



Part 6: Gangs: how to exclude so-called gang evidence in criminal trials and challenging the joint enterprise narrative

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Excluding “Gang Evidence”

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Garden Court Chambers

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The Problems Inherent in Gang Evidence

- Racialised term
- Over-used
- Over-reliance on police “experts” where evidence becomes entirely one-sided
- Stigmatises young black men because of friends they choose to have or music they listen to
- Uses expressions of opinions on social media which do not go to the issues in criminal cases
- Over 80% of knife-crime incidents resulting in injury to an under 25-year-old in London were found to be non-gang related yet political pushing of “gang wars” continues to increase
- Vague term relying on police discretion and which in turn allows further racialisation of the term
- 72% of those responsible for gang-flagged violence (as defined by police) were black



Gang Matrix – What is it

- “Tool” created in a highly politicised response to the 2011 London riots
- Purports to be a risk management tool
- Individuals placed on the matrix listed as nominals with green, amber or red rating
- In October 2017, almost 4000 individuals were placed on the matrix, 78% were black
- Youngest included “nominal” was 12 years old and 99% male
- Metropolitan police figures 27% of those responsible for youth violence are black
- An incredibly worrying disconnect



Gang Matrix – Amnesty Report May 2020

Amnesty has recently published a report detailing the endemic problems and structural racism embedded in the Gang Matrix.

“Trapped in the Matrix”

https://www.amnesty.org.uk/files/2018-05/Trapped%20in%20the%20Matrix%20Amnesty%20report.pdf?lJSxllcKfkZgr4gHZszovW8JZoW3V_PD=



TRAPPED IN THE MATRIX

**Secrecy, stigma, and bias in
the Met's Gangs Database**



Trapped in the Matrix – Amnesty Report

- 35% of those included in the matrix have never committed any serious offences
- 75% have been victims of violence themselves
- 80% 12-24 years old
- 87% from black, Asian and minority ethnic backgrounds



Trapped in the Matrix – Amnesty Report

- Many of the indicators used to identify “gang members” simply reflect elements of youth culture and identity that have no link to serious crime
- No clear processes to correct errors or make amendments to the matrix
- No method of formal challenge for individuals placed on the matrix or those wanting to be removed
- No form of notification to individuals placed on the matrix
- Given information sharing, increases risk of discrimination which is exacerbated by its use in the CJS



What you can consider doing in your cases

- Gain as much information as possible from support workers, social workers, school records, family and your client (if consent to discuss the case)
- Consider instructing your own expert if the Crown are relying on a police officer to establish a gang background and/or association or if the Crown seek to rely on inclusion in the gang matrix
- Challenge the prejudicial methodology underlying the police “expert” evidence
- Rely on the Lammy review or other independent reports into the over-use of gang evidence
- Rely on the Amnesty report and other reports on specific problems with the Gang Matrix
 - Section 7 deals with how the gang matrix may breach human rights laws



What practical steps can you take if opposing the application is bound to fail

Propose realistic alternatives and ensure the judge is aware there are a number of alternatives available in performing the necessary balancing exercise:

- Draft agreed facts to deal with the real issues the Crown want covered
- Will accepting association with individual(s) cover the issue
- Restrict to stills instead of videos
- Restrict to playing video without audio or lyrics
- Suggest extracts of videos/lyrics or redacting particularly prejudicial sections your client is not involved in e.g. misogynistic comments, exaggerated statements



Checklist

- What are the issues in the case?
- How is the gang evidence sought to be admitted relevant to those issues?
- Is the Crown's witness appropriately expert to give evidence about gangs?
- Does the evidence survive a qualitative assessment?
- Is the evidence more prejudicial than probative?
- Is any evidence being admitted under section 98 or 101(1) CJA 2003?
- What legal directions need to be given about the use that can and cannot be made of the evidence?



Routes to Exclude Evidence

- Usual routes of:
 - Opposing application to admit evidence (whether arguing not section 98 CJA 2003 or not one of bad character gateways in section 101(1) CJA 2003)
 - If bad character evidence, arguing it is unjust to admit it (section 101(3) CJA 2003)
 - Residual exclusionary discretion under section 78 PACE 1984



The Case Law – Does it help?



