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EVIDENCE OF CHARACTER IN CRIMINAL CASES:  
A CRITICAL ANALYSIS.

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BY,  
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ACKNOWLEDGEMENT.

My most sincere thanks go first to my supervisor, Mr. A.G. Ringera, whose mastery teaching of the Law of Evidence developed in me the desire to write this Dissertation. His persuasive, analytical and convincing criticisms cannot go unnoticed for they <sup>have</sup> been the force behind the production of such work.

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Every which has occurred on the case. Indeed, I will also examine the evidence on the basis of which evidence of similar facts is admitted to evidence and consider the parties involved. I will attempt to answer questions like whether there is any work in the paragraphs that a person who has committed some offence to the act of the law has committed the act in fact, whether the law evidence is in fact conclusive and whether reliability in the rule is sufficient to allow evidence of such fact in circumstantial evidence. I will then proceed to show the principle of events based on the fact of the fact evidence and the time when similar fact may be permitted.

In chapter three will be considered the judicial discretion to admit or exclude evidence of bad character. Since in Kenya, judicial authorities are usually cited, I will first look at the English case and the English Criminal Evidence Act 1984, section 1 (F) in so far as they render the evidence of judicial discretion possible. Matters affecting the exercise of this discretion that it has been accepted as usual to order the English decisions will then be considered, to be followed by the Kenyan position as contained in the Evidence Act and decided cases.

Chapter four will attempt to give solutions and recommendations to the problems raised in the foregoing chapters - see the conclusion.

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P R E F A C E

Evidence of Character in Criminal cases is an area in the law of Evidence which students of law have tended to overlook. In this dissertation I intend to pinpoint problems arising from applying section 57 (i) of the Evidence Act (Cap 80, Laws of Kenya). In the first chapter, I intend to identify the problem of defining what the term "Character" means; to show various definitions given e.g. in U. K., Nigeria and Kenya, either as stated in the relevant Evidence Acts, text-books and cases; and also show which definition I favour for the purposes of this dissertation. I will also consider whether evidence of good and bad character should be given in evidence and why.

In chapter two, I will consider similar fact evidence to the extent that it relates to evidence of character. First, I will look at the common law rule, the principles announced in MAKIN's case and the ambiguity and controversy which has centred on the case. Second, I will then consider the position in Kenya (Statute and cases). I will then venture to give reasons as to the basis on which evidence of similar facts is admitted in evidence and also consider the rationale involved. I will attempt to answer questions like whether there is any merit in the presumption that a person who has committed acts similar to the one in issue before is likely to have committed the act in issue, whether similar fact evidence is in itself conclusive and whether similarity is the sole ingredient in allowing evidence of similar fact in character cases. I will then proceed to show the attitude of courts toward admitting similar fact evidence and the time when similar fact may be produced.

In chapter three will be considered the judicial discretion to allow or disallow evidence of bad character. Since in Kenya, English authorities are usually cited, I will first look at the English cases and the English Criminal Evidence Act 1898, section 1 (f) in so far as they render the existence of judicial discretion possible. Matters affecting the exercise of this discretion where it has been assumed to exist as under the English decisions will then be considered, to be followed by the Kenyan position as formulated in the Evidence Act and decided cases.

Chapter four will attempt to give solutions and recommendations to the problems raised in the foregoing chapters - i.e. the Conclusion.

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ABBREVIATIONS

A.C.	=	Appeal Cases
All E. R.	=	All England Reports
Att-Gen	=	Attorney General
C.A.	=	Court of Appeal
Camb. L. J.	=	Cambridge Law Journal
Cap.	=	Chapter
Cox C.C.	=	Cox Criminal Cases
Cr. App. R.	=	Criminal Appeal Reports
Crim. L. R.	=	Criminal Law Review
D.P.P.	=	Director of Public Prosecutions
E.A.C.R. ( <del>E.A.</del> )	=	East African Court of Appeal
E.A.L.R. (EA)	=	Eastern Africa Law Reports
K.B.	=	Kings Bench
K.L.R.	=	Kenya Law Reports.
L.Q.R.	=	Law Quarterly Review
Le & Ca.	-	Leigh & Cave
Mod. L. R.	=	Modern Law Review
Q. B.	=	Queens Bench
R.	=	Rex (Reginam, Republic)
W.L.R.	=	Weekly Law Reports.



A CRITICAL ANALYSIS

CHAPTER ONE

"EVIDENCE OF CHARACTER:" MEANING

Any attempt to define the word Character is met with problems. The Kenya Evidence Act (Cap 80) does not have a clear cut definition but only gives the constituents of character as follows:-

"In sections 55, 56, and 57 of this Act the word 'Character' includes both reputation and disposition but except as provided in section 57 evidence may be given only of general reputation and general disposition and not of particular acts by which reputation or disposition were shown."

The words "reputation" and "disposition" are not defined in the Act. The Ballentine Law Dictionary gives the definition of Character as

"that which a person is as demonstrated by his acts and utterances, whether good or bad from the standpoint of morals. Character consists of the qualities which constitute the individual while reputation is the sum of opinions entertained concerning him .... Character is what a person is. Reputation is what people say of him".<sup>2</sup>

But not withstanding this distinction which is everywhere agreed upon, the two words ( i.e. Character and reputation) are sometimes used even by English Judges as synonymous.<sup>3</sup> This is no doubt the view manifested in the case of R V ROWTON<sup>4</sup> which will be considered below. In the legal sense it means reputation as distinguished from disposition. Cross<sup>5</sup> states that "Character" means disposition and that disposition is the tendency to act, think or feel in a particular way.<sup>6</sup> AGUDA T. AKINOLA in his book<sup>7</sup> gives the meaning of the word "Character" as follows:-

" Section 71 says that 'Character' means reputation as distinct from disposition. The effect of section 71 would appear to be this that whereas evidence of evil disposition is under no circumstances regarded as relevant, evidence of reputation .... is regarded as relevant."<sup>8</sup>

...../2.....

A wind of change has been blowing ever since the decision in R. V. ROWTON. This is clearly seen in the words of ARCHIBOLD J. F:-

"Character: The meaning to be attached to this word probably includes both the general reputation and the actual moral disposition of the defendant as known to the witness." 9

In this quotation one notices that there is a move from the statement in R V ROWTON that character means reputation. The position was made clearer by the LORD CHANCELLOR (VISCOUNT SIMON) in the case of WILLIAM STIRLAND V. - DIRECTOR OF PUBLIC PROSECUTION.<sup>10</sup> The relevant portion of his judgement is as follows:-

"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 neighbours may think of him? .....

I am disposed to think that in paragraph (f) (where the word 'character' occurs four times) both concepts are combined." 11

In brief the facts of this case were as follows; A defendant who was charged with forgery put his character in issue specifically stating that he had never been charged with any offence. After he had been asked in cross-examination about the circumstances of the termination of his employment at a bank and had given his own account of the reasons for that termination it was suggested to him by counsel for the crown that the employment had been terminated because he was questioned about a suspected forgery. The defendant denied the allegation. It was held by the House of Lords that the defendant might fairly be understood to have used the word charged in his evidence in the sense which it bears in section 1 (f) that is to say, "accused before a court" and not "suspected or accused without prosecution" and that the cross-examination was therefore irrelevant, either as a challenge to the veracity of the defendant's evidence or as going to disprove good character and was therefore inadmissible.

Other writers say that Character evidence may be defined as the testimony relating and confined to the general reputation which the person who is subject of the enquiry **sustains** in the community or neighbourhood in which he lives or has lived. The most important point to note is that **an opinion** about a person's character and mental disposition can only be gained from a detailed analysis and investigation of his past life.<sup>12</sup> WIGMORE has the following to say of character:-

" .... The law itself clearly demonstrates this because there is in fact more than one way of evidencing actual character. Reputation is not the sole way. Individual estimate was formerly always available and still is in some jurisdictions. Specific acts of conduct are also available for some purposes especially to show a witness' character. If reputation were the essential relevant fact, these other modes of proving character would be impossible ....."<sup>13</sup>

If reputation is not the sole way of evidencing character then disposition is another and this brings us to the Kenyan situation where character is said to include both reputation and disposition. A witness could be asked for his estimation of the disposition of one of the parties and finally evidence might be given of the party's reputation - the general opinion of his disposition prevailing among those who know him best. When this method is adopted, the evidence is often spoken of as evidence of character. CROSS comes up with another view altogether, that the word character is frequently used to mean disposition and not reputation.<sup>14</sup>

Another confusion arises from the definition of "character" and "reputation" as given in STROUD'S JUDICIAL DICTIONARY:-<sup>15</sup>

" A man's 'Character' is the esteem in which he is held by others who know him and are in a position to judge his worth".  
(Per Lord Denning; PLATO FILMS V SPIEDEL 1961 AC 1090) 16

And as concerns reputation it states as follows:-

" Reputation is a fact ..... (It) is the popular belief of the nature of a man's character". 17

The two definitions do not seem to make any difference: they all concern what another person holds of another and as such this leads us back to the case of R. V. ROWTON.

