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Bodies of Knowledge and Robes of Expertise: Expert Evidence about Drugs, Gangs and Human Trafficking

*Tony Ward and Shahrzad Fouladvand**

Abstract: This article discusses a type of expert evidence in which a witness, often a police officer or other state official, informs the court about patterns of criminal activity and in some cases draws inferences as to the defendant's involvement in such activity. Their claim to expertise rests not on academic knowledge or scientific research but on some combination of personal experience and information from colleagues and informants which is considered to comprise part of the 'body of knowledge' in their field. While we accept that such witnesses may have genuine expertise, the reliability of their evidence is as much in need of critical scrutiny as that of scientific experts. We examine in particular the evidence of police officers who infer gang membership from rap lyrics and videos, and the decisions of the Single Competent Authority identifying victims of human trafficking, which have recently been found admissible as hearsay evidence of expert opinion.

* Northumbria University and University of Sussex, respectively. We would like to thank Kyri Katsoglou, Keir Monteith QC, Amena Owusu-Bempah, Eithne Quinn, Michael Stockdale, a professional in the National Anti-Slavery and Human Trafficking Network, and the Editor and anonymous reviewer for their helpful comments on earlier drafts of this article.

Either the prosecution or the defence in a criminal trial may wish to call evidence to explain certain patterns of criminal activity, so that the jury can appreciate how the other evidence in the case fits that pattern. The evidence may concern the quantities, prices and packaging typical of sales of a prohibited drug in a particular area; the gangs alleged to be active in a particular neighbourhood, their insignia, distinctive language, and rivalries;¹ the sequence of transactions typical of a particular form of fraud, such as ‘carousel fraud’;² or the methods used by human traffickers in certain countries to control their victims.³

The best-informed witnesses about such matters will often be people who have gained expertise not primarily through academic study or professional training but because their work often brings them into contact with the relevant kind of criminal activity. Police officers, and others who investigate crimes in an official capacity, are prominent among those who claim this kind of expertise, but others such as drug outreach workers may also qualify, and so, at least in theory, could people who have gained expertise through a criminal career of their own.⁴ English law with its ‘characteristically pragmatic’⁵ approach to expertise, accepts that people without formal credentials may be ‘competent to provide the court with information likely to be outside the court’s own knowledge and experience, given [their] experience and professional background’.⁶

² *G* [2004] EWCA Crim 1240, [2004] 2 Cr. App. R. 38; *Ramzan v HM Advocate* [2015] HCJAC 9. For reasons of space we do not discuss this type of evidence further here.

³ See below, section on ‘Human Trafficking’.

⁴ *Chatwood* [1980] 1 WLR 874.

⁵ *Robb* (1991) 93 Cr. App. R. 161, 164.

⁶ *Byrne* [2021] EWCA Crim 107, [99].

The admissibility of evidence of this type raises issues of both expert opinion and hearsay, because typically much of a witness's expertise will derive from what they have been told, either by other experts or by the people they claim expertise about. The leading cases of *Hodges*⁷ (on drug dealing) and *Myers*⁸ (on gangs) establish a principle that combines both these areas of law. In brief, the evidence of experts may draw upon the body of knowledge in their field, and a body of knowledge and/or experience may form the subject of expert evidence if inferences can be drawn from it that are relevant to the case and sufficiently reliable to assist the jury. As the Privy Council expressed it in *Myers*, the witness 'must have made a sufficient study, whether by formal training or through practical experience, to assemble what can properly be regarded as a balanced body of specialised knowledge which would not be available to the tribunal of fact. ... [C]are must be taken that simple, and not necessarily balanced, anecdotal experience is not permitted to assume the robe of expertise.'⁹

Unfortunately, the danger of unbalanced anecdotal experience being accepted as expertise remains very real. The main argument of this article is that the courts need to take more seriously the 'new and more rigorous approach to expert evidence that was supposed to be inaugurated by the new Criminal Practice Direction 19A issued in 2015. Although drafted primarily with scientific evidence in mind, the Practice Direction is applicable to all expert opinion evidence and most (though perhaps not all) expert evidence of patterns of criminal behaviour is opinion evidence – or so we shall argue. In general, the party adducing expert evidence bears the burden of proving it is reliable,¹⁰ but where the defence adduces the evidence to meet a merely evidential burden, there may be some sources of evidence that can be presumed reliable unless the prosecution proves otherwise. In the last section of the article

⁷ [2003] EWCA Crim 290.

⁸ [2009] UKPC 40.

⁹ *Myers* [2009] UKPC 40, [58].

¹⁰ *Atkins* [2009] EWCA Crim 1876, [2010] 1 Cr. App. R. 8, [9].

we argue that one novel type of expert evidence can justifiably be treated in this way: namely a decision by the Single Competent Authority that a defendant is a victim of human trafficking, where this is admitted as evidence in support of a defence under the Modern Slavery Act 2015, s. 45.

Police officers as experts

The law relating to police expertise has developed largely in response to concerns about hearsay and character evidence. As so often in the English law of expert evidence, there is a lack of systematic attention to the crucial issue of reliability.¹¹ Nevertheless, there are elements of the case law which could provide the basis for a more rigorous approach.

The first case of note is *Edwards*.¹² Evidence from a drugs charity worker, who would have said that the amount the defendant claimed to consume was ‘very high but still credible’,¹³ thus supporting the defence that it was possessed for personal use, was excluded by the trial judge on the basis that it was hearsay, since it was based on what he was told by drug dealers about the amounts they consumed. The evidence from a police officer who would have expressed the opposite view was excluded for the same reason. The Court of Appeal upheld the decision, thereby calling into question what was already well-established practice of allowing police officers to give this kind of evidence.¹⁴ Both the trial judge and the Court of Appeal made it clear that their concern was the unreliability of the evidence. There was no systematic sampling of drug users, and the charity worker claimed that ‘as a result of his experience on the street,

¹¹ See for example G. Edmond and A. Roberts ‘The Law Commission’s Report on Expert Evidence in Criminal Proceedings’ [2011] Crim. LR 844.

