to correct the false impression.

110 Court's duty to give reasons for rulings

(1) Where the court makes a relevant ruling –
  (a) it must state in open court (but in the absence of the jury, if there is one) its reasons for the ruling;
  (b) If it is a magistrates' court, it must cause the ruling and the reasons for it to be entered in the register of the court's proceedings.

(2) In this section "relevant ruling" means –
  (a) a ruling on whether an item of evidence is evidence of a person's bad character;
  (b) a ruling on whether an item of such evidence is admissible under section 100 or 101 (including a ruling on an application under section 101(3);
  (c) a ruling under section 107.

112 Interpretation of Chapter 1

(1) In this Chapter
"misconduct" means the commission of an offence or other reprehensible behaviour;

Anthony Albert Weir.

3. On 21st March 2005 in the Crown Court at Manchester this 44 year old appellant was convicted of sexual assault by touching a girl under the age of 13, contrary to section 7 of the Sexual Offences Act 2003. He was subsequently sentenced to an extended sentence, the custodial element of which was 15 months imprisonment. As the sentence was in excess of 30 months he is required to comply with the notification provisions of Part 2 of the Act for an indefinite period, not, as stated by the Judge when sentencing, for ten years, but that is not a matter with which have been concerned when considering his appeal.

4. The alleged victim J was a ten year old girl living in the same street as the appellant, who lived with his partner and her children C and T. J and C were friends, and sometimes J slept at C's home. J said that when she did so on Saturday 4th July 2004 the appellant assaulted her by touching her vagina over her night clothes. According to J he had exposed himself to her on four or five previous occasions, and on Sunday 5th July he told her that he used to pay girls £5 to watch him masturbate, and asked her if she wanted to watch. She refused, but on that Sunday when he took the children swimming he peeped into the cubicle when she was naked, and then forced three pounds into her hand. J complained to her mother on the following Sunday, and the police were then informed. When interviewed the appellant denied that anything improper took place. He had not exposed himself to the girl, and on Saturday 4th July his partner was away but his friend Dean Allen was with him, and he had only gone into the children's bedroom to check that all was well. On the Sunday when he took the children swimming he had said nothing about masturbation. He had not spied on J, and although he did give her some money it was only to purchase food from the café. His case in relation to the Saturday evening was supported by Dean Allen, who detected no abnormality.

5. On 16th February 2005, at a plea and directions hearing, the prosecution applied to adduce evidence that on 9th August 2000 the appellant was cautioned for taking an indecent photograph of a child, contrary to section 1 of the Protection of Children Act 1978. The application was granted, and it is that decision which is challenged in this appeal. It is common ground that the relevant statutory provisions are those to be found in the sections 101(1)(d), 103(1)(a), 103(2)(b) and 103(4(b) of the Criminal Justice Act 2003.

6. On 15th December 2004 the Secretary of State exercised his powers under section 103(4)(b) by making the Criminal Justice Act 2003 (Categories of Offences) Order 2004 which came into force at the same time as sections 98 to 110 of the 2003 Act. Paragraph 2 of the Order provides -

> (1) The categories of offences set out in Parts 1 and 2 of the Schedule to this Order are hereby prescribed for the purposes of section 103(4)(b) of the 2003 Act.
>
> (2) Two offences are of the same category as each other if they are included in the same Part of the Schedule.

Part 1 of the Schedule sets out offences in the theft category. Part 2 is headed "Sexual Offences (Persons under the age of 16) Category". It includes the section 7 offence with which the appellant was charged before the Crown Court, but contains no reference to the offence in respect of which he had received a caution.

7. Mr James, for the appellant, therefore submits that as the offence in respect of which the caution was administered was not, for the purposes of section 103(2)(b) an offence of the same category as the one with which he was charged the evidence of the caution should not have been admitted. The Order, Mr James submits, is plainly selective. It does not include every possible offence, and unless categorisation is determinative of admissibility (where, as in this case, offences are not of the same description and thus within the ambit of section 103(2)(a)) then what is the point of categorisation? That was an argument which appealed to Mitting J at Preston Crown Court in the unreported case of O'Neil 22nd February 2005, but that was a case in which no relevant categorisation Order had been made by the Secretary of State, and it is not clear whether the attention of the judge was drawn to paragraphs 131 to 132 of the paper prepared by Professor John Spencer QC for the Judicial Studies Board. As Professor Spencer points out, and as we accept, it is necessary to look carefully at the opening words of section 103(2). They show that a defendant's propensity to commit offences of the kind with which he is charged can be proved in ways other than by evidence that he has been convicted of an offence of the same description or an offence of the same category. Unless that approach is adopted no proper weight is given to the use of the word "may" followed by the words in brackets, and the conclusion makes good sense because it allows for the admission of, for example, the fact that the defendant has previously asked to have taken into consideration offences of the kind with which he is now charged, despite the fact that an offence taken into consideration, like a caution, is not a conviction (see Nicholson [1947] 2 All E R 535).

8. Of course if the evidence sought to be adduced is evidence of convictions satisfying the requirements of paragraph (a) or (b) then the task of deciding admissibility is made easier, so the categorisation process does have an effect, and that seems to us to answer the question which Mr James posed.

9. For those reasons, although we do not agree with the trial judge that "an offence contrary to section 1 of the 1978 Act can properly be regarded (for the purposes of section 103(2)(b) of the Criminal Justice Act 2003) as being within the same category as an offence contrary to section 7 of the 2003 (Sexual Offences) Act" we do agree with the alternative line of reasoning adopted by the judge, and reflected in this judgment. That renders it unnecessary for us to consider the alternative submission put forward by Mr Vardon for the respondent that the evidence of the caution would in any event be admissible pursuant to section 101(1)(g) because the defendant had in effect attacked the character of the complainant. The appeal against conviction therefore fails, and is dismissed.

Romanathan Somanathan

10. On 20th January 2005 in the Crown Court at Croydon this 42 year old appellant was convicted of two offences of rape, and he was subsequently sentenced to nine years imprisonment. In his notice of appeal he seeks an extension of time of approximately four months in which to seek leave to appeal against conviction, and his applications for an extension of time and leave to appeal against conviction were referred to this court by the registrar. During the course of the hearing we granted the necessary extension of time (the delay was attributable to the time required to obtain transcripts) and we granted leave to appeal. We turn now to outline the case.

Outline of the allegations and the Trial.

11. Wendy Anenden is now 30 years of age. She came to England from Mauritius in 1996 and married, but her marriage broke down and in 2002 she was buying a new flat. At that time she started to attend the Hindu Temple at Thornton Heath where the appellant was the main priest or Aya. It was the prosecution case that after several conversations, on the telephone and at the Temple, the appellant visited her flat on 11th July 2002 to conduct a poojah (or blessing), and that whilst there he raped her. Thereafter he continued to contact her and she continued to attend the Temple. He visited her flat again in September 2002, ostensibly to give her a gift he had obtained on a religious trip to the Himalayas, and it was the prosecution case that he then raped her for a second time. She became pregnant, she said by him, and an abortion was performed on 26th November 2002. She said that she made efforts to approach people at the Temple about the appellant, but the community appeared closed to her, and it was not until November 2003 that she complained to the police.

12. The appellant was then interviewed on 11th March 2004 and denied any offending. He said that he did visit the complainant's home in July 2002 to conduct a poojah, but there was no impropriety, and in September 2002 he never even went to her home. He also denied having had any previous problems, in particular when he worked at Tooting. The false allegations made against him were, he said, attributable to members of the Mauritian community who wanted to give his Temple a bad name. In his Defence Case Statement served on 16th August 2004 the appellant relied on his answers given during the course of his interview under caution, and added that the complainant "is not a witness of truth and has some ulterior motive in making and indeed pursuing this complaint."