Disposition is defined as "Frame of mind, nature or temperament".<sup>10</sup> CROSS gives the definition in the following words: "the tendency to act, think or feel in a particular way."<sup>19</sup> Evidence of conduct on as great a variety of occasions as possible, might be adduced ~~for~~, for it is to be assumed that someone who frequently acts in a given manner has a disposition to do so. Secondly, previous convictions tend to establish disposition provided they can be treated as conclusive or at least received as evidence of facts upon which they are founded.

An analysis of the above quotations brings one to the point that the word character is used in three different ways:-

1. To include reputation and disposition (which is the present English view and the East African stand with special reference to Kenya)
2. To mean reputation as distinct from disposition. (which is the Nigerian interpretation in section 71 of the Nigerian Evidence Act)
3. To mean disposition as distinct from reputation. (A meaning given by CROSS in his book,; Cross on Evidence)

} ?

In this dissertation I will adopt the meaning of character as given by the Kenya Evidence Act (Cap 30), which is the same as under the English law.

IV/ CHARACTER: GOOD AND BAD

In criminal cases general evidence of good character of the accused is relevant and admissible in favour of the accused, though general evidence of bad character is not admissible. As for one, evidence of bad character is admissible where character is itself a fact in issue. So in R V ROWTON, WILLES J. Said:-

"It is a mistake to suppose that because the prisoner can only raise the question of character, it is therefore a collateral issue. It is not. Such evidence is admissible because it renders it less probable that what the prosecution has averred is true, it is strictly relevant to the issue."<sup>20</sup>

A man's character is often a matter of importance in explaining his conduct and in judging his innocence or criminality. It becomes of great importance in weighing the probabilities in doubtful cases; that is when any reasonable doubt arises as to the guilt of the prisoner, evidence of good character may turn the scale in his favour. When the evidence against the accused is such as to clearly establish his guilt, no importance is attached to evidence of good character. Sarkar <sup>21</sup> illustrates this point as follows: B is found in possession of A's watch. He states by way of explanation that he found it and was keeping it to give it to A. The value of this explanation will depend entirely on the character and position of the person making it. T. AKINOLA AGUDA IN his book <sup>22</sup> gives us another example:-

"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"

Bad character is generally inadmissible in criminal proceedings not because it is not relevant but as a matter of policy, to admit character evidence in proof or disproof of other issues would be to cause surprise and create a prejudice or bias for or against a person.

In R. V. ROWTON WILLES, J. said

".... and the result would be that the man on his trial might be overwhelmed by prejudice instead of being convicted by that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but it is excluded for reasons of policy and humanity; because although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice to the other ninety-nine."<sup>1123</sup>.

Just as every person is assumed to be sane, he is also assumed to be of normal moral character. There is therefore no need to prove character until his character is brought in question. Evidence of bad character becomes relevant and admissible only in reply i.e. when the accused has in the first instance given evidence of good character, the whole question of his character good or bad, is opened and the other side is then at liberty to tender evidence of general bad character. Evidence of bad character becomes also admissible when it is itself a fact in issue. Where upon the trial of a person accused of an offence, the previous commission of a similar offence becomes relevant for the purposes of showing existence of any state of mind e.g. criminal knowledge or intention, the previous conviction becomes relevant. Evidence of character whether for or against the accused must bear reference to the trait involved in the charge against him.

III. SECTION 57 OF THE EVIDENCE ACT (CAP 30 OF KENYA LAW)

Ad:

Section 57 of the Evidence Act of Kenya, has provisions which are similar to those of the English Criminal Evidence Act 1898. <sup>24</sup> The English Criminal Evidence Act 1898 was intended to give the accused the charter so to speak, to give evidence on oath in the witness box on his own behalf. But in the same section some limitations have been put on this charter. These limitations can also be traced in the provision of section 57 (1) (c). This provision is based on the view that where the accused attacks prosecution witnesses not on the ground

that their conduct outside the evidence given by them makes them unreliable witnesses than the judge <sup>must</sup> know the character of the accused. This section has proved a cause of anxiety to judges who have realised the risk that the section which was designed to allow the accused to give evidence freely in his own defence might become a trap for the unwary. He would be unable to put forward any defence no matter how true which involves an imputation on the character of the prosecutor or any of his witnesses without running the risk if he had the misfortune to have a record of his previous convictions being brought up in court while being tried on a wholly different matter (This will be discussed in detail in the next chapter). It might have been with this in mind that LORD GODDARD C. J. in the case of R. V. CLARK <sup>25</sup> considered when cross-examination as to character should be allowed. He said;

" I do not want to make any joke about the matter or to put it otherwise than perfectly seriously; but one knows well that police officers are regarded as fair game for cross-examination and to make charges against and I do not believe that any judge would allow a roving cross-examination into the prisoners part merely because he said, ' The police constable is a liar', or 'The police constable is <sup>not</sup> telling the truth' for all he is doing is pleading not guilty with emphasis ...."

A mere denial of evidence given by the prosecution will not let in cross-examination as to character; even though it is expressed in vehement terms such as calling the prosecutor a liar. <sup>26</sup> One cannot close his eyes to cases where the accused is deliberately entrapped into making imputations by the questions put to him in cross-examination (see chapter three). It would also appear to be the case where the prosecution, without any such intention, puts the accused into a dilemma during cross-examination so that, in order to defend himself, he can only resort to allegations which amount to imputations. <sup>27</sup>

The first rule is largely a matter of common sense. Because relevance is no matter of degree on which there can differ, such cases arise under the second rule may be excluded on the first rule. R. V. CLARK. There is very little authority on the first rule but it is of recent origin and depends very much on a classification of cases.

...../8.....

CHAPTER TWO

SIMILAR FACT EVIDENCE

THE COMMON LAW RULE:

Three rules govern the admissibility of past bad behaviour offered as evidence that a particular act was done. First, the bad behaviour must be relevant to the alleged act; It must tend to prove it. Evidence that a boy stole apples in 1913 is not relevant to whether in 1943 he robbed a bank. Evidence of consensual intercourse is irrelevant to an earlier charge of rape. 1

Secondly even if it is relevant, the past bad behaviour is inadmissible if it is <sup>only</sup> relevant ~~to~~ to show that the actor has a bad disposition, and his disposition is not highly relevant to some issue at the trial. Evidence of a man's convictions for robbing banks would be admissible if his explanation for possessing money stolen from a bank in 1943 was that he found it in the street; for his disposition would be highly relevant to his supposedly innocent state of mind. But such evidence would be inadmissible if he said that at the time of the robbery he was in another country robbing a bank; his disposition would not then be relevant to any issue at the trial. However, evidence that he broke into a bank on Tuesday and was found removing clothing discovered by bank officials after a robbery on Monday would be admissible because it has a relevance other than proving bad disposition; it shows actual participation in the Monday crime. 2

Thirdly, in criminal cases even though evidence of bad behaviour is technically admissible under the first two rules, it may be excluded because its prejudicial effect exceeds its probative value. Thus, if evidence of a man's prior bank robberies proceeds only from a paid police informer known to have a grudge against the accused the evidence might well be excluded. ✓

The first rule is largely a matter of common sense. Because relevance is an issue of degree on which minds can differ, some cases cited under the second rule may be examples of the first and vice versa e.g. HARRIS V D. P. P. 3 There is very little authority on the third rule for it is of recent origin and depends very much on a discretion governed

...../9.....



only by the particular facts. Matters such as unreliability or staleness would be relevant to the discretion. Where there is a question whether an act was accidental or intentional or done with or without knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned is relevant. Evidence of other acts of the accused similar to the act complained of may be relevant to rebut defences of accident, lack of intention and lack of knowledge. The English rule on this matter is as laid down by Lord HERSCHELL, L. C. in MAKIN V ATT-GEN for NEW SOUTH WALES:

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

The case of NOOR MOHAMED V R cannot go unnoticed. In this case the Judicial Committee allowed an appeal against a conviction for murder on the ground that evidence concerning previous acts of the prisoner had wrongly been admitted. The appellant had been charged with murder by cyanide poisoning of a woman, Ayesha who lived with him as his wife. There was no evidence that the prisoner had actually administered the poison, and in order to fill the gap in the evidence, the prosecution sought to tender evidence that two years previously the accused's first wife Gooriah, had also died of cyanide poisoning under circumstances that he had persuaded her by a trick to take the poison. After argument in the absence of the jury the trial court had allowed this evidence to be introduced. On appeal the Judicial Committee came to the view that the evidence referring to the first wife should not have been allowed and that the verdict could not stand. In R V SMITH

the appellant was charged with the murder of Bessie Munday; evidence was admitted to show that he murdered other women at a later date. The first question raised on appeal was that the judge was wrong in admitting evidence of the deaths of Alice Burnham and Margaret Lofty, that whether the evidence was admissible or not depended on the principles enunciated in the case of MAKIN V ATT-GEN for NEW SOUTH WALES. It was held that it was a general principle or rule of law that when there is prima facie evidence that a defendant is guilty of the act charged, evidence of similar acts is admissible to show that those acts were done with intent. The matter can now be said to have been finally settled by the House of Lords in HARRIS V D. P. P.<sup>9</sup> The appellant, a policeman who was at all material times on duty in a market, was indicted on eight counts each of which alleged a breaking into the same office in the market and stealing therefrom between May and July. The evidence showed that most of the gates of the market were closed and that on each occasion the thief had entered the office by the same method and stolen part of the money the whole of which he could have stolen. Apart from evidence of opportunity there was no evidence to connect the appellant with the seven counts. With regard to the eighth count, the evidence showed that a burglar alarm had been placed on the premises unknown to the appellant who was on duty in the market at the time. Immediately after, the alarm sounded and some detectives who had been lying in wait ran to the market, and saw the appellant standing near the office. Although he was acquainted with some of the detectives he nevertheless disappeared from sight for a short period sufficient for him to hide the money where it was later found. The jury acquitted him on the first seven counts but convicted him on the last count, which conviction was upheld by the Court of Criminal Appeal. The House of Lords however by a majority of four to one, quashed the conviction on the grounds that irrelevant evidence in the nature of the evidence of earlier thefts was wrongly admitted. The House of Lords expressly approved the principle laid down in Makin's case and saw no need of modifying it.

But the point that one can trace in all these cases is that controversy has centred on the case of Makin. There the Counsel for the Makins submitted that the general rule as to similar fact evidence

was one of exclusion, subject to certain exceptions, while counsel for the Crown contended that such evidence was generally admissible. The judgment of the Board did not clearly indicate which of these two views merited judicial approval and from the ambiguity sprang a controversy; even though courts favour the first view. Another important ambiguity in the case is whether the evidence was admitted to prove actus reus or mens rea. The individual words used are not without ambiguity and the variation in their arrangement multiplies the possibilities of terminology confusion. 10

" The application of the Makin rule has always been acknowledged to be a matter of great difficulty. The test is whether the evidence is sufficiently relevant to an issue before the jury. Relevancy is a matter of degree and depends upon the sort of issue raised and the other evidence in the case." 11

POSITION IN KENYA

Putting aside the common law stand the state of affairs in Kenya needs some consideration. In the Kenya Evidence Act (Cap 80) section 57 (1) (a) makes it manifest that similar fact evidence may be considered in cases of character. It is important to keep clearly in mind that the second proposition laid down in Makins case is incorporated in section 15 of the Kenya Evidence Act for this has not been clearly stated in any of the cases involved and causes confusion. Section 15 is not an exception to the rules set forth in section 14 but is rather an application of the general rule and must be read subject to section 14 insofar as evidence of state of mind e.g. knowledge and intention is concerned. The prosecution may adduce evidence of criminal acts other than those charged without waiting for the accused to set up a specific defence calling for rebuttal. But the judge has a discretion to exclude such evidence though strictly admissible if it merely tends to deepen suspicion against the accused and its prejudicial effect is out of proportion to its probative value.

*Ishu Makenzi's*

The leading case on sections 14 and 15 is JOHN MAKINDU V R 12 in which the defendant was charged with the severe beating of a small boy to whom he was in loco parentis, which allegedly caused the boy's death. During the trial, one Petro testified that on the night before his death,

he had heard the deceased cry out, and that the next day the boy was taken to the hospital where he died. Medical evidence showed that the boy had, at the time of death, both new and old bruises on his head and body and a fractured arm which was still in plaster, and that the fresh blow on the head indicated that there had been a fresh blow causing a fresh haemorrhage which, acting on top of the old haemorrhage, was the immediate cause of death. The defence was that the boy was an epileptic subject to fits and that his injuries had been caused by falls for which the appellant was not responsible. The prosecution sought to introduce evidence of previous severe beatings of the deceased by the defendant in order to rebut a defence that the death of the deceased was due to accident caused by epilepsy. The evidence was objected to by counsel for the defence who said that the defendant was not going to raise a defence of accident or mistake or absence of intention; he was going to say that the deceased had been an epileptic, but he was not going to advance any theory as to how or why the deceased met his death. It was held in dismissing the appeal that the evidence was admissible in explanation and substantiation of the cause of death and also as showing a motive in the appellant: for revenge on the deceased and the appellant's ill-will towards him; and the fact that the evidence was admitted in rebuttal when it could have been admitted in anticipation did not cause any prejudice to the appellant. Both the accused in the case of THE QUEEN V HAROLD WHIPP AND CHAUDHARY MOHAMED SHARIFF 13 were charged

with counts of conspiracy to defraud and the first accused was also charged with counts of fraudulent false accounting. All the five charges related to episodes which took place in 1953. The prosecution sought to adduce evidence of a similar offence by the first accused in 1955. To this evidence the defence objected. Sir KENNETH O'CONNOR, C. J. held that where the gist of the offences charged is fraud; intention is material and evidence of other similar acts to be proved may be given to prove the intent. The similar acts to be proved may have been committed before or after the offence charged but they must be similar transactions and so connected with the offence as to form part of the evidence on which it is proved; they must not merely tend to show a general fraudulent disposition. Evidence of the 1955 trans-

actions was admissible to show intention and system and to rebut a defence open to the accused of innocent intention and accident.

This was reached after reviewing many English cases <sup>14</sup> some of which have already been considered above. In the case of MOHAMED SAEED AKRABI V REGINAM <sup>15</sup> the appellant was convicted by the chief magistrate on two counts of use of criminal force with intent to outrage modesty. His appeal to the supreme Court was dismissed and he lodged a second appeal based on two grounds. First, that the conviction could not stand on the uncorroborated evidence of two young boys even though the magistrate had warned himself of the danger of acting on their uncorroborated evidence and secondly that the evidence of other offences of similar nature which were not charged should not have been admitted. Dismissing the appeal, SECLAIR (V-P) BRIGGS AND BACON - justices of appeal, held that evidence of similar offences not charged is admissible where there are reasonable grounds for expecting that the accused will set up a defence of accident or mistake. Although the appellant's defence at the trial was a complete denial of the acts alleged against him, certain statements made by him when first confronted with the boys indicated that he might set up a defence of accident or mistake. In the Ugandan case of YAFESI KAYIDA V REX <sup>16</sup> the appellant was convicted of possession of one bottle of bismuth oxide contra section 300 (2) Ugandan Penal Code, a cognizable offence. When the accused was brought before the magistrate an information or complaint was signed both by the complainant and the magistrate. No other charge appeared on the record. A prosecution witness gave evidence of a syringe and other drugs found with bottle of bismuth oxide, the subject of the case. A subsequent prosecution witness gave evidence and the accused was cross-examined to suggest that he was practicing medicine. One of the issues resolved concerned the evidence of one Christopher Ikanza in which a clear suggestion of the commission of another offence other than that which the appellant was being tried was manifest. This evidence would have been allowed in as evidence of similar fact, but the court held that it was prejudicial and could not be justified on the ground that it was admissible to refute a defence which had been indicated or would be otherwise open to the appellant. From the foregoing cases - both at common law and the East African stand, especially Kenya, similar fact evidence may be called in to establish actus reus or mens rea OF a crime in question.

BASIS OF ADMISSIBILITY.

