

CHAPTER SEVEN

CHARACTER EVIDENCE

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INTRODUCTION

If common sense were to be given free rein it would be proper to take the good or bad character of a party to a suit into consideration in deciding the question whether he is liable for civil wrong or guilty of an offence. An obvious example would be a case of murder in which the accused is a member of a dreaded notorious gang.¹ But one of the objects of the law of evidence is to prevent common sense from having a free rein because there are cases in which to permit it might lead to an unjust result² where a party is either unduly favoured or prejudiced.³ In order to guard against any of these results, special rules have been developed to regulate the extent to which evidence of character can be adduced in a trial.

This chapter examines the extent which evidence may be adduced on the character of a party in civil and criminal cases. It attempts to address issues such as: what is character evidence, in what circumstances is such evidence relevant? Does a trial judge have a discretionary power to admit or, disallow the adduction of character evidence? If yes, what is the extent of such a power? What is the obligation of a counsel and prosecution to guard against the adduction of character evidence? In our discussion of these issues, we shall focus as much as possible on Nigerian cases and statutory provisions in order to determine the law and practice on this subject in Nigeria.

Character evidence is specie of evidence of previous misconduct.⁴ Whatever form the evidence takes, it is affected by exclusionary rules.⁵ However, care must be taken to distinguish between the rules that regulate the admissibility of character evidence and similar fact evidence and possibly also the rationale for their admissibility.⁶ It suffices to say that the provisions of sections 67-72 and section 160(1)-(d) of the Evidence Act mainly govern character evidence in Nigeria. The word "character" is used no less than fifteen times in these provisions.⁷ In *Stirling v D.P.P.*⁸ Lord Simon L.C. said:

¹See *Lawal v The State* (1946) All N.L.R. 107 where the court wrongly relied upon the evidence of a prosecution witness who had said that the accused and his friends were known as "Ohio Boys" or thugs.

²R. Cross and C. Tapper, *Cross on Evidence*, 6th ed. (1985) p. 349

³*Ibid* 353

⁴Similar fact evidence and previous conviction are other specie. See Y. Osinbajo, *Cases and Materials on Nigerian Law of Evidence*, (1992) p. 170.

⁵R. Cross and C. Tapper, *op. cit.* p. 248

⁶Y. Osinbajo, *op. cit.* p. 170.

⁷See general sections 67-72 and section 160 (1)(d) Evidence Act, Cap 62 Laws of Federation of Nigeria, 1990 (Hereinafter called "{the Act}")

⁸[1944] A.C. 315 at 324, [1944] 2 All E.R. 13 at 17

"There is perhaps some vagueness in the use of the term 'good character' in this connection. Does it refer to the good reputation which a man may bear in his own circle, or does it refer to the man's real disposition as distinct from what his friends and neighbour may think of him?"

Against the background of the above statement, it will be appropriate at this stage to consider the meaning of "character" within the provisions of the Act.

THE MEANING OF CHARACTER

In the ordinary language, "character" means general reputation as distinct from disposition which refers to tendency to act, think or feel in a particular way.⁹ A person who has the tendency to act in a good way on certain occasions¹⁰ may be reputed to be a person of bad character.

There had been a controversy in England on whether the word "character" as used in section 1 (1) of the *Criminal Evidence Act*, 1898 includes disposition or specific instances of good or bad behaviour. In *Jones v. D.P.P.*,¹¹ Lord Denning took Lord Hewart's view that it is too late to argue that 'character' as used in the Act means reputation' and nothing else, but Lord Devlin expressed the opinion that that was the meaning intended by the draftsman of the statute. It is however now settled since the decision of the House of Lords in *Selvey v. D.P.P.*¹² that 'character' when used in the English Criminal Evidence Act of 1898 means both reputation and disposition.¹³

See generally sections 67-72 and section 160 (1)(d) Evidence Act, Cap 62 Laws of Federation of Nigeria, 1990 (Hereinafter called "the Act") [1944] A.C. 315 at 324, [1944] 2 All E.R. 13 at 17

The Nigerian Evidence Act however makes a distinction between reputation and disposition. This definition and principle are underlined in section 72, which provides that:

In section 67-71¹⁴ the word "character" means reputation as distinguished from disposition, and except as previously mentioned in those sections, evidence may be given only of general reputation and not of particular acts by which reputation and disposition is shown.¹⁵

⁹See Cross & Willink, *Outline of the Law of Evidence*, 5th ed. 1980 p. 248.

¹⁰For instance going to mass or mosque everyday and giving alms to the poor or giving to charity.

¹¹[1962] A.C. 435 at 671, [1962] 1 All E.R. 569 at 580.

¹²[1970] AC 304, [1968] 2 All ER 497

¹³R. Cross & C. Tapper, *op. cit* p. 365. In *Selvey v. DPP* [1968] 2 All E.R. 497 (1970) A.C. 304 someone accused of buggery alleged that the prosecutor had offer to go to bed with him for a pound, told him that he had already gone on the bed for that sum with another man, and because his offer was rejected, dumped indecent photographs in the accused's room out of pique. If, throughout the entirety of section 1 (f) "character" were to mean "reputation" certainly *R v Selvey* would have been decided otherwise and it would be difficult to construe that part of section 1 (f)(ii) under which the accused will lose his shield if the nature or conduct of his defence involves imputations on the "character of the prosecutor" or witnesses for the prosecution". It would then become possible to argue that someone who swore that a policeman had extracted a confession from him by violence was not casting imputations on the character of a witness for the prosecution. See R. Cross & C. Tapper, *op. cit*. pp. 364-5.