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Overview

- Seven appeal cases selected
- All appeals dismissed; therefore, not much help on their facts
- Authorities assist with the framework and principles for exclusionary arguments
- Scope for argument for:
 - (a) wholesale exclusion of gang evidence;
 - (b) limiting of gang evidence to be admitted; and
 - (c) judicial direction limiting prejudice for any gang evidence admitted



1. *R v Sule* [2013] 1 Cr App R 3

- Crown sought to admit incidents of tit-for-tat gang violence in three months preceding the murder.
- The evidence was relevant to the Crown's case of motive for murder, therefore admissible under section 98 CJA 2003 (to do with the alleged facts of the offence), alternatively section 101(1)(c) CJA 2003 (important explanatory evidence).
- Because the evidence went to motive, no need under section 98 for a chronological proximity (a temporal connection) between past incidents and offence.
- *Comment: Chronological proximity still important for (a) probative force on the motive issue and (b) gateway and admissibility in non-motive issues*



2. *R v Lewis* [2014] EWCA Crim 48

- Trial concerned large-scale public disorder in Birmingham during the 2011 riots.
- The offences involved the use of firearms and attacks upon the police.
- Crown sought to admit membership of/association with gangs in order to show well-organised violence was committed by persons known to each other through gangs, with similar past behaviour and attitudes.
- Leveson LJ set out four questions for a judge to consider:
 - (1) Is the evidence relevant to an important matter in issue between a defendant and the Crown;



R v Lewis (cont.)

- (2) Is there proper evidence of the existence and nature of the gang or gangs?
- (3) Does the evidence, if accepted, go to show that the defendant was a member of or associated with a gang or gangs which exhibited violence or hostility to the police or links with firearms? and
- (4) If the evidence is admitted, will it have such an adverse effect on the fairness of the proceedings that it ought to be excluded?

Comment: Subsequent authorities make clear that this is not a definitive set of questions for every case. Each application must be decided on a case-by-case basis.



3. *Myers v R* [2016] AC 314

- Privy Council decision from Bermuda: judgment of Lord Hughes.
- Evidence of gang membership which truly added something beyond mere propensity and which could assist the jury to resolve one or more issues in the case, as distinct from being merely gratuitous information, was admissible.
- A police officer whose training or practical experience has given him a balanced body of specialist knowledge about criminal gangs as an expert.
- Any evidence of the police officer based on hearsay material would only go to the officer's opinion, and not to the truth of any fact in issue in the trial.
- A police officer giving evidence as an expert on gangs, must, like any other expert, comply with all the duties of an expert witness



4. *R v Awoyemi* [2016] 4 WLR 114

- Trial concerned shooting of gang member. Attempted murder and firearms offences.
- No rule against the admissibility of gang affiliation unless there is evidence of:
 - (a) gang violence or hostility to police or links with firearms;
 - (b) hostility between the two gangs in question.
- Evidence of gang affiliation was admissible because:
 - (a) Offence “bore all the hallmarks of gang related violence”; and



R v Awoyemi (cont.)

(b) Crown “could establish a possible motive for the shooting and an association with firearms and lethal violence and could negative innocent presence and association”.

- Documents could have been edited or agreed facts made to avoid the jury learning of less relevant and prejudicial matters.
- Too late on appeal to challenge the expertise of police witness on gangs, which was accepted at trial.
- In the legal directions, the judge must make clear to the jury the basis upon which the evidence is admitted, direct the jury how to use the evidence and warn the jury not to assume guilt even if they found gang membership.



5. *R v Stewart* [2016] EWCA Crim 447

Trial of possession of a firearm with intent to endanger life. Defence of no intent (mere courier).

Recorder admitted gang evidence including membership of a gang and the background of disputes, however she excluded:

- Association evidence including where D was engaging in anti-social behaviour with gang members;
- Evidence linking D with a man awaiting trial for firearms offences and attempted murder; and
- Messages sent from D's phone saying "Your [sic] dead"

On the facts of this case, and given that the evidence was admitted via section 98 CJA 2003, the failure to give full legal directions on gang membership did not make the conviction unsafe.



6. *R v Sode* [2017] EWCA Crim 705

- Trial of shooting murder. Defence of non-presence or involvement.
- In performing the balancing exercise the judge admitted some gang evidence as relevant to the issue of motive but excluded a large part of the application.
- Para 47: “Given the potential prejudicial effect of putting an offence in a gang context, however, we accept that it is incumbent upon a trial judge to assess carefully the issue to which gang affiliation evidence is said to relate and to make the kind of qualitative assessment of the evidence, to which reference was made in *Myers* and upon which reliance was placed by counsel.”