¹² [2001] EWCA Crim 2185.

¹³ Quoted in *Edwards*[2001] EWCA Crim 2185, [7].

¹⁴ *Hodges* [2003] EWCA Crim 290.

he could tell which drug users were reliable witnesses and which were not'. Because the users whose statements the witnesses relied on were unidentified, their reliability could not be tested by cross-examination, and the witnesses' claims about consumption levels were not supported by any medical or scientific evidence.¹⁵

In *Hodges*¹⁶ the Court of Appeal held that *Edwards* did not call into question the admissibility of police evidence on the street prices of drugs and the way in which they were usually sold in a particular area. The court treated the information the officer had been given by informants and by his colleagues as analogous to the use by forensic scientists of unpublished research by other scientists. This may seem a somewhat strained analogy, but the ruling on forensic science evidence in *Abadom*¹⁷ had in turn relied on the case of *English Exporters v Eldonwall*,¹⁸ where the reliance by valuers on hearsay evidence of house prices affords a closer analogy to the evidence of drug prices admitted in *Hodges*.

The Court of Appeal distinguished *Edwards* on the basis that the police sergeant who gave evidence against *Hodges* was a more reliable witness than his counterparts in the earlier case, both because of his very extensive experience and because unlike evidence of consumption levels, his evidence did not trespass upon areas where medical or scientific evidence would have been appropriate. Rose LJ also quoted approvingly the dicta of HHJ Burford in the unreported case of *Bryant* about the need for officers to record systematically the evidence on which they relied; and he quoted the South Australian case of *Bonython* to the effect that the 'body of knowledge or experience' on which an expert's opinion is based must be 'sufficiently organised or recognised to be accepted as ... reliable'.¹⁹

¹⁵ *Taylor* [2001] EWCA Crim 2185, [9], [14].

¹⁶ [2003] EWCA Crim 290.

¹⁷ (1983) 76 Cr. App. R. 48.

¹⁸ [1973] Ch 415.

¹⁹ *Bonython* (1984) 38 SASR 45, quoted in *Hodges* [2003] EWCA Crim 290 [16].

Taken together, therefore, *Edwards* and *Hodges* establish that opinion evidence based on hearsay will be admissible only where the information obtained from informants and colleagues is ‘sufficiently organised’, e.g. through systematic record keeping, to amount to a ‘reliable body of knowledge’ which is an appropriate basis for expert evidence. This will bring it within the common-law hearsay exception preserved by the Criminal Justice Act 2003, s 118(1), r 8, ‘under which in criminal proceedings an expert witness may draw on the body of expertise relevant to his field’. The ‘body of expertise’ assembled by a police officer is likely to be a mixture of hearsay and personal experience, but an officer who draws *purely* on experience to give ‘evidence of fact of what takes place on many occasions on the streets’²⁰ does not need to qualify as an expert witness.

The Privy Council opinion in *Myers*, the leading case on evidence about gangs, broadly confirms the *Hodges* approach. In dealing with the evidence of the head of a unit of the Bermudan police specialising in gang crime, the Privy Council showed an awareness of the potentially partisan nature of this kind of evidence. After a brief reference to *Bonython*, the Privy Council said that an officer ‘must have made a sufficient study, whether by formal training or through practical experience, to assemble what can properly be regarded as a balanced body of specialised knowledge which would not be available to the tribunal of fact.’²¹ Lord Hughes JSC also stressed that a police officer who dons the ‘robe of expertise’ must abide by the duty of the expert to be impartial:

In particular, a police expert needs to be especially conscious of the duty to state fully any material which weighs *against* any proposition which he is advancing, as well as all the evidence on which he has based that proposition. When considering an application by the Crown to adduce the evidence of a police expert, it is incumbent on the judge to satisfy himself that these duties are recognised, and discharged.²²

²⁰ *Bryan*, unreported (CA, 1984), quoted in *Hodges* [2003] EWCA Crim 290, [11].

²¹ *Myers v R* [2015] UKPC 40, [2016] AC 24, [58].

²² *Myers* [2015] UKPC 40, [60].

The duties to which *Myers* drew attention are now codified in the Criminal Procedure Rules. The expert's duty is to assist the court by giving an 'objective unbiased' opinion.²³ Their report to the court must 'give details of any literature or other information which the expert has relied on in making the report'; 'contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based'; and 'if the expert is not able' – which must mean able consistently with the duty of impartiality – 'to give an opinion without qualification, state the qualification'.²⁴ Importantly, too, the report must 'include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence'.²⁵ 'It is critical', as the Court of Appeal has recently affirmed, 'that the party calling an expert witness is confident that the witness understands and, to the extent it is practical for the party to check, is discharging his or her obligations to the court.'²⁶

The requirement to provide information about reliability complements Criminal Practice Direction (CPD) 19A, which sets out the factors the court should take into account in determining whether evidence is 'sufficiently reliable to be admitted'. The list of factors closely follows that proposed by the Law Commission as a basis for legislation,²⁷ and were incorporated in a Practice Direction after the government decided (on grounds of cost) not to proceed with the legislation the Law Commission recommended. The Law Commission intended these factors to be applied to both scientific and non-scientific evidence, and although the CPD refers specifically to the case of *Dlugosz*²⁸ which requires 'a sufficiently reliable scientific basis' for expert evidence, the rule and the practice direction are applicable to any

²³ Criminal Procedure Rules 2015, r. 19.2(1)(a)(i).

²⁴ Crim. P. R. 2015, r. 19.4(b), (c) and (g).

²⁵ Crim. P. R. 2015, r. 19.4(h).

²⁶ *Byrne* [2021] EWCA Crim 107, [100].

²⁷ Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales* (Law Com 325, 2011).