The basis of admissibility of such evidence is improbability of the coincidence of many identical or similar accidents. The relevance of similar fact evidence on the issue of intention on the other hand will usually be a relevance solely and directly via propensity - the propensity to have a particular state of mind. Yet this has its danger; the danger of prejudice involved in admitting evidence the sole relevance of which is directly via propensity is infinitely greater than that generally involved in admitting evidence which has relevance according to objective standards based on the improbability of coincidence of identical or similar facts. <sup>17</sup> Is there any merit in the presumption that a person who has committed acts similar to the one in issue before is the one who has done the act? Proof that he has on other occasions done one or several acts similar to the one in issue is clearly by itself completely incapable of establishing that he has committed the crime with which he is being charged and is therefore irrelevant. <sup>18</sup> Evidence of behaviour of the prisoner on other occasions may on the other hand in certain circumstances make it possible to draw conclusions about his habits and way of life or about his personality and character. Mere propensity of a person to do certain acts is of course by itself not remotely sufficient to prove that the accused did, in a particular instance, commit such an act. On the other hand propensity to behaviour of a certain kind and especially towards certain crimes may well have some bearing on the issue before the court, since it makes it likely that he, rather than a third person <sup>committed</sup> ~~committed~~ the offence in question. <sup>19</sup> Yet this does not distinguish him from all the other people, for it is not hard to find other persons with the same evil propensity. The question therefore arises whether similar fact evidence is in itself conclusive. Evidence that the prisoner has a poor reputation in the neighbourhood for honesty or that he has repeatedly been convicted of criminal offences, leads to the inference that there is something in his morality which makes him in this respect different from the majority of his fellow men. As might be discerned from the foregoing, similarity alone is not sufficient to sustain a conviction.

The number of incidents is also important. But even if the two factors are viewed most favourably there is a hiatus in reasoning which must be filled. Each of these conditions of relevance and credibility represents a complex of inter-relating and variable factors. So far as relevance is concerned, the text-book rubric indicates the importance of similarity between different incidents relied upon. But this is by no means the only, nor is it the most important factor. Another to which attention is drawn in BOARDMAN V D. P. P.<sup>20</sup> is the number of incidents. The most important variable however, and the most intusively discussed in the House of Lords is that of peculiarity. It is not enough to show even a high degree of similarity between different incidents if their occurrence is too common. Indeed in the case of most criminal acts the definition of the offence and the limitations of human physique and ingenuity will dictate some fundamental similarity between different examples. The similarity must after all be capable of identifying the actor in the incidents with the accused. This is best achieved by showing a shared and significant deviation from the common norm for criminal acts of that type. Occasionally as in R. V. STRAFFEN<sup>21</sup> the circumstances may themselves limit the range of perpetrators of an undoubtedly committed crime as to reduce the extent of requiring deviation. The second group of variables relates to credibility. The court must be satisfied that the evidence of other criminal acts is credible before it can be admitted. In most, the cogency of the proof of the other incidents is a highly relevant variable depending, as it most often does, upon the testimony of witnesses and frequently the very same witness testifying to the substantive counts. It should not be overlooked that similarity of technique is not in itself sufficient to show a disposition in the accused to commit the offence in that way, unless the respect in which similarity is shown is itself unusual. It would clearly be insufficient in order to show a disposition to rob banks, that bank notes were taken on each occasion. There are cases in which evidence of the commission of a prior crime is admissible even though there is no question of similarity in the manner of commission. If a person were being prosecuted for trespassing on a prohibited defence area, and his defence was that he was unaware that the place was a prohibited area, proof that he had been convicted for trespassing on that same area would be admissible to show

The strength of the appeal to the unlikelihood of coincidence often

that he knew that it was such a place and no striking similarity between the offences would be required. <sup>22</sup> The case of O'MEALLY <sup>23</sup> goes to the same effect. In the case of THOMPSON V R <sup>24</sup> the appeal is "wouldn't it be odd if two boys wrongly identified as a man who interfered with them an innocent man who was in fact a practicing homosexual?" In R V SMITH <sup>25</sup> it was held that no reasonable person would believe it possible that Smith had successively married three women, persuaded them to make wills in his favour, bought three suitable baths, placed them in rooms which could not be locked, taken each wife to a doctor and suggested to him that each of them had had some kind of fit in the Bath and been drowned. <sup>26</sup> It follows that attention must be paid to the issues in the case and the facts as a whole.

The precise issues must be identified because, for example the disposition of the accused will make his innocence a much stranger coincidence if he admits the actus reus but denied some part of the Mens rea than if he denies the actus reus. The actus reus may nevertheless be proved by sufficient strong similar fact evidence (e.g. in Makins case). Probably the similarities in the evidence must be <sup>e</sup> greater when the actus reus is in question. A very clearly proved disposition to commit a particular crime may be inadmissible if there is nothing to connect the accused with the crime charged. A very slight connection, such as opportunity may suffice however (e.g. R V STRAFFEN) and the accused may even be convicted though there is no directly proved connexion other than possible opportunity between him and the similar facts e.g. cases of poisoning in a household. This is why HARRIS V D. P. P. (cited above) is controversial. The difficulties of this reasoning should be remembered in Lord HENRY, C. J'S words;

"The risk, the danger, the logical fallacy is indeed quite manifest to those who are in the habit of thinking about such matters. It is so easy to derive from a series of unsatisfactory accusations; if there are enough of them, an accusation which at least appears satisfactory. It is so easy to collect from a mass of ingredients not one of which is sufficient, a totality which will appear to contain what is missing." <sup>27</sup>

The strength of the appeal to the unlikelihood of coincidence often



depends on the high degree of similarity of similar fact evidence. It tends to limit the number of persons likely to commit the crime. Sometimes so much similarity has been demanded that the court has placed "too high a premium on versatility and too heavy a penalty on dullness."<sup>28</sup> But in general it is right that where the means of committing a crime might have adopted in either case by anyone of an indefinite number of persons and where no other connection is shown to have existed the evidence is inadmissible. Similarity narrows the gap between proving the accused was a wrong-doer in general and proving he did this particular wrong. That similarity must be so marked as to suggest a special "system" or "technique" obscures the fact that the basic test is a high degree of relevance and this depends on all the evidence. The need for some special connexion proved through similarity used as the basis for an appeal to coincidence means that similar fact evidence is more readily admitted in unusual crimes than common ones e.g. poisoning, incest, unnatural sexual cases and perverted murders. If crimes are common others may have done them. If crimes are rare, most people are inhibited from committing them, and proof of lack of inhibition is very relevant. Further the amount of proximity in time to be looked for depends partly on the crimes involved. The similarity of admissible similar facts may vary; so may their number. One previous abortion was enough in

R. V. BOND.<sup>29</sup> Similar fact evidence relevant must be raised in substance if it is to be admissible. The prosecution must prove the accused with the necessary degree of certainty.

SIMILAR FACT EVIDENCE AND THE LAW.

The law is wary of admitting similar fact evidence for the following reasons: first, the effect of this evidence may be unduly prejudicial even on a trained tribunal; before a completely untrained jury it might have an effect disproportionate to its actual probative value. Sometimes its probative value is great; sometimes it's small because it is stale or not similar enough, or of infrequent occurrence. They may be unwilling to entertain the possibility that a bad man has reformed. The more revolting the suggestion, the more a jury may be likely to lose sight of the fact that it may not be true.<sup>30</sup> Secondly, similar fact evidence raises many collateral issues which it may be too distracting, expensive and time consuming to investigate in the light of

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the main issues of the case. Thirdly, it may take the person against whom it is tendered by surprise unless he is prepared to defend himself with respect to all the bad acts of his life. Fourthly, if similar fact evidence is too freely admissible, it may encourage the police not to search for the real criminal but instead to discover someone with possible opportunity and a record. In the same way it may be possible for the criminal to cover his tracks by committing the crime in circumstances where another man with a record may be suspected.

TIME FOR PRODUCTION.

In the first part of this chapter an attempt is made to show the origin of similar fact evidence is usually introduced by the prosecution against the accused; but it could be introduced by the accused against the prosecution e.g. by showing that certain policemen habitually induce involuntary confessions. Evidence of prior good conduct is often rejected for want of relevance or weight or because it would raise too many collateral issues. Evidence of prior intercourse between the accused and a woman complaining of rape is admissible as relevant to consent. The accused may raise his good character as evidence of innocence. Conduct in respect of which the accused was acquitted cannot normally be relied on as a similar fact evidence. The defence which similar fact evidence rebuts must be raised in substance if not in so many words. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice. Of course, if the prosecution had always to wait for a defence to be raised expressly, the accused might often succeed unfairly in a submission that there is no case to answer despite the availability of admissible and weighty similar fact evidence; so the prosecution may rebut defences reasonably likely to be raised by the accused on the facts. An admission of the fact which the prejudicial evidence is meant to rebut will prevent it being admitted. But mere plea of not guilty is not enough to prevent similar fact evidence being admitted, for defences fairly attributable to the accused can be rebutted.

would be willing to do the same for the appellant. The trial judge held that these attacks on the prosecutor amounted to imputations on his character within the meaning of section 1 (1) (11) and *15-19-19* for the prosecution to cross-examine the appellant on his previous convictions.