¹⁴See sections 67-71 generally

¹⁵Section 72. The underlining is ours.

There would have been fundamental divergences between our law and the English law and of course the relevance of English cases on this subject in Nigeria if not for the above underlined words in section 72. There are specific provisions in our Evidence Act, which permit evidence of disposition or particular acts to be given even when they do not technically amount to evidence of character.¹⁶ Therefore evidence of both reputation and disposition can be adduced wherever they are declared to be relevant under the Act.

On the contrary, evidence of bad character under the Act is given a wider definition to include previous conviction. Section 68(4) of the Evidence Act provides that "whenever evidence of bad character is relevant evidence of a previous conviction is also relevant."¹⁷

When a witness is asked about the character of a party with regard to certain matters, it must be made plain to him that he is being asked what he knows about that person's reputation and not his opinion concerning his character.¹⁸ *In R v Rowton*,¹⁹ Rowton was charged with an indecent assault upon a man. He called a witness to speak about his good moral character. In reply to a question concerning Rowton's character for decency and morality of conduct, the witness said:

I know nothing of the neighbourhood's opinion because I was only a boy at school when I knew him, but my own opinion and that of my brothers who were also pupils of his, is that his character is that of a man capable of the grossest Indecency and the most flagrant immorality.

Rowton was convicted, but his conviction was quashed on appeal on the ground that the witness was not competent to speak on the character of the accused person.

PURPOSES OF CHARACTER EVIDENCE

"Character evidence" may be employed for two purposes. First, to impeach the witness's credibility. This does not directly touch upon the issues that are directly relevant to the case. It serves only as a means of persuading the court that the evidence of the impeached witness is unreliable in so far as it might bear upon the issue.²⁰ Impeachment of this kind is governed by the provisions of the Evidence Act on cross-examination²¹ and is therefore strictly speaking out of the scope of character evidence. Second, "character evidence" may be employed for *substantive* purposes. Here, evidence of character is used to prove "substantive facts, which are in issue."²² Sections 67-72 and section 160(1)(d) of the Evidence Act govern such use of character evidence.

Consequently, since the rules governing character evidence depend upon the particular purpose for which it is being employed, a distinction should always be drawn between the substantive and credibility purposes. While easy to articulate in theory, this distinction occasionally becomes difficult for

¹⁶See sections 67-72

¹⁷See section 68(4)

¹⁸Cross & Wilkins, *op. cit.* p. 267

¹⁹(1865), Le & Ca. 520

²⁰I. Younger, *et al. Principles of Evidence*. 2nd ed. 1991, p. 360.

²¹See generally sections 188(2), 189, 190, 193 & 197 Evidence Act.

²²I. Younger, *et. al, op. cit.* p. 360

many students, legal practitioners and judges to make in practice. Younger succinctly stated the significance of drawing the distinction thus:

*In all likelihood, your mastery of character evidence will reflect the extent to which you are able to keep its substantive and credibility component analytically distinct".*²³

Regrettably, writers in Nigeria have not expressed this distinction between the substantive and credibility objectives of character evidence clearly. Rather, the distinction seems to have been confused. For instance, while distinguishing between the rationale for the admissibility of character evidence and similar fact evidence a distinguished writer, has this to say:

*In criminal cases for example, except where other specific provisions are made similar fact evidence may be used by the prosecution to establish guilt of the accused, character evidence is essentially directed at bolstering or destroying the credibility of witnesses*²⁴

It shall soon become clear that as a rule any (character) evidence for the purpose of impeaching credibility is relevant and admissible if it relates to a witness but character evidence relating to substantive issue is affected by the exclusionary rules as enacted in the Evidence Act.

We now turn to the consideration of the question. When is character evidence admissible in Nigeria under the Evidence Act? This question will be treated separately under civil and criminal trials.

CIVIL TRIALS

Section 67 of the Evidence Act provides that the question whether a party is of a good or bad character is generally not relevant in a civil trial "except in so far as such character appears from facts otherwise relevant".²⁵ The logical basis for this rule was clearly stated by *Eyre C. B. in A. G. v Bowman*²⁶ and elaborated by Baron Martin in *A.G. v. Radloff* thus:

*....in civil cases ... no presumption would fairly arise, in the very great proportion of such cases from the good (or bad) character of the Defendant, that he (did or) did not commit the breach of contract or a civil duty alleged against him.*²⁷

If character evidence were to be generally admissible to proof or disproof of the liability of a party to a civil action, then what would happen where a case involves two parties with equally good or bad character? For example, of what relevance is the good or bad character of a party in an action for trespass or for a declaration of title to lands?²⁸ It is therefore advisable for the parties to concentrate on proving or disproving the ingredients or elements of the civil wrong rather than seeking to establish or disprove the liability of the party by character evidence.

²³Ibid.p.360

²⁴Y. Osinbajo, op. Cit.p.170

²⁵CAP 112, LFN 1990

²⁶(1971) 2 Bas & P. 532 (n)

²⁷(1854) 10 Exch. 84 at 97. (The words in bracket are ours.)