²⁸ [2013] EWCA Crim 2.

expert opinion evidence where reliability is a precondition for admissibility.²⁹ Since *Hodges* and *Myers* establish that a degree of reliability is a precondition for allowing police officers to testify as experts, the CPD factors are applicable to them. Indeed the one reported case in which expert evidence has been excluded in reliance on the CPD factors concerns police evidence about drugs.³⁰

Fact, opinion and hearsay

Before looking in detail at the CPD factors we must address a possible objection to their application to police evidence, namely that the CPD is expressly confined to expert *opinion* evidence.³¹ It might be argued that in many cases, the evidence of police officers, though it is expert evidence, is evidence of fact rather than opinion.³² *Phipson on Evidence* and *Hodgkinson on Expert Evidence* both maintain that substantial categories of expert evidence should be categorized as evidence of fact.³³ More directly relevant in the present context is an *obiter dictum* in *Kennedy v Cordia*, the Supreme Court's leading decision on expert evidence in Scottish civil cases, that the evidence the Privy Council found to be admissible in *Myers v DPP* was 'factual evidence of the practices of [criminal] gangs'.³⁴ According to Lords Reed and Hodge, who wrote the unanimous judgment, the distinction is significant in Scottish law because opinion evidence is subject to a strict test of 'necessity', whereas expert evidence of

²⁹ Criminal Practice Directions (consolidated) [2019] EWCA Crim 295, 19A.4.

³⁰ *R (Wright) v CPS* [2015] EWHC 62 (Admin).

³¹ CPD 19A.1.

³² We are indebted to an anonymous referee for pressing this point.

³³ H M Malek (ed.) *Phipson on Evidence* (19th ed., 2017), [33-10]; T. Hodgkinson and M. James, *Expert Evidence: Law and Practice* (5th ed., 2020), [1-011].

³⁴ *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 WLR 597, [42]. The 'necessity' test was adopted in *Gage v HMA* [2011] HCJAC 40; 2011 SCL 645, on the basis of a restrictive reading of the English case of *Turner* [1975] QB 834.

fact is introduced as a matter of convenience, to establish facts which could in principle be established by a large amount of direct evidence.³⁵

This way of classifying *Myers*, though perhaps convenient in Scottish law, is not supported by anything explicitly stated in the Privy Council opinion. A more pertinent discussion of the fact/opinion distinction is Megarry J's careful analysis in *English Exporters v Eldonwall*,³⁶ from which the 'body of knowledge' exception to the hearsay rule derives. Megarry J distinguished between, on the one hand, the knowledge derived partly from personal experience and partly from information provided by others, on which an expert could base an *opinion* in a particular case (e.g. about the value of a house); and on the other hand, statements which are relied on as evidence of particular *facts* (such as the purchase price of a particular house comparable to the one in question), which do not escape the hearsay rule by virtue of being part of a body of expert knowledge. Similarly, the Privy Council in *Myers* distinguished between the expounding of general study (whether by the witness or others) and ... the assertion of a particular fact in issue in the case. The first is expert evidence, grounded on a body of learning or study; the second is not, even if it may be given by someone who is also an expert. The line between the two is case-specific, but it will usually be possible to discern it.³⁷

The expert who judges that the street value of a certain drug in a certain area is such-and-such, or (as in *Myers*) that a defendant can be 'considered' a 'member' of a gang, is expressing an opinion based on their judgment of what in the mass of second-hand information they have accumulated can be considered reliable,³⁸ and what can be inferred from it in a particular case. On any reasonable interpretation of the slippery distinction between fact and opinion, that is

³⁵ *Kennedy v Cordia* [2016] UKSC 6, [46].

³⁶ [1973] Ch 415, 420-1.

³⁷ [2015] UKPC 40, [66]

³⁸ *English Exporters v Eldonwall* [1973] Ch 415, 420-1.

opinion evidence. An expert who bases a statement of *fact* on a *particular* hearsay statement (for example about the defendant's link to a gang) must judge that hearsay statement to be reliable, which is an opinion. Following *English Exporters* and *Myers*, that opinion in itself is not a ground for the court to rely on the hearsay statement: the court must make its own decision whether the hearsay is admissible and reliable.

A further reason why evidence of gang membership will nearly always involve opinion evidence is the nebulous character of gang membership itself. As noted in *Elliott*, 'membership' is 'no more than a convenient shorthand' encompassing various degrees of affiliation or support.³⁹ 'Violent gangs... are unlikely to issue membership cards, and so proof of membership will almost inevitably involve the prosecution putting forward evidence of a number of circumstances from which gang membership could be inferred.'⁴⁰ The very existence of something sufficiently permanent and distinctive to be identified as a 'gang' is an – often debatable – inference from a number of circumstances.⁴¹ It might be theoretically possible to present a jury with a mass of factual evidence about contacts among a network of people and let them draw their own conclusions about the existence and membership of gangs, but in practice this is unlikely.

A complication of the distinction between expert opinion based on hearsay admissible under the 'body of knowledge' rule and evidence of fact founded on particular hearsay statements is that sometimes, as in *Elliott*, statements relied upon to prove gang membership may not constitute hearsay within the meaning of the Criminal Justice Act 2003 because, being made (or so the prosecution contends) to other members of the gang who already know that the person concerned is a member, they are not made with the intention of causing another person to

³⁹ *Elliott* [2010] EWCA Crim 2378, [17], quoted in *Lewis* [2014] EWCA Crim 48, [96].

⁴⁰ *Elliott* [2010] EWCA Crim 2378, [31].

