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Admissibility of evidence of co-defendant's bad character under s.101(1)(e) Criminal Justice Act 2003: irrelevance of common law authorities

R v Platt [2016] EWCA Crim 4

Keywords criminal evidence; admissibility; s.101(1)(e) Criminal Justice Act 2003; bad character; co-defendants

P, the appellant, appealed against his conviction for murder on two grounds. The first ground of appeal (to which this case note relates) was that evidence of P's bad character had been wrongly admitted for P's co-defendant, M. The second ground of appeal (which is not further considered in this case note) concerned the admission of psychiatric evidence relating to M's mental state.

The allegations against P and M related to the murder of V, the victim. All three lived in a guest house in which ex-offenders were housed. When fire officers attended a fire at the guest house they found V's dead body which was still alight. V had received multiple injuries to his face and there was a ligature around his neck but his death had been caused by carbon monoxide poisoning. The prosecution case against P alleged that P had attacked V, inflicted serious injuries on V and then set V on fire because V had refused to give P his post office card and PIN. The prosecution case against M (alleging a joint attack by P and M) depended upon establishing its case against P. M asserted that he had not been involved in V's murder and ran a cut throat defence against P. P did not positively assert that M had murdered V but placed P in a group of three residents who might have done so.

P had numerous previous convictions including convictions for dishonesty offences and for possessing offensive weapons. In particular, twenty three years earlier, when P was 15 years old, he had been convicted of arson and P also had two convictions for causing grievous bodily harm (from 1995 and 2003). The prosecution did not apply to adduce evidence of P's previous convictions but M applied to adduce evidence of them under s.101(1)(e) of the Criminal Justice Act 2003. The judge admitted evidence of the latter three convictions under s.101(1)(e) as evidence of P's propensity to be untruthful because P had implicitly put M's credibility in issue and had put M in a group of three residents who might have murdered V. She held that the matters in issue between P and M were factual disputes concerning their respective locations in the guest house at the material time and the credibility of P and M and that the three convictions had substantial probative value. In reaching her decision the judge relied upon the decision at common law of the House of Lords in *Randall* [2004] 1 WLR 1413. Following the judge's decision to admit evidence of P's three convictions, P then applied for and was granted permission to adduce evidence of M's convictions and those of the two other residents referred to above, which resulted in the judge then admitting evidence of P's dishonesty convictions.

On appeal, P, submitted that the arson conviction could only be admissible if it had substantial probative value in relation to propensity to arson and that the two convictions for causing grievous bodily harm could only be admissible if they had substantial probative value

in relation to propensity to violence. P, however, highlighted the time intervals between the convictions and the murder, the fact that the circumstances of the arson were very different to those of the murder and the fact that the nature of the two convictions for causing grievous bodily harm was different to that of the murder. P asserted that the convictions could not be relevant to credibility; the very ground upon which the judge had admitted them. P also asserted that the judge had relied on a common law decision (*Randall*) but that s.99 of the 2003 Act had abolished the relevant common law principles.

Held, in dismissing the appeal,

The judge had been bound to determine the admissibility of P's convictions under s.101(1)(e) of the 2003 Act, which had abolished the common law principles in *Randall*. Whilst the common law principles were set out in *Archbold*, they were not relevant to admissibility under the 2003 Act. The sole test applied should be that in s.101(1)(e) and this was especially important because (unlike the position where evidence of bad character is tendered by the prosecution under s.101(1)(d)), where evidence of bad character is admissible under s.101(1)(e) the court does not possess discretion to exclude it. The substantial probative value test in s.101(1)(e) is a higher test than the test of relevance in s.101(1)(d). Section 104(1) (which relates to propensity to untruthfulness or credibility under s.101(1)(e)) had not been applicable because the admissibility of P's three convictions could not have been based on substantial probative value in relation to credibility. Consequently, the two questions for the court were whether the evidence had substantial probative value and whether the matter in relation to which it had substantial probative value was of substantial importance in the context of the case as a whole. The word substantial was an ordinary word which required no gloss but should be given its ordinary meaning. It was neither necessary nor desirable to refer to the common law concerning the admissibility of evidence of bad character that the 2003 Act had abolished and the time might well have come to remove references to it from textbooks. If the judge had solely concentrated on the two questions referred to above she would have concluded that they were not of substantial probative value in relation to propensity. The judge's directions to the jury had, however, emphasised the limited value of the evidence to propensity, the age of the convictions, the very different circumstances and the limited assistance that the jury would be given by the dishonesty convictions. Thus, the jury would have attached little or no weight to the convictions and there was very strong evidence against P. Consequently, P's conviction was not unsafe.

