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

Introductory

Bad character defined

Misconduct

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In *R v Hajdarmataj* [2019] EWCA Crim 303, the Court of Appeal laid down the following important principles concerning the admissibility of evidence of acquittals.

1. It is helpful to distinguish between the evidence of misconduct given at the earlier trial at which the accused was acquitted and the evidence of the acquittal itself. Where evidence of the first is admitted, the question of the admissibility of the second will often arise. Fairness to both sides is the guide on this question.
2. Where a complainant's evidence was the essence of the case against the accused in the earlier trial and accuracy or credibility were critical questions, it may be appropriate to adduce the evidence of the fact of the acquittal as well as the complainant's evidence. This is because, if the jury are not told of the acquittal, they might wrongly conclude there was no acquittal which would be highly prejudicial. There is also a risk that, despite directions, they might search on the internet for the result of the trial.
3. Where evidence of the fact of the acquittal is admitted, the jury will be directed that it is not relevant to their considerations and they must assess the evidence for themselves.
4. Under the 2003 Act, there is no requirement that the evidence of misconduct from the previous trial, in order to be admissible, bears a striking similarity to what is alleged in the subsequent trial.
5. It will be for the prosecution to satisfy the court that no injustice will be caused by introducing evidence from an acquittal. A principal safeguard is the disclosure of 'unused material' or records of any previous accounts given by witnesses in order to check for consistency.
6. Failures in this respect may be relevant to admissibility or discretionary exclusionwhen the prosecution make an application to admit evidence of the misconduct.

7. If the solicitors representing the accused at the second trial have unused material and/or previous statements from the first trial at which the accused was acquitted because they represented the accused, then it may be their duty to produce them if requested to do so in accordance with Criminal Procedure Rule 15.4(1), depending on the content of the defence statement; but this does not relieve the prosecution from their duty as it is the prosecution who are making the application.

8. The safeguards which apply when seeking to introduce evidence of misconduct from an acquittal cannot be less than those which apply when there is a retrial. At a retrial it is essential for the prosecution to produce unused material and previous statements in interview or otherwise.

9. At a retrial, it will normally be essential for a prosecution application to be supported by evidence of what was said at the first trial by one means of another. It would be normal to obtain a record of evidence given by relevant witnesses in the first trial in the form of a transcript or a recording, which can be used to produce a note agreed by advocates covering relevant points. If an agreed note cannot be achieved by access to a recording or by cooperation, a transcript will normally be required.

10. Each case will turn on its own facts and the judge must consider safeguards required on a case-by-case basis when considering both admissibility and any application to exclude. Concerning admissibility, it would normally be relevant to consider the fact that the accused had been acquitted.

See also *R v Mellars* [2019] EWCA Crim 42.

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

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Evidence 'to do with' the alleged facts of the offence may also cover misconduct in a count what has been improperly included. See *R v Morris* [2019] EWCA Crim 147 where a count improperly included because the offence stated was summary only. Compare, *R v Stark* [2015] EWCA Crim 1513.

Nexus in time

Footnote 44

See also *R v H* [2018] EWCA Crim 2868.

Evidence of the bad character of a person other than the defendant

Threshold conditions for admissibility

Evidence of substantial probative value

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As to when the assessment of the probative value by the judge should be made, it was held in *R v Hussain* [2015] EWCA Crim 383 that it should be at the time of the application to admit the evidence and not after all the evidence had been called.

Nature and number of the events etc

In *R v Jukes* [2018] 2 Crim App R 114 (9), CA, a conviction for conspiracy to pervert the course of justice was not admissible under s 100 where the co-accused had pleaded guilty, his credibility was no longer in issue and the conviction did not have substantial probative value in relation to the other principle issues.

Concerning evidence of previous false allegations with substantial probative value, see *R v Alexander* [2018] EWCA Crim 239, a case of domestic violence where a previous allegation by the complainant against the accused resulted in her receiving a caution for wasting police time.

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Jury directions

Where the prosecution bear the burden of proof on the matter in issue to which the evidence of bad character has substantial probative value, the judge must be careful not to mislead the jury. In *R v Alexander* [2018] EWCA Crim 23, the trial judge improperly directed the jury that: 'if you are sure that it [the evidence of the bad character of the complainant] does demonstrate such a propensity [a propensity to make false allegations against the accused]…you may take it into account when you are considering whether her evidence…is credible'. He should have said: 'If you think that it may be that the…[bad character evidence] demonstrates a propensity…' (at [29]-[30]).

The requirement of leave where evidence is not agreed

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Leave under both s 100(4) and s 41 will normally be considered at a ground rules hearing, as will restrictions on the scope of questioning where leave is granted. See, for example, *R v Dinc* [2017] EWCA Crim 1206.