⁴¹ S. Hallsworth and T. Young, 'Gang Talk and Gang Talkers – A Critique' (2008) 4 *Crime, Media, Culture* 175.

believe what is stated.⁴² The letters relied on in *Elliott* were nevertheless very effective in causing the police officer who gave evidence to believe in the existence of a gang of which he had never heard before.⁴³ If the evidence had been dealt with as comprising statements in furtherance of a joint criminal enterprise, they would have been inadmissible as hearsay unless there was some further evidence linking the defendant and the author of the letter to the alleged enterprise.⁴⁴

Criteria of reliability

Having established that police evidence about patterns of drug dealing and gang activity generally constitutes opinion evidence, we can now consider the factors set out in the CPD that are relevant to its admissibility.

All of the criteria in CPD 19A.5 are potentially relevant to drug or gang evidence, and some of them are close to factors that have been considered in previous cases. Thus the ‘extent and quality of the data’ and the ‘completeness of the information available to the expert’ were important factors in distinguishing between the inadmissible evidence in *Edwards*⁴⁵ and the admissible evidence in *Hodges*.⁴⁶ The question of whether an expert’s opinion, if it ‘relies on an inference from any findings...properly explains how safe or unsafe the inference is’ comes close to the reason for rejecting the drug charity worker’s evidence in *Edwards* – he could not satisfactorily explain how it was safe to rely on an inference from what some drug users told him, while rejecting other statements he considered unreliable. A proper explanation of the safety of any inference should ensure that the strength of the opinion expressed by an expert does not go beyond what can properly be inferred from the data on which it is based, even

⁴² *Elliott* [2010] EWCA Crim 2378, [31], [33].

⁴³ *Elliott* [2010] EWCA Crim 2378, [13].

⁴⁴ *Devonport* [1996] 1 Cr. App. R. 221, 226.

⁴⁵ [2001] EWCA Crim 2185.

⁴⁶ [2003] 2 Cr. App. R. 15, [26-7].

though the part of the Law Commission's Draft Bill that expressly referred to the strength of an opinion has not been transposed into the Practice Direction.⁴⁷ The 'extent to which the expert's opinion is based on material falling outside the expert's own field of expertise' is relevant to cases where police officers or civilian experts trespass in the field of toxicology, as in *Edwards and Wright*.⁴⁸ The question of where in the 'range of expert opinion' an expert's opinion lies is potentially important in cases (such as those considered in the next section) where there is a divergence between police views and those of social scientists. Equally relevant, as we shall see in the next section, are the potential 'flaws' set out in CPD19A.6.

Unfortunately, there is nothing in recently reported cases to indicate that police gang expertise is being subjected to any kind of rigorous scrutiny. In *Awoyemi*, the leading case on gang affiliation evidence, counsel for the appellants attempted to challenge the expertise of the police sergeant who gave evidence but was told that as the officer's expertise had been accepted by the different counsel who appeared at trial, it was 'far too late to take the point now'.⁴⁹ Similarly in *Rashid*, the Court of Appeal observed that 'no point was taken' at trial about the officer's qualification to give expert evidence, 'and we can understand why'.⁵⁰ In *Lewis*, the Court of Appeal followed *Hodges* and *Elliott* in holding that a police officer was entitled to rely on hearsay from unspecified informants as he 'clearly had the requisite knowledge of experience',⁵¹ but did not so much as mention the word 'expert' or the limited guidance on the reliability of expert evidence provided by *Myers*. In *Sode*, *Myers* is mentioned but reduced to

⁴⁷ Law Commission, *Expert Evidence in Criminal Proceedings* (2011), Draft Bill, cl. 4(1)(b).

⁴⁸ *R (Wright) v CPS* [2015] EWHC 62 (Admin).

⁴⁹ [2016] 4 WLR 114, [24].

⁵⁰ *Rashid* [2019] EWCA Crim 2018, [36].

⁵¹ [2014] EWCA Crim 48, [95].

a vague requirement for a ‘qualitative assessment’ of the evidence, considered as evidence of bad character rather than expert evidence.⁵²

The failure of the defence to challenge this evidence appears to be symptomatic of the failure of the bar to take up the challenge of the ‘new and more rigorous approach’ of CPD 19A.⁵³ Expert evidence on gangs is in particular need of close scrutiny because of the risk that it will be tainted by structural or institutional racism. Even if an individual police expert is free of personal prejudice, the institutional ‘body of knowledge’ on which they draw is one in which serious violence is much more likely to be identified as gang-related when it occurs in areas with high BAME populations than when it occurs in predominantly white areas.⁵⁴ The reasons for the overrepresentation of young black males in gang databases are complex,⁵⁵ but ethnic differences in ‘urban street lifestyles, cultures and peer friendship networks’⁵⁶ are important factors.

The lack of scrutiny of the gang-related expert evidence in *Awoyemi*, *Lewis*, *Rashid* and *Sode* is especially disappointing as all four cases involved a type of evidence that appears particularly open to challenge under the CPD criteria.

Rap music as evidence

The type of evidence we have in mind uses of the lyrics or videos of rap songs to implicate the author or performers in gang membership. In *Awoyemi*, both handwritten lyrics and a YouTube

⁵² *Sode* [2017] EWCA Crim 705, [36], [47-51].

⁵³ *H* [2015] EWCA Crim 1555, [44]; G.Davies and E. Piasecki, ‘No more Laissez Faire? Expert Evidence, Rule Changes and Reliability: Can More Effective Training for the Bar and Judiciary Prevent Miscarriages of Justice?’ (2016) 80 *J. Crim. L.* 327.

⁵⁴ P. Williams and B. Clarke, *Dangerous Associations: Joint Enterprise, Gangs and Racism* (Centre for Crime and Justice Studies, 2016), 4-5.

⁵⁵ See Mayor’s Office for Policing and Crime, *Review of the Metropolitan Police Gangs Matrix* (2018) <https://www.london.gov.uk/sites/default/files/gangs_matrix_review_-_final.pdf> (accessed 1 March 2021); J.A. Densley and D.C. Peyrouz, ‘The Matrix in Context: Taking Stock of Police Gang Databases in London and Beyond’ (2019) 20 *Youth Justice* 11.

