

Admissibility of Drill Music Handout
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Legal Gateways

Section 98 Criminal Justice Act 2003

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

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

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

"Misconduct" is defined in section 112 of the Act as: "the **commission of an offence or of other reprehensible behaviour**". What is capable of constituting reprehensible behaviour is fact specific and has been held to include membership of a violent gang, R v Lewis [2014] EWCA Crim 48.

Exclusionary Power

Section 78 Police and Criminal Evidence Act 1984

(1) In any proceedings the court **may refuse to allow** evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, 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**.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

Section 101 Criminal Justice Act 2003

"In criminal proceedings evidence of the defendant's bad character is admissible if, **but only if** –

- a) all parties to the proceedings agree to the evidence being admissible;
- b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross examination and intended to elicit it;
- c) it is **important explanatory evidence**;
- d) it is relevant to an important matter in issue between the defendant and the prosecution;
- e) it has **substantial probative value in relation to an important matter in issue between the defendant and a co-defendant**;
- f) it is evidence to correct a false impression given by the defendant; or
- g) the defendant has made an attack on another person's character.

Important Explanatory Evidence – section 101(1)(c)

This is an important gateway for the prosecution and there is significant overlap with evidence that 'has to do with' the alleged facts of the offence.

Section 101(1)(c) should be considered together with section 102 which provides that:

- “For the purposes of section 101(1)(c) evidence is important explanatory evidence if
1. without it, the court or jury would find it **impossible or difficult properly to understand other evidence** in the case, and
 2. its **value for understanding the case as a whole is substantial**.

Important matter in Issue between the Defendant and the Prosecution – section 101(1)(d)

Section 103(1) provides that matters in issue between the defendant and the prosecution include –

1. the question **whether the defendant has a propensity to commit offences of the kind with which he is charged**, except where his having such a propensity makes it no more likely that he is guilty of the offence;
2. the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant’s case is untruthful in any respect.

Important Matter in Issue between defendant and co-defendant – section 101(1)(e)

This is the gateway intended to deal with ‘cut-throat’ defences and once the evidence meets the criteria for admissibility, there is no discretion to exclude.

Use of Bad Character Evidence

The significance or weight to be attached to bad character evidence is a matter for the jury. Of note, once evidence has been admitted through one of the gateways, it can be used for any purpose for which it is relevant *R v. Highton* [2005] 1 WLR 3472. However, the jury ought to be given directions by the judge as to the reason why the evidence was admitted and its relevance and use in their deliberations, see *Campbell* [2007] EWCA Crim 1472:

“35. If the jury is told in simple language and with reference, where appropriate, to the particular facts of the case, why the bad character evidence may be relevant, this will necessarily encompass the gateway by which the evidence was admitted....

37. **Where evidence of a criminal or otherwise blameworthy act on the part of the defendant is adduced because it bears on a particular issue of fact and this evidence has no bearing on the defendant's propensity to commit the offence charged, this should be made plain to the jury...**

43. It is, of course, clearly highly desirable that the jury should be **warned against attaching too much weight to bad character evidence** let alone concluding that the defendant is guilty simply because of his bad character.”

Fairness

Bad character applications are subject to section 101(3):

“The court **must not admit** evidence under subsection (1)(d) or (g) if, on 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**".

Illustrative Cases

Saleem [2007] EWCA Crim 1923

Section 18 case regarding admission of rap lyrics as to do with the facts of the case, i.e. motive, however, conviction otherwise safe.

A number of Rap lyrics had originally been downloaded from the Internet and were contained in files on the appellant's computer together with 2000 files relating to rap music, one rap lyric had been altered significantly by the appellant.

The prosecution relied on a three-line paragraph in a five-page printout of the lyrics in the following terms:

"Im gon make history, 1stly dey gon call me mister an dey gon say I dissed ya, I hav 2 b carfull hu I talk 2 becos ur bird wil be da listner, 2ndly February 24th my birth day im gon make it ur worst day, 3rdly do I have 2 have u layin in emergency 2 have dem stitch ya?"

