

**Coventry University Repository for the Virtual Environment
(CURVE)**

Author name: Steventon, B.V.

Title: Criminal evidence: bad character - Criminal Justice Act 2003 s.101(1)(d).

Article & version: Published version

Original citation & hyperlink:

Steventon, B.V. (2007) Criminal evidence: bad character - Criminal Justice Act 2003 s.101(1)(d). *Coventry Law Journal*, volume 12 (2): 66-72.

<http://wwwm.coventry.ac.uk/bes/law/about%20the%20school/Pages/LawJournal.aspx>

Copyright © and Moral Rights are retained by the author(s) and/ or other copyright owners. A copy can be downloaded for personal non-commercial research or study, without prior permission or charge. This item cannot be reproduced or quoted extensively from without first obtaining permission in writing from the copyright holder(s). The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the copyright holders.

Available in the CURVE Research Collection: March 2012

<http://curve.coventry.ac.uk/open>

Coventry Law Journal

2007

Case Comment

Criminal evidence: bad character - Criminal Justice Act 2003 s.101(1)(d)

Beverley Steventon

Subject: Criminal evidence

Keywords: Admissibility; Bad character; Credibility; JSB specimen directions; Jury directions; Previous convictions; Propensity

Legislation: Criminal Justice Act 2003 s.101 (1)(d)

Case: R. v Campbell (Kenneth George) [2007] EWCA Crim 1472; [2007] 1 W.L.R. 2798 (CA (Crim Div))

****Cov. L.J. 66* Facts**

The complainant gave evidence that she lived in a one bedroom flat and had met the appellant through a former girlfriend of his. She said that the appellant visited her flat to take drugs with her and that, on occasion, their relationship was sexual, but she found him frightening. In March 2006 the appellant had gained access by kicking down the door. He then moved a television set and commode into the bedroom and told the complainant to remain in there. She was frightened of him and initially did as she was told. The following day she tried to leave the flat but he dragged her back by her hair. He occasionally left the flat for short periods and on Friday, 17 March went out to the doctor's surgery. She did not leave the flat at this time as the surgery was in sight of the flat and she said she was too frightened to leave. That evening she ran away to the house of a friend, Declan. The following evening, 18 March, the appellant arrived at Declan's house. The complainant said the appellant was very angry and dragged her into the hall by her shoulders, catching her neck and the back of her head on a fire extinguisher. He then banged her head against a wall and tried to strangle her. The police were called but she did not, at that stage, complain of any injuries. However, the following day she attended the police station and reported the appellant's behaviour. The police noticed scratches on her neck and found blood in the hall of Declan's house. However, the complainant declined to submit to a medical examination.

The appellant gave evidence that the complainant was his girlfriend and that they smoked crack cocaine together. He said he had been sleeping at her flat but spent days away from it and never prevented the complainant from leaving the flat. He said there had been no arguments and no violence. He had visited the doctor's on 17 March, the complainant had left of her own accord to go to Declan's house, and the complainant had invented the allegations of assault and false imprisonment.

****Cov. L.J. 67*** The appellant had many previous convictions, including a number for violence and dishonesty, and at trial the Crown sought, and obtained permission, to adduce two previous convictions. The first was for actual bodily harm of a former girlfriend and the second was for the battery of his then current girlfriend. These convictions were for behaviour including hair pulling, grabbing by the throat and strangulation. He pleaded guilty on both occasions. The Criminal Justice Act 2003 has seven gateways through which evidence of bad character might be adduced and the Crown sought to adduce the evidence of the previous convictions under section 101(1)(d) Criminal Justice Act 2003 on the basis that the previous convictions showed a propensity to commit acts of violence towards women.

With regard to the issue of bad character the judge directed the jury that they must not convict the appellant only on the basis of the bad character but that they could use the

previous convictions to help resolve the issue of whether or not he had a propensity, or tendency, to be violent towards women. The judge further directed the jury that they could use the evidence of the two previous convictions to decide whether the appellant's testimony had been truthful i.e. that it was relevant to his credibility as a witness, and when deciding whether the appellant was guilty of the offence charged. The jury retired to consider their verdict and two and a half hours after retiring they sent two questions to the judge. The second question was as follows:

"What was the significance of revealing the defendant's two previous assault convictions? Anything else we should know?"

The judge discussed with counsel how he should answer the question and it was agreed that he should say there was nothing else they should know. It was also agreed that the judge should repeat his earlier direction to the jury. After the jury had retired for a second time defence counsel raised the issue as to whether it had been appropriate for the judge to indicate that the jury could take into account the appellant's bad character when deciding whether or not he had been truthful. The appellant was convicted.

The primary ground of appeal was that the fact that the appellant had two previous convictions, to which he had pleaded guilty, had no bearing on his propensity to tell the truth. The judge should not have directed the jury that his previous convictions **Cov. L.J. 68* might have relevance to his credibility. This was a material misdirection that rendered the jury's verdict unsafe. The defence argued that when directing the jury as to the relevance of the evidence regard should be had to the gateway(s) through which the evidence was or could have been adduced.

