General Crime: **Article**

TITLE: *The Use of Gang Affiliation as Evidence of Bad Character*

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Few words provoke as much bias among a jury as ‘gang’. To some, a gang member is a nocturnal, hooded stranger. Others will assume gangs only exist in cities, are young, or motivated by criminal intent. And some will make assumptions about race, class, and gender.

While we can never know for sure what a jury is motivated by – how their imaginations work, or what conscious or unconscious biases they bring to the table – mentions of gang affiliation in the courtroom are particularly at the mercy of jurors' prejudices, opening a doorway to a host of pre-conceived stereotypes that often point towards a guilty verdict.

Few would argue that being in a gang is a positive thing for a jury to hear and, therefore, evidence that a person is or has been in a gang comes under the bad character provisions of the Criminal Justice Act 2003 ('CJA'). The evidence can only be adduced when it is 'to do with the facts of the offence', under the allowance in Section 98, or as evidence of a person's prior misconduct, under one of the statutory gateways, usually Section 101 (c) (important explanatory evidence) or Section 101 (d) (important matter an issue).

The statutory allowance for such evidence is, therefore, since 2003, a broad one. This appears to have been Parliament's intention. The first draft of the CJA defined bad character evidence as limited to previous convictions, but it was expanded to incorporate previous 'reprehensible conduct' under Section 112. The Government at the time said it was committed to "maintaining a fairly wide ambit" in the provisions.

While ‘reprehensible’ is not defined by the Act – earning the label of “an adjective of considerable ambiguity” from Dr Roderick Munday, Reader Emeritus in Law at Peterhouse College, Cambridge – the revision was a clear signal that Parliament had the intention to give juries more information,

opening the gates for increased gang affiliation evidence. Defence counsel in *Awoyemi*[1] described it as a dramatic change, resulting in far too much prosecutorial enthusiasm.

The first 'test case' for the bad character provisions in relation to gang affiliation evidence was *R v Lewis and others*,[2] where multiple defendants were charged in relation to the burning down of a pub and shots being fired at police officers during the London Riots in 2011. The jury were shown rap videos involving footage of guns and threatening lyrics about harming police officers, and told that the defendants were in gangs. The Court held the affiliation was properly adduced, and Sir Brian Leveson set out a 4-stage test for reaching that conclusion:

"*(1) Is the evidence relevant to an important matter in issue between a defendant and the prosecution?*

(2) Is there proper evidence of the existence and nature of the gang or gangs?

(3) Does the evidence, if accepted, go to show the defendant was a member of or associated with a gang or gangs which exhibited violence or hostility to the police or with links with firearms?

(4) If the evidence is admitted, will it have such an adverse effect on the fairness of the proceedings that it ought to be excluded?"

It was the third stage of the test that was key, providing an explicit requirement to link the gang's activities to the matters in issue in the case itself.

It appeared that the test would be a strict check on prosecutorial enthusiasm, and it was applied in *Adebola Alimi* in the same year.[3] The defence had a positive ID and cell site evidence to show the defendants were not present at a shooting of several police officers, but they were convicted after the Crown adduced evidence of their gang affiliation. The Court of Appeal quashed the conviction: there was no evidence the gang had any hostility to the police and the Crown had failed to demonstrate that the defendants were anything more than affiliated with the gang. The judgement identified two problems with gang affiliation evidence: it is sometimes irrelevant (a legal issue), and the affiliation is sometimes improperly proven (a practical issue).

But the *Lewis* test was negated in *Awoyemi and Others*,[4] often regarded as the primary case for gang affiliation evidence. Gang affiliation was adduced as the Crown painted an attempted murder as gang-

[1] EWCA Crim (2016) 668
[2] [2014] EWCA Crim 48.
[3] [2014] EWCA Crim.
[4] EWCA Crim (2016) 668

related, despite no evidence that the two 'rival' gangs had any hostility between them. The Court of Appeal, when granting leave, appeared to acknowledge the 3rd stage of the Leveson test by stating "*it seems to us arguable that the judge fell into error* […] *it is arguable that such evidence could only become relevant* […] *if hostility between the two gangs was demonstrated*".[5] But this principle was rejected on appeal; the Court concluded that there was no need for the Crown to make out hostility for the gang affiliation evidence to be admissible because gangs "*will not necessarily commit their specific feuds to writing*". The judgement also held that the Leveson test was specific to the case it was used in and should not be more broadly applied, although there is anecdotal evidence that it is still occasionally relied on by trial judges.