²⁸See generally T.A. Aguda, *The Law of Evidence*, 4th Ed. pp 61-62

If a party pleads character evidence and attempts to adduce evidence in support of it in a civil trial, the other party is entitled to raise objection against such evidence. In *Oyewole v. Keleni*²⁹ the Plaintiff instituted an action claiming damages done to his vehicle by the reckless driving of the Defendant's driver. Upon the action coming up for hearing, counsel for Plaintiff sought to put in evidence the proceedings in a criminal action against Defendant's driver in the Magistrate Court in which the driver was convicted.

The Defendant objected. The trial judge upheld the objection on the authority of *Hollington v Hewthorn & Co. Ltd*³⁰ where it was said that, inter alia, that:

*.... Civil court must base its finding on the facts placed before it without any regard to the proceedings before another tribunal.*³¹

EXCEPTIONS IN CIVIL TRIALS

It was noteworthy that section 67 admits character evidence in civil cases “*when character appears from other facts which are otherwise relevant.*”³² Therefore, the pertinent question, when a party is seeking to adduce character evidence should be whether the character of the party is a fact in issue or fact relevant to the fact in issue? It is only in those few civil cases where the answer will be in the affirmative that character evidence will be relevant. A case of defamation may afford a good example. If a Plaintiff sues for defamation and the Defendant sets up a defence of justification, then the Plaintiff's character necessarily becomes relevant to the issue, hence evidence of his bad character may be adduced to justify or prove the truth of the defamation.³³

Also, section 70 of the Evidence Act expressly states that character evidence is relevant in civil cases where the character of any person is such as to affect the amount of damages which he ought to receive.³⁴ Therefore, in an action for defamation, a Plaintiff may adduce evidence of his good character to justify his claim of certain amount as damages or reduce that of the other party.³⁵

Furthermore, evidence of the character of the parties in a divorce case based on adultery may be relevant. There is no gainsaying in the fact that divorce presents classical cases of accusation, counter accusation and name calling between the parties.³⁶

²⁹(1948) 12 WACA 327

³⁰ (1943) K.B. 587

³¹ (1948) 12 WAC AT 592

³² See section 67

³³ F. Nwadialo, op. cit. 75

³⁴ See section 70.

³⁵ It should be noted that the facts relating to the character of such a person must appear on the pleadings. See *Jones v James* (1968) 18 L.T. 243, *Butterworth v Butterworth* [1920] p. 126 at 146

³⁶ Especially where the petition is on the ground that the respondent under section 15(2) that the petitioner cannot be reasonably expected to live with the respondent under section 15(2) of the Matrimonial Causes Act, Cap 220, LFN, 1990. See also *Olagundoye v Olagundoye* [1976] 2 FNR 255, *Ayangbayi v Ayangbayi* (1979) 10 – 12 CCCHJ. 225, *Sotomi v Sotomi* [1976] 2 FNR 104, *Ekrebe v Ekrebe* [1993] 3 NWLR (1996) 514. C.A., *Anyaso v Anyaso* (1998) 9 NWLR (pt. 564) 150, C.A. and *Akinbuwa v Akinbuwa* (1998) 7 NWLR (pt. 559) 661.

EFFECT OF CHARACTER EVIDENCE IN CIVIL CASES

It may be instructive to pause and consider the effect of the adduction of character evidence in civil cases. Does a party who has given evidence of his good character or bad character of the other party lose his protection under the Act? There is neither an express provision in the Evidence Act nor a decided case on this issue. However, there seems to be a suggestion by writers that such a party has "widely opened the reputation and character door" which gives the other party the right to give evidence of his bad character.³⁷ It is our view however that a party should not be regarded to have lost the protective shield of section 67 merely because he has given evidence of his own character or bad character of the other party in the circumstances permitted by the Act. The other party should only be allowed to cross-examine him on his character in so far as it relates to the fact in issue. If this qualification is not made, persons with character that is not startling³⁸ may not be courageous enough to fully pursue their claims in civil actions and give evidence since to do so might unduly reopen the sad old memories of their sordid past. It is therefore suggested that the courts except in rare cases where the good or bad character of either or both parties are in issue should strictly uphold the general rule disallowing character evidence. A party should not be asked and if asked should be entitled to refusal to answer embarrassing questions that go to no issue. Against this background, it is advocated that our judges should invoke the provisions of Section 201 to exclude such evidence.

CRIMINAL TRIALS

If the prosecution could prove that an accused is of a bad character, one could argue that such evidence would be useful in determining whether that accused actually committed the offence³⁹ based on the popular belief that someone who has a bad character is a person likely to commit offences.⁴⁰

This argument is common enough in everyday life, but it is dangerous in a court of law and might operate unfairly against the accused person. The adage "give a dog a bad name and hang him" is a timely reminder of this danger.⁴¹ Hence the rule of character evidence was evolved as an exclusionary rule to guard against an ever-ready acceptance of the argument that the accused must have committed the crime because he is the kind of man who would commit the crime.⁴²

We shall now turn to consider in details the rules governing the admissibility or otherwise of the evidence of good and bad character of parties in a criminal trial, *in seriatim*.