CHAPTER THREE

JUDICIAL DISCRETION.

LIBRARY

In Chapter one, the question what is character was examined. Chapter two dealt with Similar fact evidence to the extent that it incorporates evidence of bad character. In this chapter it is intended to look at the issue of the existence of otherwise and the operation of judicial discretion to exclude evidence of bad character in certain circumstances.

ENGLISH CRIMINAL EVIDENCE ACT 1898.

In the first part of this chapter an attempt is made to show the origin of the discretion to allow or disallow evidence of bad character under the English law. The discretion to allow or disallow similar fact evidence has already been considered.<sup>1</sup> A look is now made at the English Criminal Evidence Act 1898 section 1 (f). In considering the question of discretion then, it is important to hold clearly separate three distinct formulations of the doctrine of discretion. Secondly it is essentially useful to identify the source of the discretion to exclude Cross-examination under section 1 (f) (ii) Whether it is conferred by the Criminal Evidence Act 1898 or by the inherent power of the court to regulate its own process or by a rule of the law of evidence. Thirdly, the earliest reported instances of the exercise of the discretion to exclude relevant and admissible evidence. Forth, the dicta relied upon were obiter. Fifth, the House of Lords was being accordingly unduly timorous in considering that the discretion was too well established to be overthrown. The case of SELVEY V D. P.P.<sup>2</sup> gives a better starting point. The appellant Selvey had been convicted of committing an act of buggery upon the prosecutor. The course of his defence was such that he was in effect asking the jury to disbelieve the prosecutor on the grounds that the prosecutor was a sort of male prostitute who had said to the appellant on the very day on which the offence being tried was alleged to have been committed, that he had already that day "been on the bed" with another man for a pound and would be willing to do the same for the appellant. The trial judge held that these attacks on the prosecutor amounted to imputations on his character within the meaning of section 1 (f) (ii) and allowed counsel for the prosecution to cross-examine the appellant on his previous convictions.

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As a result the appellant was convicted. His appeal to the House of Lords was allowed, after having been dismissed in the Court of Appeal. The Respondent contended that there was no such discretion in a trial judge to exclude cross-examination under section 1 (f) (ii) of the Criminal Evidence Act 1898, that a trial judge at a criminal trial has no power to exclude evidence which he holds to be admissible and relevant; and that the obiter dicta to the contrary of many learned judges should be disapproved. The House of Lords held that there was such discretion. LORD DILHORNE had this to say, "since (the case of Fletcher) it has been held in many cases that a judge has a discretion ..... In the light of what was said in all these cases by judges of great eminence, one is tempted to say that it is far too late in the day even to consider the argument that a judge has no such discretion." <sup>3</sup> Lord PEARCE and WILBERFORCE said that there was an over-whelming mass of distinguished authority that the discretion existed. <sup>4</sup>

The three formulations may be stated briefly as follows:-

- (a) A trial judge may suggest to counsel for the prosecution that he should not lead evidence the admissibility of which the judge has doubts. <sup>5</sup>
- (b) The trial judge may exclude evidence which he holds to be admissible and relevant on the ground that its prejudicial tendency in the eyes of the jury outweighs its probative value. <sup>6</sup>
- (c) The trial judge may exclude evidence which he holds to be relevant and admissible and of un<sup>M</sup>peachable probative value on the sole ground that its reception would operate unfairly against the accused. <sup>7</sup>

If the discretion is thought to spring from section 1 (f) it will apply only in relation to that section and more important still, it should have been rejected upon the normal canons of construction of statutes as being a meaning which the words of the statute cannot reasonably bear. <sup>8</sup> If the discretion is thought to come from inherent powers of the courts of secure a fair trial to the accused or from the inherent power of the judge to control the trial before him, and to see that justice is done in fairness to the accused, the next question arises as to whether there is any scope in the law for the application of such inherent power to override fixed rules which were intended to apply to that particular situation. The only other possible source for the discretion to exclude cross-examination under section 1 (f) (ii) is a rule of law of evidence that a trial judge has a discretion to exclude admissible and relevant evidence which is unduly prejudicial to the accused. In so far as the court did not exclude the evidence in R. V. WATSON <sup>9</sup> it did not exercise its discretion and as a consequence the dictum of PICKFORD, J that there was a discretion in the court was obiter. The consequence of this point is that the dicta relied upon were obiter and that no authority bound

the House of Lords.

The House of Lords felt that it was far too late even to consider overthrowing the doctrine of discretion, which appears to have arisen in its second formulation certainly no earlier than MAXWELL V. D. P. P. Perhaps one could usefully compare the case of BUTTON V. D. P. P.<sup>10</sup> where the House of Lords differently constituted, in an attempt to reconstitute the common law on a sound basis, overruled a view of law of affray which had existed and doubtless been upheld since 1822 notwithstanding that this would remove a defence which a person accused of that offence would in practice have had at any time during the last one hundred years. In the case of R. V. HUDSON<sup>11</sup> a court of five judges held that the words of the section must receive their natural and ordinary meaning. After this decision we find expressions of opinion that the trial judge has a discretion in certain cases to mitigate the harsh or strict application of section 1 (f) (ii) PICKFORD, J. said that to apply the rule in HUDSON strictly would be to put a hardship on the prisoner with a bad character. He said that it does not follow that a judge necessarily allows the prisoner to be cross-examined to character, but that he has a discretion not to allow it and the prisoner has that protection. In R. V. FLETCHER, BANKES, J. said that where a judge entertains a doubt as to the admissibility of evidence he may suggest to the prosecution that they should not press it, but he cannot exclude evidence which he holds to be admissible. It has been pointed out by LIVESSEY<sup>12</sup> that the basic premiss upon which LORD MOULTON relied in R. V. CHRISTLE<sup>13</sup> that in a civil action evidence may always be given of any statement made to the opposite party is fundamentally erroneous. As a result of this misapprehension, he was induced to lay down a harsher rule in criminal cases than that which obtains in Civil cases. Discretion was from that date not mentioned to any case reported until MAXWELL V. D. P. P. The ratio of this case is that even where it is permissible to cross-examine as to character under section 1 (f) (ii) it is not permissible to ask ~~to~~ whether the prisoner has previously been acquitted on a similar charge since a previous acquittal is not relevant as going to disprove good character. The case was concerned with relevance and it held that a judge in a criminal case has a duty to exclude irrelevant evidence which is also prejudicial to the accused. The dictum as to a discretion to exclude relevant evidence was therefore obiter. The case of WILLIAM STIRLAND V. D. P. P.<sup>14</sup> is similar in point. The true position is that the impugned questions were excluded because they possessed no probative value whatever and

presented no case and were not justifying cross-examination of the accused

because the trial judge is under a strict legal duty to exclude that evidence which is not legally relevant and that this duty is all the more onerous if the evidence happens also to be highly prejudicial. Despite all these, it was stated in R. V. COOK<sup>15</sup> that it was well settled that the court of Criminal Appeal would not interfere with the discretion of the trial judge unless he had erred in principle or there was, no material on which he could properly arrive at his decision.

