

# Evidence of bad character case study



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### 1. That Z had sex with T D & H

The evidence that Z had sex with T D & H can be admitted with the agreement of all the parties <sup>[1]</sup>. However it is unlikely that Z would agree that this evidence could be admitted therefore that X would have to rely on one of the other provisions of section 100 (1) of the Criminal Justice Act 2003 in order to admit the evidence.

Section 100 (1) of the Criminal Justice Act 2003 stipulates, “ Evidence of the bad character of a person other than the defendant is admissible if and only if:

1. It is important explanatory evidence,
2. It has substantial probative value in relation to a matter which –
  1. is a matter in issue in the proceedings, and
  2. is of substantial importance in the context of the case as a whole, or
3. all parties to the proceedings agree to the evidence being admissible

Therefore it is likely that Z will try and admit this evidence under s100(1)(b) arguing that it has substantial probative value in relation to a matter that is either a matter in issue in the proceedings or that is of substantial importance in the context of the case as a whole. In order to determine whether or not the evidence has substantial probative value case law prior to the enactment of the Criminal Justice Act 2003 should be considered where it was considered that such evidence could be admitted if it was “ striking similarity <sup>[2]</sup> ” and of “ sufficient probative force to overcome prejudice. <sup>[3]</sup> ”

It is likely that this evidence will be admitted.

## 2. That Z was convicted of wasting police time

The evidence that Z had been convicted of wasting police time could again be admitted if both parties agree to the evidence being admitted. However it is unlikely that Z would agree that this evidence can be admitted therefore that X would have to rely on one of the other provisions of section 100 (1) of the Criminal Justice Act 2003 in order to admit the evidence.

Section 100 (1) of the Criminal Justice Act 2003 stipulates that “ evidence of the bad character of a person other than the defendant is admissible if and only if:

4. It is important explanatory evidence,
5. It has substantial probative value in relation to a matter which –
  1. is a matter in issue in the proceedings, and
  2. is of substantial importance in the context of the case as a whole, or
6. all parties to the proceedings agree to the evidence being admissible

Therefore it is likely that Z will try and admit this evidence under s100(1)(b) arguing that it has substantial probative value in relation to a matter that is either a matter in issue in the proceedings or that is of substantial importance in the context of the case as a whole. In order to determine whether or not the evidence has substantial probative value case law prior to the enactment of the Criminal Justice Act 2003 should be considered, as above and in consideration of that evidence it is unlikely that the evidence will be admitted. This does not appear to be of substantial importance and it

is likely that the jury could reach the right conclusion without hearing this evidence.

### 3. That W is a lesbian who is prejudiced against men

The evidence that W is a lesbian who is prejudiced against men can be admitted with the agreement of all the parties <sup>[4]</sup>. However it is unlikely that W would agree that this evidence could be admitted therefore that X would have to rely on one of the other provisions of section 100 (1) of the Criminal Justice Act 2003 in order to admit the evidence.

Section 100 (1) of the Criminal Justice Act 2003 stipulates, “ evidence of the bad character of a person other than the defendant is admissible if and only if:

7. It is important explanatory evidence,
8. It has substantial probative value in relation to a matter which –
  1. is a matter in issue in the proceedings, and
  2. is of substantial importance in the context of the case as a whole, or
9. all parties to the proceedings agree to the evidence being admissible

Therefore it is likely that Z will try and admit this evidence under s100(1)(b) arguing that it has substantial probative value in relation to a matter that is either a matter in issue in the proceedings or that is of substantial importance in the context of the case as a whole. On this basis it is unlikely that this evidence will be admitted.

### 4. Psychiatric evidence in respect of Y

The evidence that Y is suffering from Potipahr's Wife Syndrome can be admitted by agreement by the parties. <sup>[5]</sup> However it is unlikely that Y would agree that this evidence could be admitted therefore that X would have to rely on one of the other provisions of section 100 (1) of the Criminal Justice Act 2003 in order to admit the evidence.

Section 100 (1) of the Criminal Justice Act 2003 stipulates that “ evidence of the bad character of a person other than the defendant is admissible if and only if:

10. It is important explanatory evidence,
11. It has substantial probative value in relation to a matter which –
  1. is a matter in issue in the proceedings, and
  2. is of substantial importance in the context of the case as a whole, or
12. all parties to the proceedings agree to the evidence being admissible

X will need to argue that the evidence is important explanatory evidence. Evidence is “ important explanatory evidence” for these purposes if “(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and (b) its value for understanding the case as a whole is substantial <sup>[6]</sup> . Except in relation to evidence of conduct, which is alleged to be similar to matters in dispute at the trial, evidence of witness's bad character may not be adduced without the leave of the court <sup>[7]</sup> . Section 100(3) identifies certain factors to be taken into account by the trial judge, alongside any others considered relevant, in

exercising his discretion to grant leave to allow bad character evidence to be given. Such factors include the number of relevant incidents, the lapse of time, and other common sense considerations relating to similarities between past and present conduct and questions of contested identity. Therefore such evidence will only be admitted if it bears substantial probative value, and the court grants leave. It would therefore be concluded that in this instance that the evidence would be admitted.

#### 5. Previous evidence of V

Assuming as discussed above that the X is not successful in admitting any of the evidence (as if he is this will mean that the evidence of his bad character and previous convictions will automatically be admitted) the Criminal Justice Act 2003 contains a dedicated scheme of rules to regulate the admissibility of evidence of the accused's extraneous misconduct in s101 (1). These rules are different from those rules that exist for the admittance of other witness's previous character.