GOOD CHARACTER

The accused has been permitted to adduce evidence of his good character from very early times.⁴³ Following the common law position, section 68 of the Evidence Act provides that "in criminal

³⁷ See generally TA Aguda, *op. cit.* 105 and F. Nwadialo, *op. cit.* 76

³⁸ For example, people with previous convictions

³⁹ J.C. Klotter, *Criminal Evidence*, 5th ed. p. 140

⁴⁰ A.T. Aguda, *op. cit.* p. 119

⁴¹ Cross & Wilkins *op. cit.* p. 249

⁴² *Ibid*

⁴³ See *R v Tumer* (1664) State Tr 565 at 613, *R v Harris* (1680) 7 St Tr 926 at 929

proceedings, the fact that the person accused is of a good character is relevant." The Act however does not indicate the probative value of such evidence. It suffices to say that the evidence of good character cannot demolish a clearly established offence against an accused person. However, in very doubtful cases, evidence of good character may so operate on the minds of a judge as to create a doubt in the case against the accused.⁴⁴ Nokes captured limited value of evidence of good character in a criminal case thus:

*"If an alarm of theft is raised at a charity bazaar, and the thief slips a stolen purse into the pocket of a bishop, the episcopal character may allay suspicion, but if a bishop should be caught in the act of "shoplifting" the episcopal character would merely appear to be unmerited"*⁴⁵

Although section 68⁴⁶ simply states that evidence of good character is relevant, it is advisable to restrict such evidence to those aspects relevant to the nature of the charge.⁴⁷ Thus in *R v Turner*⁴⁸ where an accused was charged with treason. It was held that evidence of his good character should not be general, but limited to his character for loyalty and being peaceable. In *R v Williamson*⁴⁹ Lord Ellenborough C.J. permitted a male mid-wife charged with manslaughter to adduce evidence of his kind and skillful attention to other women. According to Aguda, it is doubtful if a good reputation for honesty will be held relevant in a charge for assault. If the offence is one of fraud then it is more useful to ask the question, "what is the accused's character for honesty" and if the offence is one for rape or related offences, the question should be: "what is the accused's moral character?"⁵⁰

Evidence of good character is a double-edged weapon, for as it will soon become evident, when it is given, the prosecution is entitled to adduce evidence of bad character of the accused, if any.⁵¹

BAD CHARACTER

The general rule is that evidence of bad character of the accused person is inadmissible in his trial. If a prosecution witness were allowed to testify to the accused reputation as a man likely to have committed the offence, the purpose of the evidence could only be to support an argument that he is probably guilty because of his bad character. If similar fact evidence were generally regarded as being irrelevant in support of such an argument, it would be absurd to allow the much less cogent evidence of character in support of the same contention.⁵² There are few exceptions to this general rule under the Act. These are:⁵³

- (a) When bad character of the accused is in issue;

⁴⁴A.T. Aguda, *op. cit.* 107

⁴⁵Nokes, *An Introduction to Evidence*, 3rd ed. p. 127.

⁴⁶See section 67

⁴⁷Cross, *op. cit.* p. 301

⁴⁸(1817) 32 State Tr 957 at 1007

⁴⁹(1807) B.C & P 635

⁵⁰A.T. Aguda, *op. cit.* p. 121

⁵¹F. Nwadiro, *op. cit.* p. 76

⁵²Cross Wilkins, *op. cit.* p. 268

⁵³Section 69 Evidence Act

- (b) When the accused has given evidence of his good character and
- (c) Circumstances when the accused may be cross-examined to show that he is of bad character pursuant to the provision of section 160(d).

Unless any of these exceptions applies, reception of evidence of bad character is wrong and a conviction may be quashed on that ground unless there is other evidence, which could have sustained the conviction or no injustice is thereby occasioned.⁵⁴

Where evidence of the bad character of an accused is relevant, the rule is that such evidence need not be restricted to those types that the accused is charged. In *R v Winfred*⁵⁵ where an accused was charged with indecent assault, evidence of his dishonest dealings with other person's property in the past was admitted. It was said that there is no such thing as "putting half a prisoner's character in issue and leaving out the other half".⁵⁶ The rule in *R v Winfred* has been criticised by Nokes as permitting evidence that is "irrelevant" and "can have no purpose but prejudice" to be adduced. We identify with the above view. If the circumstances for admitting similar fact evidence can be strictly circumscribed by the Act, certainly, it is illogical to allow the prosecution to adduce evidence of bad character which does not bear directly on the element of the offence or any of the issues in question.

The unfair prejudicial effect of such evidence is better illustrated by asking certain pointed questions. Of what relevant is the evidence that an accused who is standing trial for rape has previously been convicted for manslaughter? Or of what relevance is the evidence that an accused who is standing trial for forgery has been previously convicted of dangerous driving? To adopt the rule in *R v Winfred* to unduly extend the meaning of the word "relevancy" under the Evidence Act. To say that evidence of bad character of an accused is relevant should not open the floodgate to all his foibles and peccadilloes that have no bearing to the charge in question. This is the approach taken in *Odutade v Police*.⁵⁷ In that case, the Appellant was charged with the offences of stealing, receiving stolen properties and being a rogue and vagabond. Evidence of his convictions over ten years old was given and admitted. On appeal, it was argued for the police that the convictions were put in for the purpose of proving the vagrancy charge. It was however held that the evidence should not have been allowed as the whole purpose of the charge of being a rogue and vagabond was apparently to prejudice the fair trial of the Appellant.