MATTERS AFFECTING EXERCISE OF DISCRETION:

Despite the lack of existence of the discretion in the English Criminal Evidence Act 1898, section 1 (f) (ii) some courts have assumed its existence. This being so, they have sought guidance in certain principles in their exercise of such discretion. The matters which on principle or on the basis of decided cases may affect the mind of the judge when exercising his discretion are conveniently divided into two classes (a) Considerations stemming from its nature of the attack made on the character of the prosecutor or prosecution witness and (b) other considerations. As concerns the first division, it is now settled that an imputation on the character of a prosecution witness will not be any less an imputation because it is made in the course of developing a defence. Courts have been reluctant to apply this principle if to do so might deter the raising of a defence. A similar reluctance may now be reflected in a refusal in such a case to permit cross-examination of the accused, as to his past record. In R. V. COOK<sup>16</sup> DEWLIN, J. referred to the protection which the judge would desire to extend as far as possible to an accused who was endeavouring only to develop a line of defence. A similar approach is suggested by LORD GODDARD, C. J's explanation of R. V. BIGGIN,<sup>17</sup> Moreover in R. V. BROWN<sup>18</sup> Cross-examination of the accused under the section was held to have been properly allowed expressly because the defence in its attack on the prosecution witness had gone further than merely developing a defence of self-defence. It may be suggested that the judge is entitled to bear in mind as a factor influencing the exercise of his discretion whether the imputation is the result of a deliberate attack on a prosecution witness calculated to discredit his testimony or arises out of a genuine attempt to elicit facts in connection with the offence charged or the matters with which the evidence of the witness has dealt. Assertions of this kind however have always been treated merely as forms of emphatic denial of the prosecution case and not as justifying cross-examination of the accused:

"he is a liar," "he is lying".<sup>19</sup> It may therefore be assumed that a judge would only in exceptional circumstances allow the prosecution to cross-examine the accused on his past record in answer to an allegation that the prosecution witnesses are lying or that evidence is false. In exercising his discretion the judge might bear in mind, in an appropriate case, the fact that an attack on a prosecution witness which technically involves an imputation on his character has not been pressed very far or formed a serious substantial item in the defence case. Under the second division one may have a look at the prejudicial effect of cross-examination of the accused as to his past record against the damage done by the attack on the prosecution witness.<sup>20</sup> If the effect of such cross-examination might greatly outweigh the results of the defence's attack, so as to render a fair trial almost impossible, the cross-examination would properly be disallowed.<sup>21</sup> The fact that the accused is conducting his defence in person is clearly a fact that the judge will take into account in exercising his discretion.<sup>22</sup> An allegation against a prosecution witness amounting to an imputation on his character may be made by the accused as a result of questions put to him in cross-examination which are (deliberately or intentionally) calculated to provoke or trap him into making such an allegation. In such an event the judge should refuse an application for leave to cross-examine as a result of the imputation. What amounts to imputations are listed by EDWARD GRIEW in the Criminal Law Review.<sup>23</sup> One need only mention that where the allegation was made as to the conduct of the witness in connection with the matters to which evidence related,<sup>24</sup> or as to the conduct of the witness in the transaction with which the alleged offence was concerned<sup>25</sup> or as a necessary part of the accused's defence to the prosecution case<sup>26</sup> or by way of emphatic denial of the truth of the prosecution evidence, the court will not hold such allegations as imputations on character. EDWARD GRIEW also gives what allegations do not amount to imputation on character.<sup>27</sup> Paragraph (iii) of the Criminal Evidence Act 1898, section 1 (f) deals with the giving of evidence against any other person charged with the same offence.

DISCRETION: JOINT TRIALS AND CROSS-EXAMINATION OF CO-ACCUSED

Generally speaking, if one accused gives evidence on his own behalf, this evidence can be, in so far as it is relevant to his

co-accused's guilt, be used against that co-accused. Likewise what the defendant says in answer to cross-examination by the prosecution can be evidence against his co-defendant. It is a not uncommon situation for one accused's best time of defence to tend to inculpate a co-accused. From the point of view of the defendant, joint trials occasion considerable disadvantages. Not only has he to seek to establish his own innocence but he must avoid inculpating his co-accused by attempting to shift the burden of responsibility onto his shoulders. If he does incriminate his fellow <sup>accused</sup> prisoner even by accident, he is liable to cross-examination as to his character and past record under the section. The trial judge is left with the discretion to allow separate trials or not on application to that effect by the defence counsel. The discretion must be exercised judicially and not capriciously. One cannot avoid the case of MURDOGH V. TAYLOR.<sup>28</sup> Two accused, L and M were charged jointly with receiving stolen cameras. The prosecution alleged that L had tried to sell the cameras which were in a box to a shopkeeper for £100 but that being unsuccessful he had enlisted the help of M who was waiting in a car outside and that M had then suggested that the shopkeeper could have them for £60. The defence of L opened first and L in substance agreed with the prosecution story. M in his defence however said that the shopkeeper had offered £60, he did not know that the box contained cameras and that he had then become suspicious and had left. M was cross-examined by counsel for L and was asked whether he was saying that he had nothing to do with the cameras but that it was L's responsibility entirely. M replied that he was. In view of M's answers counsel for L claimed the right to cross-examine M under section 1 (f) (iii) and the court held that he could do so. The meaning of "Evidence against" was considered even though it had earlier been considered in R. V. STANNARD.<sup>29</sup> A further question for the House of Lords is MURDOGH V. TAYLOR was whether if an accused had given evidence against a co-accused, the trial judge has a discretion to exclude cross-examination under section 1 (f) (iii). The co-accused seeks to defend himself to show that the co-defendant is unworthy of credit or belief and to support that assertion by proof of bad character. If the prosecution sought to cross-examine under this paragraph i.e. section 1 (f) (iii) the court would have a discretion.

POSITION IN KENYA.

In the Kenya Evidence Act (Cap 80, Laws of Kenya) there is a provision which states that if an accused has given evidence against a co-accused, the trial judge has a discretion to exclude cross-examination under section 1 (f) (iii) if the co-accused seeks to defend himself to show that the co-defendant is unworthy of credit or belief and to support that assertion by proof of bad character. If the prosecution sought to cross-examine under this paragraph i.e. section 1 (f) (iii) the court would have a discretion.



a statutory provision, which gives the court the discretion to allow or disallow evidence of bad character. The provision states as follows:

" Provided that the court may in its discretion, direct that specific evidence on the ground of the exception referred to in paragraph (c) of this subsection shall not be led if, in the opinion of the court the prejudicial effect of such evidence upon the person accused will so outweigh the damage done by imputations on the character of the complainant or any witness for the prosecution as to prevent a fair trial." 30

The case of OMONDI AND ANOTHER V. REPUBLIC <sup>31</sup> GIVES a better beginning point. The appellants were charged with robbery with violence contrary to section 296 (2) of the Penal Code. During his cross-examination (conducted through an interpreter) the first appellant in answer to questions from the prosecutor alleged that a police sergeant who had given evidence against him was "deliberately committing perjury." The prosecutor, then put to the first appellant details of his past convictions and these questions were allowed by the magistrate on the ground that the first appellant had put his own character in issue by accusing the sergeant of perjury. In the case of the second appellants, a large part of the evidence against him consisted of the evidence of a handler of a police tracker dog. Both appellants were convicted and appealed. On appeal the main points in issue were whether the questions to the first appellant about his previous convictions should have been allowed by the court and whether undue reliance had been placed on the evidence about the dog. It was held that to challenge the evidence of a witness was not to conduct the defence so as to impugn the character of a witness within section 57 of the Evidence Act 1963 and as such the <sup>line</sup> ~~time~~ of cross-examination which was adopted in this case was unfair to the first appellant. It was held that in any event, the trial judge should have exercised his discretion under the proviso to section 57 of the Evidence Act 1963 to exclude the questions asked by the prosecutor. AINLEY G. J., quoting CHANNEL, J. in R. V. PRESTON (supra) came to the conclusion that to challenge a witness's evidence is not to conduct the defence so as to impugn the character of the character of the witness within the meaning of the provision. He also said the following of the proviso to section 57 (1).

" Whatever can be made of the ponderous proviso to section 57 (1) of the Evidence Act, and it is very difficult to know how a magistrate can apply that proviso without knowing what the previous convictions are, it is we think clear that the court has a discretion to disallow questions about convictions and bad character even if the accused has in strict law let them in by the conduct of his defence or otherwise." 32

To him previous convictions and bad character of the accused must be clear to the magistrate so as to bring to effect the proviso but this has to be limited by the judge's discretion to allow or disallow such evidence. For a judge to know whether or not to exclude evidence of which may be prejudicial to the accused, he has to hear the evidence first. What is the effect of this? One can persuasively and effectively submit that there may still be prejudice since even if the court decides to disallow such evidence, there will still remain the impressions that the court is dealing with a habitual criminal; and this will have to affect the judgement.