7. *R v Fender* [2018] EWCA Crim 2829

- Trial of conspiracy to sell or transfer weapons and ammunition.
- Gang evidence admitted under section 101(1)(f) CJA 2003 (to correct a false impression): which included “*I don’t like gangs. They make me quiver*”.
- Court of Appeal relied on the fact that the police ‘expert’ had access to the gangs matrix in concluding he was an expert.
- In addition, previous work experience at a gangs unit was held to contribute to their conclusion he had sufficient expertise.
- *Comment: Further future challenges must be made to officers’ expertise where part of the reason for that expertise is a deeply flawed tool.*



First instance experience

- *R v TB and others* – Birmingham Crown Court – 2018 – HHJ Patrick Thomas QC
- Shooting murder. Issue was identification on CCTV footage as the shooter.
- Evidence that all candidates for the shooting were members of a gang.
- Gang membership had no probative force against TB, therefore not admitted.
- *R v JM and others* – St Albans Crown Court – 2019 – Mr Justice Bryan
- Stabbing murder. Issue was denial of being the stabber/party to joint enterprise to stab.
- Evidence that deceased was not, and was not mistaken for, a gang member.
- Gang membership of JM not relevant to motive, therefore not admitted.



Overarching themes of the case law

- Racial profiling and harmful stereotypes are often at play in assessing probative value of the evidence
- Cautious approaches by judges who often allow Crown applications in whole or part
- Many judges rule the evidence is “to do with the facts of the case” and therefore shy away from a full bad character analysis, and sometimes full legal directions
- The absence of a temporal connection has proved not to be fatal despite evidence originating from a time when the defendant was a **child**



Conclusion

- The case law has often manifested previous stereotypes or flawed approaches
- In order to challenge admissibility:
 - Challenge expertise of Crown's police witnesses on gangs
 - Instruct your own experts
 - Rely on external reports
 - Be reactive and propose detailed alternatives to minimise the admissible material



Combatting the prosecution's Joint Enterprise Narrative and Narrowing the Issues in the Judge's Summing Up

Thalia Maragh, Garden Court Chambers

13 October 2020



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A City Seen/ Dangerous Associations Trailer

<https://www.youtube.com/watch?v=8RgQ1KunnBU>



Joint Enterprise

“a person who assists or encourages another to commit a crime is known as an accessory or secondary party. The actual perpetrator is known as a principal, even if his role may be subordinate to that of others. It is a fundamental principle of the criminal law that the accessory is guilty of the same offence as the principal.” Joojee [2017 AC 387; 395 §1]



Joint Enterprise - Fundamental Principles

- Where two or more persons embark on a JE each is liable for the acts done in furtherance of the JE.
- That includes liability for unusual consequences if they arise from the execution of the agreed JE.
- But the other participants are not liable for the consequences of that unauthorised act which goes beyond tacit agreement as part of Common Enterprise.
- It is for the jury to decide whether what was done was part of the joint enterprise or was or may have been an unauthorized act and therefore outside the scope of the JE (Arch §18-15).



The Prosecution Narrative - Use of the Gang Construct in JE cases

- **Reliance on “gang talk “** - a recognisable set of linguistic cues echoed within policy, media and academic discourse, which deftly tie issues of serious youth violence to the unreliable construct of ‘the gang’—**the prosecution draws on a ready-made narrative to construct the primary association necessary to infer collective intent**
- **Use of gang talk predominantly in cases where defendant was non white** (negative racialised minority group) Racialisation of communities – construct of crime and poverty
- **Reliance on non criminal conduct or associations with individuals who are suspects**
- **utilising the gang as the primary form of association**, prosecutors serve to symbolically communicate to the sentencer and, more importantly, the jury a story



The Prosecution Narrative - Use of the Gang Construct in JE cases

- **Criminalising culture** – association through Imagery and music - incorporation of images and videos of defendants engaging in non-criminal behaviours, which, through popular culture, become indicative of criminal involvement and affirm a presumption of criminality.
- **Photos** in which individuals were holding hands in a particular form, revealing **tattoos**, dressed in a particular colour or referring to music groups.
- **Playing certain music videos or reading out song lyrics in court**, drill, 'hip-hop', 'grime' and 'rap' genres.



R v. Johnson –Haynes [2019] 4 W.L.R. 133

7 defs convicted of murder, including the appellant who was 17 yrs old. The deceased was attacked by a group of youths the defendant was one of these present
The prosecution' case had all the tropes of racialising of black defendants and their narrative included:

- Several of the defs were associated with a local gang (with one of the defs Mclean allegedly its leader);
- The def was friendly with McLean and admitted knowing that he was the leader of the gang but there was no evidence of the def participating in any gang related activity;
- On arrest the police found artwork making reference to SNM and three of his co-accused by their street names.