Discretion to exclude

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Where the bad character evidence sought be introduced, whether by the prosecution or the defence, is in the form of hearsay, the judge ought to have regard to the exclusionary discretion under s 126(1)(b) of the Act: *R v Shaid* [2019] EWCA Crim 142. The provision states that the court may refuse to admit hearsay if satisfied '… that the case for excluding it, taking account of the danger that to admit it would result in an undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.' See also **Ch 11**, **Other safeguards**, **Discretion to exclude**.

Section 101 of the Criminal Justice Act 2003

Admissibility and use

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Footnote 112

See also *R v RJ* [2017] EWCA Crim 1943

See also *R v Abdullah* [2019] EWCA Crim 1137 at [28], where, citing *R v Highton* [2005] 1 WLR 3472, CA, the Court of Appeal stated, 'It is a long established principle that previous bad character evidence once admitted can be relied on as evidence in support of any inference or conclusion which may be properly drawn from it.'

The judge's summing-up

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Footnote 112

See the Crown Court Compendium (July 2019), Part 1, 12-2, para 5.

Footnote 113

See generally, the Crown Court Compendium (July 2019), Part 1, 12-1 - 12-2.

Footnote 115

The Crown Court Compendium (July 2019), Part 1, 12-5–12-9

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

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

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Footnote 154

For another example, see *R v Lovell* [2018] 1 Cr App R (S) 364 (48), CA.

The judge's summing-up

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Footnote 164

See now the Crown Court Compendium (July 2019), Part 1, 12-5, para 6.

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

Important matters in issue

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Footnote 172

See also *R v Spottiswood* [2019] EWCA Crim 949: in the accused's trial for murder, evidence that he had used offensive force in placing a prison officer in a headlock was admissible to rebut his defence that he placed the deceased in a headlock in self-defence.

The admissibility of evidence showing a propensity to offend

Page 538, para 12

A case is not necessarily weak just because the ultimate issue is the credibility of the complainant and inconsistencies in the complainant's account do not significantly undermine her credibility: *R v Steltner* [2018] EWCA Crim 1479 at [27].

Nor is a case necessarily weak where an identifying witness has given a partial identification, but there is a jigsaw of strong circumstantial evidence: *R v Howe* [2017] EWCA Crim 2400. See also *R v Spottiswood* [2019] EWCA Crim 949, where there was a clear case for the accused to meet.

Footnote 198

See now, the Crown Court Compendium (July 2019), Part 1, 12-6, Examples 1-4..

Misconduct after the offence charged

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Footnote 202

See also *R v D (N*) [2013] 1 WLR 676 at [45]: a sexual interest in children is a characteristic which is unlikely to change over the years. See also *R v A* [2009] EWCA Crim 513 as to timing of child pornography and abuse.

Misconduct other than convictions

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Concerning evidence of a disposition towards misconduct, such evidence may be capable of demonstrating propensity since a person may be more likely to behave in a particular way if he has a disposition to do so. An example might be the accused expressing, in text messages, a readiness to use random aggression if his relationships break up, even in the absence of evidence of actual aggression when his relationships have broken up. See *R v Cooper* [2018] EWCA Crim 1454

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Where evidence in one count is properly cross-admissible, it is difficult to argue that a defendant will be 'prejudiced or embarrassed in his…defence' within the meaning of the Criminal Procedure Rules 2015, r 3.21(4), justifying severance and separate trials, unless there is some other factor making this desirable (such as the need to avoid overloading an indictment or overburdening the jury). See *R v Toner* [2019] EWCA Crim 447, where historic offences for possession of indecent photographs of children were properly cross-admissible in respect of recent similar offences and vice versa, all offences having been the subject of counts on the same indictment and severance not being justified.

Where evidence is cross-admissible between counts on an indictment which state different types of offence with different elements, directions to the jury will need to be carefully tailored and qualified. *R v Cooper* [2017] EWCA Crim 43

Misconduct with similar facts

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Footnote 229

See now the Crown Court Compendium (July 2019), Part 1, 13, para 14 and Example 1.

Footnote 231

See now the Crown Court Compendium Part 1 (July 2019), 13. paras 8-10 and 15, which refers judges to the direction at 12-6, Example 1.

The principle would also seem to apply to cross-admissibility in order to prove identification: see *R v Wallace* [2008] 1 WLR 572, CA.

Misconduct to prove identity

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Footnote 236

See the Crown Court Compendium (July 2019), Part 1, 12-6, para 12 and Example 4.

Use of s 103(1)(b)

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Footnote 258

See also *R v LH* [2017] NICA 67 at [19] and [20](i).