13. At the start of the trial on 11th January 2005 Ms G. Etherton for the prosecution applied to call three witnesses as evidence of bad character, pursuant to Chapter 1 of Part II of the Criminal Justice Act 2003. Those witnesses were Indira Mungur, Vidula Amoorden and Seevaratnam Nagendram. The first two were young women who said that at a vulnerable time in their lives they were subjected to sexually charged approaches made by the appellant similar to those which the complainant would say were made to her. The other two women were not visited by the appellant at home because proposed visits were abandoned when he discovered that they would not be alone, and in neither case was there any allegation of rape. Mr Seevaratnam was the founder and chairman of the Board of Trustees of the Temple at Tooting, and he was able to give evidence as to the appellant's behaviour when employed there, and as to the reasons why his employment was brought to an end.

14. The application to call the three witnesses was resisted by Mr Squirrel, who was then appearing for the appellant, and the main argument put forward was that the relevant provisions of the 2003 Act did not apply to this trial because the investigation and the initial criminal proceedings took place before the relevant provisions came into force. As a result of a subsequent decision of this court it is now clear, and before us it has been common ground, that the defence argument was misconceived, and the judge was right to reject it. During the course of his submissions Mr Squirrel was asked by the judge whether if the new Act applied he could argue against the inclusion of evidence of bad character, and he replied "well, it is going to be difficult, I concede that". A little later, at page 11F of the transcript, counsel expressly conceded that the applications fell within section 101(1)(f) and (g) of the 2003 Act, but invited the judge

to make use of his power to exclude under section 101(3) of the 2003 Act, and possibly also under section 78 of the Police and Criminal Evidence Act 1984.

15. Having regard to the way in which the application was advanced it is not surprising that the judge, after deciding that the 2003 Act did apply, was succinct in dealing with the requirements of that Act. He found that the application was properly made under section 101(1)(f) and (g) if not under (d) as well and continued -

> "I have thought hard about my discretionary power under subsection 3 to exclude the evidence, but do not do so. Much of this proposed evidence would have been admissible under the old law in any event."

The trial then began, and on the following day, 12th January 2005, Miss Etherton sought a ruling that the statement of Vidula Amoorden should be read pursuant to section 23 of the Criminal Justice Act 1988. Evidence was called as to the circumstances under which her statement was obtained, and as to the steps taken to secure her attendance at court. They were conceded to have been appropriate steps, but it was nevertheless submitted, principally by reference to section 26 of the 1988 Act, that the statement should not be read because the evidence was important and could not be challenged. As to that the judge said -

> "There is no doubt that this witness is an important and significant one. She gives evidence of similar fact to the extent of the grooming process that this defendant allegedly employed to wear down the resistance of those that he targeted. However, in my judgment, Mr Squirrel falls into error in saying that the evidence cannot be challenged. The defendant has challenged her account in interview, and, moreover, the defence is as able to controvert the evidence in the statement as ever it was …. And I have come to the conclusion that, having thought about the matter carefully, that the statement ought to be read in the interests of justice, and so doing will not cause an unfairness within the meaning of this section or section 78 of the Police and Criminal Evidence Act, and consequently I allow Miss Etherton's application."

16. The jury then heard the rest of the evidence of the complainant and they heard evidence from two witnesses to whom she complained in June or July and in November 2002. They also heard from Indira Mungur and the statement of Vidula Amoorden was read. They heard from Mr Seevaratnam (of Tooting Temple) and they heard from Professor Lipner, professor of Hinduism at Cambridge University, who was able to set in context much of what had been said by others. Most of what the Professor said was not contentious, but at page 8B of the transcript of the Professor's evidence he was asked -

> "Q. If one were a Tamil woman living in England making an allegation of rape by a priest, help us, please, how difficult a thing that would be to do given the community background and the person making the allegation and against who it is made?

A. Mind-boggling - that would be a mind-boggling thing to do. For a woman to make an allegation of rape or something like that against her priest, given the ethnic circumstances involved, would require - its an extraordinary act and would require a tremendous amount of impulse of one sort or another, either courage or whatever, but it is certainly a very unusual thing to happen."

The prosecution case concluded with evidence in relation to the interview with the appellant on 11th March 2004, and there were also schedules in relation to telephone contacts between the complainant and the appellant.

17. The appellant gave evidence on his own behalf, but the defence which he advanced was not as foreshadowed in his interviews and in his Defence Case Statement. He said that he fell out with Mr Seevaratnam at Tooting because Mr Seevaratnam was running the Temple as a business. He thought Mr Seevaratnam was worried that the appellant was too popular, and he added that by the end he was unhappy and "my contract was not renewed by agreement". As to the complainant he gave details of his dealings with her, maintaining that she attempted to seduce him, and said -

> "Mrs Anenden has lied because she was obsessed with me and I rejected her – three times she tried to get me and failed. I accept I didn't mention this in interview; only afterwards did I learn about things."

Referring to Indira Mungur and Vidula Amoorden as well as the complainant the appellant said -

> "All three women have collaborated and told lies about me."

At this stage it is unnecessary for us to refer to the summing-up. We will deal with specific criticisms made in relation to it later in this judgment.

Issues on Appeal.

18. Having set the scene we can now summarise the issues raised in this appeal. They are as follows -

(1) That the judge was wrong to admit the bad character evidence (i.e. the evidence of Indira Mungur, Vidula Amoorden and Seevaratnam Nagendram) because none of it was admissible under section 101(d)(f) or (g) of the 2003 Act.

(2) That the judge gave inadequate reasons for admitting the evidence, a point only taken during the course of submissions to us.

(3) That the judge's directions to the jury in relation to bad character evidence were inadequate.

(4) That the evidence of Professor Lipner as to the likelihood of a woman making an allegation against a Hindu priest was inadmissible and prejudicial.

(5) That the judge should not have permitted the statement of Vidula Amoorden to be read, and failed to give adequate directions in relation to it, and -

(6) That each of the convictions is thus rendered unsafe."

For the purposes of this appeal it was common ground that the convictions stand or fall together.

Relevant Legislation.

19. In this appeal the following sections of the 2003 Act are relevant, and the relevant parts of those sections are to be found set out in our introduction to all five appeals -

Section 99(1)

Section 101(1)(d), (f) and (g)

Section 101(3)

Section 103(1)(a) and (b)

Section 105(6)

Section 110

It will also be necessary to refer in due course to sections 23 to 26 of the Criminal Justice Act 1988, and to section 78 of the Police and Criminal Evidence Act 1984.

Chronology.

20. For certain purposes it is important in this case to bear in mind the sequence of events as disclosed by the evidence, so we summarise the chronology.

21. In 1998 the appellant ceased to work at Tooting Temple after being there for two years, and moved to Hendon. In November 2001 he left Hendon to open his own Temple at Thornton Heath.

22. In about June 2002 the appellant was consulted by the complainant. She says that he went to her home to perform a poojah on 11th July 2002 and that was when the first rape took place. The complainant had intended her friend Primeela to be present for the poojah but she was unable to attend. However, according to the complainant, very soon after the rape she spoke to Primeela and to another friend Evelyn Chin-Hom Lap about what had occurred, and Evelyn Lap gave evidence of that conversation at the trial. She said that in about June or July 2002 she was at Manchester University when telephoned by the complainant in distress. She said that her priest had come to her

house, didn't want to leave, and had bolted the door. He had pinned her to the floor and she struggled. She couldn't fight him off. He said they should be together. She said no several times, but afterwards she felt weak and dirty. She said he forced her, she didn't want to, and Evelyn Lap understood she meant something sexual.

23. In August/September 2002 the appellant was in India with his family and, according to the complainant, it was in September 2002, soon after his return, that he visited her home with a gift and raped her for the second time. She then became pregnant and consulted a Marie Stopes Clinic with a view to an abortion. She told Danusia Bourden, a nurse at the clinic, that the putative father was the priest at the Temple, and Danusia Bourden gave evidence to that effect. The abortion on 26th November 2002 was preceded by a scan on 22nd November 2002, which showed the foetus to be just over seven weeks old, indicating that conception took place early in October.

24. In about February or March 2003 Vidula Amoorden was planning a fast, and consulted the appellant. According to her sexual approaches then began which she initially terminated by threatening to tell his wife what he was doing. He then, in about March 2003, offered to do prayers at her house and she agreed because she wanted the house blessed. When he telephoned to say he was on his way she said that her brother was with her and looking forward to meeting him. The appellant then cancelled his visit, saying that he was getting late for the Temple. Later he rang to say that she must be alone for the blessing, which Vidula Amoorden did not accept, pointing out that her father was a priest. According to her the appellant then became offensive, and she terminated the conversation and changed her telephone number.