⁵⁶ A. Gunter, *Race, Gangs and Youth Violence* (Policy Press, 2017), 135.

video were held admissible as evidence of ‘the extent to which the individuals concerned had signed up to gang and gun culture’ and therefore of their propensity to commit offences which ‘bore all the hallmarks of gang related violence.’⁵⁷ They were also admitted as important explanatory evidence, and the Court suggested that they could have been treated as evidence which was not of bad character because it was ‘to do with the facts of the offence’.⁵⁸ As Paul McKeown shows in his commentary in this *Review*, the judgment glosses over the lack of evidence for the enmity between two gangs that supposedly motivated for the shooting with which the defendants were charged.⁵⁹

In *Rashid*, evidence of the nature of a particular gang and the defendants’ membership of it was ‘[b]ackground evidence ... which was relevant to the motive or intention in relation to the possession of arms.’ The police expert’s ‘opinion evidence that [the co-defendant] Tshoma was a gang member was to a large extent based on Tshoma’s participation on two music videos’⁶⁰ (Tshoma protested that the video was ‘just a performance’).⁶¹

In testifying that Tshoma was a gang member, the officer also drew on ‘knowledge gleaned from social media as well as from unrevealed sources’ which the Court said he was clearly entitled to do on the authority of *Myers* and *Lewis*. As we have seen, however, *Myers* distinguishes between general knowledge of the characteristics of a gang, which can form part of a body of expert knowledge,⁶² and particular facts proved by hearsay. The prosecution’s claim that Rashid and Tshoma were ‘senior members’ of a gang fell into the latter category but the court did not analyse the meaning or reliability of the specific hearsay statements on which

⁵⁷ [2016] EWCA Crim 668, [2016] 4 WLR 114, [33], [32].

⁵⁸ *Awoyemi* [2016] EWCA Crim 668, [9], [17].

⁵⁹ Paul McKeown ‘Evidence: *R v Awoyemi*’ [2017] Crim LR 331.

⁶⁰ *Awoyemi* [2016] EWCA Crim 668, [14], [49].

⁶¹ *Awoyemi* [2016] EWCA Crim 668, [19].

⁶² [2015] UKPC 40, [66]

this evidence relied. Although hearsay from ‘unrevealed sources’ is no longer regarded as inadmissible in all circumstances, the Court of Appeal’s ruling in *Brown* distinguishes between cases where the prosecution seeks to withhold the identity of the person who has made a statement, and cases where they simply do not know it.⁶³ This suggests that, where the prosecution relies on specific informants to link a person to a gang, they should either identify them or call them as anonymous witnesses under the Coroners and Justice Act 2009.

In *Sode* evidence was admitted of a video made by the deceased, along with a text message by one of the defendants describing the video (accurately, his counsel suggested) as ‘trash’,⁶⁴ and another video made by one of the defendants two years before the offence, when he was 14, where used a gesture and language said to indicate support for a gang opposed to that of the deceased.⁶⁵ In *Lewis*, the police officers called as experts described a complex network of affiliated gangs and claimed that these gangs ‘posted videos on the internet so as to announce the individuals’ membership of the gang’.⁶⁶ A certain hand gesture made on the videos was said to be an indication of membership.

The use of rap and drill music (the sub-genre of rap that featured in *Rashid*) in the literal fashion in which they were used in these cases, appears to be common practice in English trials, following a trend set by US prosecutors.⁶⁷ A BBC News report, drawing on research by Eithne Quinn and Abenaa Owusu-Bempah, identifies 67 trials since 2005, involving 232 defendants, in which evidence of this type has been given.⁶⁸

⁶³ *Brown* [2019] EWCA Crim 1143, [2019] 1 WLR 6721 [38] (cf. *Ford* [2010] EWCA Crim 250)..

⁶⁴ [2015] EWCA Crim 705, [15], [38].

⁶⁵ *Sode* [2015] EWCA Crim 705, [18], [40].

⁶⁶ [2014] EWCA Crim 48, [44]. For further discussion of the use of rap videos in this case see P. Williams and B. Clarke, *Dangerous Associations: Joint Enterprise, Gangs and Racism* (London: Centre for Crime and Justice Studies, 2016), 9.

⁶⁷ E. Nielson and A. Dennis, *Rap on Trial* (The New Press, 2020).

⁶⁸ S. Swann, ‘Drill and Rap Music on Trial’ <<https://www.bbc.co.uk/news/uk-55617706>> (13 January 2021, accessed 15 February 2021).

Because of the combination of slang and fast-paced delivery characteristic of drill music, a police officer usually acts as an ‘interpreter’ of the lyrics.⁶⁹ In *O* the Court of Appeal held that evidence about the meaning of the lyrics had been improperly admitted as non-expert opinion, but that if a proper foundation had been laid, the officer concerned might have been accepted as a ‘local expert’:

The word ‘expert’ is slightly strange in these circumstances because it is, of course, very far removed from medical expertise or scientific or commercial expertise, but nevertheless there is no reason why a local person may not have expertise in a local dialect, and, as we have said, if the ground had been properly laid, it may well be that WPC Haynes was capable of being regarded as an expert in that limited sense about the language and patois of south London.⁷⁰

In the intellectual property case of *Confetti Records v Warner Music UK*, Lewison J held that the lyrics of a Garage song, ‘although in a form of English, were for practical purposes a foreign language’ and therefore only expert evidence was admissible to explain their meaning.⁷¹ In some cases, academic linguists have been used as experts in dialects such as ‘Multicultural London English’, which includes words with Caribbean, Arabic and Polish roots and is used in some drill performances.⁷² When the expert is a police officer, there is little discussion of whether they meet the criteria for admitting expert evidence. In *Elliott*⁷³ the evidence of a police officer who both interpreted letters written to the defendant as referring to gang membership, and testified about patterns of gang activity, was held to be admissible under the principle stated

⁶⁹ K. Rymajdo, ‘Drill Lyrics are Being Used as Evidence Against Young Black Men in Court’, *Vice* 24 Aug 2020, <https://www.vice.com/en/article/4ayp5d/drill-lyrics-used-against-young-black-men-court-uk> [accessed 4 Nov 2020]. See e.g. *Rashid* [2019] EWCA Crim 2018[10], [12], [15].