We now turn to the consideration of the circumstances in which evidence of bad character of an accused will be relevant under the Act.

WHERE THE BAD CHARACTER IS IN ISSUE

⁵⁴*Lawal v The State (supra)*, *Anyanwu v The Queen* (1963) 1 All NLR 273, *R v Thomas* (1958) 3 FSC 8, *R v Butterwasser*(1948) I.K.B 4.

⁵⁵(1939) 27 CAR 139 .

⁵⁶at 76

⁵⁷(1952) 20 NLR p. 81

The first exception is where the bad character of an accused is a fact in issue that must be proved. Here, the bad character is in effect an ingredient of the offence charged.⁵⁸ That is, a proof of the previous offence is a *sine qua non* for the accused to be found guilty of the present charge. The offences of being a rogue and vagabond and receiving of stolen property afford good examples. Before a person could be convicted for the offence of being a rogue and vagabond under section 250(1) of the Criminal Code, it must first be proved that he has previously been convicted for the offence of being an idle and disorderly person under section 249 of the same code.⁵⁹ Therefore, it is only persons who have a record of previous conviction for the latter offence that could be convicted for the former. Also, for the purpose of proving guilty knowledge in a charge of receiving stolen property under section 427 of the Criminal Code, the fact that the accused has been previously convicted of any offence involving fraud or dishonesty within the period of five years preceding the date of that charge may be proved.⁶⁰ Although here, the previous conviction of the accused is not directly in issue, but when it is viewed in connection with the fact that he is in possession of a stolen property, it may necessarily follow from his bad character that he had knowingly or intentionally stolen the goods.

WHERE THE ACCUSED HAS PUT HIS CHARACTER IN ISSUE

Where the accused person has given evidence of his good character, the prosecution is entitled to rebut it by evidence of bad character.⁶¹ The accused's evidence of his own good character usually refers to the fact that he has led a good life, never been in trouble, and done a number of good acts.⁶² It can hardly be denied that such evidence does not directly negate the elements of the offence or establish the innocence of the accused; rather, it seeks to create a favourable impression in the mind of the judge about the character of the accused. There is therefore no reason why the prosecutor should not be allowed to show that the character of accused is not such as he wants the court to believe and thereby dispel the untrue and unmerited good reputation by adducing evidence of his bad character, if any. An accused with good character that is above the board like Caesar's wife does not stand the risk of losing anything if he proves evidence of his good character. Therefore where the case against such an accused is weak, it may be advantageous to give evidence of good character.

EXCEPTIONS UNDER SECTION 160(d)

As a general rule, a witness can be asked any question on any matter whatsoever during cross-examination.⁶³ However, qualifications are made to this rule where an accused person, with a previous record of conviction or bad character elects to be a witness in his own defence. It is necessary to reproduce the provisions of section 160(d) in full:

160(d) a person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has

⁵⁸F. Nwadialo, p. 77

⁵⁹See section 405 (21) & (3) of the Penal Code, Cap. 345 LFN, 1990.

⁶⁰See section 427 of the Criminal Code, Cap. 77 LFN, 1990.

⁶¹F. Nwadialo, op. cit. p. 77

⁶²Cross & Willimks, op. cit. p. 268.

⁶³See generally sections 188-206 Evidence Act

committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless

- i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
- ii) he has personally or by his legal practitioner asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
- iii) he has given evidence against any other person charged with the same offence;⁶⁴

The above provisions are taken almost word for word from section 1(f) of the English Evidence Act, 1898.

It will be observed that section 160(d) begins with a prohibition of four types of questions –those tending to show previous charges, those tending to show previous offences, those tending to show previous convictions and those tending to show bad character. Reference is then made to the situations in which such questions are permitted.⁶⁵ It will be convenient to begin by considering the scope of the prohibition before the circumstances in which cross-examination on the bad character of the accused will be permitted under section 160(d).

THE PROHIBITIONS UNDER SECTION 160(d)

Section 160(d) provides that the accused person shall not be asked, and if asked, shall not be required to answer, "any question tending to show".

MEANING OF "TENDING TO SHOW"

If the opening statement of the provision of section 160(d) were to be construed strictly, then it would mean that the accused could not be asked any question even by his counsel which tends to show or reveal his bad character. In practice, however, the provision has been interpreted to prohibit cross-examination of the accused by the prosecution on his character. So where an accused person disclosed in his examination-in-chief that he had previously been in trouble with the police in connection with an earlier conviction for another offence and the prosecution cross-examined him on the similarity between the explanations he gave about his movements on that occasion and the one under trial, it was held that the cross-examination was proper as the fact of the earlier conviction was revealed by the accused himself.⁶⁶ The cross-examination was therefore not one tending to show that he had been

⁶⁴See section 160(d)

⁶⁵Cross, *op. cit.* p. 355

⁶⁶*Jones v D.P.P*[1944] AC 315, [1944]2 All E.R. 13

convicted of or charged with a different offence. So the prohibition would not be infringed if evidence of the bad character had already been given by the accused himself.⁶⁷

THE MEANING OF "PREVIOUS CHARGES"

The question that is prohibited under section 160(d) is one that tends to show that the accused has 'committed', or been 'convicted' of or been 'charged' with another offence apart from the offence for which is standing trial. While the words "committed" and "convicted" have not given rise to any controversy in practice, the same cannot be said for the word "charges". In *Stirland v DPP*⁶⁸ the prosecution under cross-examination asked an accused whether he had not been 'suspected' of forgery by his former employer to which the accused said no. It was held that this question was improper because the word "charged" used by the accused in his evidence could have reasonably meant "charged before the court" and that mere suspicion of forgery did not amount to being charged in this sense. The question was therefore "irrelevant in rebutting the claim of the accused. According to Lord Simon:

... It is no disproof of good character that a man has been suspected of or accused of a previous crime. Such questions as "were you suspected" or "were you accused" are inadmissible because they are irrelevant to the issue of character, and can only be asked if the accused has expressly sworn to the contrary.