25. It was at about the same time, in March 2003, that Indira Mungur, who is the sister-in-law of Vidula Amoorden, consulted the appellant, and according to her suggestive conduct of which she complained continued until July 2003.

26. Meanwhile the complainant was still in contact with the appellant and taking part in ceremonies at the Temple. In April 2003 she says that she went to Windsor with her son to visit Legoland, and stayed in a family room at an hotel. According to the appellant she asked him to perform a poojah at Windsor, and provided him with a railway ticket. When he got there she took him to her hotel bedroom where she made advances to him, which he rejected, and he then left. The complainant accepted that under pressure she told the appellant of her proposed visit to the hotel and was scared that he might follow her, but he did not do so.

27. On 6th May 2003 the complainant paid £150 to the appellant for a poojah. She was about to have an operation and, according to her, wanted a poojah in another Temple with people around, but the appellant found out and insisted that he would do it.

28. In July 2003 the appellant was to perform a service at the home of Indira Mungur, who arranged for her sister-in-law Vidula Amoorden to be present, although the appellant had told her that she should not have any family member present. About two hours before the proposed service, at a time when the appellant knew that Vidula Amoorden was to be present, the appellant telephoned to cancel the service, saying, according to Indira Mungur, that he had to have an eye operation. When she saw him a couple of days later there was no sign of any operation, and he said that his eyes had recovered. According to the appellant he did not cancel services at the homes of either Vidula Amoorden or Indira Mungur when he knew that they would not be alone, nor

did he say anything to Indira Mungur about an eye operation. He was due to meet a priest from India, and simply told her that he had another appointment.

29. The appellant stated that on 11th September 2003, after a summer visit to India, he took a gift to the complainant at her home which she rejected. That, he said, was disrespectful, and although she subsequently visited the Temple he ignored her because she had been disrespectful.

30. The appellant asserted that in October 2003 he finally rejected the complainant, and the last recorded telephone call between them was in that month.

31. In November 2003 the complainant went to the police. They then obtained statements from the complainant, Vidula Amoorden and Indira Mungur, whose name was given to the police by Vidula Amoorden, and, as we have already said, on 11th March 2004 the appellant was interviewed by the police.

Issue 1 – Admissibility of bad character evidence.

32. We turn now to the first of the issues which arise in this appeal, reminding ourselves that at the outset in the court below it was accepted that the criteria set out in section 101(1)(d) (f) and (g) were satisfied. Had that not been the case no doubt a distinction would have been drawn between the evidence of Indira Mungur and Vidula Amoorden on the one hand and the evidence of Seevaratnam Nagendram on the other. His evidence would also have been divided into two parts - the first relating to the reasons for the appellant's departure from Tooting, and the second relating to what the witness saw or heard relating to the appellant's behaviour whilst at Tooting.

33. Mr Kovalevsky QC, for the appellant, submitted to us that none of the bad character evidence (i.e. none of the evidence of Indira Mungur, Vidula Amoorden or Seevaratnam Nagendram) should have been admitted under section 101(1)(d) because none of it was relevant to any important matter in issue between the defendant and the prosecution. As Miss Etherton, for the respondent, pointed out, section 101(1)(d) does have to be read in the light of section 103(1), which makes it clear that for the purposes of section 101(1)(d) matters in issue include a propensity to commit offences of the kind charged, and a propensity to be untruthful.

34. Mr Kovalevsky submitted, correctly, that the sole issue was whether the complainant's account was true, and he went on to submit, again correctly, that before the implementation of the 2003 Act the evidence of Indira Mungur and Vidula Amoorden, if not that of Sevarartnam Nagendram, would only have been admitted if it satisfied the requirements of similar fact evidence, as set out in DPP v P [1991] 2 AC 447. Mr Kovalevsky then submitted, contentiously, that the coming into force of the 2003 Act has not significantly altered the test for admissibility of similar fact evidence. In support of that proposition he relied upon certain passages from the speech of Lord Phillips in O'Brien v Chief Constable of South Wales Police [2005] 2 WLR 1038, and upon the reference made to those passages in R v Edwards and others [2005] EWCA Crim 1813.

35. As Mr Kovalevsky recognised, O'Brien was not a criminal case, and we remind ourselves that section 99(1) of the 2003 Act expressly provides that -

> "The common law rules governing the admissibility of evidence of bad character *in criminal proceedings* are abolished" (our emphasis).

At paragraph 12 of his speech in O'Brien Lord Phillips said -

> "Where a defendant to a criminal charge has a criminal record, his propensity to commit crime will normally have some relevance to the question of whether he committed the offence with which he is charged. As a general rule such evidence has nonetheless been held to be inadmissible on the ground that its prejudicial effect is likely to outweigh its probative value. Exceptions have, however, been made to this general exclusion. The nature and extent of those exceptions have proved a frequent preoccupation of the appellate courts and, on at least four occasions, of your Lordships' House. They are now to be found codified in sections 101 to 106 of the Criminal Justice Act 2003, which were brought into effect in December last year."

We consider that passage, which is not an essential part of the reasoning in O'Brien, to be capable of being misunderstood. The 2003 Act completely reverses the pre-existing general rule. Evidence of bad character is now admissible if it satisfies certain criteria (see section 101(1)), and the approach is no longer one of inadmissibility subject to exceptions (see also the Explanatory Notes to the Act Paragraph 358 and the observations of Professor Sir John Spencer QC in his paper for the Judicial Studies Board at paragraphs 37 and 143).

36. In paragraph 33 of his speech Lord Phillips said -

> "The test of admissibility advanced by Lord Mackay in Director of Public Prosecutions v P still requires similar fact evidence to have an enhanced relevance or substantial probative value before it is admissible against a defendant in a criminal trial. This is because such evidence usually shows that the defendant is a person of bad character and thus risks prejudicing a jury against the defendant in a manner that English law regards as unfair. Instead of applying Lord Mackay's simple test, the trial judge now has to apply his mind to the matters set out in sections 101 to 106 of the 2003 Act. These preserve, however, by rules of some complexity, the requirement that the similar fact evidence should have an enhanced probative value."

That is also reflected in paragraph 52 of the speech. The Act does not say anything about "enhanced probative value" or "enhanced relevance" (the words used in R v Edwards and others). Paragraph 363 of the Explanatory Notes does refer to an "enhanced relevance test" but only in relation to section 100 of the Act. The terms of that section clearly impose a higher test in respect of the introduction of a non-defendant's bad character than the test for the introduction of a defendant's bad character. If the evidence of a defendant's bad character is relevant to an important

issue between the prosecution and the defence (section 101(1)(d)), then, unless there is an application to exclude the evidence, it is admissible. Leave is not required. So the pre-existing one stage test which balanced probative value against prejudicial effect is obsolete (see also section 99(1)).

37. In the context of this case we are satisfied that all of the bad character evidence which the prosecution sought to adduce satisfied the requirements of section 101(1)(d). In substance it was the case for the prosecution that over a prolonged period, beginning when she was emotionally vulnerable, the complainant was subjected by the appellant to sexually charged behaviour which on two occasions culminated in rape. The defendant's response was one of complete denial. He did not simply say that there was never any rape. He denied that he had behaved improperly at any time. It was therefore plainly relevant to an important matter in issue between the parties, namely the credibility of the complainant on the one hand and the defendant on the other, for the prosecution to show that the behaviour to which the complainant said that she had been subjected (other than the actual offences of rape) followed a pattern used by the defendant in relation to two other women who attended the Temple at Thornton Heath, that his behaviour towards women at Tooting gave cause for concern, and that, contrary to his assertion in interview that he had no problems at Tooting, he left his post there because of his behaviour and because he was untruthful, thus exhibiting a propensity to be untruthful (see section 103(1)(b).