The amended version of the lyrics, including the short passage set out above, had been created on 7 November 2004; the computer file containing it had last been accessed on 13 February 2005, 10 days before the attack. The significance of this part of the lyric was that it referred to the appellant's birthday on 24 February and that an assault resulting in significant injuries was planned for that day.

At the conclusion of argument, the judge gave a short ruling in the following terms:

" I do not see any unfairness. I am against you [the appellant]. It is clear it is relevant. If nothing else, it is relevant to rebutting the defence of innocent presence."

The Court found there to be an insufficient factual nexus between the lyrics and the offence (paragraph 32):

"We do not, however, consider that the evidence in relation to the rap lyrics is admissible as "to do with the facts of the offence". In our view, there is **insufficient connection in time with the facts of the offence; these were composed three months earlier, even though accessed about 10 days before the attack. Nor were they evidence of a motive or reason for committing the offence.** In short, applying the **ordinary meaning of the words "to do"**, they were not sufficiently connected with the facts of the offence to be "to do" with them."

O [2010] EWCA Crim 2985

Possession firearm with intent

The prosecution case was that O was in possession of a firearm and ammunition on that occasion, with intent to endanger life, that he was a member of a violent and territorial gang and in support of that contention at trial they relied upon YouTube

video which showed him rapping with many others and using words which were said to relate to guns and gangs.

O's case was that the gun was not in his possession and that he had no knowledge that it was in the taxi although he accepted that he had noticed it before he left. He said the YouTube video was concerned was an attempt to gain attention in the commercial music market and the references to guns and violence were metaphorical.

The admissibility of this evidence as propensity evidence was challenged, as was the police officer's expertise in interpreting lyrics. The Court considered this evidence was admissible and concluded as follows, paragraphs 24-29:

"So far as section 101(3) is concerned, it appears that the judge in his ruling did not give specific attention to it, but **we consider that prejudicial as such evidence necessarily is, it would not have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. It was not after all in dispute that the appellant was the person who he appeared to be on the video, or that the video was not what it was, but the issue was, subject to some possible disputes about particular wordings in it, whether the video was part of art or part of life.** The submission, both at trial and on appeal today was, in so many words, that it was part of art. **The issue was whether that was correct or whether it was rather part of the life of warring gangs in south London, whatever artistic gloss might be put upon that way of behaving.** Thus, the publication of similar videos, using very similar gun culture language from artists such as Ice Cube and Cypress Hills was in evidence and, as we have said, although there was some dispute as to the meaning of some of the language, such as who "Uncle P" might be, or indeed what Uncle P might be, nevertheless that was not really where the issue over the video lay. Thus, there were numerous references to the Blue State, which it was common ground was a reference to Lewisham. It is referred to in the mouth of the appellant, as "my fucking set" or "my manor" and there is explicit language about blowing brains out and "fuck a leg shot aim for his weak top" and so forth.

Therefore we consider that this was properly admitted as relevant. **We reject the submission of Mrs Smullen that it was irrelevant and too remote as possibly being too distant in time at a distance of some 6 months or so before the arrest, or as being too remote because it involved no specific threat to anyone in particular on any particular occasion.**

It was certainly, we consider, relevant because it went to the appellant's disposition or propensity and because it was relevant to the important matter in issue of whether the gun found at his feet but not mentioned to the taxi driver was in his possession with the intent to endanger life.

We turn therefore to the second ground of appeal, which was that **WPC Haynes' comments on the lyrics** were improperly admitted as the opinion evidence of a non expert. We consider that, as far as it goes, this ground is correct. It is perfectly true that WPC Haynes was put forward by the prosecution as **someone with local insight and experience.** We consider that much of the evidence that she gave about the situation of gangs in the locality and so forth was factual evidence, it might have

been challenged evidence but it was factual evidence, which was entirely admissible as coming from a police officer with local experience. It may even have been, if the ground had been properly laid, that that local experience would have been sufficient for her to have given evidence as a local expert. **The word "expert" is slightly strange in these circumstances because it is, of course, very far removed from medical expertise or scientific or commercial expertise, but nevertheless there is no reason why a local person may not have expertise in a local dialect, and, as we have said, if the ground had been properly laid, it may well be that WPC Haynes was capable of being regarded as an expert in that limited sense about the language and patois of south London. However, the ground was not laid and it was accepted from the beginning and accepted by her in evidence that she was not an expert. In those circumstances there was no basis for her to give opinion evidence, that is to say evidence that was not factual, evidence, which may have lain outside the experience of a normal jurymen.**

