

# Life in crime



After *R v Card*, bad character evidence should be handled with caution, warns David Rhodes

“PARLIAMENT’S PURPOSE IN THE [BAD character] legislation was to assist in the evidence-based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice. It is accordingly to be hoped that prosecution applications to adduce such evidence will not be made routinely, simply because a defendant has previous convictions.” (per Rose LJ in *R v Hanson* [2005] EWCA Crim 824). These words were given renewed impetus in the case of *R v Card* [2006] EWCA Crim 1079, which examined the dangers and safeguards available in admitting bad character where there is a risk of contamination.

The defendant, Clifford Card, was convicted on count 2 of a twocount indictment alleging sexual assault, on a child aged under 13 years. Count 1 related to a child named M and count 2, to A, M’s older brother. Both incidents were said to have taken place on the same date, at the same place, their home, when a number of adults, including their mother, was present.

Card had a number of previous convictions for similar offences, which were admitted as evidence of his propensity to commit such offences under s 101(d) of the Criminal Justice Act (CJA) 2003. In making his ruling on bad character, the trial judge rejected a submission based on *Hanson* that it would be unjust and prejudicial to admit the bad character evidence because the prosecution’s case was very weak and because there was a potential risk of contaminated evidence between the witnesses.

During the trial, it emerged that the Crown’s evidence was clearly contaminated. The first complainant, M, admitted that she had made up some things about Card. Crucially, she told of how she had sat down with her mother, her brother A and another witness and discussed what they were all going to tell the police. She conceded that the substance of the allegation was what her mother had told her to say and that the word “touched” was not one which she herself used or understood. Likewise, her brother A confirmed that his mother had told him what to say about the

defendant and that when he recounted the allegation of sexual assault to his mother she had replied “excellent”.

At the close of the prosecution’s case, the defence made a successful submission of no case to answer on count 1, but the trial judge ruled there was a case to answer on count 2.

The defence also made a submission under the new provisions of s 107 CJA 2003, that the judge must stop the trial and direct an acquittal because of the dangers of having admitted bad character in a case where there was clearly contaminated evidence. The judge dismissed that submission without discussion. The gist of his ruling seemed to be that trial process could deal with contamination in the ordinary way.

The defendant did not give evidence and was duly convicted.

The Court of Appeal quashed the conviction. Sir Igor Judge explained that s 107 provides a powerful safeguard for defendants whose bad character had been put into evidence. He said that the effect of s 107 is to reduce the risk of a conviction based on over-reliance on evidence of previous misconduct and acknowledges the potential danger that, where the other evidence in the case is contaminated, the evidence of bad character may have a disproportionate impact on the evaluation of the case by the jury. In other words, the dangers inherent in contamination may be obscured by the evidence of the defendant’s bad character.

The safeguard is not a matter of discretion, it is a duty to stop the trial and direct an acquittal (or a retrial) if the judge is satisfied that there has been important contamination of evidence. Whether or not there is a case to answer, or whether the issue of contamination could be considered by the jury, is immaterial, the trial “must” be stopped as a matter of law. The risk of bad character outweighing the flaws in the Crown’s case is just too great.

The decision to admit bad character evidence is usually made at the outset of the trial, before any evidence is heard. However, the Court of Appeal suggested that in cases such

as this, where the defence makes a responsible submission that there is material in the prosecution case itself to suggest that there was or may have been witness contamination, it would normally be sensible for the judge to postpone a decision until the suggested contaminated evidence has been examined at trial. By postponing the bad character ruling until after the complainants had given evidence, the trial judge would not then be acting on his judgment about anticipated evidence, but rather he would make a decision based on the evidence itself.

Strikingly, explained the Court of Appeal, the unusual feature of s 107 is that after the admission of evidence, a duty is imposed on the judge to make what is in truth a finding of fact. Plainly if the case goes to the jury issues such as contamination and collusion will be left to them in the familiar way, with appropriate directions and warnings. But the decision at the end of the prosecution case, as to whether the evidence of a witness is false, or misleading, or different from what it would have been if it had not been contaminated, now requires that the judge should form his own factual assessment. In doing so, he trespasses into the territory traditionally regarded as the exclusive domain of the jury.

## Comment

The aim of bad character evidence may well be to “assist in the evidence-based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice”. Yet this case, and s 107, seems to concede that bad character evidence is purely prejudicial. For if the evidence exists against a defendant, he will be convicted and the bad character evidence adds little to that process. If the evidence against the defendant is weak or contaminated, then bad character evidence ought not to be admitted because of the danger that it would distract the jury and lead to wrongful conviction.

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