38. That brings us to the second stage of the procedure required by the statute, namely the application of section 101(3). In this case counsel for the defendant did apply to exclude the evidence, and bearing in mind the provisions of Article 6 of the European Convention, we consider it important that a judge should if necessary encourage the making of such an application whenever it appears that the admission of the evidence may have such a adverse effect on the fairness of the proceedings that the court ought not to admit it. As Miss Etherton accepts, section 101(3) does require the judge to perform a balancing exercise, and that exercise does require the judge to look carefully at the evidence sought to be adduced.

39. In our judgment the probative force of the evidence of Indira Mungur and Vidula Amoorden was considerable because, if accepted, it lent powerful support to what the complainant said about the appellant's technique. Without going into detail the evidence of each woman showed that the appellant sought to strike up a relationship with them when they were at a low ebb in their lives. He belittled their former or intended partners, he admired their clothes, and suggested what colours they should wear, he acquired telephone numbers and addresses and then telephoned regularly, often late at night. He spoke of dreaming of them, of being married to them in a past life, and of the Gods now sending them to him. He offered gifts and did things to their hands and hair in the Temple which were inappropriate because they were only done when a girl became a woman or by her husband. Finally he sought to visit each of them at home when they were alone, and only in the case of the complainant did he succeed. There was no significant indication of collusion although, as we have noted, Indira Mungur and Vidula Amoorden were related by marriage, and one gave the name of the other to the police. The admission of that highly relevant evidence could not in our judgment, have such an adverse on the fairness of the proceedings that the court ought not to have admitted it, not least because the appellant knew precisely who the witnesses were, and what they would say, so he would be able where

appropriate to challenge what they had said, and to adduce evidence to the opposite effect.

40. Turning to the evidence of Seevaratnam Nagendram, we take a similar view of his evidence as to the reasons why the appellant ceased to work at Tooting. The appellant had told the police officers that he had no trouble there, and it was highly probative to show that he had been dismissed because he lied to Seevaratnam Nagendram and because of behaviour which Seevarartnam Nagendram had witnessed, or put to the appellant. With all of that the appellant could be expected to deal. If Seevaratnam Nagendram had been allowed to give evidence about complaints made in relation to the appellant's behaviour which he received from unidentified third parties and which were not put to the appellant such evidence by its nature would have been very difficult for the appellant to meet, and should therefore in fairness to the appellant have been excluded pursuant to section 101(3), but there was no such evidence tendered in this case. Seevaratnam Negendram was quite clear that his concerns, arising from what he saw and heard, were put to the appellant. For example he was asked -

> "Q. Did you speak to him about the concerns that were being raised or coming to your attention about his attitude to some women?
>
> A. Yes on several occasions I have spoken to him, even spoken about his dress."

41. Similarly in relation to the lies which, according to Seevaratnam Negendram, the appellant told about his contact with a French family, even to the extent of swearing on God. It is quite clear from the evidence that what mattered to Mr Seevaratnam was the appellant's response to him and the appellant was well able to deal with that.

42. We therefore conclude that the judge was right to admit all of the evidence pursuant to section 101(1)(d) having given consideration to the application made under section 101(3).

43. Our conclusions in relation to section 101(1)(d) make it possible for us to deal more succinctly with the other gateway provisions. We accept that a simple denial of the offence or offences alleged cannot, for the purposes of section 101(1)(f), be treated as a false impression given by the defendant. But that was not the situation in this case. The appellant put himself forward as a man who not only had no previous convictions but also enjoyed a good reputation as a priest, particularly at Tooting, where he had previously been employed, and was the victim of a conspiracy hatched up by members of the Mauritian community at Thornton Heath. That, as Mr Kovalevsky accepted, opened the gateway for the admission of evidence as to what happened at Tooting, but he invited our attention to section 105(6) which states that evidence is admissible under section 101(1)(f) "only if it goes no further than is necessary to correct the false impression". We accept that is a statutory reversal of the previous common law position that character is indivisible (R v Winfield [1939] 27 Cr A R 139), but we do not accept Mr Kovalevsky's submission that all that was required in this case to correct the false impression was for Mr Seevaratnam to state that decisions had been taken not to renew the appellant's contract because of complaints that had been received. The gateway having been opened the prosecution was entitled

to adduce a full account of what, according to their witness, brought the Tooting contract to an end. A slightly more difficult question is whether the evidence of Indira Mungur and Vidula Amoorden would be admissible to correct a false impression given by the appellant. Miss Etherton submitted that it was because of the appellant's allegations in interview about a conspiracy. We prefer to put it slightly differently. In our judgment the evidence of the two women was admissible under section 101(1)(f) because part of the false impression given by the appellant in interview and, as it turned out later by calling seven character witnesses, was that he was a priest who had never behaved inappropriately towards female worshippers at his Temple.

44. We note that the provisions of section 101(3) do not apply to subsection (1)(f), and we see no reason to doubt that section 78 of the 1984 Act should be considered where section 101(1)(f) is relied upon (see the judgment of Lord Woolf CJ in Highton and others [2005] EWCA Crim 1895 at paragraph 13, and the views of Professor Spencer at paragraph 21 of the paper to which we have already referred). In this case for the reasons which we have already given when dealing with the application of section 101(3) to section 101(1)(d) we do not see any way in which, in relation to subsection (1)(f), section 78 would assist the appellant.

45. We turn now to the final gateway provision relied upon, namely that the appellant at interview and thereafter made an attack on the complainant's character (section 101(1)(g)). Mr Kovalevsky accepts that he did so, but he submitted that the opening of that gateway should not be regarded as rendering all available evidence of bad character admissible. That is a somewhat difficult submission because in the first place it must be noted that section 105(6) has no application to section 101(1)(g), and, secondly, it is clear from the decision in Highton that once this gateway is open the evidence admitted may be used not only in relation to credibility but also in relation to propensity. In our judgment the attack on the character of the complainant clearly opens the door to all of the evidence on which the prosecution sought to rely, subject to the requirements of section 101(3), which we have already considered in relation to section 101(1)(d).

Issue 2 - The Judge's reasons.

46. We accept that the judge's reasons for deciding as he did were brief, but they have to be considered in the light of the argument advanced before him. The principal issue was whether the 2003 Act applied. He was right about that. It was accepted by the defence that the gateway provisions were satisfied, so the only other issue was the application of section 101(3) of the 2003 Act or section 78 of the 1984 Act. The significant difference between those provisions is to be found in the mandatory opening words of section 101(3), but they do not apply until the court reaches its conclusion as to whether 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. In other words the first step is for the judge to perform the balancing act, and it is clear to us that is what the judge did. That is what he was referring to when he spoke of his discretionary power under subsection (3) to exclude evidence. We accept that he could have expressed himself better, but we do not regard infelicity of expression as an effective ground of appeal.

Issue 3 - Directions to the Jury.

47. Mr Kovalevsky submits that the judge failed to direct the jury properly as to the use that could be made of the bad character evidence of Indira Mungur, Vidula Amoorden and Seevaratnam Nagendram. In particular it is said that the judge failed to refer to the possibility of collusion or innocent contamination as required by R v H [1995] 2 AC 596 and, secondly, he did not invite the jury to consider the similarities between the accounts.

48. Collusion was never raised as an issue in this case but the possibility of innocent contamination was put to and rejected by Indira Mungur. During the course of the evidence the judge did caution the jury about the way in which they should approach evidence of bad character, and he returned to the topic in his summing-up, saying at page 38G of the transcript in relation to Vidula Amoorden -

> "Bear in mind the direction I gave you about that, but consider both her account and that of Mrs Mungur. In the absence of collaboration and putting minds together and fabricating these allegations that they make, is it likely that these women have separately invented these incidents?
>
> You heard from Mr Seevaratnam, the owner of the Tooting Temple. I referred to his evidence when I gave you a direction about character generally. His evidence is admissible to counter the defendant's assertion in interview that there was never any problem at Tooting, and also the defendant has made an attack on the truthfulness of Mrs Anenden."