R v N [2020] 1 Cr App R 32

- The def was convicted of wounding with intent. Pros case - Def was either one of 2 attackers or that he was in the vehicle to encourage the attackers if necessary

The prosecution's narrative included:

- He was a member of the Anyone Can Go Gang [E6]
- Evidence of gangs that operated in LB Newham including a drill video which featured the defendant and note of lyrics on his phone in which he appeared to described himself boasting about the attack



R v N [2020] 1 Cr App R 32

- The defendant denied taking part in the attack; the “Anyone Can Go Group” was not a gang but an association of friends and accepted that he had appeared in the video but denied that he was referring to the attack in the song



Combating the JE Narrative

- Challenging Pros experts on gangs
- Calling defence Experts to challenge the narrative [Criminologists, experts in ethnography, anthropologist]
- Recognising the cognitive development of young defs children and young adults and calling experts to account for decision making
- Objecting to admission of bad character (previous convictions gang /association evidence)Objecting to prejudicial evidence



R v Lamarr Gordon [2017] EWCA 2213; [2018] EWCA 1555

Identifying Def's Vulnerability

Application for leave to adduce Fresh evidence – Expert report from a consultant clinical neuropsychologist [opinion that the appellant's presentation suggested a triad of impairments characteristic of all autism spectrum conditions] and consultant forensic psychologist [He had not been diagnosed with ASD at the trial and the Expert gave evidence on appeal that it was possible that the diagnosis of ASD was missed at the trial].



Narrowing the Issues in the Judge's Summing up – *R v N*

Written direction and Route to Verdict - The judge's initial summing up did not distinguish clearly between, on the one hand, mere presence and knowledge that an attack might be planned by others and, on the other, presence coupled to knowledge that an attack might be planned coupled further to an intention to participate in an appropriate way in the attack.

On the facts, that should have been explained to the jury because they needed to have a clear understanding as to the circumstances in which N could be guilty upon a joint enterprise basis.

The omission of a clear direction had led to confusion in the jury's mind which then led them to raise the issue in a note.



R v N [2020] 1 Cr App R 32

- CA found that the judge's response to the note cured the lack of clarity in the initial direction.
- Lack of written direction – CA noted that it was surprising that no written direction was given to the jury, given the very serious offences capable of leading to substantial sentences if convicted.
- The Crown Court Compendium - Part 1 (2019) section 7.4 "Accessory/secondary liability". Section 1.9 emphasized more generally the real utility of written directions,
- Judges "should" prepare written directions and that they "must" be discussed and preferably agreed with counsel.



Health Warnings – Challenging the Narrative

Need for special warnings (confronting the stereo types in JE cases where the pros' narrative relies solely on evidence association to establish guilt (in particular):

- Gang association
- Knowledge/ relationship with the suspect
- appearance in music video
- Tatoos/ markings presented as representing gang affiliation

Judges should also confront the stereotype of racial bias in their summing up



Dangerous Associations: Joint Enterprise, Gangs and Racism

Becky Clarke, Manchester Metropolitan University

13 October 2020



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Key Findings

Dangerous associations: Joint enterprise, gangs and racism

An analysis of the processes of criminalisation
of Black, Asian and minority ethnic individuals