In criminal proceedings evidence of the defendant's bad character is admissible if, but only if –

1. all parties to the proceedings agree to the evidence being admissible,
2. the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
3. It is important explanatory evidence,
4. It is relevant to an important matter in issue between the defendant and the prosecution

5. It has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
6. It is evidence to correct a false impression given by the defendant, of
7. The defendant has made an attack on another person's character

Therefore this evidence can be admitted by agreement by the parties however this is unlikely. Therefore it is likely that the prosecution will attempt to admit the evidence under sections c and d and these are provisions, which are concerned with similar fact evidence. One significant dimension of the “ similar facts” cases concerned the dangers posed by deliberate collusion between witnesses or innocent cross-contamination of their evidence.

In determining the admissibility of evidence of the accused's misconduct in the first instance, however, section 109 obliges the court to treat the evidence as true, unless “ it appears, on the basis of any material before the court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true <sup>[8]</sup> . Therefore given the similarities between the previous incident and the current one it is likely that this information will be allowed to be admitted into the current proceedings. The reason for this is that the evidence can either be considered to be important explanatory evidence or alternatively that it is relevant to an important matter in issue between the defendant and the prosecution

#### 6. X's previous conviction of Exposure

The CJA 2003 contains a dedicated scheme of rules to regulate the admissibility of evidence of the accused's extraneous misconduct in s101(1):

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In criminal proceedings evidence of the defendant's bad character is admissible if, but only if –

8. all parties to the proceedings agree to the evidence being admissible,
9. the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
10. It is important explanatory evidence,
11. It is relevant to an important matter in issue between the defendant and the prosecution
12. It has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
13. It is evidence to correct a false impression given by the defendant, of
14. The defendant has made an attack on another person's character

Therefore this evidence can be admitted by agreement by the parties however this is unlikely. Therefore it is likely that the prosecution will attempt to admit the evidence under sections c and d and this are provisions, which are concerned with similar fact evidence. One significant dimension of the “ similar facts” cases concerned the dangers posed by deliberate collusion between witnesses or innocent cross-contamination of their evidence.

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court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true <sup>[9]</sup> .

Section 107 where evidence of the accused's bad character has been admitted into the trial without the accused's agreement, under section 101(1) paragraphs (c)-(g), and the court is satisfied at any time after the close of the prosecution's case that (i) that evidence is contaminated such that (ii) a conviction would be unsafe, " the court must either direct the jury to acquit the defendant of this offence or, if it considers that there ought to be a retrial, discharge the jury". Either way, proceedings will not be allowed to continue if it emerges during the course of the trial that material evidence of bad character has been contaminated.

A previous conviction can be admitted as evidence of propensity if it falls into either: (i) one of the categories of offences; or (ii) the statement of the offence in a written charge or indictment would be the same. Thus, a person who has been convicted of actual bodily harm and is now charged with actual bodily harm will fall into the second category (same description)-but a person who has been convicted of theft and is now charged with burglary would not. However, the Home Office will introduce two sets of categories of offences-the first broadly comprising all Theft Act offences, the second comprising sexual offences involving sexual contact with children.

Therefore given the similarities between the previous incident and the current one it is likely that this information will be allowed to be admitted into the current proceedings. The reason for this is that the evidence can either be considered to be important explanatory evidence or alternatively

that it is relevant to an important matter in issue between the defendant and the prosecution

### 7. Directing the Jury

Because of the statutory grounding of the criminal evidence rules the rules on directing the jury, in relation to similar fact evidence and evidence of bad character have altered somewhat. The provisions that we are concerned with here are contained within Section 107 where evidence of the accused's bad character has been admitted into the trial without the accused's agreement, under section 101(1) paragraphs (c)-(g), and the court is satisfied at any time after the close of the prosecution's case that (i) that evidence is contaminated such that (ii) a conviction would be unsafe, " the court must either direct the jury to acquit the defendant of this offence or, if it considers that there ought to be a retrial, discharge the jury". Either way, proceedings will not be allowed to continue if it emerges during the course of the trial that material evidence of bad character has been contaminated.

Finally, there is a power for the court to discharge the jury and either direct an acquittal or order a retrial if a judge, having admitted evidence of bad character, later decides that such evidence was " contaminated".

Contamination is defined in terms of evidence that is false or misleading in any respect, as a result of the witness who gave the evidence either having agreed to give false evidence, or being affected by hearing other evidence in the case. It seems these provisions are aimed particularly at allegations of multiple sexual abuse where other allegations are, on occasion, felt to be the consequence of collaboration by different witnesses. In such cases it would

be open to the judge to cure the problem by direction to the jury, but where it is felt that direction is inadequate and any subsequent conviction would be unsafe, the judge is empowered to discharge the jury.

In conclusion therefore if the judge is satisfied with the evidence and there is no evidence of contamination or collusion then this evidence of the defendant's previous bad character will be admitted.

### Bibliography

#### Legislation

Criminal Justice Act 2003

#### Books

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**Footnotes**

[1] S100 (1) (C)

[2] DPP v Boardman 1975] AC 421 HL

[3] DPP v P [1991] 2 AC 447 at 460

[4] S100 (1) (C)

[5] S100 (1) (C)

[6] S100(2)

[7] S100(4)

[8] S 109 (2)

[9] S 109 (2)