

A Practical Guide to Bad Character Applications

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Introduction

The purpose of this talk and these accompanying notes is to provide you with a practical guide of how to approach this complex yet crucial part of criminal evidence. From the moment that you get disclosure in a case you ought to start thinking about how the law of bad character is going to affect your client.

This talk is going to be split into three parts:

1. Making bad character applications for prosecution witnesses.
2. Resisting bad character applications made by the Crown.
3. The use of bad character evidence at trial.

Defence applications to adduce bad character

It is important to look carefully at the antecedents of any witnesses whom the Crown intends to call to give evidence. In deciding whether to make a bad character application there are two things that we are looking for. The first is evidence of untruthfulness by the witnesses. The second is evidence of behaviour that assists our case, such as where a witness has a propensity to behave in a certain way. In either case, the relevant test for admissibility is found in section 100 CJA 2003.

The most important part of the above section is 100(1)(b) and this is what will be discussed below.

Untruthfulness of witnesses

This commonly manifests itself in two ways. The first is where the witness has a previous conviction for an offence which required the witness to lie. Good examples of this are offences of deception or perjury, as in order to commit these offences the witness must have been untruthful. Offences of dishonesty, such as theft, are not sufficient for this purpose, as they do not require any untruthfulness. The second is where a witness has been found guilty after trial after pleading not guilty. In these circumstances, either a witness will have lied when interviewed or during evidence, or by their plea they will have been untruthful.

If either of the above types of conviction appear on the witnesses' record, then there is a good chance that a bad character application will have merit.

The honesty of a prosecution witness will, in the vast majority of cases, be of substantial importance in the context of the case as a whole. It should be noted that the previous convictions of relatively minor witnesses are unlikely to be of sufficient importance to justify allowing their previous convictions in. If a seemingly unimportant and minor witness is a crucial one from the defence point of view, it may well be necessary to explain why in order to satisfy section 100(1)(b)(ii).

Witnesses with other relevant previous convictions

There are considerations other than the untruthfulness of a witness where their previous convictions are relevant. A particularly common situation is where the defendant is charged with common assault and pleads self-defence. If the complainant has previous convictions for violence or public disorder then the propensity of that witness to use violence will be important as supporting the defendant's account of self-defence.

Important considerations

A crucial consideration when considering making a bad character application is the character of the defendant. Adducing bad character evidence against a prosecution witness will count as an attack on another person's character and the defendant's own previous convictions will go in. Care needs to be taken not to do more harm than good. If the defendant is facing an offence of violence and his antecedents are all related to driving offences then there is little harm that can be done by their admission. If the prosecution witness has a history of being untruthful and the defendant doesn't it may well be worth making an application. It is worth noting that if the defendant has a relevant record then the Crown may well be applying themselves for his or her bad character to go in.

Procedure

The defence have 14 days from the prosecution purporting to comply with their duty of disclosure to make an application for a non-defendant's bad character. Applications can be made at any time but there will need to be a good reason for failing to do so within 14 days. One of the most common reasons is that the Crown have not fully complied with their duty of disclosure, especially where the defence have requested details regarding a witness' antecedents. The relevant form is form 6442 and can be found at <http://www.hmcs.gov.uk> in the criminal forms section. After the form has been served the court will list the matter for a binding ruling to be made. Putting as much detail as possible into the written application is advised as it can sometimes be difficult to persuade district judges to change their mind once it has been made up.

Defending Applications to Adduce the Defendant's Bad Character

The first question to ask when one receives a prosecution application to adduce evidence

of a defendant's bad character is whether or not there is any prospect of successfully opposing it. Sometimes you will simply be wasting your time by trying to oppose a strong application. When looking at the prosecution's application check what ground they are applying under.

The most common is section 101(d), the part dealing with an issue between the prosecution and defence; usually propensity. However, there are still a very large number of applications going through the magistrates' court that use section 101(c), important explanatory evidence. This ground is very rarely satisfied, as the court would have to be unable to understand the case without it. It used to be the case that if evidence was admitted under any gateway then it could be used for any purpose. Following the case of R v Davis [2008] EWCA Crim 1156, this has changed and evidence admitted under section 101(c) can no longer be used to show a propensity.

We are essentially looking for the same things as with non-defendant's bad character; is there a propensity to be untruthful or to commit offences of a type similar to the one charged. The more facts that we are able to obtain from the Crown at this stage the better. An example could be where a defendant is charged with domestic violence and has a record containing offences of violence. Initially it might look like a strong application but if all of those offences were non-domestic you will have a chance in arguing that they don't actually show a propensity.

It is frequently the case that the Crown attempts to rely on previous allegations, as well as previous convictions, especially in domestic violence cases. The probative value of such allegations is minimal and any application based solely on such evidence ought to be strongly opposed. One argument that is helpful when opposing such applications is to ask

how the Crown proposes to adduce such evidence. Usually, the only primary evidence of such events will come from the complainant so doesn't add anything to the case as a whole apart from complexity and length.

Procedure

Any prosecution application for bad character must be opposed on form 6444, which can be found in the criminal forms section of <http://www.hmcs.gov.uk>. Any application to oppose must be made within 7 days of receiving the Crown's application. As with defence applications for bad character, it is best to put as much detail in the form as possible.

Using Bad Character Evidence at Trial

Much of the use to which bad character evidence can be put is obvious but there are some aspects that can be complicated. The statements from any previous conviction that has been allowed in are not admissible. The normal rules of evidence apply in such cases. If the defendant does not admit that he was responsible for one of his previous convictions then do not sign a section 10 admission agreeing anything other than the fact of conviction. The prosecution will have to call evidence from the primary witnesses of those convictions and the defence will have the usual opportunity to cross examine and to call any evidence they wish to rebut the Crown's case. Otherwise, the Crown will have to rely solely on the fact of conviction and put the matter to the defendant in cross-examination.

When adducing evidence of the bad character of prosecution witnesses, try and get as much detail as possible into a section 10 admission. Rather than having the prosecutor read it out at the start of his case, it can be more effective to produce it as part of the defence case. It is also important to reiterate in closing what use you say the court ought to make of the bad character evidence that you have fought so hard to adduce!

List of Useful Cases

Blake (2006) 170 JPN 144

Bovell [2005] EWCA Crim 1091

Brima [2006] EWCA Crim 408

Campbell [2007] EWCA Crim 1472

Davis [2008] EWCA Crim 1156

Edwards [2005] EWCA Crim 1813

Hanson [2005] EWCA Crim 824

Highton [2005] EWCA Crim 1985

Musone [2007] EWCA Crim 1237

Renda [2005] EWCA Crim 2826

Smith (2006) 170 JPN 142

Somonathan [2005] EWCA Crim 2866

Tulley & Wood 171 JP 25

Wallace [2007] EWCA Crim 1760

Weir [2005] EWCA Crim 2866