That, as it seems to us, in the context of this case, satisfied the requirements of R v H, and earlier in his summing-up the judge had referred to the evidence of Vidula Amoorden and Indira Mungur as evidence capable of supporting the complainant. At page 6D he said -

> "Now, these incidents and aspects of their evidence, if you accept them, are capable of supporting Mrs Anenden's account of the defendant's course of conduct or course of behaviour towards her, and the prosecution say that together they show a picture of the targeting of vulnerable women at uncertain times in their lives and a purposeful course of grooming towards a situation from which he could take advantage. Now, that is a matter for your judgment."

The judge went on to deal with the evidence in detail. In our judgment he cannot be criticised for failing to spell out similarities between the accounts, and indeed had he done so he would have been assisting the prosecution rather than the defence.

Issue 4 - Professor Lipner.

49. Earlier in this judgment we set out one of the questions asked of Professor Lipner and the answer that he gave. Mr Kovalevsky submits that the question should not have been asked, and the answer should not have been given, still less should it have been

relied upon by prosecuting counsel in her closing speech and referred to by the judge in his summing-up because "this evidence essentially amounted to an assessment of the likelihood of false allegations of rape being made by a Hindu women against a priest." We disagree. The word false is an interpolation. Miss Etherton did not ask the witness to express a view about the truth or falsehood of the allegation, and he did not purport to do so, but the jury was entitled to know from an expert whether or not within the Hindu community an allegation of this kind was unusual. In our judgment there is no substance whatsoever in this ground of appeal.

Isue 5 – The statement of Vidula Amoorden.

50. Vidula Amoorden made her statement on 1st March 2004 but later indicated that she did not wish to attend to give evidence, and the judge heard evidence from which he was able to conclude that all reasonable efforts had been made to locate her. That is not disputed. He then had to consider whether her statement could be read, having regard to the factors set out in section 26 of the Criminal Justice Act 1988, namely (1) the contents of the statement; (2) the risk of unfairness to the accused having particular regard to whether it was likely to be possible for the accused to controvert the statement, and (3) any other circumstances that appeared to the court to be relevant. The judge considered those statutory provisions and in a ruling set out earlier in this judgment decided that the statement could be read. Mr Kovalevsky submitted that his conclusion was wrong because the witness was important and if she could not be produced and cross-examined her evidence should not be adduced at all. In our judgment that cannot be accepted, not least because it would frustrate one important purpose of the statute, which was to prevent a prosecution from being hampered by intimidation of witnesses. The reality was, as we have already indicated, that the appellant was well able to deal with the statement of Vidula Amoorden and, as Miss Etherton points out, his counsel was able to put his case not only to the complainant but also to Indira Mungur. We consider that the judge's carefully considered decision to allow the statement to be read cannot be faulted.

51. Then it is said that the judge failed properly to direct the jury in relation to the statement which had been read. When the statement was read the judge warned the jury to bear in mind that because the witness did not attend they were deprived of the opportunity to hear her cross-examined, and he repeated that warning in his summing-up, saying at page 8G of the transcript -

> "Remember that Mr Squirrel was deprived of the opportunity to cross-examine her and challenge her evidence, and take that into account when you assess how much weight to put upon what that witness says, bearing in mind that it was a statement made to a police officer in contemplation of criminal proceedings. So tread carefully, and bear in mind Mr Squirrel was not able to put his case to her in the way that he did, for example, to Mrs Mungur."

52. Mr Kovalevsky submitted that the direction was inadequate because the witness was important, and drew our attention to the decision of this court in McCoy 10th December 1999, unreported save in [2000] 6 Archbold News 2. In that case the statement read was that of the victim of what was alleged to be a wounding with intent to do grievous bodily harm who identified his attacker. His evidence was, as

this court found, "wholly crucial to the case". It was not entirely clear why he did not attend, and the judge was precipitate in allowing his statement to be read before giving sufficient time to exhaust the possibility of his being brought to court. It was in that context that Laws LJ said at paragraph 25 of the transcript -

> "If a statement of a critical witness is to be read to a jury, perhaps especially in an alibi case where identification is the true issue, it must be incumbent on the trial judge to ensure that the jury realise the drawbacks which are imposed on the defence if the prosecution statement is read to them. It is not enough simply to say that counsel has not had the opportunity of cross-examining. A lay jury may not appreciate the significance of that fact. The judge must at least explain that it means that they may feel quite unable to attach anything like as much weight to the evidence in the statement as they might if it was tested in cross-examination; and where appropriate it would be necessary, certainly desirable, for the judge also to indicate to the jury by way of illustration the sort of matters that might well be put in cross-examination in the particular case."

53. In the present case the evidence of Vidula Amoorden was important, but it was not crucial, and the judge in his direction drew attention not only to the lack of opportunity to cross-examine but also to the question of how much weight should be put on what the witness said. He also illustrated what might have been put to her had she attended by referring to the cross-examination of Mrs Mungur. In those circumstances it seems to us that he did all that was required of him in this case, where the situation was different to that which arose in the case of McCoy.

Conclusion.

54. Thus we conclude that the appellant has failed to substantiate any of his grounds of appeal, and accordingly this appeal against conviction is dismissed.

Stephen Yaxley-Lennon

The Background

55. On 18th April 2005, in the Luton Crown Court, this appellant was convicted by a majority of 11.1 of assault occasioning actual bodily harm (Count One) and by a majority of 10-2 of assault with intent to resist arrest (Count Two). He was sentenced to 12 months imprisonment on Count One and 3 months imprisonment concurrent on Count Two. He appeals by way of leave of the single judge.

The prosecution case

56. The incident in question took place in Luton at around 3am on 4th July 2004. The victim was an off duty police officer called Dalton. He and his neighbours Mr and Mrs Bye were woken by an argument in the street between the appellant and his girlfriend Jenna Vowles. Although living in the same street, Dalton and the Byes did not know each other. Concerned by the screaming and raised voices, the three of them went into the street from their homes.

57. The appellant was described as being “on a short fuse” and that “something had riled him”. Miss Vowles was sobbing and hysterical wanting nothing to do with him. Dalton concerned for Miss Vowles, told the appellant that he should let her go home alone. He indicated that he was a police officer and showed the appellant his warrant card. He tried to bring the appellant to the ground. Both men fell to the ground. The appellant managed to get to his feet and kicked Mr Dalton in the head. Dalton had thrown no punches. Dalton then stood up and told the appellant that he was arresting him for assaulting a police officer. It was subsequently decided that such an arrest would not be prudent and that the Byes who had witnessed the whole incident, would ascertain the appellant’s address.

The defence case

58. In interview and in evidence, the appellant said that he had been out clubbing. He had drunk one bottle of Smirnoff Vodka. He and Jenna Vowles had an argument. She had dropped her mobile phone and was on her hands and knees trying to pick it up. The eye witnesses must have assumed that he was the aggressor. Dalton came up to him. He asked the appellant what he was doing. His breath smelled of alcohol. Jenna was not sobbing or crying. Dalton told him he was not going home and pushed him around, pushing him in the face and pulled his legs from under him. He did not produce a warrant card or say he was a police officer. The appellant did not kick him. It was only at the end when Dalton was threatening him that he indicated he was a police officer. The appellant did not believe him. He suggested that Mr Bye knew Dalton as he addressed Dalton by his Christian name, telling him to leave it and go home. The appellant and Jenna then ran home.

59. Jenna Vowles gave evidence along the same lines of the appellant, describing the argument as a tiff, but that they were happily going home when the incident broke out.

Background to the judges ruling.

60. During evidence in chief of Jenna Vowles, counsel for the appellant asked her whether she or the appellant had taken any drugs that evening. She replied “No”.

61. In cross examination, counsel for the Crown asked her the following questions:

“ Q - You were asked questions by Mr Urquhart about what you had been drinking. Yes?

A – Yeah.

Q – An you say you had had four drinks and you were a bit tipsy. Correct?

A – Yeah.

Q – And then he asked you about whether you had taken any drugs. Correct?

A – Yeah.

Q – Just tell about drugs please for a moment. What do you want to tell us about drugs?

A – I don't take drugs

Q – Never taken drugs?

A – No

Q – Never possessed drugs?

A – Yes

Q – Yes. Tell the jury about that

A – I was cautioned in November for possession of drugs

Q – Which drug?