In other cases, the courts have also overruled attempts to read a 'nexus in time' into Section 98 to prevent historic gang affiliation being part of the facts of an offence (see *Sule*[6] and *Lunkulu and Others*[7]). Most recently the Court of Appeal considered gang affiliation evidence, including drill music, in *Shaveek Dixon-Kenton*.[8] One of several drill videos appeared to show gang members mocking the death of the victim. The Court declined to interfere with its admission at a late stage of the trial process, despite the inability of the defence to instruct an expert. There was also no specific reference in their judgement to the ongoing debate about drill music as an evidential source. Overall, there is a clear reluctance to allow the common law to narrow the scope of the situations in which gang affiliation as evidence of bad character can be presented, which is likely to be consistent with Parliament's intentions.

The trend towards the admissibility of gang affiliation evidence is more troubling considering the quality of that evidence. The 2nd limb of the now-overturned Leveson test summarises the issue: "is there proper evidence of the existence and nature of the gang?". While it is generally accepted wisdom that there has been an increase in the number of active gangs in the UK, neither the Office of National Statistics nor the Home Office track this quantitatively, not least because of a gang's often loose and elusive structure. Crucially, many gangs engage in activity that is not necessarily criminal. They are usually geographic in nature, and young people may be identified as part of a gang simply because of their age and the area in which they live. The Metropolitan Police, in their submission to the Lammy Review, warned against a tendency to label all groups of young people in a certain area as a 'gang' when they are not.

[5] Paul McKeown, '*Evidence: R v Awoyemi (Toby)*' (Crim LR 2017) 133.
[6] [2013] 1 Cr App R 3.
[7] [2015] EWCA Crim 1350.
[8] [2021] EWCA Crim 673

Gang membership is also a broad description and the nuance can be lost in the courtroom. One example is the Waltham Forest Gang. The Centre for Social Justice carried out a study of this group in 2006, concluding that only 44% of the gang were 'committed members'. The remainder were 'wannabes' (14%), 'occasional but ambivalent affiliates' (28%) or 'reluctant affiliates' (14%). They concluded that the line between a gang and casual association is a blurry one. This creates a problem in the courtroom where a defence lawyer may not, for strategic reasons, wish to argue a satellite issue of the extent of a particular defendant's involvement or commitment to a gang.

When it comes to the courtroom, demonstrating gang affiliation can be a tenuous exercise. The police may simply say they are unable to evidence why a defendant is in a gang to avoid prejudicing 'ongoing investigations' that can take years to resolve. But when they are put into evidence, the markers used by the police, and upheld by the courts, are sometimes vague. A black and white bandana in *Elliot* was used to suggest not only that the defendant was a member of a street gang, but that, as a result, he was connected with firearms and even had an intention to use firearms. Other markers include hand gestures, or the language used in voluminous phone downloads. Rap lyrics and drill music are also increasingly common ways to tie a defendant with a gang; what a defendant may think are innocuous lyrics that fit this genre are used to suggest criminal intent or association. The explanation for such evidence also usually comes from police officers who are relying on their varying levels of professional experience rather than any exact science, and who often rely on multiple hearsay and unidentified hearsay (held to be acceptable, see *Hodges*).

There is no sign that the Court of Appeal is willing to intervene in this area, and the impact of gang affiliation evidence is most keenly felt by BAME defendants. When the then-Government launched a review of racial bias in the criminal justice system in 2016, an MP noted that the use of gang affiliation in policing and prosecutorial strategies was "sweeping up young black and minority ethnic people into our prison system".[9] The Lammy Review noted that when 'gang' rather than group or association is mentioned in a courtroom, it can be used to signal ethnicity and promote implicit racial bias, rather than to describe the links between suspects.

This issue is no longer going unnoticed. The BBC recently worked with two academics, Eithne Quinn and Abenaa Owusu-Bempah, to look at the use of drill and rap music in criminal trials to prove gang association across 70 different trials from 2005 onwards; most of the trials were conducted in the last two years and the vast majority of the defendants were young black men and boys. They raised serious

[9] Jessica Mullen, 'Government Announces Review of Racial Bias in CJS', (*Clinks*, 2nd February 2016) <https://www.clinks.org/community/blog-posts/government-announces-review-racial-bias-criminal-justice-system-and-new> accessed 20 August 2018.

concerns about prosecutorial strategies that, in their view, relied on "stereotypical imagery about young black men and boys as criminal".

Whatever Parliament's original intention in passing the CJA, there are clear risks of injustice in the use of gang affiliation evidence. And if this evidence is improperly put before a jury, or when a jury are invited to draw tenuous conclusions from it, it is BAME defendants who may pay the price.

This article forms the basis for a podcast series soon to be released by members of QEB Hollis Whiteman. In his 4-part series, Oliver will speak with Edward Brown QC, William Boyce QC, David Spens QC, Fallon Alexis and Tom Bromfield about the use (and abuse) of drill music to demonstrate gang association and criminal intent, and its links with racial bias. If you'd like to contribute to the discussion, send your questions, comments or experiences to us by emailing barristers@qebhw.co.uk.

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