

Chapter 18: Evidence of character: evidence of bad character in criminal cases

The admissibility of evidence of bad character ‘to do with’ the facts of the offence or in connection with its investigation or prosecution

Evidence ‘to do with’ the alleged facts of the offence

Nexus in time?

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In s 98(a), the words ‘to do with’ have broad application so that evidence to do with the alleged facts of the offence can cover prior conduct relevant to motive: *R v Ditta* [2016] EWCA Crim 8 at [7].

Evidence of the bad character of the defendant

Section 101 of the Criminal Justice Act 2003

Admissibility and use

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In *R v McMahon* [2017] NICA 58, the Northern Ireland Court of Appeal held that once the accused’s previous convictions for indecent assault had been admitted as evidence of propensity in his trial for rape, they were also relevant to his credibility in circumstances where ‘there was a real issue about the competing credibility of [the accused and] the complainant’ (at [33]). See also below under **Bad character evidence under s 101(1)(d) relevant to the credibility of the accused, Use of s 103(1)(b)**

Section 101(1)(a)—evidence admitted by agreement of all the parties

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Footnote 137

See also *R v RJ* [2017] EWCA Crim 1943, where, in the accused’s trial for conspiracy to import cannabis, an unedited notebook was placed before the jury. In its unedited form, the notebook suggested that drugs dealing extended beyond the period stated in the indictment and may have involved class A drugs. The court held that the notebook was potentially highly prejudicial and misleading, and consideration should have been given to agreeing formal admissions in respect of those parts of the notebook which concerned relevant entries about cannabis (at [35]).

Section 101(1)(c)—important explanatory evidence

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Footnote 145

See also *R v Leathem* [2017] EWCA Crim 42 at [40], where the court referred to guidance in *R v Lee* [2012] EWCA Crim 316. In *R v Lee*, concerning whether evidence was admissible under s 101(1)(c) because, as the trial judge had said, ‘to exclude it would leave a lacuna in what happened’, Hughes LJ stated at [12], ‘To say that evidence fills out the picture is not the same as saying that the rest of the picture is either impossible or difficult to see without it.’

Admissibility as evidence relevant to important matters in issue and as evidence ‘to do with the facts of the offence’

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In *R v McNeill* [2007] EWCA Crim 2927, it was said that the words ‘to do with’ in s 98(a) were ‘clearly limited by the context... of s 101(1)(c)’s reference to important explanatory evidence, and gateway (d)’s reference to important matter in issue’ (Per Rix LJ at [7]). So, although it is possible for evidence to be admissible under both s 101(1)(c) and s 98(a) depending on the facts of the case (where in gang cases involving gang affiliation evidence), this is surely not what was intended by parliament.

Section 101(1)(d)—prosecution evidence relevant to an important matter in issue between the defendant and the prosecution

Bad character evidence under s 101(1)(d) relevant to the guilt of the accused

Important matters in issue

Page 533

Footnote 177

See also *R v Hay* [2017] EWCA Crim 1851: a conviction for robbery in 2003 was admissible to rebut part of the accused’s defence that he was innocent with a co-accused three hours before a robbery. In *Homebase*, they had been browsing in the axe section and purchased industrial gloves, and in the robbery an axe and industrial gloves were used. However, it is difficult to see how the previous robbery was relevant in rebutting the innocent association by the accused in *Homebase*. Evidence of the circumstances of the 2003 conviction for robbery did not seem to involve association with the co-accused, or even preparatory acts.

The admissibility of evidence showing a propensity to offend

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In *R v Surge* [2017] EWCA Crim 1840, it was stressed that deciding whether a conviction could show propensity to commit offences was an exercise of judicial judgment and ‘the hurdle for an appellant when challenging the admission of such evidence is high’ (at [15]). Further, in *R v McMahon* [2017] NICA 58 at

[25], the Northern Ireland Court of Appeal stated that court's focus will be on whether the judge's decision is 'plainly wrong' or the judge has exercised discretion 'unreasonably in the *Wednesbury* sense'.

Bad character evidence under s 101(1)(d) relevant to the credibility of the accused

Use of s 103(1)(b)

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In *R v McMahon* [2017] NICA 58, the accused was tried for rape in Northern Ireland. He had two previous convictions for indecent assault arising from the same event which dated from thirteen years previously, and they were admitted as evidence of propensity under Northern Irish provisions equivalent to s 101(1)(d) and 103(a). At the trial, the judge ruled that the convictions were admissible not only to show that the accused had a tendency to commit sexual offences against young women, but also 'to lie about those offences', and directed the jury using expressions such as 'untruthfulness' and 'tendency to lie'. Although the Northern Ireland Court of Appeal said that the judge should not have directed the jury in this way, it held that once the evidence was admitted as relevant to the accused's propensity, it was also admissible as relevant to his credibility (see also *R v Campbell* [2007] 1 WLR 2798 at [31]). However, no consideration seems to have been given to the question whether propensity to be untruthful might have been demonstrated by the fact that, in respect of the two previous convictions, the accused had given evidence under oath and had been disbelieved (see coverage of *R v Hanson* [2005] 1 WLR 3169, CA, in text, under **Bad character evidence under s 101(1)(d) relevant to the credibility of the accused p 549**).

Footnote 258

See also the dictum of Morgan LCJ in *R v LH* [2017] NICA 67 at [16]: "paragraphs [[30]-[31] of the judgment in *R v Campbell* [2007] 1 WLR 2798] leave very little room... for the introduction of evidence of propensity for untruthfulness or, in effect, the use of bad character in assessing the credibility of the defendant... there is a substantial body of case law suggesting that the Court of Appeal has now moved away from such a narrow interpretation."

General

Right of an accused to challenge evidence of a conviction

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Footnote 411

See also *R v Zawadzka* [2016] EWCA Crim 1712, concerning a conviction in an EU member state. The accused was tried for murder and blamed her brother. Evidence of her conviction in Poland for theft, which she disputed, was admitted under s 101(1)(g). Although the conviction was not unsafe, it was held that the judge should have directed the jury that if they were not satisfied on the balance of probabilities that the accused had committed the offence of theft, they should dismiss it from their minds.