

THE RED LION LECTURES 2022

WEBINARS

'How the Past Comes Back to Haunt You': an update on Bad Character

TUESDAY 26 April 2022

18:00 - 19:00

REGISTRATION REQUIRED

PANELLISTS



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“How the Past Comes Back to Haunt you”: an update on Bad Character

— 26.04.22 —

Presented by Jeremy Benson QC & Bethan Rogers

S100 Criminal Justice Act 2003

S100 (b) CJA 2003 “It has substantial probative value in relation to a matter which - :

- i. is a matter in issue in the proceedings, and
- ii. is of substantial importance in the context of the case as a whole”

Example: R v SD – first instance, awaiting permission to appeal.

Two very important cases to keep in your back pocket:

R v Braithwaite [2010] EWCA Crim 1082

Nature of material. Mere Allegations almost never admissible. Inevitably only convictions or cautions.
Relates to both S100 & S101 CJA 2003.

R. v Brewster (Neil) [2010] 2 Cr. App. R. 20 §22 &23

Substantial probative value re: credibility. The court must consider:

1. The importance of the evidence given by the witness in the context of the case.
2. “Whether the bad character evidence is reasonably capable of assisting a fair-minded jury to reach a view whether the witness’s evidence is, or is not worthy of belief.” The convictions do not have to be for offences of dishonesty.

R v Aam [2021] EWCA Crim 1720

Facts – this was an appeal against a conviction for rape. The appellant and complainant were married and evidence of his reprehensible and controlling behaviour within the marriage had gone before the jury, as evidence that had to do with the alleged facts of the offence

Issue raised – whether a judge should give a bad character direction where evidence of reprehensible behaviour has been admitted under s.98 Criminal Justice Act 2003

The Court of Appeal considered the previous decision of **R v MA [2019] EWCA Crim 178**. It was concluded that this was the model for how a jury should be directed in such situations

Ruling – appeal dismissed

The Court of Appeal reiterated that, the purpose of the directions suggested in MA was to ensure that the jury did not use the particular evidence in an improper way, which would mean either (a) using disputed evidence of reprehensible behaviour without first accepting that evidence, i.e. being sure of it,

R v Aam [2021] EWCA Crim 1720

(b) treating evidence of reprehensible behaviour as supporting a disputed part of the prosecution case it could not reasonably be said to support, or

(c) convicting the defendant on a charge the jury were considering wholly or mainly on the basis of the evidence of reprehensible behaviour.

R v Dixon-Kenton [2021] EWCA Crim 673

Facts:

DK was convicted of the murder of Solomon Small. The killing took place in Brixton on 15.8.2019. DK stabbed him with a large Kitchen knife in the chest. There were five other stabs wounds including defensive injuries to the arms. Five days later he surrendered to the police and was identified by an eye witness. When interviewed he made no comment.

Just before trial the prosecution served evidence from a police officer (PC Barr) with experience of South London gangs. The evidence supported the contention that DK and the deceased were members of rival gangs. There was also evidence adduced of other individuals' affiliations with gangs. Against defence objections, the judge ruled the evidence admissible.

R v Dixon-Kenton [2021] EWCA Crim 673

The defendant had no previous convictions and denied being a member of the gang. His case was he was acting in self-defence, fearing an attack upon him by S and members of his gang; alternatively he lacked intent and/or lost control.

Leave to appeal was given on 2 grounds:

1. That expert evidence (PC Barr) ought not to have been admitted.
2. That the motive was the trigger event of the killing of JO was:
 - i. Not sufficiently supported by admissible evidence.
 - ii. Not put to D in cross-examination.
 - iii. Not accompanied by the required level of disclosure.

R v Dixon-Kenton [2021] EWCA Crim 673

Findings:

1. PC Barr was undoubtably an expert.

But: “Disagreements may arise when an expert moves from the general and contextual to the particular. It did not follow from PC Barr’s undoubted expertise in Lambeth gangs that he is entitled to assert, without more, that X or Y was a member of a particular (or any) gang. That opinion would have to be based on admissible evidence which could be tested in the usual way and Which also satisfied the requirements of the CJA.

2. Gang evidence admissible to prove motive. See *R v Myers [2016] 1 Cr. App R.11*, *R. v. Awoyemi [2016] 2 Cr App R 22* (Reviews previous authorities)

Abdi v R [2022] EWCA Crim 315

Facts:

A group attack on 16 year old boy in Coventry. There was no dispute that the perpetrators were guilty of murder. The evidence against the defendants was circumstantial. The prosecution case was that this was gang related. The issue in the case was identity.

Prosecution were given leave to call evidence from a local officer who explained the history of the two gangs allegedly involved in the incident. The officer was not permitted to give evidence of gang affiliation based on hearsay material. Such proof required direct admissible evidence.

Other evidence included:

The defendant associating with RB7 the gang in question in drill music videos.

The defendant being shot twice and not co-operating with the police.

The deceased living in the opposing gangs post code.

The shouting of “it RB7” at the time was admissible under “Res Gestae”.