In the same vein, it will be improper for the prosecution to cross-examine the accused in respect of a previous charge or offence for which he has been acquitted. In *Maxwell v DPP*⁶⁹ the accused in his trial for manslaughter of a woman by an illegal operation was cross-examined by the prosecution in respect of the similar charge for which he was indicted but acquitted. On appeal, the House of Lords held that the question was irrelevant. The acquittal of a person of a charge is inadmissible to show his bad character.

It has also been held in the Nigerian case of *Popoola v Commissioner of Police*⁷⁰ that questions cannot be asked of a charge brought against the accused but later abandoned.

Having considered the key words in the provision of section 160 (d), it is now appropriate to turn to the circumstances in which evidence of character is admissible under that subsection.

ADMISSIBLE EVIDENCE OF BAD CHARACTER

UNDER SECTION 160 (d)

There are three exceptions under section 160 (d). Unless one of the exceptions applies a cross-examination of the accused on any of the matters prohibited by the provision is improper and may

⁶⁷F. Nwadiaro, *op. cit.* p. 28.

⁶⁸(1944) A.C. 315 at 324, (1944) 2 All E.R. 13 at 17

⁶⁹(1935) A.C. 309.

⁷⁰(1964)NMLR1

generally lead to the quashing of a conviction.⁷¹ We shall now treat the exemptions which are contained in paragraphs i to iii of section 160(d) in *seriatim*.

SCOPE OF SECTION 160(d)(i)

If proof that the accused had previously committed an offence or been convicted is relevant to the establishment of his guilt for the offence for which he is presently being tried then he may be questioned by the prosecution on such earlier conviction or offence under section 160(d)(i). This may arise as previously discussed⁷² under section 69(2)(a) where, for instance, the proof of the previous offence is a *sine qua non* for the accused to be found guilty of the present charge.

A question may then be asked: what is the material difference between the provisions of section 160(d)(i) and section 69(2). In our view, while the prosecution might adduce evidence of bad character under section 69(2)(a), either through examination-in-chief or an independent witness; he can only do so through cross-examination under section 160(d)(i). Therefore, where the previous conviction of an accused is relevant to the establishment of his guilt in a trial, the prosecution is entitled to adduce evidence of his bad character even where the accused has neither given evidence in his own defence nor given character evidence through another witness. Since to bar the prosecution from so doing is to frustrate the possibility of ever establishing the guilt of the accused for the offence which he is presently standing trial.

SCOPE OF SECTION 160 (d) (ii)

An accused person who elects to give evidence in his own defense can be cross-examined as to his bad character under three conditions, namely:

- (a) if he has personally or by his legal practitioner asked questions of the witnesses for the prosecution with a view to establish his own good character, or
- (b) if he has given evidence of his good character, or
- (c) the nature or conduct of the defence is such as to involve imputations on the character of the prosecution or the witnesses for the prosecution.

In (a) & (b), the accused is said to put his own character in issue. This is also covered by section 69(2)(b). Whereas in (c), it is the character of the prosecution's witnesses that are put in issue.⁷³ There is no difficulty in respect of (b). The question when a person has given evidence of his good character has already been amply considered⁷⁴ under section 69(2)(a). Questions have however arisen in practice about whether the conditions laid down in the provisions of (a) and (c) were present. The three conditions under which an accused will lose the shield of his protection under section 160(d)(ii) will now be considered.

⁷¹ See *Lawal v The State* (supra), *Anyanwu v The Queen* (supra), *R v Austin*. (1958) Crim. L.R. 129.

⁷² See pp 10-11

⁷³F. Nwadialo, *op. cit.* p. 79.

⁷⁴See p. 11

WHERE THE ACCUSED OR HIS COUNSEL HAS CROSS-EXAMINED THE PROSECUTION WITNESS WITH A VIEW TO ESTABLISH HIS OWN GOOD CHARACTER

Here, the situation is brought into existence by the accused himself or his counsel. It must be clear from the nature of the questions put to the prosecution's witnesses that the accused aimed at establishing his good character. Therefore, where the prosecution during cross-examination elicits the evidence of good character of the accused from him, his character is not thereby put in issue and no rebuttal by the prosecution will be permitted.⁷⁵

Therefore the cross-examination of an accused should not be conducted in such a way to incite him to make imputation on the prosecution's witness. The position is the same if the evidence of good character is inadvertently given.⁷⁶ The accused person in *Popoola v Commissioner of Police*⁷⁷ was charged with burglary, stealing and unlawful wounding. At his trial, the complainant who gave evidence, said in answer to questions put to him by counsel for the accused;

"Yes, I knew accused's house; knew there are 22 rooms in the house. It is a very large house. Yes, he is richer than me. I am not surprised that the accused in spite of having a 22 - room's house should come to steal from me, if stealing is his profession".

