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STATUTORY INSTRUMENTS

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**2004 No. 1501**

The Criminal Justice (Evidence) (Northern Ireland) Order 2004

PART II

EVIDENCE OF BAD CHARACTER

*Introductory*

**“Bad character”**

3. References in this Part to evidence of a person’s “bad character” are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which—

- (a) has to do with the alleged facts of the offence with which the defendant is charged, or
- (b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

**Abolition of common law rules**

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

(2) Paragraph (1) is subject to Article 22(1) in so far as it preserves the rule under which in criminal proceedings a person’s reputation is admissible for the purposes of proving his bad character.

*Persons other than defendants*

**Non-defendant’s bad character**

5.—(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, or
  - (c) all parties to the proceedings agree to the evidence being admissible.
- (2) For the purposes of paragraph (1)(a) 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.

(3) In assessing the probative value of evidence for the purposes of paragraph (1)(b) the court must have regard to the following factors (and to any others it considers relevant)—

- (a) the nature and number of the events, or other things, to which the evidence relates;
- (b) when those events or things are alleged to have happened or existed;
- (c) where—
  - (i) the evidence is evidence of a person’s misconduct, and
  - (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,  
the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;
- (d) where—
  - (i) the evidence is evidence of a person’s misconduct,
  - (ii) it is suggested that that person is also responsible for the misconduct charged, and
  - (iii) the identity of the person responsible for the misconduct charged is disputed,  
the extent to which the evidence shows or tends to show that the same person was responsible each time.

(4) Except where paragraph (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court.

### *Defendants*

#### **Defendant’s bad character**

**6.—(1)** In criminal proceedings evidence of the defendant’s bad character is admissible if, but only if—

- (a) all parties to the proceedings agree to the evidence being admissible,
- (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
- (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.

(2) Articles 7 to 11 contain provisions supplementing paragraph (1).

(3) The court must not admit evidence under paragraph (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 paragraph (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.

#### **“Important explanatory evidence”**

**7.** For the purposes of Article 6(1)(c) evidence is important explanatory evidence if—

- (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
- (b) its value for understanding the case as a whole is substantial.

**“Matter in issue between the defendant and the prosecution”**

8.—(1) For the purposes of Article 6(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 paragraph (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.

(3) Paragraph (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.

(4) For the purposes of paragraph (2)—

- (a) two offences are of the same description as each other if the statement of the offence in a complaint 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 Article by an order made by the Secretary of State.

(5) A category prescribed by an order under paragraph (4)(b) must consist of offences of the same type.

(6) Only prosecution evidence is admissible under Article 6(1)(d).

**“Matter in issue between the defendant and a co-defendant”**

9.—(1) Evidence which is relevant to the question whether the defendant has a propensity to be untruthful is admissible on that basis under Article 6(1)(e) only if the nature or conduct of his defence is such as to undermine the co-defendant’s defence.

(2) Only evidence—

- (a) which is to be (or has been) adduced by the co-defendant, or
- (b) which a witness is to be invited to give (or has given) in cross-examination by the co-defendant,

is admissible under Article 6(1)(e).

**“Evidence to correct a false impression”**

10.—(1) For the purposes of Article 6(1)(f)—

- (a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;

- (b) evidence to correct such an impression is evidence which has probative value in correcting it.
- (2) A defendant is treated as being responsible for the making of an assertion if—
  - (a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),
  - (b) the assertion was made by the defendant—
    - (i) on being questioned under caution, before charge, about the offence with which he is charged, or
    - (ii) on being charged with the offence or officially informed that he might be prosecuted for it,
 and evidence of the assertion is given in the proceedings,
  - (c) the assertion is made by a witness called by the defendant,
  - (d) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so, or
  - (e) the assertion was made by any person out of court, and the defendant adduces evidence of it in the proceedings.
- (3) A defendant who would otherwise be treated as responsible for the making of an assertion shall not be so treated if, or to the extent that, he withdraws it or disassociates himself from it.
- (4) Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression.
- (5) In paragraph (4) “conduct” includes appearance or dress.
- (6) Evidence is admissible under Article 6(1)(f) only if it goes no further than is necessary to correct the false impression.
- (7) Only prosecution evidence is admissible under Article 6(1)(f).

#### **“Attack on another person’s character”**

- 11.—**(1) For the purposes of Article 6(1)(g) a defendant makes an attack on another person’s character if—
- (a) he adduces evidence attacking the other person’s character,
  - (b) he (or any legal representative appointed under Article 26(4) of the [Criminal Evidence \(Northern Ireland\) Order 1999 \(NI 8\)](#) to cross-examine a witness in his interests) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so, or
  - (c) evidence is given of an imputation about the other person made by the defendant—
    - (i) on being questioned under caution, before charge, about the offence with which he is charged, or
    - (ii) on being charged with the offence or officially informed that he might be prosecuted for it.
- (2) In paragraph (1) “evidence attacking the other person’s character” means evidence to the effect that the other person—
- (a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or
  - (b) has behaved, or is disposed to behave, in a reprehensible way;

and “imputation about the other person” means an assertion to that effect.

(3) Only prosecution evidence is admissible under Article 6(1)(g).

### **Stopping the case where evidence contaminated**

**12.**—(1) If on a defendant’s trial before a judge and jury for an offence—

- (a) evidence of his bad character has been admitted under any of sub-paragraphs (c) to (g) of Article 6(1), and
- (b) the court is satisfied at any time after the close of the case for the prosecution that—
  - (i) the evidence is contaminated, and
  - (ii) the contamination is such that, considering the importance of the evidence to the case against the defendant, his conviction of the offence would be unsafe,the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.

