

CHAPTER 7: Evidence of the defendant's bad character

1. *Dolly, who is on trial for handling stolen goods, currently works as a masseuse in Soho. She has three convictions for soliciting. Before she begins her testimony, the trial judge notices that Dolly is wearing a lapel badge indicating that she regularly gives blood and, in the presence of the jury, she is asked to remove it. In her evidence-in-chief, Dolly falsely claims that she is employed as a lay sister and also acts as a part-time marriage counsellor. Prosecuting counsel applies to cross-examine Dolly on her criminal record on the ground that she has created 'a false impression' within the meaning of the Criminal Justice Act 2003, s 101(1)(f). Discuss.*

This question is concerned with gateway (f). Has D given a false impression such as to trigger the gateway? Several matters require to be considered.

First, there is the blood donor lapel badge. Is D here responsible for an assertion, taking into account s. 105(4) of the Criminal Justice Act 2003 (para. 7.133)? Is the judge entitled to ask D to remove the badge (*R v. Hamilton* [1969] Crim LR 486?) By removing it, does D place herself within s. 105(3), which allows an accused to withdraw or dissociate herself from an assertion that otherwise is apt to create a false impression?

Secondly, there are D's false assertions that she is employed as a lay sister and acts as a part-time marriage counsellor. Are they apt to create false impressions?

If D's conduct and/or claims trigger gateway (f), s. 105(6) restricts the quantity of bad character evidence which then becomes admissible to no more than is necessary to correct the false impression. The question will then be to appraise D's three convictions for soliciting in light of that provision.

Finally, it might be added that even if technically admissible, the trial judge has discretion to exclude the bad character evidence under PACE, s. 78.

2. *Herbert, who has a criminal record made up largely of sexual offences, is on trial for armed robbery. In response to the question 'How would you describe Herbert's general reputation in the community?', which is put by Herbert's counsel in cross-examination to Gripe, a prosecution witness, Gripe declares: 'Well, I would emphasise that Herbert has an unblemished reputation. He is kind to old ladies, is a pillar of society, and is committed 110 per cent to good works.' At the close of this cross-examination, Herbert's counsel says to the judge, in open court: 'Obviously, my client wishes unreservedly to disassociate himself from this fulsome and, frankly, embarrassing testimonial from Gripe. Herbert would be the last person to describe himself in these terms.' Discuss.*

Gateway (f), again. Is the evidence of G, whom H has called as a witness, apt to create a false impression? If so, is H responsible for the making of that assertion under the

Criminal Justice Act 2003, s. 105(2). Does H's counsel's retraction successfully counteract the assertion within the terms of s. 105(3)? If not, does the evidence of H's record go "no further than is necessary to correct the false impression"? If so, ought the judge to exercise discretion to exclude the evidence of bad character under PACE, s. 78?

3. *Bob, a builder, is on trial for theft of a bulldozer. Because Ram, the owner of the bulldozer, is now deceased, his evidence is admitted in the form of a written statement under the Criminal Justice Act 2003, s 116. In his testimony, Bob claims that Ram originally stole the vehicle from Bob. The judge not only allows the Crown to cross-examine Bob on his convictions for theft and prison mutiny, but allows the prosecution to bring out the fact that the earlier theft conviction related to other earth-moving equipment. Discuss.*

This question relates to gateway (g). Does B's testimony amount to an attack on a person's character, the accent being upon 'person'. Does this provision cover the dead?

Does it make any difference that the allegation of bad character may be necessitated by B's defence (paras. 7.148-7.151)? If gateway (g) is triggered, how much of B's bad character can be admitted, and for what purpose (paras. 7.151-7.154)? May it be employed to show propensity? Ought the prosecution to have introduced this evidence via gateway (d)? What is the relevance of the conviction for prison mutiny? What direction ought the judge to deliver to the jury? Does the judge have discretion to exclude this evidence (see s. 101(3) and (4) and under PACE, s. 78.)?

4. *Hanzon, a faith healer, is charged in the Crown Court with handling three boxes of surgical stockings on 10 January 2011, knowing or believing them to be stolen contrary to the Theft Act 1968, s 22. The prosecution wish to adduce evidence that:*
- (i) *in 2006, Hanzon was convicted of theft;*
 - (ii) *in 2007, Hanzon was convicted of dishonestly diverting electricity contrary to the Theft Act 1968, s 13;*
 - (iii) *in 2008, Hanzon was convicted of taking Rita's invalid tricycle without authority contrary to the Theft Act 1968, s 12; and*
 - (iv) *on 21 January 2011, the police found Hanzon in possession of a fourth box of surgical stockings, stolen the previous day from a local warehouse.*

Discuss the following.

- (a) *How much of this evidence is likely to be admitted?*
- (b) *What direction ought the judge to give to the jury on the purpose for which such evidence is admitted?*

(c) Will the prosecution be permitted to introduce in evidence that Hanzon's 2006 conviction relates to the theft of a consignment of surgical trusses?

(d) Would any of your answers be different if Hanzon's defence to the handling charge were to be that he purchased the surgical stockings knowing that they were stolen, but, when arrested, he was on his way to the local hospital to which the stockings belonged, hoping to receive a reward for their safe return?

(e) Would your answer be different if the indictment were to charge Hanzon with one count of handling and another of attempting to pervert the course of justice (following an attempt to bribe the investigating police officer)?

(a) and (b) This part of the question is concerned with gateway (d), and in this case with the overlapping provision of the Theft Act 1968, s. 27(3). Some of the offences (i)–(iv) may be admissible as a means of showing H's propensity via gateway (d). Since H is charged only with handling on the indictment, other offences may be admissible via s. 27(3)(a) or (b) provided that they are either convictions for theft or handling offences within the previous five years or instances of handling goods stolen not earlier than 12 months before the date of the offence charged—although in the case of evidence admitted under s. 27(3) they will only be admissible in order to show that H knew or believed the goods to be stolen. Under gateway (d) a number of potential discretions will need to be considered: ss. 101(3) and (4), s. 103(3), PACE, s.78, and common law); under s. 27(3) only PACE, s. 78 and the common law discretion will be applicable.

(c) This evidence will be admissible if the conviction is held to be admissible via s. 101(1)(d) of the CJA 2003. On the other hand, if the evidence is admitted for a more limited purpose under s. 27(3), the evidence may be admissible (see *R v. Hacker* [1994] 1 WLR 1659.)

(d) If this evidence is admitted via s. 27(3), because the purpose for which it is admitted is restricted to proving mens rea, not propensity, it may not be admissible: see notably *R v. Duffus* (1993) 158 JP 224. If the evidence is admitted via gateway (d), it will be a case of determining whether it is sufficiently directed to "an important matter in issue between the defendant and the prosecutor".

(e) In these circumstances s. 27(3) of the Theft Act 1968 would be inapplicable because the indictment does not exclusively charge H with handling.

The evidence of H's attempt to bribe the investigating officer would not constitute 'bad character' within the terms of s. 98 of the CJA 2003 and, if relevant, would not be subject to admissibility via the gateways of s. 101.