Decision

The Criminal Justice Act 2003 introduced a number of gateways through which evidence of bad character could be admitted and the Court of Appeal was of the view that the change in the law brought about by the 2003 Act was occasion for simplifying the direction to juries in relation to such evidence. Where evidence of bad character is introduced the jury should be given assistance as to its relevance that is tailored to the facts of the individual case and that relevance can normally be deduced by the application of common sense. The Court rejected the defence submission that the jury could only use evidence of bad character for a particular purpose if it could have been introduced through the relevant gateway. Once admitted through a gateway it was open to the jury to attach significance to it in any respect in which it is relevant. To direct them only to have regard to it for some purposes and to disregard its relevance in other respects would be to revert to the unsatisfactory position that existed under the old law. It had been made clear in *R v Highton and others* [2005] EWCA Crim 1985 that the use to which character evidence may be put depends on the matters to which it is relevant rather than the gateway through which it was admitted.

The Court was of the view that a jury's common sense may tell them that it is more likely that the defendant committed the offence with which he is charged if he has previous convictions, particularly where it is shown that he has a propensity for committing offences of the same nature as the one with which he is currently charged. The distinction between propensity to offend and credibility is an unrealistic distinction and a jury may well conclude at the same time that it is more likely he is guilty and he is less likely to be telling the truth when he says he is not. The bad character in this case was admitted under the gateway in s.101(1)(d) which renders such evidence admissible where it is 'relevant to an important matter in issue between the prosecution and the defence' and s.103(1)(b) provides that such matters include 'the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is not untruthful in any respect.' The Court of Appeal considered that it would be comparatively rare for the case of a defendant who has pleaded not guilty not to involve some element that the **Cov. L.J. 69* prosecution suggest is untruthful. However, it did not follow that whenever there is an issue as to whether the defendant's case is truthful, evidence can be admitted to show that he has a propensity to be untruthful. If the jury apply common sense they will conclude that a defendant who has committed a criminal offence may well be prepared to lie about it, even if he has not shown a propensity for lying, whereas a defendant who has

not committed the offence charged will be more likely to tell the truth, even if he has shown a propensity for telling lies. In other words, whether or not the defendant is telling the truth to the jury is likely to depend simply on whether or not he has committed the offence and the jury should focus on this issue. The Court of Appeal felt that for this reason the only circumstance in which telling lies is likely to be an important matter in issue between the prosecution and the defence under s. 101(1)(d) is where telling lies is an element of the offence charged.

The Court also considered in some depth the direction to the jury. The Judicial Studies Board's specimen direction in relation to bad character directs the judge to identify the gateway through which the bad character has been admitted by reference to the wording of the Act. The Court of Appeal questioned whether this was the most desirable way in which to direct the jury. They felt that reciting to the jury the statutory wording in relation to the relevant gateway was not likely to be helpful. If the jury were told in simple language and with reference, where appropriate, to the particular facts of the case, why the bad character evidence might be relevant, that would necessarily encompass the gateway by which the evidence was admitted. The Court was of the view that in the rare case where the bad character evidence had been admitted because the defendant's propensity to be untruthful was a matter in issue between the prosecution and the defence, the direction should explain the relevance of the evidence with reference to the particular facts of the case that make that matter important. Equally the Court questioned whether it was helpful to tell the jury that they could, if they thought it right, 'take the evidence into account when deciding whether or not the defendant committed the offences with which he is charged'. The Court pointed out that the only reason the jury had heard the evidence was that it might assist them in deciding that question and they felt the jury did not need to be told this in those terms. It was noted that it is of course highly desirable that the jury should be warned not to attach too much weight to the bad character evidence, let alone conclude that the defendant is guilty simply because of his bad character. The Court concluded that the judge had given the jury the Judicial Studies Board's specimen direction without relating them to the facts of the case and that this was unlikely to have been very helpful. However, they did not consider that the judge's **Cov. L.J. 70* direction could have led the jury astray and that it could not have affected the jury's verdict.

The appeal was, therefore, dismissed.

Commentary

The law relating to admissibility of evidence as to the bad character of both defendants and non-defendants was amended by the Criminal Justice Act 2003. This case is of interest not so much for admissibility through gateway (d) or even the use to which the evidence can be put; but for the somewhat unusual criticism of the Judicial Studies Board's specimen direction.

The difficulty with the bad character of the defendant is the extent to which it is relevant and has probative value with regard to both the propensity of the defendant to commit the offence and to his credibility as a witness. The admissibility of bad character is considered to be prejudicial to the defendant. There is a risk that the jury or magistrates may give more weight to the evidence than its relevance justifies and that its prejudicial effect may outweigh its probative value. As a consequence, in English criminal law the general rule is that such evidence is inadmissible prior to a finding of guilt. This is in contrast to continental Europe where the court is routinely informed about the previous convictions of the defendant.