It was held that the accused could not be said to have put his character in issue as a result of these questions and answers.

WHERE THE ACCUSED HAS GIVEN EVIDENCE OF HIS GOOD CHARACTER

This situation is also brought into existence by the accused himself. He must either have testified by himself as to his good character or call an independent character witnesses to that effect. In *Haruna & Or v Police*⁷⁸ one of the Appellants at his trial for the offence of abetting robbery called a manager of a bank as his witness. The manager did not say in his evidence whether or not the Appellant was a customer of his bank but stated as follows:

"I know the accused financial background. He is financially sound. Since I have known the accused I don't remember him getting involved in any trouble".

It was held that the statement amounted to character evidence. Another case of where an accused put his character in issue is the case of *R v Samuel*.⁷⁹

Samuel was charged with stealing a camera that was found in his possession some weeks after the alleged theft. When he was caught, he stated that he intended to return it. At his trial, he also gave evidence to the effect that on two earlier occasions, he had found properties belonging to other persons and returned them to their owners. By so doing he was asserting himself as an honest man.

⁷⁵*R. v Beecham* (1921) 2 K, B. 464; *R v Parker* (1924) 18. Cr. App. R. 14, 76(a) *Selvey v DPP*(1968) 2 W.L.R. 1494,

⁷⁶*RvRedd*(1923)1KB.104,'

⁷⁷(1964) NMLR. 21

⁷⁸ (1969) NMLR 145

⁷⁹(1956) 40 C.A.R. 8,

Consequently, the prosecution was allowed to rebut this false claim by cross-examining him as to his previous conviction.

WHERE THE NATURE OR CONDUCT OF THE ACCUSED DEFENCE INVOLVES IMPUTATION ON THE CHARACTER OF THE PROSECUTOR OR HIS WITNESS

This situation arises where either by the nature of the offence or the evidence adduced by the prosecution, it is inevitable that the accused will make imputation on the character of the prosecution or his witness in the normal course of conducting his defence. The difficulty in the application of this rule is how to determine when such an imputation has been made. A good example is where an accused is charged with rape. In such a charge, the possible defence is consent. And to set up that defence, there must necessarily be an imputation on the character of the prosecutrix, for instance, that she is a person of loose character. So in a trial for rape, general evidence by the accused of the prosecutrix or evidence of her loose character⁸⁰ or of her consent is admissible.⁸¹ In such a situation the accused has cast imputation on the character of the prosecution. Consequently, the prosecution can cross-examine the accused on his bad character.

There is an imputation under the provision of section 160(d)(ii) when, for instance, when it is said that a confessional statement has been extracted by threat or bribes.⁸² In *Andu Maizanko v Superintendent General of Police*^{82(a)} the first Appellant in his evidence made allegations that the police had yielded to threats by one of the prosecution's witnesses to prefer a false charge against him and the other Appellants and that the prosecution witnesses were not speaking the truth. On appeal, Ouarshie Idun C.J. (as he then was) held that the Appellant had cast imputations on the character of the prosecution witnesses, hence, the evidence of his previous conviction was rightly admitted.

However, if what is said by the accused amounts in reality to no more than a denial of the charge, expressed, may be in emphatic language, it should not be regarded as coming within the provision.⁸³ Thus in *R v General Majella Nelson*⁸⁴ in which a prosecution witness, a police detective, gave evidence of an interview that the Appellant had, in which the Appellant made a full confession of his guilt. The Appellant's counsel in cross-examining this witness put it to him that his client never confessed to the offence and that the interview did not take place. Based on this, the prosecution was allowed by the trial judge to cross-examine the Appellant on his previous convictions. On appeal, it was held that the judge was wrong in doing this because the Appellant's case was a denial of the offence and the cross-examination of the constable was directed at supporting that denial. It was therefore not directed at casting imputation to establish a defence.

The mere fact that an accused person says from the witness box that the prosecution is a liar is not sufficient to constitute imputation under section 160(d)(ii). Such a statement may amount to no more

⁸⁰*R v Clay* (1951) 5 K. B 146

⁸¹*Selvey v DPP* (1968) 2 WLR 1494.

⁸²*R v Bright* (1910) 5 Cr. App. R. 13

82a (1960) WNLR. 188.

⁸³*R v Selvey. Supra*

⁸⁴(1979) 68 Cr. App R. 12

than a plea of not guilty expressed in forcible language.⁸⁵ However, it was held in *R v Rappolt*⁸⁶ that accused who said that a prosecution witness was such a horrible liar that his own brother won't speak to him had cast imputation on the character of the prosecution witness.

SCOPE OF SECTION 190(d)(iii)

There are two possible courses opened to the accused persons in a joint trial. First, all of them may consistently maintain the same line of defence in which case they "either sink or float together". The second option, which is not unusual, is for a co-accused to try and exculpate himself and shift the blame on the other co-accused.