A – It was cocaine

Q – Cocaine

A – It was in my possession. There were two empty bags which I was clearing out my house. I put them in my bag so my parents wouldn't find them"

It was at this point that the judge asked the jury to retire. There then followed discussions between counsel and court.

62. The Crown whilst conceding that they should have made an application to introduce the caution, said that they would not have raised the issue had the witness not been asked about drugs in evidence in chief. They submitted that the evidence was relevant to the question of credibility.

63. The defence having taken instructions made an application for the discharge of the jury on the basis that the wording of section 100 (1)(b) could not include issues relating to credibility and thus the evidence did not relate to a matter in issue in the proceedings. The judge said that it was premature to discharge the jury at that point without more and that he may have to re-visit the decision at a later point.

64. It was agreed between the parties and the court that the witness should be asked further questions about her caution. The witness was then called and questions were put to her in the absence of the jury. Following the voir dire, defence counsel submitted that the evidence could not fall under section 100 (1) (a) or (b).

65. The judge ruled that Jenna Vowles caution for possession of cocaine had substantial probative value to her credibility, which was an important issue in the case. It had been put that she was lying to support her boyfriend's case and there was a stark difference between the Crown and Defence accounts. He gave leave for the Crown to ask further questions to the witness in front of the jury, but indicated that he was going to direct the jury that so far as credit is concerned they should ignore the

evidence completely, as it could not really help the prosecution prove that she had been lying about what happened in relation to the events of the incident, given that she did not lie in relation to the caution. In the light of the judge's comments, counsel for the crown did not cross examine further on the matter in the presence of the jury. Counsel for the appellant re-examined the witness on the background facts leading to the caution.

Direction in summing up

66. When summing up to the jury, the learned judge gave a strongly worded direction to the jury, as follows:

> " One exchange between Mr Heimler and her (Vowles) concerned this question of cocaine. I need to deal with it. You have heard about it. Can I ask you to disregard it completely? It has got about as much to do with this case as the price of tomatoes. First of all the caution took place well after this incident itself occurred…. Secondly – and it is important – although her credibility is in issue, clearly just as much as all the witnesses credibility is in issue, the effect of drugs on that is unknown. It has got really no issue, no bearing on any issue in this case…. I am directing you to disregard her previous caution completely because it cannot help you decide what happened in the street that night…. In fairness please just disregard that completely"

Grounds of Appeal

67. The ground of appeal is that the judge erred in holding that the evidence of the caution was admissible and rejecting the defendant's application to discharge the jury.

68. The appellant's submissions are put on two bases: Firstly, that the evidence did not relate to a matter in issue in the proceedings as the section does not encompass matters of credibility. Second that even if credibility is encompassed by the section, the evidence did not pass the test of admissibility as it had no substantial probative value in relation to the question of credibility and was not of substantial importance in the context of the case as a whole. It was submitted that the evidence had very little value in relation to credibility and no relevance at all to the offence in question because a) the caution did not relate to an offence of dishonesty or showing evidence of untruthfulness; b) it related to an incident after the events in issue; c) the witness by agreeing to be cautioned had accepted her guilt; d) the witness was frank about her caution in evidence; and e) there was no suggestion that she was under the influence of drugs during the incident itself.

69. The appellant also submits that the conviction is unsafe in the light of the majority verdicts on each count on the basis that the evidence could have adversely affected their view of the witness despite the judge's strong warning.

70. On behalf of the Respondent, it is submitted that Section 100 (1) must cover the issue of credibility, for were it not to do so, unfairness would ensue. It was submitted that the evidence of the caution was relevant to credibility, but it was conceded that it was

difficult to suggest that the evidence had substantial probative value in relation to credibility in the light of the witnesses' answers.

71. Their primary submission therefore is that the conviction was safe and that the strong warning given by the judge corrected any harm done by the introduction of the evidence.

Judgment

72. We now deal with the submissions and the questions arising therefrom.

Does section 100 (1) cover issues of credibility?

73. Although couched in different terms from the provisions relating to the introduction of the defendants bad character, in our view, Section 100 (1) does cover matters of credibility. To find otherwise would mean that there was a significant lacuna in the legislation with the potential for unfairness. In any event, it is clear from paragraph 362 of the explanatory notes that the issue of credibility falls within the section.

Did the judge err in coming to the conclusion that the evidence of the caution had substantial probative value in relation to the witness's credibility?

74. In our view he did err for a number of reasons, including those which were put forward by the judge himself when directing the jury to ignore the evidence of the caution. It follows, therefore, that we find that the evidence of the caution was inadmissible under Section 100.

Is the verdict unsafe as a result of the inadmissible evidence being in front of the jury?

75. Mr Urquhart conceded that had the judge found the evidence to be inadmissible but nevertheless declined to discharge the jury, he would have difficulty persuading the court that the judge had exercised his discretion wrongly. Although the exercise of discretion was not the basis upon which the judge declined to discharge the jury, the practical effect is still the same. We have to take a view therefore whether in the light of the admission of the evidence of the caution, the conviction is unsafe. We have considered the evidence as a whole and in particular the very strong warning given to the jury and come to the conclusion that the verdicts in this case, despite being majority verdicts are not unsafe. This appeal against conviction is therefore dismissed.

Simon Charles Manister

76. On 15 April 2005 in the Crown Court at Bristol, this appellant was convicted of three offences of indecent assault contrary to section 14(1) of the Sexual Offences Act 1956.

77. A, the complainant in each case, was born on 12 March 1990 so she was thirteen at the time of the alleged offences; the appellant was thirty-nine. He was a friend of the

girl's father and he moved into the family home on 23 July 2003 and stayed there until December 2003.

78. A alleged that the appellant touched her sexually on a number of occasions, but the allegations which led to the three counts in the indictment were: Count 1, placing his hand between her legs in the region of her vagina, then on her breasts, both over her clothes, in December 2003 soon after he left her family home; Count 2 (an allegation of rape of which he was found not guilty but guilty of indecent assault), full sexual intercourse in mid February 2004; and Count 3, forcibly kissing her, touching the outside of her leg and her bottom and then between her legs in the area of her vagina, all over her clothes, before putting his hand under her upper clothing and bra and touching her breast, on 27 February 2004. All the offences were alleged to have been committed in his car.

79. A did not make any allegation against the appellant until just over a week after the last, alleged incident, when she was arrested for shoplifting. She was interviewed on three occasions, and the video recordings of the interviews stood as her evidence in chief. In the first interview on 9 March 2004 she spoke of the appellant's relationship with her family and her sympathy for him because he said he had cancer, although it turned out to be a swollen gland in his throat. She spoke of the appellant touching her up on occasions and gave her account of events which led to Counts 1 and 3. At the end of the interview she asked what she should do if she later remembered something else. The interviewing officer said A could come back and speak on tape, and asked her if she had told as much as she could. She said, "Yes".

80. The second interview was on 19 May 2004. A spoke slowly and it was difficult for the officer to get much out of her. She said that on an occasion in about mid February the appellant had spoken about paying her for sex, which disgusted her, and he tried to kiss her. She spoke of an earlier occasion just before Christmas when she was in his house and he came down naked after a shower. She spoke of him threatening to kill himself on 27 February 2004. She was asked if there was anything else she wanted to say, and she answered "No".

81. On 28 June 2004 she was interviewed for a third time because she had more to say, and she spoke of the appellant kissing her, pulling her jeans and thong down to her ankles and having sexual intercourse with her in his car on the occasion in mid February 2004. He had ejaculated onto the seat. She had not spoken about it before because she thought people would be mad at her, and she was embarrassed.

82. The appellant had no previous convictions. His case, when interviewed by the police and in his evidence at trial, was that nothing of a sexual nature had occurred between him and A. None of the allegations upon which the indictment was based were true. In interview he said that he and A had a friendship; he gave her a little bit of confidence; he never thought that she thought there was more to their friendship, and he told her "just be mates". In his evidence, he said that his relationship with A was just a friendship where he wanted to help a friend, a teenager. He was someone who was just there, a sounding board, someone to talk to. He accepted that, looking back, it was an emotionally unhealthy relationship, but he had not done any of the improper things that A said he had done.