⁷⁰ *O* [2010] EWCA Crim 2985 [27].

⁷¹ *Confetti Records v Warner Music UK* [2003] EWHC 1274 (Ch)[154].

⁷² B. Bostock, ‘Police in the UK are Using Language Experts to Help them Decipher RAP-Influenced Urban Slang because it’s now so Complicated they Keep Misunderstanding Evidence’ (2019) <<https://www.insider.com/uk-law-enforcement-use-experts-decipher-complex-urban-slang-2019-3>> [accessed 4 November 2020].

⁷³ [2010] EWCA Crim 2378, [11], [28].

in *Hodges* – that is, as expert evidence, although perhaps out of the same sense of the oddness of the word as in *O*, the judgment never refers to the officer as an expert.

If the word ‘expert’ seems ‘slightly strange’ in this context, it is perhaps because any expertise the police have in, for example, drill music is in a sense parasitic on the expertise of those who perform such music or provide a knowledgeable audience for it, and members of marginalised subcultures are not often accorded the status of experts. Nevertheless, there is an important form of expertise – dubbed ‘interactional expertise’ by the sociologists Collins and Evans – which can be acquired ‘by interactive immersion in the way of life of a culture’.⁷⁴ In this way, the interactional expert gains not just a ‘dictionary’ knowledge of the language of a particular community, but a ‘tacit knowledge’ of its shared understandings – for example, of when a drill song is to be taken as an act of provocation rather than mere entertainment. As Collins puts it (discussing a scientific community), ‘In learning to use words as the community around one uses words, one is learning ... what and who is to be taken seriously’.⁷⁵ There may be some police officers who sufficiently immerse themselves – either in person or online – in the community of drill musicians and their knowledgeable fans to acquire such a socially informed understanding of what is communicated by drill performances. There are, of course, no formal qualifications in this kind of expertise, and it is not easy for a court to distinguish an officer with ‘interactional expertise’ from one who manifests what Ilan calls ‘street illiteracy’,⁷⁶ which is analogous to what Collins and Evans call ‘primary source knowledge’ of science:⁷⁷ an ability to understand the literal meaning of a community’s language without the tacit knowledge

⁷⁴ H. Collins and M. Evans, *Rethinking Expertise* (University of Chicago Press, 2007), 23.

⁷⁵ H. Collins, ‘Language and Practice’ (2011) 41 *Social Studies of Science* 271, 282.

⁷⁶ J. Ilan, ‘Digital Street Culture Decoded: Why Criminalizing Drill Music is Illiterate and Counterproductive’ (2020) 60 *Brit. J. Criminol.* 994.

⁷⁷ Collins and Evans, *Rethinking Expertise*, 22-3.

needed to evaluate its significance. It certainly cannot be taken for granted that someone who passes muster as a ‘gang expert’ is also an expert on rap music interpretation.⁷⁸

As the Court of Appeal observed in *O*, the central issue was not the meaning of the words but ‘whether the video was part of art or part of life’.⁷⁹ The rap scholar Eithne Quinn has appeared as a defence expert witness in some of these cases, arguing that formulaic invocations of violence are intended to establish ‘street credibility’ and imitate successful performers, and cannot be taken literally.⁸⁰ Jonathan Ilan’s recent study of drill videos reaches similar conclusions.⁸¹ Keir Irwin-Rogers and Craig Pinkney argue that some drill videos are deliberate acts of provocation or threat, but ‘the vast majority’ are not.⁸² In *Lewis*, the defence argued ‘that these “rap” videos were nothing more than that a demonstration of involvement in a musical genre; they did not signify gang membership and, in particular, the words and gestures should not be taken at face value’ and at one of the two trials evidence (presumably expert evidence) ‘was introduced to support that contention’.⁸³ In the Court’s view, this went to weight and not admissibility.⁸⁴

Lewis predated the Practice Direction, which clearly endorsed the view that reliability bears on admissibility as well as weight. In CPD 19A.6, judges are exhorted to ‘be astute to identify potential flaws in [an expert’s] opinion which detract from its reliability’. Three of the ‘potential flaws’ are particularly relevant:

⁷⁸ Nielson and Dennis, *Rap on Trial*, 131-7.

⁷⁹ *O* [2010] EWCA Crim 2985, [24]

⁸⁰ ‘Expert Testimony Leads to Fairer Trials?’ *The Expert Witness* 9 Oct 2019, <https://www.expertwitnessjournal.co.uk/special-reports/1195-expert-testimony-leads-to-fairer-trials> [accessed 4 November 2020].

⁸¹ Ilan, ‘Digital Street Culture Decoded’ 994.

⁸² K. Irwin-Rogers and C. Pinkney, *Social Media as a Catalyst and Trigger of Youth Violence* (Catch 22, 2017), 20.

⁸³ *Lewis* [2014] EWCA Crim 48, [100]. On the expert evidence at the trial see P. Lewis and B. Clarke, *Dangerous Associations: Joint Enterprise, Gangs and Racism* (Centre for Criminal Justice Studies, 2016), 9.

⁸⁴ *Lewis*, [2014] EWCA Crim 48, [100].

- (b) being based on an unjustifiable assumption;
- (c) being based on flawed data;
- (e) relying on an inference or conclusion which has not been properly reached.