Nevertheless, **even if some of her observations trespassed upon this ground of inadmissibility, the fact remains that much of the language of the lyrics was common ground.** It was, as we have said, common ground that the lyrics as a whole were lyrics about guns and gun culture, as indeed other commercial lyrics have been, and that, as we have also said, **the real issue between Crown and defence was whether this was art or life.** That was an issue, which we consider was plainly in the **hands of the jury** and the judge made very little of the detail of WPC Haynes' evidence...

In the light of the very strong evidence of possession against the appellant and much other evidence besides of his participation in an allegiance to gang and gang culture in south London, we consider that **the extent to which WPC Haynes' evidence may here and there, in dealing with particular words or phrases of the lyrics of the song, have trespassed beyond the general admissibility of her evidence would not, by any means, have affected the safety of this conviction.** Therefore, although in principle we have accepted to some extent the basis of Mrs Smullen's second ground, we consider that these convictions remain safe. We therefore dismiss this appeal."

Alimi [2014] EWCA Crim. 2412

Reliance rap videos and BBM messages against co-accused to prove gang membership and motivation for shooting incident towards police.

Case at trial was alibi and adduced positive evidence as such. Two videos were adduced to rebut his defence.

Content of videos and role significant: two songs, Here I Am [YouTube Rimzee-Here I Am] and Keep Stacking [YouTube-Keep Stacking] (Reference trappings of drugs enterprise, money, cars, designer clothes etc.). Not rapping of gang related lyrics by Alimi. Described as an extra, drinking and swaying to music.

Evidence, if accepted, not demonstrative he was a member or associated with a gang, which exhibited violence or hostility with police or links to the police.

Awoyemi [2016] EWCA 668

Counsel sought to focus upon the key issues of presence and participation and challenge the forensic and provable links between the alleged gang-related background to this shooting to establish if this evidence was relevant and probative and argued that the effect of admitting this evidence was simple prejudice (paragraph 31).

See paragraph 33:

“In each case, the gang affiliation evidence provided a link between them and a gang that gloried in violence and the use of firearms, mourned murdered friends and threatened violent retribution for those who crossed them. The Crown could thereby establish a possible motive for the shooting, an association with firearms and lethal violence and could negative innocent presence and association. **The evidence was prejudicial but inevitably so and not unduly so. It went far beyond simple membership of a gang, the love of rap music, hyperbole or appearance on a video. It indicated the extent to which the individuals concerned had signed up to gang and gun culture.**”

Rashid [2019] EWCA Crim. 2018

Possession of firearms with intent

Voir dire

PC Saban evidence accepted, officer with **3 years experience** policing Newham gangs.

Judge ruled interpretation of lyrics subject of cross-examination. Expertise not questioned.

Ruling challenged on the basis that PC Saban's evidence was based: **"only on an interpretation of music videos, knowledge gained from social media and discussions with people who were not identified."** (paragraph 34)

With reference to one drill video admitted, the Court did say at paragraph 58 that it may not have been admitted but for the nature of the allegation involving firearms:

“The second item of evidence to which objection is taken is the admission of the video "Time Will Tell" which was said to link directly to the murder of the 14-year-old Corey Davis Junior. Mr Pardoe submitted that it was highly prejudicial and such prejudice could not be cured by any direction. The judge had ruled that the video was admissible and although the parties agreed to the removal of certain aspects of the gang evidence, this did not include reference to Corey Davis Junior's shooting in the drill video. We accept that **it would not have been admissible but for the fact that the conspiracy related to guns.** However, it was. As such, it was material because it **showed KS, not involved in the shooting** of Corey Davis Junior, **but in a video exhorting that shooting.** In our view there was no objection to the admission of this evidence.”

Vasilieou [2020] EWCA Crim 742

Appeal against sentence.

Judge had not delayed sentence pending outcome of NRM.

Judge entitled to use drill videos to find V was a “willing and rising member” of a violent gang, thereby aggravating his sentence.