83. The prosecution relied on various matters in support of the allegations. Semen with the appellant's DNA was found on his car seat. It could not be related to A or any particular woman, and the appellant said it was the result of unprotected sex with other, adult women.

84. There were records of a large number of mobile telephone calls between the appellant and A. He had sent her a card with the message, "Be mine as I miss you lots", which A had hidden under her mattress where it was found by her sisters.

85. The judge ruled that evidence of an earlier sexual relationship with another girl was admissible in evidence, as a result of which the appellant formally admitted, as agreed facts, that from October 1998 to September 2001 he had had a sexual relationship with B, a girl who was sixteen at the start of the relationship, when the appellant was thirty-four.

86. The judge also ruled admissible the evidence of C, a sister of A, and fifteen at the material time, that after going to the gym with the appellant he had told her, "Why do you think I'm still single? If only you were a bit older and I a bit younger". The appellant denied saying that; it was put to C in cross-examination that she had made it up.

87. The verdict of not guilty of rape but guilty of indecent assault on Count 2 must mean that the jury was sure of sexual intercourse, unlawful because of A's age, in mid February 2004, but not sure that A did not consent, or not sure that the appellant was reckless as to whether she consented. In those circumstances, the prosecution does not seek to uphold the appellant's conviction for indecent assault on Count 2 in the light of the decisions of the House of Lords in R v. J [2004] UKHL 42 and of this court in R v. W.R. [2005] EWCA Crim. 1907.

88. The appellant was never charged with unlawful sexual intercourse, and the effect of those decisions is that on 15 April 2005 when Count 2 was left to the jury, it was too late to prosecute the appellant under s6(1) of the Sexual Offences Act 1956 for having unlawful sexual intercourse as an alternative to the allegation of rape, because section 37(2) of, and paragraph 10(a) of Schedule 2 to, the 1956 Act provided that no such prosecution could be commenced more than twelve months after the alleged sexual intercourse in mid-February 2004. In accordance with Rv.J and Rv.W.R, the alternative of indecent assault could not be left to the jury either. A prosecution for unlawful sexual intercourse could not be commenced, so it was also impermissible to commence a prosecution for indecent assault by leaving it to the jury as an alternative to rape. In those circumstances the appeal against conviction on Count 2 must succeed and the conviction for indecent assault on that count is quashed.

89. The remaining appeal against the convictions for indecent assault on Counts 1 and 3 is based on a number of grounds, but primarily on the contention that the judge was wrong to rule the evidence of B and C admissible.

90. The relevant sections in Part II, Chapter 1, of the Criminal Justice Act 2003 are sections 98,99(1), 101(1)(3) and (4), 102, 103(1) and 112(1).

91. So far as the potential evidence of an earlier sexual relationship between the appellant and B was concerned, the trial judge concluded that for a man of thirty-four to

institute a sexual relationship with a girl of sixteen was properly to be described as reprehensible behaviour, and that this brought the relationship within "gateway" (d) of section 101(1). It showed a propensity to be attracted to girls of an age which was inappropriate for persons of the appellant's age. Since this was the context of the evidence, the passage of five or six years since the earlier relationship was not of significance for the purposes of section 101(4). Having formed a clear view in respect of gateway (d), the judge did not think it necessary to form a view on the additional gateway (f), to correct a false impression, argued by the Crown; he thought it more difficult, but he would not shut it out.

92. The judge ruled that the potential evidence of what the appellant was alleged to have said to A's sister, C, was admissible as "part of the background as to what is going on in this family, involving the defendant, that the jury was entitled to hear and which, if they accept the evidence, may be useful to them."

93. Mr Chamberlain challenged both rulings, as he resisted them at the trial. In respect of the sexual relationship with B, he contended that a perfectly legal relationship could not involve the commission of an offence, which we accept; nor could it, being countenanced by the law, amount to "reprehensible behaviour". There was no exploration of the details of the relationship. What if the appellant had married B? It could not, therefore, amount to misconduct or a disposition towards misconduct. The disputed evidence of what the appellant said to C indicated restraint on his part.

94. In our combined view, the judge was wrong to conclude that the sexual relationship between the appellant and B, without more, amounted to "evidence of, or of a disposition towards, misconduct on his part" and therefore evidence of "bad character" for the purposes of section 98, and therefore sections 101, 102 and 103 of the Act. The definition of "misconduct" in section 112(1) is very wide. It makes it clear that behaviour may be reprehensible, and therefore misconduct, though not amounting to the commission of an offence. The appellant was significantly older than B. But there was no evidence, or none that the Crown put forward and the judge ruled admissible, of grooming of B by the appellant before she was sixteen, or that her parents disapproved and communicated their disapproval to the appellant, or that B was intellectually, emotionally or physically immature for her age, or that there was some other feature of the lawful relationship which might make it "reprehensible". Indeed it might be inferred from the simple agreed facts that the relationship with B was a serious one, with some real emotional attachment, because it lasted some time.

95. However, once it is decided that evidence of the appellant's sexual relationship with B did not amount to "evidence of bad character", the abolition of the common law rules governing the admissibility of "evidence of bad character" by section 99(1) did not apply. We have no doubt that evidence of the relationship was admissible at common law, in the particular circumstances of this case, because it was relevant to the issue of whether the appellant had a sexual interest in A. It was capable of demonstrating a sexual interest in early or mid-teenage girls, much younger than the appellant, and therefore bore on the truth of his case of a purely supportive, asexual interest in A. It was not in our judgment unfair to admit the evidence (see section 78 of the Police and Criminal Evidence Act 1984).

96. Although the judge came to his conclusion as to the admissibility of the appellant's relationship with B by a different route, his direction to the jury as to its possible

relevance was fair and accurate. He directed them that it was for the jury to decide whether it had any relevance. He reminded them that the age of consent was sixteen. "It is something that you can take into account in deciding whether he might have been attracted to [A]. It does not mean that he would have behaved as she says that he behaved; that is assaulting her sexually. To state the obvious, you can be attracted to someone without assaulting them".

97. So far as C's evidence was concerned, the judge did not expressly rule on whether it amounted to evidence of "bad character" for the purposes of the Act, or was simply relevant as part of the background as to what was going on in the sister's family, involving the appellant. Unattractive as the alleged conversation was, we do not consider that it could safely be judged to amount to reprehensible conduct on the appellant's part. But his words, with their implied admission of sexual attraction to fifteen year old C, were again, in our view, clearly relevant to the issue of whether the appellant was sexually attracted to A, and therefore admissible for the same reasons which applied to the sexual relationship with B. It was not unfair to admit C's evidence.

98. The judge did not direct the jury as to the potential relevance of C's evidence, but it must have been plain that it fell in the same category as the admission in respect of B, namely something which the jury could take into account in deciding whether the appellant was sexually attracted to A.

99. We therefore reject the challenge to the admissibility of the appellant's conduct in respect of B and C.

100. Mr Chamberlain challenged the judge's direction in respect of the appellant's character. Having indicated in the summing-up that he would give a full "good character direction" he did so in the terms of the standard direction suggested by the Judicial Studies Board which, accordingly, concluded by telling the jury that they were entitled to take into account all that they had heard about the appellant. This, Mr Chamberlain contended, was likely to be understood by the jury to refer to his earlier relationship with B, and, therefore, to qualify the terms of the good character direction as a whole. We cannot accept this. The relevance of the appellant's lack of convictions, to be taken into account in his favour both as to his credibility and the lesser likelihood of committing the offences of which he was accused, was clearly described to the jury who, nevertheless, had to take account of all they had heard. We see no mischief in that.

101. It was contended that the judge should have given the jury a specific warning to exercise caution in relation to A's evidence in the light of what Mr Chamberlain suggested were weaknesses or implausibilities in her evidence. In particular she told the police in her first two interviews that nothing else had happened, before alleging sexual intercourse, amounting on the face of it to rape, in the third. But the case of Makinjuala; Easton [1995] 2 Cr.App.R.469, to which we were referred simply says that a judge "may" give a special warning, and we can not fault the judge's decision not to do so in this case. The judge pointed up the possible weaknesses or implausibilities as he reminded the jury of relevant evidence and issues.