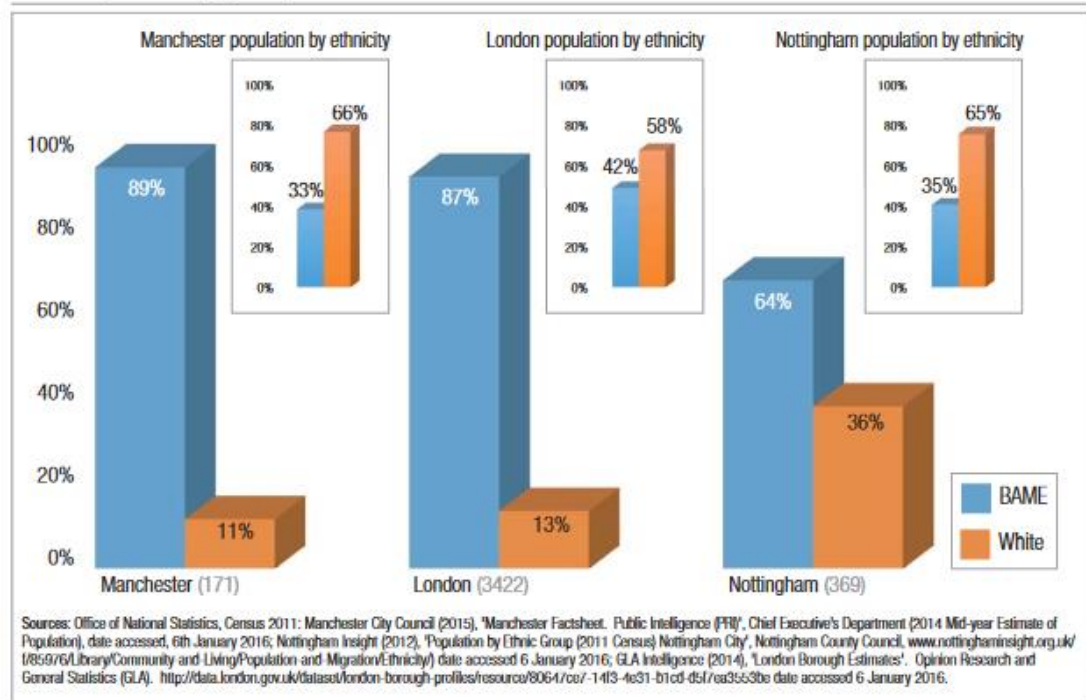
January 2016

Patrick Williams and Becky Clarke

The ethnic profile of the 'gang'

From London to Manchester the gang as defined and policed is racialised.

Chart 1: Gang membership by ethnicity



Suspect Communities

Chart 2: Gang and serious youth violence cohorts by ethnicity for the Manchester area – BAME and 'white' groupings

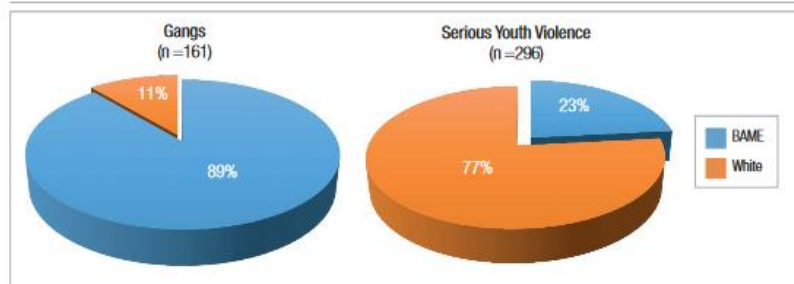


Chart 3: Gang and serious youth violence cohorts by ethnicity for the London area – BAME and 'white' groupings

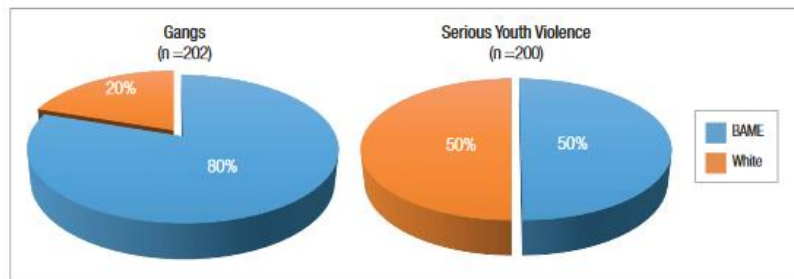


Chart 4: Gang and serious youth violence cohorts by ethnicity for the Manchester area – 'Black' only and 'All non-black' groupings

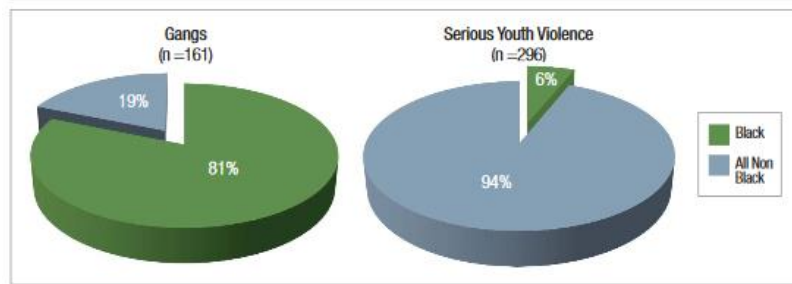
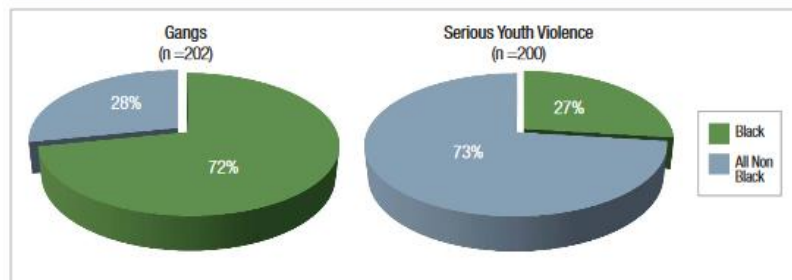