The grounds of appeal were that there was no proper evidence of gang rivalry in Coventry which manifested itself in serious violence, and that there was no clear evidence that the stabbings were gang related.

Abdi v R [2022] EWCA Crim 315

It was accepted that appearance in videos and the use in those videos of violent lyrics should not automatically lead to the conclusion that someone is a gang member:

“But that is not the same as saying that they cannot lead to that conclusion. So long as appropriate caution is advised by the judge (which is what occurred in this case) a jury is entitled to consider such material. If there was an alternative explanation for Abdi’s appearance in the videos, he did not choose to give it.” [26] per William Davis LJ

In relation to the videos, the Court was satisfied that they provided an evidential foundation for proving that D was associated with RB7.

Abdi v R [2022] EWCA Crim 315

The Court also confirmed that the evidence of A having been shot (and having refused to disclose any details of the incidents or to make witness statements) was admissible. Evidence occurring after the incident on trial could be evidence to do with the facts of the offence. These were probative of A's involvement in gang related violence.

Gang evidence

Gang evidence is not admissible unless it is relevant to an issue in the case. Even if gang evidence is relevant, it would be excluded if its prejudicial effect outweighed its probative value. Evidence of motive for an offence always will be relevant, and can be adduced under S98 CJA 2003.

Gang evidence in relation to an individual may be relevant where identity is in issue. Gang evidence can be admissible as evidence to do with the alleged facts of the offence (S98) or as bad character evidence via S101(1)(d) of the CJA 2003 or via both routes. Whichever route was taken, the judge is required to consider whether admitting the evidence would have such an adverse effect on the fairness of the proceedings that it should not be admitted.

R v Altun [2021] EWCA Crim 1844

Notable for the fact that it shows the variety of sources that bad character evidence can come from.

Facts - the defendant had been convicted of murder. At trial, he had accepted causing the injury that led to death but asserting he had been acting in proportionate self-defence.

Grounds – this case was appealed on two grounds

- 1) the Judge had been wrong to admit the defendant's medical records, as this was argued to have been in breach of the Data Protection Act 2018

R v Altun [2021] EWCA Crim 1844

2) The Judge erred in allowing such material to be adduced as it was unduly prejudicial and ought to have been excluded under s.101 (3) Criminal Justice Act 2003. Namely, that “*The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*”

Ruling – appeal dismissed

R v Hussain [2021] EWCA Crim 870

Facts – the defendant had been convicted of affray and s.18 wounding with intent. The case arose out of a background of significant altercations between two rival families, the complainant being a member of one of those families. The defendant asserted he had been falsely identified due to this background.

Grounds – the conviction was appealed on 2 grounds.

- 1) The Judge erred in only granting the s.100 application in part, and allowing only a conviction for perverting the course of justice to be adduced.

R v Hussain [2021] EWCA Crim 870

2) The Judge further erred by allowing the Crown to adduce the defendant's previous convictions under gateway g, when one has regard for the very limited extent by which the defence were allowed to attack the prosecution witness' character.

Ruling – appeal allowed on the first ground.

Useful references – R v Brewster and Cromwell [2020] EWCA Crim 1194 and R v Clarke [2011] EWCA Crim 939

R v Colecozy-Rogers [2021] EWCA Crim 1111

Facts:

D (17 years old), became involved with an argument with the deceased (16 years old). The deceased suffered a single stab wound to his heart. This all took place in a closed room. The defences were accident, self-defence, and/or lack of intent. The defence applied successfully in part to adduce evidence of previous aggressive behaviour by the deceased under S101(1)(b) CJA 2003. The prosecution then successfully applied to adduce two previous convictions for robbery when D was 15 under S101(1)(g) CJA 2003.

R v Colecozy-Rogers [2021] EWCA Crim 1111

Ground of Appeal:

Although counsel accepted that S101(1)(g) had been engaged, she argued that as the bad character admitted related to the deceased, D's bad character should not be admitted, as the deceased's credibility was not in issue. Counsel argued that the prosecution had not applied to adduce the material under s100(1)(d) indicating either a propensity to commit violence or untruthfulness. Thus evidence of the applicant's bad character should only have been admitted if it could provide the jury with material on which they could form their judgment as to whether the applicant was any more worthy of belief than the person whose character he had attacked. That means, counsel submitted, that the only legitimate purpose of admitting evidence of the applicant's bad character would be to assist the jury to make a comparative analysis.

R v Colecozy-Rogers [2021] EWCA Crim 1111

Ruling:

Where evidence is admitted through gateway (g) it is admitted because it is relevant to the general credit of the defendant, and its purpose is to show that the defendant's evidence is not worthy of belief. Where there is a conflict of evidence between the defendant and a prosecution witness whose character he has attacked, then evidence of the defendant's bad character will be relevant to the jury's assessment of the credibility of the defendant in relation to that conflict. But it does not follow that the evidence can only be admissible for the purpose of making precisely that kind of comparison. The well-established principle that the gateway may be opened where the attack is on the character of a deceased person is inconsistent with the limitation for which Counsel contends.

