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Case Comment

Criminal law: criminal evidence - murder

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Subject: Criminal evidence

Keywords: Admissibility; Manslaughter; Mens rea; Murder; Previous convictions; Propensity

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

Cases: R. v Bullen (Lee David) [2008] EWCA Crim 4; [2008] 2 Cr. App. R. 25 (CA (Crim Div))

R. v Hanson (Nicky) [2005] EWCA Crim 824; [2005] 1 W.L.R. 3169 (CA (Crim Div))

***Cov. L.J. 60 Facts**

Following the death of the victim, Shepherd, during a drunken fight in the early hours of February 3 2006 the appellant, Bullen, was charged with murder. The victim was a friend of Towers who was a friend of the appellant and they, together with others, had been drinking at a pub and then later that evening at the house of one of them. Forensic evidence confirmed that both the appellant and the victim had consumed a large quantity of alcohol. The victim had an alcohol level of 305 mgs per 100 ml blood which is a level associated with extreme drunkenness, and the appellant's was estimated to have been 225 mgs per 100 ml blood at the time of the fight, which is a level associated with a significant degree of drunkenness. Towers had offered a number of the group a lift home, including the victim and the appellant, and the fight between the victim and the appellant started when the group got out of the car close to ***Cov. L.J. 61** the victim's home. Only Towers saw the fight start and he indicated that the victim had started it with two blows to the appellant. The appellant had then struck the victim with a bottle and smashed it against his head. The two men were fighting in the centre of the road. Towers tried to intervene and the fight moved to the side of the road ending with the victim sitting unresponsive on a wall. Towers took the appellant away by car not realising how badly injured the victim was. Forensic evidence indicated the fatal injury had been inflicted in the middle of the road near the start of the fight. The pathologist certified the cause of death to be stab wounds to the neck consistent with stabbing or jabbing by a broken bottle. The injuries were such that they would not have been caused by an unbroken bottle or a bottle shattering on impact.

In the first interview the appellant denied having a bottle. At a subsequent interview he said that he had a bottle that he swung at the victim's head and that it smashed on impact and he was left with nothing in his hands. The prosecution said that he had lied twice: once when he said he had no bottle and secondly when he said he was not left with a broken bottle in his hand.

The Crown gave notice of intention to adduce bad character evidence pursuant to s.101(1)(d) of the Criminal Justice Act 2003. The notice was served in response to the anticipation that the appellant was claiming he acted in self-defence. The notice detailed eight previous convictions and asserted that they were relevant because they showed 'the defendant had a propensity to be violent' and 'to determine whether or not the defendant was acting in lawful self-defence'. The offences included assault occasioning actual bodily harm, assaulting a police officer in the execution of his duty, using threatening words or behaviour and common assault.

At the start of the trial the appellant pleaded guilty to manslaughter which was added to the indictment as count 2. As a consequence the only issue for the jury was whether the appellant had intended to kill or cause grievous bodily harm. The appellant's defence to murder was lack of specific intent and in this respect he relied on his intoxication. The Crown persevered at trial with its application to admit the previous convictions. The trial judge addressed the three questions posed in *R v Hanson* [2005] 2 Cr App R 21 with regard to admissibility of previous convictions under s.101(1)(d) and seven previous convictions were admitted.

On appeal the defence argued that as the only issue at trial was that of specific intent, as the

appellant had pleaded guilty to manslaughter, the appellant's propensity to violence was not in issue. The previous convictions were all for offences of basic intent and as such were irrelevant and prejudicial and should not have been admitted under s.101(1)(d). A second ground of appeal concerned the direction by the judge in respect of the lies told by the defendant.

Decision

The Court of Appeal was of the view that the judge had erred in principle in admitting the evidence of bad character. The only issue was specific intent and propensity to violence was not relevant to, or itself, an issue at trial. The judge both in his ruling on admissibility and his summing-up indicated that the bad character of the appellant ***Cov. L.J. 62** was admissible because it threw light on a propensity to violence and a 'propensity to commit offences of the kind charged'. However, at no time did he explain further what he meant by this. The Court of Appeal referred to para 371 of the Explanatory Notes for the 2003 Act relating to propensity to commit offences of the kind charged:

'Evidence is not, however, admissible on this basis if the existence of such a propensity makes it no more likely that the defendant is guilty...'

The Court of Appeal made it clear that it would not always be the case that a crime of basic intent was not relevant to proving an offence of specific intent and cited *R v Duggan*, reported together with *R v Edwards* [2006] 1 Cr App R 3 (31). In *Duggan* an offence of common assault was relied on, amongst others, to prove an offence of wounding with intent. However, in this case the defendant said he was entirely innocent and blamed the victim for the incident. The previous convictions showing a propensity to violence were relevant to an issue at trial, in other words as to who was the aggressor.