Chart 5: Gang and serious youth violence cohorts by ethnicity for the London area – 'Black' only and 'All non-black' Groupings



Dangerous Associations

What we did & what we found

- Over half (53.1%) of prisoners who responded were from a black, Asian or minority ethnic background.
- Three-quarters were serving sentences of more than 15 years.
- On average, the minoritised prisoners were serving longer sentences (22.3 years) than their white counterparts (19.6 years).
- These prisoners also more likely to be under 25 years of age (62% vs 41%). With 21 prisoners under 17 years of age, serving an average of 14 years.
- Nearly half (45%) of respondents reported that they were **not at the scene** of the crime when the offence was committed.

Dangerous Associations: Invoking & Contesting the 'Gang'

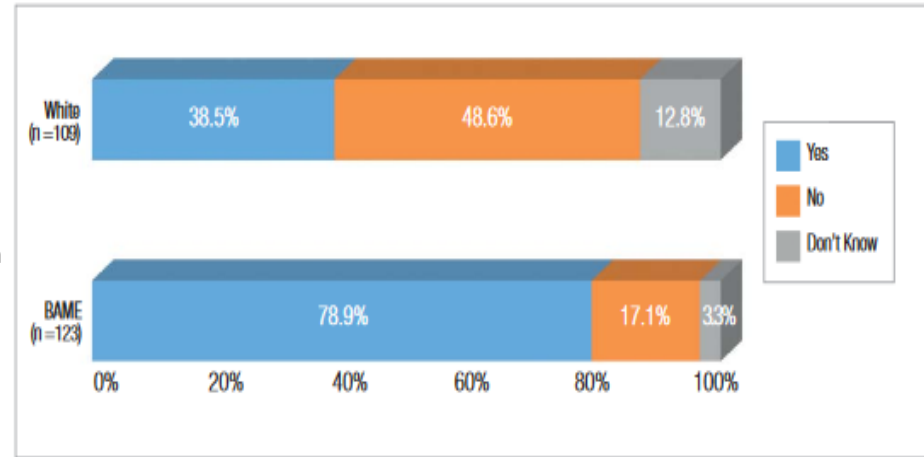
'I have never been in a gang. I was a family man who had a good job.'

'No, I have never been in a gang and I have no previous convictions of being in a gang and there is no proof that I am in a gang. It's all made up.'

'I was not a gang member. The offence was not pre-planned, it was spontaneous. I know both of the intended victims and I had and do not have any conflict with them.'

'I was brought up with the same group of people through school to holidays with family, we were very close and always together so the prosecution found it easy to call us gang members.'

Chart 7: JE prisoners reporting the gang being invoked at trial by ethnicity



Dangerous Associations

Strategies to imply gang involvement and criminality

'JUST BECAUSE WE ARE FROM THE SAME AREA AND ARE OF A CERTAIN COLOUR DOES NOT MAKE US A GANG'.

Strategies – Evidence of the gang

- Social media (Videos/Rap lyrics).
- Gang insignia (tattoos, colours).
- Cellsite (telephone calls/texts).
- Relationships (family/friends).
- **Place in local 'gang' folklore**
 - 'The Johnson Crew'; 'They said we was Gooch, but I ain't no Gooch member and I wasn't even there.'; 'St Anns where we are from has this reputation. The term 'St Anns' was used to group us together'.
- **'Gang speak'**
 - 'Kray Twins'; 'A group of young hoodlums'; 'Telling the jury, I sent out my soldiers for revenge'.
- The 'gang' = signify intent and common purpose
- The effects of racialisation = signify criminality and dangerousness
- *'Racial injustice in these cases originates from a series of targeted and criminalising policies and practices.'* (Clarke and Williams, 2020)
- <https://www.crimejusticejournal.com/article/view/1268/940>

Thank you

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