The ‘unjustifiable assumption’ that police experts may be making about rap lyrics or videos is that they can be treated as literal statements of fact. ‘The difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views.’⁸⁵ To the extent that the Court of Appeal has acknowledged this point, they treat it as an ‘obvious’ argument that should be mentioned in summing-up to the jury but has no bearing on admissibility.⁸⁶

Similarly, it is easy to see how the police may be drawing conclusions from flawed data. If they only watch videos made by people they suspect of gang membership, and watch them looking for evidence that will confirm their suspicions, both their selection and their interpretation will be skewed in the direction of equating the use of language, dress and gestures associated with a particular gang with actual membership of the gang – as opposed to ‘braggadocio’,⁸⁷ the adoption of a ‘persona’,⁸⁸ or an attempt to establish ‘authenticity’ in the eyes of a knowledgeable audience.⁸⁹ Another way of putting this point is that the police do not have the ‘*balanced* body of specialised knowledge’ referred to in *Myers*.⁹⁰

If the expert evidence in *Awoyemi* is accurately summarised in the judgment, it appears to have exemplified the ‘flaw’ of drawing inferences or conclusions that were not properly reached.

⁸⁵ *State v Skinner* 95 A 3rd 236 (2014), 251.

⁸⁶ *Soloman* [2019] EWCA Crim 1356, [12].

⁸⁷ Ilan, ‘Digital Street Culture Decoded’ 998-9.

⁸⁸ A. Dennis, ‘Poetic (In)Justice: Rap Music Lyrics as Art, Life and Criminal Evidence’ (2007) 31 *Colum JL & Arts* 1, 18, 23; R. Araibi, ‘“Every Rhyme I Write”: Rap Music as Evidence in Criminal Trials’ (2020) 62 *Ariz. L. Rev.* 805, 815, 828; Nielson and Dennis, *Rap on Trial*, 52.

⁸⁹ Ilan ‘Digital Street Culture Decoded’ 1004-5.

⁹⁰ *Myers* [2009] UKPC 40, [58] (emphasis added).

The evidence is said to have been that various rap lyrics and gestures and videos ‘established membership (and [in the case of one defendant] leadership) of the DAG gang... the criminal nature of the gang, their attitude to firearms and serious gang violence.’ Another video in which young men ‘said to be’ two of the defendants chanted ‘Aggi DAG Mardi gang’ and made various verbal and gestural allusions to violence ‘was said to establish the existence of the DAG gang, membership of it, the criminal nature of the gang, their attitude to firearms and serious gang violence’.⁹¹ It strains credulity to claim that a musical performance could ‘establish’ all those facts. While it found the evidence admissible, the Court of Appeal stopped some way short of endorsing such strong inferences, finding only that the video ‘provided a link’ between the defendants and a gang. The relevance of this was not that the DAG gang had a specific motive to attack the supposedly intended victim as the prosecution suggested, but simply that the gang ‘gloried in violence and the use of firearms, mourned murdered friends and threatened violent retribution for those who crossed them’ and the videos and lyrics showed that the defendants had ‘signed up’ to that culture.⁹²

There is a big difference between inferring membership and indeed leadership of a gang from a video and interpreting it as showing some vague kind of ‘link’ or cultural affinity with a gang and its attitudes – an enactment of being ‘signed up to gang and gun culture’ that is intrinsic to many drill performances.⁹³ In view of this gap between what the expert witness apparently claimed and what the Court thought could be validly inferred from the evidence on which those claims were based, it is hard to understand how the expert evidence could be described as ‘prejudicial but inevitably so and not unduly so’.⁹⁴ Inferences of this nature should be subjected to the same level of scrutiny as inferences about the type of contact that is likely to have led to

⁹¹ [2016] EWCA Crim 668, [9]

⁹² *Awoyemi* [2016] EWCA Crim 668 [33] (emphasis added).

⁹³ Ilan ‘Digital Street Culture Decoded’, 1005.

⁹⁴ *Awoyemi* [2016] EWCA Crim 668 [33].

the presence of DNA traces on an object: the evidence the expert proposes to give ‘must be clearly set out in full in the terms in which it is to be given’⁹⁵ and inference that cannot be justified should be edited out.

The importance of balance, emphasised in *Myers*, is also reflected in CrimPR 19.4(f), which requires that an expert report must, where there is a ‘range of opinion on the matters dealt with in the report’, set out that range and explain the expert’s own position within it. Police officers are not academics, but if they are going to set themselves up as experts on an aspect of popular culture, they should be sufficiently aware of the small body of academic literature in the field to be able to explain to the court that interpreting rap or drill songs as autobiographical statements is controversial.

The issue of balance is particularly important in this area because rap lyrics and videos are overwhelmingly used against young, black defendants to construct a narrative that resonates with stereotypes about black criminality.⁹⁶ The genres of popular music and video that feature in trials are dominated by black performers and audiences, so an over-literal interpretation which treats them as evidence of criminal activity will disproportionately tend to criminalise black people, including people who might be guilty of nothing worse than adopting a criminal persona for purposes of entertainment. These are potentially grave prejudicial effects which must be taken into account as part of the ‘qualitative assessment’ required when gang affiliation evidence is used as evidence of bad character.⁹⁷ The probative value against which those effects must be balanced depends, in part, on the reliability or otherwise of the expert evidence.

⁹⁵ *Reed* [2009] EWCA Crim 2698; [2010] 1 Cr. App. R. 23, [122].

⁹⁶ L. Fatsis, ‘Policing the Beats: The Criminalization of UK Drill and Grime Music by the London Metropolitan Police’ (2019) 67 *Sociological Review* 1300, 1305-8; A. Owusu-Bempah, ‘Part of Art or Part of Life? Rap Lyrics in Criminal Trials’, <http://eprints.lse.ac.uk/106408/1/politicsandpolicy_rap_lyrics_in_criminal.pdf> (accessed 21 Feb 2021).

⁹⁷ *Sode* [2017] EWCA Crim 705 at [36].