COMMENTARY

The admissibility of evidence of the bad character both of the accused and of persons other than the accused is governed by provisions of the Criminal Justice Act 2003. Section 99 of the 2003 Act abolished the common law rules which had formerly applied in this area (apart from a common law rule, preserved by s.118(1), which allows evidence of reputation to be admitted to prove bad character). The decision of the House of Lords in *Randall* was a leading case in relation to the admissibility of evidence of the accused's bad character for a co-defendant at common law but as the Court of Appeal indicated in *Platt* the relevant common law principles were abolished by s.99 of the 2003 Act. Thus, in accordance with the

decision in *Platt*, it is both unnecessary and probably undesirable to re-examine those common law principles further here. Rather, the key is to focus on the principles of the 2003 Act which now govern the admissibility of evidence of bad character in criminal proceedings.

Where a co-defendant wishes to adduce evidence of a defendant's bad character, the 2003 Act creates three potential gateways. The first is s.101(1)(a), under which evidence of a defendant's bad character is admissible if the parties all agree. The second is s.101(1)(c), a gateway available both to the prosecution and to the defence, under which evidence of a defendant's bad character may be admissible as "important explanatory evidence". The third, which was the relevant gateway in *Platt*, is s.101(1)(e), under which evidence of a defendant's bad character may be admissible for a co-defendant if the evidence has substantial probative value in relation to an important matter in issue between the defendant and the co-defendant. Section 101(1)(e) is supplemented by s.104. Section 104(1) provides that evidence of bad character is relevant is only admissible under s.101(1)(e) as evidence of a defendant's propensity to be untruthful if the nature or conduct of the defendant's defence undermines that of the co-defendant who seeks to adduce the bad character evidence. Where evidence of a defendant's bad character is tendered under s.101(1)(e) solely as evidence of the defendant's propensity to commit offences of the kind charged, s.104(1) does not come into play (see *McLean* [2006] 2 Cr App R 4 at [53]). Section 104(2) makes clear that evidence of a defendant's bad character is only admissible under s.101(1)(e) if adduced by a co-defendant or elicited in cross-examination by a co-defendant. Thus, the gateway created by s.101(1)(e) is not available to the prosecution.

As the Court of Appeal in *Platt* recognised, the key issues that the court must consider when determining the admissibility of evidence of bad character under s.101(1)(e) were elucidated by the Court of Appeal in *Phillips* [2012] 1 Cr App R 25, namely, whether it has substantial probative value and whether the matter in relation to which it has substantial probative value is one of substantial importance in the context of the case as a whole. An important point that the Court of Appeal emphasised in *Platt* is that unlike the situation in which evidence of a defendant's bad character is tendered by the prosecution, once the judge decides that evidence of a defendant's bad character is admissible for a co-defendant under s.101(1)(e) the judge does not possess discretion to exclude it. Thus, as the Court of Appeal in *Platt* emphasised, it is important to remember that the admissibility of bad character evidence for a co-defendant under s.101(1)(e) is governed by a test which requires "substantial probative value". Conversely, whilst the admissibility of evidence of the accused's bad character for the prosecution under s.101(1)(d) is governed by a simple test of relevance, this is subject to the possibility of exclusion in the exercise of the court's exclusionary discretion under s.101(3). The one situation in which the court may be entitled to exclude evidence which would otherwise be admissible under s.101(1)(e) is that in which the co-defendant who wishes to adduce the evidence has failed to comply with the notice requirements laid down by CrimPR Part 21 (see *Musone* [2007] 2 Cr App R 29 at [56]).

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