Section 160(d) (iii) permits an accused to be cross-examined as to his bad character if "he had given evidence against any other person charged with the same offence". The rationale for this rule is that it is only fair that an accused person should be allowed to discredit that co-accused that suddenly turned a "witness" for the prosecution. Although the section does not indicate that the accused who is giving evidence and the person against whom he is giving evidence must be on a joint trial,⁸⁷ in practice, the exception generally comes into operation in a joint trial of two or more persons.⁸⁸ It must be noted that for the provisions to apply, the accused and the co-accused must be charged with the same offence. The provision will not apply if they are tried jointly but for different offences.⁸⁹

Evidence against a co-accused may be evidence either supporting the case of the prosecution against the accused in a material respect or evidence undermining his defence. The test whether the evidence of an accused is "against" his co-accused is objective and depends on its effect on the mind of the judge. If each of the accused gives evidence exculpating himself and incriminating the other, their evidence will be deemed to be against each other and each may be cross-examined by the other on evidence of bad character. The evidence will not be regarded as being against the co-accused if it can lead to the acquittal of both the accused and the co-accused.⁹⁰

DISCRETION OF THE JUDGE

Where an accused has lost the protective shield offered by the law in any of the circumstances listed in sections 69 and 160 (d), in practice, the prosecution usually seeks leave of the court to cross-examine an accused person on his bad character before doing so.⁹¹ The judge may disallow the prosecutor from giving such evidence of bad character if he is of the view that the prejudicial effect of the evidence will outweigh its evidential value.⁹²

⁸⁵TA Aguda, *op cit.* 134, See also *R v Rouse* (1904) I.K.B. 184 at 89, *R v Preston* (1909) I.K.B 568.

⁸⁶(1911) C Cr. App. R. 156.

⁸⁷T.A. Aguda. p. 135

⁸⁸F. Nwadialo, p. 82.

⁸⁹*R. v Roberts* (1936) I ALL ER. 23.

⁹⁰ *R v Zangoullas* (1962) Crim. L.R. 544

⁹¹*R v McLean* (1926) 19 CAR 104

⁹²*R v Cook* (1959) 2 Q. B. 340

However, in a situation where evidence has been given by an accused against his co-accused, the co-accused has an absolute right to cross-examine the accused on his bad character.⁹³ In such a circumstance, a trial judge has no discretion whether to allow or disallow the questions that may be put by the co-accused concerning the bad character of the accused.

CONCLUSION AND RECOMMENDATIONS

From the foregoing discussion, it can be seen that the exclusionary rule of character evidence under the Evidence Act is generally structured to admit character evidence only when they are relevant to the issue before the court. This is necessary to prevent the introduction of side issues to a trial, which can unduly predispose the court either in favour or against a party to a suit.

However, in certain circumstances, character evidence are allowed to impeach the credibility of a party who has given evidence of his good character or impute the bad character of the other party and or his witnesses. Against these backgrounds, the following recommendations are hereby presented for urgent review in order to strengthen the value of the exclusionary rule of character evidence in Nigeria:

- (i) The consequences of adducing evidence of good character in a civil case need to be clarified. The suggestion that such a party has "widely opened the character door" and lost his defence under the Act should be rejected by our courts. It is submitted that the other party should be allowed to adduce evidence of bad character only to the extent that such evidence is relevant to the character established. For instance, where the ground for petition in a divorce suit is desertion and the petitioner has given evidence that he is homely, the petitioner should not be allowed to adduce evidence that the petitioner has defrauded her employer in the past or jump a Police bail. To allow such evidence can only serve the purpose of unduly prejudicing the mind of the judge. Our judges should invoke the provision of section 201 Evidence Act⁹⁴ to disallow such evidence.
- (ii) It is necessary to restrict the admissible evidence of good character of an accused under section 69 to those that are relevant to the nature of the character in issue. For instance, if a well-respected and renowned Imam or Pastor is found with a fresh human head in circumstances that show that he has committed murder, evidence of his good character should only be relevant during the *allocution* or sentencing.
- (iii) Conversely, the admissible evidence of bad character should be restricted to those types with which the accused is charged. Our court should qualify the rule in *R v. Winfred*⁹⁵ in order not to undermine the presumption of innocence of the accused.
- (iv) The accused and his counsel should painstakingly weigh the relative advantages of adducing evidence of good character of the accused before doing so. Evidence of good

⁹³ *Murdoch v Gaylor* (1965) A.C. 574.

⁹⁴ See section 201 Evidence Act

⁹⁵ *Supra*

character is best adduced where the case against the accused is relatively weak, and the accused is "above board like Caesar's wife".

- (v) Counsel to the accused should be vigilant to detect and duly object to the adduction of any evidence of bad character by the prosecution.

Also, he must properly lead the accused and his witnesses in such a way that they will not unnecessarily put the character of the accused in issue or cast imputation against the prosecution witness.

- (vi) The present practice of obtaining the leave of the court before adducing evidence of bad character should be preserved and expressly enacted in our Evidence Act.
- (vii) The provision of sections 67-72 of the Evidence Act should be streamlined with that of section 160(1)(d) and other relevant sections in such a way that all the provisions of the Evidence Act on character evidence will be brought together.
- (viii) Finally, the overlap in the provision of section 160(1)(i)&(ii) and section 69(2)(a)&(b) should be removed. The provisions of section 160(1)(i)&(ii) are merely repetitious of circumstances that are already covered by section 69(2)(b)&(b).