The questions then arises as to how far one should go in his defence without coming within the spheres of casting imputations on the character of the prosecution witnesses. The case of RIVERS ATHERSTONE ROYSTON V. REGINAM<sup>33</sup> gives an answer. The appellant was arraigned before a jury in the Supreme Court of Kenya on an information containing nine counts. On three of these counts he was charged and convicted with his co-accused Thomas William Baxter Bollough of conspiracy to defraud contrary to section 312 of the Kenya Penal Code. On three counts he was convicted jointly with Bollough of obtaining money by false pretences contrary to section 308 of the Penal Code. His co-accused did not appeal against any of his convictions. On two counts the appellant was charged alone and convicted of theft by an agent contrary to section 278 (b) of the Penal Code. On the ninth and last count he was charged alone and convicted of attempting to obtain money by false pretences contrary to section 308 and 390 of the Penal Code. In the cross-examination of certain prosecution witnesses by the appellants counsel and in the appellants evidence; imputations were made involving the character of certain prosecution witnesses. Both the appellant and his counsel were endeavouring to put before the jury a general picture that the prosecution witnesses who had advanced money to the appellant were not above evading the law if it be to their advantage and contended that the inducement working on their minds was not any specific representation made by the appellant, but their confidence in him as a person in touch with opportunities from which there might be large profits not always bearing scrupulous investigations. After a perusal of many English cases<sup>34</sup> the learned judge held that where imputations involving the character of prosecution witnesses are an integral part of the defence without which the accused cannot put his case before the jury fairly and squarely, he cannot be cross-examined on his previous criminal history, and secondly that where a provision of local legislation is textually the

same as a provision in an English Act, courts ought to follow decisions of English courts on the English section. This case was also used as an authority in the Ugandan case of ABDALLA KATWE AND OTHERS V. UGANDA 35 where the appellants were charged with conspiracy to commit robbery. The evidence was that, acting on information received, an inspector of police, with five other officers in plain clothes went into his car to patrol a road and saw a car 150 yards in front of him move so as to block his way. Five Africans armed with stones descended and came towards his car. When the officers emerged, the Africans withdrew but were arrested and stones were found in their car and the number plates were greased and smeared with sand. At the trial counsel for the appellants in cross-examination suggested to the inspector that he had fabricated the evidence. Later the prosecution officer applied for leave to cross-examine the fifth appellant. Both the third and fifth appellants admitted previous convictions and the magistrate convicted all the appellants. On appeal the main grounds of appeal of bad character of the third and fifth appellants under section 52 of the Evidence Ordinance and that counsel for the appellants were entitled to make imputations against the character of the inspector at the trial without the appellants being cross-examined on their previous criminal history because it was an integral part of the defence without which the appellants would not have put their case before the magistrate fairly and squarely. After considering the case of R. E. JONES 36 BENNET, J. In dismissing the appeal held that in suggesting to the inspector that he had planted stones in the appellants car and had obscured the number plates with grease and sand, counsel for the appellants went beyond what was necessary for the proper and fair presentation of his client's case before the court; accordingly the magistrate had properly exercised his discretion in admitting evidence of bad character of the third and fifth appellants. In short, then, if the questions raising imputations of character on the part of the complainant or prosecution witnesses are necessary to put the case fairly and squarely before the court, cross-examination of the accused on his own character is not permissible, but if the questioning goes beyond what is necessary, on the ground that the court ought not to believe the witness owing to his conduct outside the evidence given, the accused leaves himself open to the presentation of evidence concerning his own behaviour.

CHAPTER FOUR

CONCLUSION

I. DEFINITION:

It is now settled that "reputation" is not the sole way of evidencing character. Individual estimate was always available and still is. Specific acts of conduct are also available for some purposes, especially to show a witness's character. If "reputation" were the essential relevant fact, these other modes of proving character would be impossible. Since "reputation" is not the sole way of proving character then "disposition" is another. Therefore, character includes both "reputation" and "disposition;" and it would be of some help if the distinction between the two was brought out clearly in the Act and their definitions given. The position in Nigeria is that character means "reputation" as distinct from "disposition." This leaves alot to be desired. Taking into account the fact "reputation" is a fact ..... it is the popular belief of the nature of a man's character" it will be erroneous to leave out the disposition element. "Disposition" being defined as "the frame of mind, nature or temperament," may be seen as the catalyst leading to the actus reus from which "reputation" is learned. If this be accepted as true, then we can hardly have "reputation" without "disposition." (Apart from the few cases such as automatism, involuntary acts, etc - where the "disposition" may not be in existence) The meaning of character as given by CROSS also offers some problem - that character means "disposition" as distinct from "reputation". If the definition of "disposition" given above be accepted as the right one, then there is no way one's character may be known. The "disposition" has to lead to some act from which the "reputation" of the person will be learned. I suggest that the Kenyan definition of character (though it is more of what the elements of character are) is to be viewed favourably.

II. SIMILAR FACT EVIDENCE

The general rule is that such evidence is not admissible except to prove guilty knowledge and intent on the part of the prisoner or to prove a system or course of conduct, or to rebut a defence of accident or mistake or other innocent condition of the mind. Evidence cannot be given for the prosecution to prove that the defendant is of bad character or has propensity to commit criminal acts of the same nature as the offence charged.

But in the cases where a guilty knowledge or intention or design is of the essence of the offence, proof may be given that the defendant did other acts similar to those which form the basis of the charge. Since evidence is admissible to show not that the defendant did the acts which form the basis of the charge, but that he did them intentionally and not accidentally or inadvertently or innocently or that they formed part of a system. In view of the strong prejudice that would be created in the mind of the judge by evidence of this class, which shows that the prisoner has been guilty on another occasion of a similar offence, the greatest care ought to be taken to reject such evidence unless it is plainly necessary to prove something which is really in issue. Many lawyers are prepared to argue that the fact that a man is predisposed towards a certain type of action is very cogent evidence tending to show that he has again committed the same sort of act. This is not conclusive; but it is very pertinent and no detective worth his salt would ignore it when seeking the perpetrators of a crime. What no one doubts is that in a criminal trial such evidence is not usually admissible; but that is not because it is of no probative value. It is because we tumble over backwards and at times too far to avoid the danger "that a dog may be hanged for no better reason than that it has a bad name". We therefore tend to exclude evidence of the accused's character. That that is the real reason for its exclusion and not its alleged irrelevance is demonstrated by the fact that evidence of the accused's good character is freely admitted. Relevance of similar fact evidence on the issue of intention will usually be solely and directly via propensity. This as was mentioned in chapter 3 has its dangers. Proof that the accused has on other occasions done one or several acts similar to the one in issue is clearly by itself completely incapable of establishing that he has committed the crime with which he is being charged and therefore it is irrelevant. One can imagine a situation where two criminals have a tendency of committing theft crimes in a particular way - but who may be operating in different parts of the city. If it turns out to be that only one of them has a record and not the other, then the one with a record might end up being tried for acts of his fellow criminal. This can lead to real injustice. As a whole it is not hard to get another person with the same evil propensity. Other criminals may imitate a well known criminal's way of perpetrating crimes just to incriminate him, especially if they have no records themselves. Similarity should not be the sole or only (way) ingredient of determining whether one is guilty of a similar crime - unless of course the respect in which the similarity is shown is itself quite unusual.

Similarity is generally inadmissible to the accused even though there may be some ground for holding it technically admissible. The decision must then be left to the judge.

Other variables such as peculiarity, relevance and credibility should be considered for reasons already mentioned in chapter three. Similar fact evidence often tends to limit the number of persons likely to commit the crime but this does not mean that we cannot have more than one person who are likely to commit the crime. As such where the similarity is unusual, it must be so marked as to suggest a special "System" or "technique." Some special connection must be proved - and if it is not possible, then evidence of similar facts should be done away with as it, more often than not, can lead to miscarriage of justice, raises <sup>many</sup> collateral issues, takes the accused by surprise and may encourage the police "not to search for the real criminal but instead to discover someone with possible opportunity and a record; and also because it may be possible for the criminal to cover his track by committing the crime in circumstances where another man with a record may be suggested. Its a hard fact that some criminals reform their ways of life and it would be very absurd to attribute to him his past record. In criminal cases courts ex abundant (and really for no other reason) will generally refuse to admit evidence tending to show that the accused is of bad character.