Prior to the 2003 Act the bad character of the defendant was admissible primarily either under the similar fact doctrine or the Criminal Evidence Act 1898. Where such evidence was admissible as similar fact the evidence was deemed to be directly relevant to the issue of guilt and the jury were directed accordingly. In contrast, where bad character was brought out in cross-examination, under the 1898 Act this evidence was primarily relevant to the credibility of the defendant and not directly relevant to the issue of guilt. Therefore prior to the 2003 Act the use to which the bad character evidence could be put depended on the means by which it had been put before the court.

Under the 2003 Act evidence of the defendant's bad character remains generally inadmissible prior to a finding of guilt but the Act provides seven gateways, under s.101(1), through which such evidence may be admitted if it fits the relevant criteria. One question before the Court in *Campbell* was whether the use to which the **Cov. L.J. 71* evidence could be put depended on the gateway through which it was admitted. In this case the relevant gateway used to admit two of the defendant's previous convictions was s.101(1)(d). This gateway renders the bad character admissible where 'it is relevant to an important matter in issue between the defendant and the prosecution'. This gateway is supplemented by s.103 which indicates that for the purpose of gateway (d) the matters in issue between the defendant and the prosecution include the question whether the defendant has a propensity to commit offences of the kind charged and the question whether the defendant has a propensity to be untruthful. In *Campbell*, the prosecution submitted that two of the defendant's previous convictions showed a propensity to commit acts of violence against women and the previous convictions were admitted on the basis.

When directing the jury with regard to the previous convictions the judge referred to their relevance to both propensity and credibility. The previous convictions were clearly relevant to propensity and admitted on that basis but the defence raised the question as to whether it had been correct for the judge to direct the jury that they could also be relevant to credibility. The Court of Appeal cited and followed *Highton*. In this case the Court made it clear that the use to which the evidence could be put depended on its relevance and not on the gateway through which it had been admitted. In *Highton* the issue concerned previous convictions admissible under gateway (g) 'the defendant has made an attack on another person's character'. Under the old law such evidence was admissible as relevant to the credibility of the accused i.e. his truthfulness as a witness, and would not have been directly relevant to the issue of guilt. The Court of Appeal's ruling in *Highton* indicated that if the bad character was also relevant directly to the issue of guilt it could be used in this way irrespective of the gateway through which it was admitted. *Highton* had previous convictions for offences of dishonesty and violence, which were considered relevant to his propensity to commit the offences of kidnapping, robbery and theft with which he was charged. It is, therefore, clear that the use to which bad character evidence can be put does not depend on the reason for admissibility or the gateway through which it was admitted - the only question is what is it relevant to?

The jury need to be given assistance as to the relevance of the bad character that is tailored to the facts of the case, hence the direction to the jury is of key importance. It is with regard to this issue that this case is notable. The Court of Appeal in *Campbell* impliedly criticised the Judicial Studies Board's specimen direction indicating that part of it was not likely to be helpful to the jury and indicating that the direction must relate **Cov. L.J. 72* to the facts of the case. Lord Phillips CJ indicated, in a departure from previous decisions, that a trial judge's failure to provide a jury direction in accordance with a relevant specimen direction should no longer be treated as an automatic ground of appeal or automatically to allow an appeal. Judges must consider whether a jury would have reached the same conclusion by the application of common sense to the evidence. In *R v Meyer* [2006] EWCA Crim 1126 the appellant had been convicted of causing grievous bodily harm with intent. The appellant hit the victim fracturing his cheekbone and at trial claimed he had acted in self-defence.

Evidence was given that the appellant had a previous conviction for unlawful wounding and one for causing actual bodily harm, and had pleaded guilty on both occasions. The judge directed the jury that the previous convictions were potentially relevant to credibility. On appeal it was noted that the prosecution and defence had agreed that the previous convictions were not relevant to credibility. Although the Court of Appeal recognised that bad character, once introduced, could have relevance to issues beyond those that led to its admission, it was of the view that in this case previous convictions for violence, to which the appellant had pleaded guilty, could not have any meaningful impact on his credibility and the appeal was allowed. Although, on appeal, the defence submitted that *Campbell* was on all fours with *Meyer* the Court of Appeal felt that it was not helpful to rely on previous decisions on particular facts as if they were legal precedents, and that in *Campbell*

the summing-up could not have had any impact on the safety of the verdict. It is clear from *Meyer* and *Campbell* that although bad character may be used for any purpose to which it is relevant the judge must ensure a clear direction to the jury. The judge should ensure that he only directs the jury to both propensity and credibility if the bad character admitted could have a meaningful impact on both issues. A misdirection by the judge or failure to follow the Judicial Studies Board's specimen direction will not automatically lead to a successful appeal; what matters is whether the jury might have come, through common sense, to the same conclusion and ultimately whether the summing-up could have had any impact on the safety of the verdict.

Beverley Steventon, Head of Law, Coventry University

Cov. L.J. 2007, 12(2), 66-72