

Ch 19: Evidence of character: evidence of bad character in criminal cases

'Bad character' defined

Misconduct

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The definition of misconduct also covers evidence of misconduct which led to a caution that was subsequently deleted: *R v Pierce* [2020] EWCA Crim 855.

Acquittals

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Evidence of the accused's misconduct may be admissible in a subsequent trial where he has previously been acquitted by the jury after a trial of the facts or on the direction of the judge.

As to the latter, the judge in the subsequent trial will have to consider the circumstances leading up to the judge's direction in the earlier trial and, where the prosecution seek to call a witness from the earlier trial, whether there was evidence which cast doubt on the truthfulness of the witness. See *R v Halliday* [2019] EWCA Crim 1457, [2020] Crim LR 340, CA.

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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A nexus in time may be required where it shows that the accused had some particular knowledge relevant to the offence charged: see *R v Byrne* [2021] EWCA Crim 107 (knowledge in respect of the nature of fraudulent activity). See also *R v Sullivan* [2015] EWCA Crim 1565, which is covered in the text.

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

Section 100 of the Criminal Justice Act 2003

Threshold conditions for admissibility

Evidence of substantial probative value

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The credibility of a defence of innocent presence may be a matter in issue: see *R v Boxall* [2020] EWCA Crim 688.

Evidence that amounts to no more than a general attack on the witness's character will not have enhanced relevance: *R v McChleery* [2019] EWCA Crim 2100

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Footnote 75

See also *R v Bater-James* [2020] EWCA Crim 790; *R v A* [2020] EWCA Crim 1687; and *R v Shaid* [2019] EWCA Crim 412.

Nature and number of the events etc

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The fact that an allegation of misconduct by a witness comes from the accused alone does not of itself prevent the allegation from having substantial probative value, since under s 109 the judge must operate on the assumption that the evidence is true unless no court or jury could reasonably find it to be untrue: see *R v Lockett* [2015] EWCA Crim 1050. See also *R v Umo* [2020] EWCA Crim 284.

In *R v Hussain* [2021] EWCA Crim 870 at [36], it was said that the cumulative effect of criminality spanning many years may mean that the evidence has substantial probative value.

Where the accused is charged with sexual offences and both he and his witness are sexual offenders, evidence of the witness's sexual offending is relevant to his (the witness's) credibility. Such witnesses are in a special category because they may regard sexual offending differently from most members of society and may be unduly sympathetic to a person charged with sexual offences: *R v Murphy* [2020] EWCA Crim 137.

Satellite litigation

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Footnote 94

See also *R v Umo* [2020] EWCA Crim 284 at [37] – [38] and *R v Shaid* [2019] EWCA Crim 412.

Jury directions

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Concerning how the judge should direct the jury about the burden of proof on the matter to which the bad character evidence relates, *sed quaere*, *R v Fichardo* [2020] Crim LR 1164, [2020] EWCA Crim 667, at [30], where the court baldly stated (obiter): "... we express the provisional view that if the complainant denies having made the suggested false allegation, the jury should be directed that the burden is on the defendant to prove on the balance of probabilities that the allegation was made and was false." Cf *R v Brewster* [2011] 1 WLR 601, CA, at [22], where there was no suggestion that the accused bore a burden of proof.

Discretion to exclude

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See *R v Murphy* [2020] EWCA Crim 137. See also, *R v Boxall* [2020] EWCA Crim 102: it would have been open to the defence to apply to exclude, under s 78, prosecution evidence of the bad character of a third party.

Evidence of the bad character of the defendant

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 184

See also *R v Lanning* [2021] EWCA Crim 450: in the accused's trial for murder by stabbing, his previous conviction for unlawful wounding with a knife was admissible to rebut his defence that the stabbing was not deliberate. See also *R v Hamilton* [2021] EWCA Crim 424.

The admissibility of evidence showing a propensity to offend

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As to the principle stated in paragraph 4, see, eg, *R v Day* [2019] EWCA Crim 935, where in a case of kidnapping and attempted sexual assault, similarities in the circumstances of a 22-year-old conviction for rape demonstrated sufficient probative force.

As to the principle stated in paragraph 5, see, eg, *R v Burton* [2021] EWCA Crim 1297 at [48], where the court recognised that there was some force in the argument that the accused's previous convictions for the possession of a bladed article and wounding with intent did not show propensity to use firearms to commit murder.

Misconduct other than convictions

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Where the prosecution wishes to cross-admit bad character evidence, there is a requirement to provide notice: *R v Gabbai* [2020] 4 WLR 65, CA.

Whether misconduct establishes propensity

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In cases of gang related fatal stabbings, the issue may not be the accused's propensity to commit the offence charged but propensity to carry knives, which might be demonstrated by convictions for lesser offences such as the possession of a bladed article in a public place: see *R v CN* [2020] EWCA Crim 1028; *R v Hamilton* [2021] EWCA Crim 424; and *R v Khan* [2015] EWCA Crim 1755.