### III. JUDICIAL DISCRETION.

There is no statutory judicial discretion under the English Criminal Evidence Act, 1898 section 1 (f), to allow or disallow evidence of bad character that may be prejudicial to the accused. As established earlier the dicta relied upon for the existence of such discretion, English courts have gone ahead to formulate some principles to guide them in the application of such discretion. The most disturbing question has been what test should be applied in admitting or dismissing relevant evidence. In an array of cases, different views have been expressed in different terms. In R. V. COOK<sup>1</sup> LORD DEVLIN said that such evidence should be excluded if the effect of the evidence outweighs its probative value. LORD DU PARCQ in NOOR MOHAMMED V. R. had this to say;

" The judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as the purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion

and the sense of fairness of the judge." 2

Section 58

It is clear from this that the judges have extended the discretion (which is not statutory but a rule of judicial practice) to exclude ~~that~~ where evidence of similar facts. The court of Criminal Appeal had decided that where evidence is tendered of a previous conviction, to prove guilty knowledge against a receiver of stolen property, the judge has a discretion to exclude that evidence if its prejudicial effect would make it impossible for the jury to take a dispassionate view of the crucial facts of the cases 3 The House of Lords in R. V. CHRISTLE 4 said that such evidence has to be excluded if it has little or no evidential value. The question that is bound to arise is how the court can come to the conclusion that the evidence tendered is of little evidential value, or the evidence is gravely prejudicial or the prejudicial effect outweighs its probative value. It has to hear the evidence first; and on this point one can effectively and convincingly argue that even if the evidence is declared to be of no probative value or that it is gravely prejudicial, there will always remain an impression on the mind of the judge which still can affect the judgment or lead to disastrous effects. Under the proviso to section 57 (1) of the Kenya Evidence Act (Cap. 80) discretion is given to the court to allow or disallow evidence of bad character, in relation to paragraph C only. But it is not uncommon to find the discretion being exercised in cases of similar fact evidence and in allowing cross-examination between co-accuseds. Commenting on the proviso, AINLEY, G. J. in OMONDI V. REPUBLIC came to the conclusion that the discretion could not be exercised without first knowing what the previous conviction of the accused are. But as stated above the exclusion of such evidence in most cases leaves the judge with the impression that he is dealing with a habitual criminal and this may be prejudicial to accused. I would suggest for these reasons, that since the discretion, more often than not, may lead to the miscarriage of justice or be prejudicial to the accused, it should be done away with. The state of affairs should be that no evidence of similar fact or previous convictions should be given in evidence and if this be done, there will be no need of such discretion. On the other hand unless it is quite necessary co-accused persons should be tried separately because of the disadvantages of joint trials as clearly expressed above.

CHAPTER ONE:

FOOTNOTES:-

1. Section 58
2. P. 192
3. 88 N. E. 1031
4. (1865) Lc & Ca 520
5. GROSS ON EVIDENCE (4th ed; Butterworths & Co. Ltd., London, 1974)
6. Ibid; P. 309
7. THE LAW OF EVIDENCE IN NIGERIA (1st ed; African Universities Press, Lagos, 1960)
8. Ibid; P. 99
9. Pleading, Evidence and Practice in Criminal Cases. P. 306 Paragraph 553 (39th ed; Sweet & Maxwell, London, 1976)
10. 30 Cr. App. R. 40
11. Ibid; P. 52
12. HANMELMAN, 'Evidence of Evil Propensity' 12 Mod. L. R. 4
13. WIGMORE ON EVIDENCE P. 447 - 448 (3rd ed; Little, Brown & Co., Boston, 1970)
14. GROSS ON EVIDENCE, op Cit. P. 309
15. (4th ed; Sweet & Maxwell, London 1971)
16. P. 424
17. P. 2349
18. Ballentine Law Dictionary P. 358 (3rd ed; The lawyers Co-operative publishing Co; Rochester, N. Y., 1969)
19. P. 309
20. 10 Cox C. C. 25
21. SARKAR ON EVIDENCE, P. 543 (12th Ed; S. C. Sarkar & Sons (Private) Ltd., Calcuta, 1971)
22. THE LAW OF EVIDENCE IN NIGERIA, Cit. 102
23. Supra; note 20
24. Section 1 (f)
25. (1955) 3 W. L. R. 320
26. R. V. ROUSE (1904) 1 K. B. 184.
27. 1056 Crim. L. R. 244 - 245, 'Putting Character in Issue.'  
by J. D. NEWTON.
28. OWEN AND CHIFFER, Supra, note 10 at P. 106
29. HENNING BAKER ADEMI V. BOSTON (1984) 23 L. A. C. 511.



CHAPTER TWO

FOOTNOTES:

1. R. V. RODLEY ( 1913 ) 3 K. B. 468
2. HEYDON: EVIDENCE, CASES AND MATERIAL ( 1st Ed. Butterworths, London, 1975).
3. (1952) A. C. 694
4. R. V. DOUGHTY ( 1965 ) 1 W. L. R. 331
5. R. V. MASON ( 1914 ) 10 Cr. App. R. 169
6. (1894) A. C. 59 at P. 65
7. (1949) A. C. 182
8. (1915) 11 Cr. App. R. 229
9. Supra, Note 3
10. GOWEN AND CARTER, ESSAYS ON THE LAW OF EVIDENCE ( Clarendon Press, Oxford, 1956)
11. L. H. HOFFMAN, 'Cross-examination of the Accused' 83 L. Q. R. 187
12. (1961) E. A. 327 ( C. A. )
13. (1955) 28 K. L. R. 243
14. Ibid;
15. (1956) 23 E. A. G. S. 512
16. (1951) 18 E. A. G. A. 288
17. P. B. CARTER, 'ADMISSIBILITY OF EVIDENCE OF SIMILAR FACTS' 69 L.Q.R. 84
18. HAMMELMAN, 'EVIDENCE OF EVIL PROPENSITY' 12 Mod L. R. 3
19. HAMMELMAN, Op. Cit., P. 4
20. (1973) 58 Cr. App. R. 169
21. (1952) 2 Q. B. 911
22. EGGLESTON, EVIDENCE, PROOF AND PROBABILITY (1st Ed; Weidenfeld and Nicolson, London, 1978)
23. R. V. O'HEALLY (1953) V. B. R. 30
24. (1918) A. C. 221
25. (1914 - 1915) All E. R. Rep. 262
26. HEYDON, P. 260
27. R. V. BAILEY (1924) 2 K. B. 300 at P. 305
28. D. W. L., COMMENT ON R. V. SLENDER, 54 L. Q. R. 335 at P. 336
29. (1906) 2 K. B. 389
30. GOWEN AND CARTER, Supra, note 10 at P. 146
31. MOHAMED SAEED AKRABI V. REGINAM (1956) 23 E. A. C. A. 512.

34. Ibid;

35. (1964) E. A. 477

36. (1929) 17 Cr. App. R. 117

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CHAPTER THREE

FOOTNOTES:

1. Chapter 2
2. (1970) A. C. 308.
3. (1968) 2 All E. R. 509, A. 3 Footnote 20
4. Supra, note 3 at P. 527
5. R. V. FLETCHER (1913) 8 Cr. App. R. 53 at 56
6. MAXWELL V. D. P. P. (1935) A. C. 309 at 321
7. R. V. POLYNE (1963) 1 W. L. R. 637.
8. JONES V. D. P. P. (1962) A. C. 635 at 662 per LORD REID
9. (1913) 8 Cr. App. R. 249
10. (1966) A. C. 591 at 627, F.
11. (1912) 2 K. B. 464
12. BERNARD LIVESEY, 'JUDICIAL DISCRETION TO EXCLUDE PREJUDICIAL EVIDENCE' 1968 26 Com. L. J. 292.
13. (1914) A. C. 545
14. (1944) A. C. 319
15. 1959) 2 Q. B. 340
16. Ibid. P. 347
17. (1920) 1. K. B. 213
18. (1960) 44 Cr. App. R. 181
19. MR R. V. ROUSE (1904) 1 K. B. 184
20. R. V. COOK (1959) 2 Q. B. 340 at 345
21. R. V. JENKINS (1945) 31 Cr. App. R. 1 at 15
22. R. H. HUDSON (1912) 2 K. B. 464 at 470 per LORD ALVERSTONE, C. J.
23. EDWARD GRIEW, 'IMPUTATIONS ON THE CHARACTER OF THE PROSECUTOR OR WITNESS FOR THE PROSECUTION - A RESTATEMENT' 1961 Crim. L. R. 149-150
24. R. V. PRESTON (1909) 1 K. B. 565
25. R. V. MORGAN (1910) Cr. App. R. 157
26. R. V. BRIDGEMATER (1905) 1 K. B. 131
27. EDWARD GRIEW, Supra, Note 23 at 151
28. (1965) 2 W. L. R. 425
29. (1964) 1 All E. R. 34
30. Proviso to Section 57 (1)
31. (1967) E. A. 802
32. Ibid; at 806
33. (1953) E. A. C. A. 147
34. Ibid;
35. (1964) E. A. 477
36. (1923) 17 Cr. App. R. 117



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