102. It was argued that the judge made comments which might have suggested that A's shoplifting was caused by the appellant's behaviour towards her, when he should have

directed them that the reprimand for shoplifting was central to her credibility; and that he raised matters which were not canvassed by counsel on either side, including the possibility that A was attracted to the appellant and may have consented to what happened. But the jury was clearly reminded of her shoplifting and the judge's comments all related to questions which would have come to the minds of worldly members of the jury, and were fairly balanced. We reject the final, and associated submission that the summing-up was "overly favourable" to the Crown's case.

103. For all these reasons we reject the challenges to the conduct of the appellant's trial. His convictions on Counts1 and 3 were safe and his appeals against those convictions are dismissed.

104. The success of the appeal against conviction on Count 2 removes the sentence of five years. The sentence of twelve months on Count 1 was not challenged, but that of three years and six months on Count 3 was said to be manifestly excessive in the light of what was contended to be the relatively low level of indecency. But even leaving aside the events of Count 2, where the jury must have been satisfied of full sexual intercourse, Count 3 was a second occasion of indecency when the appellant had A alone in his car. It was in breach of trust by a friend of her father. It was that friendship which had enabled the appellant to become close to her. Her evidence was that on 27 February 2004 the appellant told her that he felt like killing himself, and that he had a gun in the dashboard (although there was no evidence that that was true); that he smashed her mobile telephone after looking at its images, and then drove at high speed so that she was frightened he would kill them both. Then came the indecent assault. The judge accepted her account, as he was entitled to, for the purposes of sentence. In our judgment the events of that night consisted of indecency after intimidation. The appellant did not have the mitigation of admitting his conduct, and the sentence which the judge imposed on Count 3, concurrent to that on Count 1, was not excessive.

105. The appeal against the remaining total sentence of three years and six months is dismissed.

Hong Qiang He and De Qun He

106. On 10 March 2005, in the Crown Court at Southwark, these appellants were convicted of violent disorder (Count 1), contrary to section 2(1) of the Public Order Act, 1986. Each now appeals against his conviction.

107. A co-defendant, Feng He, was convicted of the same count of violent disorder. A further co-defendant, Pin Shuen Chan was acquitted of the count of violent disorder on the judge's direction, but convicted of wounding with intent to cause grievous bodily harm (Count 2).

108. The counts arose out of a running fight between two groups of young men in Chinatown in west central London on the evening of 9 September 2004. Various weapons including knives and baseball bats were used. Parts of the concluding events were captured on CCTV in Shaftesbury Avenue.

109. The CCTV film was alleged to show the appellant De Qun He ("De") being struck on the head after which he ran away up Shaftesbury Avenue. A group was seen fighting

and moving in the direction taken by Hong Qiang He ("Hong"). Hong was said to have used a baseball bat before falling to the ground. Pin Shuenn Chan ("Chan") was said to have walked towards the group and then run to where Hong was lying, before bending over and stabbing him twice in the leg. De was seen to return, pick up an advertising board, and wave it in a threatening manner towards the group fighting over Hong. Hong was helped to his feet and his friends moved up the street and around the corner. Two of the friends were carrying baseball bats. De put down the advertising board and went with them. They turned into Gerrard Place where some got into a car in which some of the weapons were deposited. Feng He drove the car away. Two got out of the car in King William IV Street, including Hong who was bleeding badly from leg wounds. The car was driven off but soon stopped by police. The driver and the one remaining occupant, De, were arrested. Metal bars wrapped in cellophane, lawn edge cutters and a hammer were found in the boot.

110. Hong, De and Feng He were alleged to belong to one group, and Chan, who was arrested in Shaftesbury Avenue, to the other.

111. When interviewed, Hong said he went to the scene to calm the situation. He did not know if he went to Shaftsbury Avenue. He was hit on the head and stabbed twice, and taken away in a car.

112. De was not interviewed.

113. Chan said he armed himself with a knife, fearing that he would be attacked. He was set upon by others who were armed with knives. He denied using the knife to stab someone, but he was not very clear and did not remember.

114. None of the defendants gave evidence. They put their characters in. Feng He and Chan had no previous convictions. Hong had a caution and De a Conditional Discharge. The judge gave a good character direction in respect of all.

115. The issues in the case of each defendant were his involvement in events and whether he might have been acting in lawful defence of himself or another.

116. The appeals revolve around the admission of evidence, adduced on behalf of Chan, that the appellants were known to the police from previous incidents. On 19 November 2002 they had been the victims of a knife attack but had refused to provide statements. On 6 June 2004 they had been arrested on suspicion of committing a serious assault but had been released without charge after the alleged victims refused to provide statements.

117. Counsel for Chan submitted that evidence of both incidents was admissible by virtue of section 101(1)(e) of the Act which provides that:

> "In criminal proceedings evidence of the defendant's bad character is admissible if, but only if …
>
> i. (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant …"

118. The judge rejected this submission, rightly in our view, because he did not consider that being the subject of the conduct of others on 19 November 2002, and failing to make witness statements, demonstrated "reprehensible behaviour", still less the commission of an offence; nor did the mere fact of arrest on 6 June 2004, without evidence to support a charge against either appellant. So neither previous matter could amount to "misconduct" as defined in section 112(1) or, therefore "bad character", as defined in section 98 for the purpose of section 101(1)(e).

119. However, the judge concluded that the fact that evidence of the previous matters was not admissible as "bad character" did not exclude its relevance. He took the view that

> ii. " … it is potentially relevant to Mr Chan's defence, namely that he was attacked. In this regard the position between defendants on the one hand and the prosecution and defendants on the other is quite different. In short a greater latitude is allowed to a defendant and if there is evidence that some defendants are to be found at or about the scene of disturbances such as the one with which we are concerned then it may assist the jury in deciding whom to believe. This is not necessarily one and the same thing as bad character. There is no conduct reprehensible or otherwise necessarily inherent in the circumstances by which someone may be surrounded, but equally the repetition of such circumstances may be relevant … in the light of the defence actually advanced by Mr Chan … I make this ruling, of course, under the common law".

120. No doubt there are cases where previous conduct of a defendant is of probative value and therefore relevant to a matter in issue between him and the prosecution or him and a co-defendant, yet the "bad character" provisions of Chapter 1 of Part II of the Act relating to the defendant's "misconduct" do not apply. In such cases, section 99(1) of the Act whereby the common law rules governing the admissibility of evidence of "bad character" in criminal proceedings are abolished does not exclude the relevant material because it does not amount to "evidence of bad character". But this was not such a case. The evidence of events on 19 November 2002 and 6 June 2004 could only be relevant if it might show that either appellant had a propensity to violent conduct and therefore bear on Chan's case of self-defence. To show such a propensity it had to amount to "reprehensible behaviour", "misconduct" and, therefore "bad character". By the same measure as events on 19 November 2002 and 6 June 2004 could not amount to reprehensible behaviour, misconduct or, therefore bad character, they could not bear on Chan's case. There was no room for relaxing this approach simply because it was a defendant, Chan, who sought to introduce the evidence, rather than the prosecution.

121. On the face of the CCTV evidence, interpreted by police officers who knew the appellants, and unchallenged by evidence at trial from the appellants, there was a strong case against each appellant on Count 1, but the admission of the earlier incidents may have poisoned the well so far as their own case of self-defence were concerned, making their convictions unsafe. Their appeals against conviction are accordingly allowed.

122. It is not therefore necessary to consider Hong's second ground of appeal, but we do so for completeness. The prosecution relied on two alleged lies by Hong, in his police interview. Mr Kapur argued that the judge erred when directing the jury: "You must first decide whether the defendant did, in fact, deliberately tell these lies". Those words, Mr Kapur contended, removed from the jury the decision as to whether the statements were lies at all, which was contested. However, that argument depends on a partial reading of the summing-up. The judge had hitherto referred to the "alleged lie", it being "alleged that he lied", and to "the lies alleged" and "the alleged lies". The jury must have understood that it was for them to decide whether either statement by Hong was in fact a deliberate untruth. The remainder of the judge's direction on the topic was fair and accurate. We see no merit in this ground of appeal.