Misconduct with similar facts

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Failure to direct the jury on the cross-admissibility of allegations may render a conviction unsafe: see *R v Adams* [2019] EWCA Crim 1363.

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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Usually an important matter in issue will be the defendant's propensity to be untruthful but, depending on the facts, it might also be his propensity to commit the offence charged (see, eg, *R v Phillips* [2012] 1 Cr App R 332 (25), CA), or a matter such as whether his association with someone who has committed a crime is an innocent one: *R v Fanta* [2021] EWCA Crim 564 at [61] citing *R v Hay* [2017] EWCA Crim 1851 at [21].

Admissibility

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In *R v Byrne* [2021] EWCA Crim 107 at [145], the court stated that the fact that the evidence sought to be adduced by the co-accused may give rise to satellite litigation is not a basis for refusing to admit it and is instead a matter for case management to be dealt with proportionately in accordance with the guidance provided in *R v Phillips* [2012] 1 Cr App R 332 (25), CA, at [59]. The guidance in *R v Phillips* is to the effect that the judge: (i) can control the scope of the evidence and how it is presented to the jury; (ii) can impose a timetable on the co-accused on the deployment of the evidence; and (iii) has a responsibility to explain the relevance of the evidence to the jury and how to approach it.

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

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Where the assertion is made in an interview, the judge will need to identify precisely what the accused is addressing when making the assertion in order to establish whether the assertion is really apt to give a false impression: *R v Khan* [2020] EWCA Crim 163.

An assertion by the accused about his character which is literally and technically correct may still give a false impression depending on what it might imply. For example, an accused who asserts that he has never supplied drugs might be literally correct if he has only ever *attempted* to supply them, but this might wrongly imply that he is not the kind of person who would ever be involved in the supply of drugs (*R v Khan* [2020] EWCA Crim 163).

Where the judge allows corrective evidence to be admitted, the prosecution must still prove to the criminal standard that accused did in fact give a false impression (*R v Gabbana* [2020] 4 WLR 160).

The jury should be directed to the effect that before they can use the evidence to decide whether the accused was a truthful witness, they must be sure that he was trying to mislead them. See: the Crown Court Compendium (December 2020) Part 1, 12-8, Example.

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

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However, the purpose of the gateway is not limited to assisting the jury on the credibility of the accused's oral testimony because where s 101(1)(g) is triggered evidence of his bad character is admissible even if he elects not to testify: see *R v Yaryare* [2020] 4 WLR 156, CA, at [99] – [104]. See also s 106. Equally, s 101(1)(g) may be triggered where the attack is on the character of a person who declines to make a statement or give evidence, or a deceased person: *R v Colecozy-Rogers* [2021] EWCA Crim 1111.

An attack on another person's character

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A judge may defer his decision as to whether there has been an attack and it is always open to the parties to revisit the issue in the light of how the evidence and circumstances emerge and evolve: *R v Thomas* [2020] EWCA Crim 4 at [26].

Where the central issue in a case is the credibility of the complainant and the accused has called her credibility into question in a prepared statement read out in interview, the judge may legitimately indicate that the accused's bad character will be admissible if he gives evidence and there will be no unfairness if, as a consequence, the accused decides not to give evidence: *R v Thomas* [2020] EWCA Crim 4.

Evidence admitted through inadvertence

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It is convenient at this point to consider the separate question of improper research by the jury into the accused's background. The question whether a jury should be discharged may also arise where one or more jurors have improperly researched the accused's background on the internet and discovered that he has previous convictions. The legal principles from relevant case law may be summarised as follows (see *R v KK* [2020] WLR 63 at [72]):

1. Where such an irregularity comes to light, the overarching consideration is fairness. (*R v KK* [2020] WLR 63 at [70]).
2. Such improper conduct infringes two core principles: (i) open justice; and (ii) the right of both the prosecution and defence to have the opportunity to address all the material being considered by the jury when reaching their verdict. (*R v KK* [2020] WLR 63 at [72]).
3. Where issues of apparent bias arise in relation to whether the jury can be properly and fairly allowed to continue and to return verdicts, the required approach is objective. The question is whether a fair minded and independent observer, having considered the relevant facts, would conclude that there was a real possibility or risk that the tribunal would be biased. (*Porter v Magill* [2002] 2 AC 357, HL).

4. The mere fact that the internet has been used to obtain information pertaining to the case is not on its own a sufficient ground for discharging the jury. (*R v McDonnell* [2011] 1 Cr App R 347 (28), CA).
5. The judge must not act on speculation (for example, speculation about what the juror has discovered and whether the juror has revealed this to other jurors) and must have a firm basis for drawing any relevant conclusion. (*Ibid*, at [29]).
6. The judge should conduct a proper investigation. The first question is: what was said by the juror to other jurors, if anything? The second question is: what is the likely impact of the disclosure on the jury's deliberations? (*R v Dhaliwal* [2020] EWCA Crim 843 at [105], [110] and [113]).
7. Another consideration might be whether the jury had already reached verdicts in respect of the accused before the improper disclosure occurred. (*Ibid*, at [116]).