(2) Where—

- (a) a jury is directed under paragraph (1) to acquit a defendant of an offence, and
- (b) the circumstances are such that, apart from this paragraph, the defendant could if acquitted of that offence be found guilty of another offence,

the defendant may not be found guilty of that other offence if the court is satisfied as mentioned in paragraph (1)(b) in respect of it.

(3) If—

- (a) a jury is required to determine under Article 49A(2) of the [Mental Health \(Northern Ireland\) Order 1986 \(NI 4\)](#) whether a person charged on an indictment with an offence did the act or made the omission charged,
- (b) evidence of the person’s bad character has been admitted under any of sub-paragraphs (c) to (g) of Article 6(1), and
- (c) the court is satisfied at any time after the close of the case for the prosecution that—
  - (i) the evidence is contaminated, and
  - (ii) the contamination is such that, considering the importance of the evidence to the case against the person, a finding that he did the act or made the omission would be unsafe,

the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a rehearing, discharge the jury.

(4) This Article does not prejudice any other power a court may have to direct a jury to acquit a person of an offence or to discharge a jury.

(5) For the purposes of this Article a person’s evidence is contaminated where—

- (a) as a result of an agreement or understanding between the person and one or more others, or
- (b) as a result of the person being aware of anything alleged by one or more others whose evidence may be, or has been, given in the proceedings,

the evidence is false or misleading in any respect, or is different from what it would otherwise have been.

### **Offences committed by a defendant when a child**

**13.**—(1) In proceedings for an offence committed or alleged to have been committed by the defendant when aged 21 or over, evidence of his conviction for an offence when under the age of 14 is not admissible unless—

- (a) both of the offences are triable only on indictment, and
  - (b) the court is satisfied that the interests of justice require the evidence to be admissible.
- (2) Paragraph (1) applies in addition to Article 6.

### *General*

### **Assumption of truth in assessment of relevance or probative value**

**14.**—(1) Subject to paragraph (2), a reference in this Part to the relevance or probative value of evidence is a reference to its relevance or probative value on the assumption that it is true.

(2) In assessing the relevance or probative value of an item of evidence for any purpose of this Part, a court need not assume that the evidence is true if it appears, on the basis of any material before the court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true.

### **Court's duty to give reasons for rulings**

**15.**—(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 Order Book.
- (2) In this Article “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 Article 5 or 6 (including a ruling on an application under Article 6(3));
  - (c) a ruling under Article 12.

### **Rules of court**

**16.**—(1) Rules of court may make such provision as appears to the appropriate authority to be necessary or expedient for the purposes of this Order; and the appropriate authority is the authority entitled to make the rules.

(2) The rules may, and, where the party in question is the prosecution, must, contain provision requiring a party who—

- (a) proposes to adduce evidence of a defendant's bad character, or
- (b) proposes to cross-examine a witness with a view to eliciting such evidence,

to serve on the defendant such notice, and such particulars of or relating to the evidence, as may be prescribed.

(3) The rules may provide that the court or the defendant may, in such circumstances as may be prescribed, dispense with a requirement imposed by virtue of paragraph (2).

(4) In considering the exercise of its powers with respect to costs, the court may take into account any failure by a party to comply with a requirement imposed by virtue of paragraph (2) and not dispensed with by virtue of paragraph (3).

(5) Nothing in this Article prejudices the generality of any statutory provision conferring power to make rules of court; and no particular provision of this Article prejudices any general provision of it.

(6) In this Article—

“prescribed” means prescribed by rules of court;

“rules of court” means—

- (a) Crown Court rules;
- (b) rules of court made under section 55 of the Judicature (Northern Ireland) Act 1978 (c. 23);
- (c) county court rules; and
- (d) magistrates' courts rules.

## **Interpretation of Part II**

17.—(1) In this Part—

“bad character” is to be read in accordance with Article 3;

“criminal proceedings” means criminal proceedings in relation to which the strict rules of evidence apply;

“defendant”, in relation to criminal proceedings, means a person charged with an offence in those proceedings; and “co-defendant”, in relation to a defendant, means a person charged with an offence in the same proceedings;

“important matter” means a matter of substantial importance in the context of the case as a whole;

“misconduct” means the commission of an offence or other reprehensible behaviour;

“Order Book” means the Order Book required to be kept under rule 19 of the [Magistrates' Courts Rules \(Northern Ireland\) 1984 \(SR 1984 No. 225\)](#);

“probative value”, and “relevant” (in relation to an item of evidence), are to be read in accordance with Article 14;

“prosecution evidence” means evidence which is to be (or has been) adduced by the prosecution, or which a witness is to be invited to give (or has given) in cross-examination by the prosecution.

(2) Where a defendant is charged with two or more offences in the same criminal proceedings, this Part (except Article 6(3)) has effect as if each offence were charged in separate proceedings; and references to the offence with which the defendant is charged are to be read accordingly.

(3) Nothing in this Part affects the exclusion of evidence—

- (a) under the rule in section 3 of the Criminal Procedure Act 1865 (c. 18) against a party impeaching the credit of his own witness by general evidence of bad character,
- (b) under Article 28 of the [Criminal Evidence \(Northern Ireland\) Order 1999 \(NI 8\)](#) (restriction on evidence or questions about complainant's sexual history), or
- (c) on grounds other than the fact that it is evidence of a person's bad character.