The evidence admissible

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Concerning a plea of not guilty and the accused gave an account (on arrest, in interview, or in evidence) which the jury must have disbelieved *R v LH* [2017] NICA

67 at [22], the Northern Ireland Court of Appeal doubted that a single such incident would necessarily establish a propensity to be untruthful

Section 101(1)(e)—evidence of substantial probative value in relation to an important issue between the defendant and a co-defendant

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Obviously where a defendant pleads guilty, the gateway that must be gone through by the co-defendant is s 100: *R v Jukes* [2018] 2 Cr App R 114 (9), CA.

Section 101(1)(f)—prosecution evidence to correct a false impression given by the defendant

Page 559

In an appeal, the court will often be able to determine whether the accused has given a false impression by looking at the transcript of the trial: *R v Omotoso* [2018] EWCA Crim 1394 at [45].

Concerning the timing of applications under s 101(1)(f), they can be expected to be made when the accused is giving evidence rather than after he has finished. *R v Omotoso* [2018] EWCA Crim 1394 at [51].

Where the accused's assertions are specific, judges should take care not to 'over interpret' what the accused has said and to conclude that he has given a false impression when he has not. In *R v Omotoso* [2019] Crim LR 156, CA, the accused was asked towards the end of his examination-in-chief, what he did for a living. He replied, 'I was actually an auditor for a company… and I was in the process of getting my heavy goods vehicle [HGV] licence.' The judge ruled that he had given the false impression of acting as a professional auditor when his work apparently involved stock-taking. However, in view of the fact that he had also made reference to getting his HGV licence, the Court of Appeal was 'very doubtful whether the words [used]… could have conveyed the impression that he was acting in some professional capacity or carrying out a professional task.' ([2018] EWCA Crim 1394 at [50]-[51]).

The evidence to correct a false impression

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R v Omotoso [2018] EWCA Crim 1394 is an example of a case where the evidence went 'far further than was 'necessary to correct' any false impression within the meaning of s 105(6).' On the other hand, the admissibility of an item of evidence is not conditional upon it being capable, in and of itself, of amounting to a complete answer to the false impression: *R v Fender* [2018] EWCA Crim 2898 at [25].

Where it is questionable whether the accused has given a false impression, but the judge has justifiable concerns that the jury could be misled, the concerns may be dealt with by a corrective admission rather than by introducing evidence of bad character. See *R v Omotoso* [2018] EWCA Crim 1394.

Section 101(1)(g)—prosecution evidence where the defendant has made an attack on another person's character

An attack on another person's character

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An 'attack on another person's character' means an attack in front of the jury and what is said in the absence of the jury in a voir dire should not form part of the judge's decision as to whether s 101(1)(g) is triggered (although it may provide a focus for the judge in respect of what is said in front of the jury). See *R v Omotoso* [2018] EWCA Crim 1394 at [53] and [58]: the judge should not have taken into consideration what was put to a police officer during an abuse of process application.

As to the timing of an application under s 101(1)(g), where the parties have agreed that the accused's defence will involve an attack on another's character it would be usual for the application to be made before the accused gives evidence. Where the judge considers that s 101(1)(g) is triggered but the prosecution makes no application, the judge must take great care if he decides to prompt one. Judges must be scrupulous not to take on the function of the prosecutor or give that appearance, and any suggestion to the prosecution must be expressed carefully. Judges must also take into account the possibility that advocates may have already agreed an approach or that the prosecution advocate has reached an independent decision for good reasons. See *R v Omotoso* [2018] EWCA Crim 1394 at [47] and [54].

Evidence which amounts to an attack

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See again, *R v Omotoso* [2018] EWCA Crim 1394. Where part of the accused's defence involves cross-examining a police officer about flaws in a police investigation, this is not of itself objectionable and s 101(1)(g) should not be invoked too quickly, which might unfairly shut down a legitimate line of cross-examination. Nor is it objectionable in itself for the accused to call a witness to undermine the evidence of a police officer. In some situations where it appears that a legitimate line of questioning by the accused's advocate might risk going too far and triggering s 101(1)(g), a gentle hint from the judge might be sufficient.

Discretionary exclusion

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It is incumbent on the judge to consider the exclusionary discretion: *R v Omotoso* [2018] EWCA Crim 1394

Stopping the case where evidence is contaminated

Page 572

Footnote 390

See now, the Crown Court Compendium (July 2019), Part 1, 13, para 14 and Example 1.

Rules of court

Page 575

In *R v AG* [2018] 1 WLR 5876, it was stated that an application to admit bad character should be made in writing, not informally, and the judge must give a ruling, however briefly the circumstances may require

Evidence admitted through inadvertence

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Footnote 414

See also *R v C* [2019] EWCA Crim 88 (11). A remark by a witness during cross-examination could have invited highly prejudicial speculation about the accused's

good character (an important issue in the case), but the effect was not in fact to introduce bad character.