The Court of Appeal was of the view that in this case things started to go wrong when the Crown failed to reconsider why they wanted to put the previous convictions before the court after the defendant pleaded guilty to manslaughter. The trial judge, when considering admissibility and the three questions in *Hanson* failed to take into account the limited nature of the issue at trial. The particular difficulty in this case was the combination of the narrow issue of intention at trial together with the appellant's general history of offences of basic intent which had not resulted in grievous bodily harm. The Court of Appeal was of the view that one previous conviction involving the use of glass might have in some circumstances been relevant and fairly admitted but for the reasons given concluded that the trial judge had erred in admitting the previous convictions.

With regard to the issue of lies the Court of Appeal agreed with the defence that the judge should have made reference to the fact that the defendant may have lied because he knew he was guilty of assault causing the victim's death, albeit not murder, and that he was therefore trying to distance himself from it.

The appeal was allowed and a retrial ordered.

Commentary

The appeal in *Bullen* concerns an interesting point relating to the new character provisions under the 2003 Act and provides additional guidance for the trial judge when considering admissibility.

Under the 2003 Act evidence of the defendant's bad character is admissible under s.101(1) if it fits one of seven gateways. In this case the Crown sought to adduce the bad character through gateway s.101(1)(d) 'it is relevant to an important matter in issue between the defendant and the prosecution'. Section 101(1)(d) is supplemented by s.103; s.103(1) indicating that an important matter in issue between the defendant and the prosecution includes:

***Cov. L.J. 63** the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence (s.103(1)(a)).

In this case the Crown initially asserted that the previous convictions showed 'that Bullen had a propensity to be violent' and 'to determine whether or not he was acting in lawful self-defence'. After the appellant pleaded guilty to manslaughter the Crown asserted that the previous convictions demonstrated 'a propensity on the part of the appellant to commit acts of violence which therefore made it more likely than might otherwise have been the case that the defendant was guilty of murder'.

The trial judge, when deciding whether or not to admit the previous convictions, considered the three

questions posed in *Hanson* :

- i) Does the history of convictions establish a propensity to commit offences of the kind charged? The trial judge was of the view that it did. The offences involved violence that was usually deliberate.
- ii) Did the propensity make it more likely that the defendant committed the offence of murder? The trial judge was of the view that a jury, properly directed, could conclude that it did.
- iii) Is it right to rely on these convictions and will proceedings be unfair if they are admitted? The trial judge was satisfied this was not the case.

It is clear that both the Crown and the trial judge were considering admissibility of previous convictions in the wider context of proving the defendant had committed the offence. There was no specific consideration by either the Crown or the trial judge of the relevance of the previous convictions to the one issue before the jury, in other words did the appellant possess the *mens rea* for murder? It is accepted that the 2003 Act has changed the law such that previous convictions indicating propensity are more likely to be admissible. The Court of Appeal in *Somanathan* [2006] 1 Cr App R 303 made it clear that bad character is admissible under the 2003 Act notwithstanding that it might not have satisfied the pre-existing test for similar fact evidence. However, such evidence must still be relevant and the key question on appeal was how those previous convictions were relevant to the issue before the court. If it is not relevant it is inadmissible. Following the appellant's plea to manslaughter how were the previous convictions relevant to the only remaining issue before the Court, the defendant's *mens rea* ? On reflection this seems an obvious issue but as sometimes happens the issue of relevance is assumed and gets lost amid the arguments for admissibility. In this case the Crown, having decided they wished to introduce the defendant's previous convictions at a time when they believed he may put forward the argument of self-defence, failed to reconsider the basic issue of relevance following the appellant's plea to manslaughter. As is always the case you can only determine the relevance of an item of evidence in the context of the particular issue you are dealing with. The Court of Appeal made it clear that the fact that previous convictions were for offences of basic intent would not mean that they could never be relevant to proving an offence of specific intent and indeed would have been in this case had the defendant not pleaded guilty to manslaughter and had he raised the issue of self-defence.

***Cov. L.J. 64** The Court of Appeal was of the view that the trial judge failed to take into account the limited issue before the Court when considering the three questions in *Hanson*. When considering the first question 'Does the history of convictions establish a propensity to commit offences of the kind charged?' the trial judge should have reminded himself that 'a propensity to commit offences of the kind charged' was a deliberately broad concept, properly designed for the generality of cases, but to be handled with care when the sole issue was specific intent. With regard to the second question 'Does that propensity make it more likely that the defendant committed the offence charged?' this was the trial judge's opportunity to consider relevance. He did not ask himself whether the propensity was relevant to an 'important matter in issue between the defendant and the prosecution' and he should have identified the issue and explained what light the previous convictions could throw on the case he was concerned with. In response to the third question the Court of Appeal was in no doubt that it was unjust or unfair to rely on a number of previous convictions which could not in themselves throw any light on the issue of intent which was the only issue before the jury.

This case serves to clarify that although, under the 2003 Act, previous convictions are more readily admissible than under the common law, they must be relevant to an issue before the court. Where the prosecution seeks to admit previous convictions under s.101(1) they should clearly identify how the propensity is relevant. In addition, the clarification by the Court of Appeal on the approach to the three questions in *Hanson* provides further guidance for trial judges who should take note particularly with regard to question two and consider the issue to which the previous convictions and propensity are relevant.

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