The extent to which the probative value of evidence about popular music depends on expert evidence will, however, vary. In a case like *Saleem*,⁹⁸ where a striking coincidence connects the lyrics (referring to some violent incident that would occur on the protagonist's birthday) with the circumstances of the crime (a violent attack which occurred on the defendant's birthday), the jury may reasonably be able to surmise, once they understand the literal meaning of the lyrics, that they probably refer to the crime. The American case of *US v Stuckey* affords a striking example: 'Statements that Stuckey dislikes and kills "snitches," fills their bodies with holes, wraps them in blankets, and dumps them in the road provides [*sic*] direct evidence that Stuckey shot Darbins, wrapped his body in blankets, and dumped it in the road.'⁹⁹ In such cases the jury can infer that the most likely explanation of the similarity between the lyric and the crime is that this particular lyric refers to real events. Such an inference does not depend on an unjustified assumption that rap lyrics in general are autobiographical, nor does it need an expert to explain it to the jury (although the jury may need expert help to understand the literal meaning of the words).

Where a statement is interpreted in this autobiographical way it may well amount to a confession,¹⁰⁰ in the sense of a statement 'adverse to the maker'¹⁰¹ and so the prosecution must prove to the criminal standard that it was not made as a result of anything said or done which might render it unreliable.¹⁰² This raises the question of whether drill performers may be egged on, for example by producers or online comments, to provide authentic-sounding accounts of a violent way of life which cannot be relied on as statements of fact. If it refers to an event which was in the future when it was written, the lyric may be a statement of intention admissible

⁹⁸ [2007] EWCA Crim 1923.

⁹⁹ *US v Stuckey* 253 Fed Appx 468 (2007) at 482-3.

¹⁰⁰ *Bucknor* [2010] EWCA Crim 1152, [32].

¹⁰¹ Police and Criminal Evidence Act 1984, s. 82(1).

¹⁰² Police and Criminal Evidence Act 1984, s. 76(2).

as *res gestae*,¹⁰³ or if written or sung by an alleged gang member other than the defendant, as a statement in furtherance of a joint criminal enterprise. In all these cases it must be considered whether the evidence is ‘potentially safely reliable’¹⁰⁴ or whether it should be excluded under PACE s 78.

Human trafficking

We have seen that the type of expert evidence admitted in drug dealing and gang cases developed by way of an exception the hearsay rule. It allowed witnesses to draw on information provided by colleagues and informants as part of a body of knowledge in their field of expertise, which enabled them to form opinions about the criminal activities in which particular defendants were involved. The use of this type of evidence becomes much more problematic when particular statements (or even artistic performances treated as statements) are endorsed by expert witnesses as establishing the nature of a defendant’s involvement in criminal activity. The same problems can arise where what the evidence seeks to establish is that the defendant’s role in criminal activity was that of a victim rather than an offender: specifically, that they have a defence under the Modern Slavery Act 2015, s. 45.

In these cases, the defendant claims to have been a victim of ‘relevant exploitation’, that is, exploitation linked to human trafficking, which includes criminal exploitation; and that as a direct consequence of their exploitation they were compelled to take part in the criminal activity in the sense that they had no realistic alternative but to do so, or in the case of a person under 18, that a reasonable person with the same ‘relevant characteristics’ would have done

¹⁰³ *Callum* [2010] EWCA Crim 1325, [43].

¹⁰⁴ *Ibrahim* [2012] EWCA Crim 837; [2012] 2 Cr. App. R. 32, [107], discussed in *Riat* [2012] EWCA Crim 1509; [2013] 1 Cr. App. R. 2, [33].

the same.¹⁰⁵ They bear an evidential burden in respect of each element of the defence, but once that burden is discharged the prosecution must disprove one or more elements to the criminal standard.¹⁰⁶

In order to meet the evidential burden, some defendants may have recourse to a novel type of expert evidence of patterns of criminal activity – novel in the sense that it is introduced in the form of a document produced for a different purpose by an official body with specialised expertise. That body is the Single Competent Authority (SCA), a unit in the Home Office that determines whether individuals referred to it under the National Referral Mechanism are victims of trafficking, and entitled to certain assistance under the Council of Europe Convention Against Trafficking in Human Beings.

The admissibility of this type of evidence was accepted in *DPP v M*.¹⁰⁷ M was charged with possession of a bladed article and class A drugs. In the Youth Court, he relied on the defence that he was a victim of trafficking who had offended as a result of exploitation by older criminals. The District Judge treated the Decision Minute recording the SCA's conclusive grounds decision – a finding on the balance of probabilities that M was a victim – as admissible evidence which, together with the evidence of the arresting officers and the agreed facts, was sufficient to discharge the evidential burden on the defence. The prosecution had failed to make her sure that that the statutory defence did not apply.

The caseworkers who make decisions on behalf of the SCA are analogous to the police sergeant in *Myers* in the sense that they receive some specialised training and work within a unit which has accumulated a body of knowledge about a particular kind of criminal activity.¹⁰⁸ They do

¹⁰⁵ Modern Slavery Act 2015 s. 45 (1) and (4).

¹⁰⁶ *MK and Gega* [2018] EWCA Crim 667; [2019] QB 86.

¹⁰⁷ [2020] EWHC 3422 (Admin).

¹⁰⁸ *Myers* [2015] UKPC 40, [7].

not, however, have the same kind of ‘hands on experience’ that a specialist police officer does, and so they are even more vulnerable than the police to the accusation that their ‘expertise’ rests on untested hearsay. Moreover, if their decision is admitted as hearsay (either by agreement or as a ‘business document’ under the Criminal Justice Act 2003, s 117) it will not comply with the Criminal Procedure Rules or CPD, nor does the SCA caseworker undertake to comply with the duties of an expert witness.

It is therefore understandable that counsel for the prosecution in the appeal against M’s acquittal said of the SCA minute:

It was non-expert opinion evidence and was hearsay. The decision was the product of a review of extraneous material by a Home Office employee who was not an expert. Insofar as the decision contained evidence of fact rather than opinion, that evidence was equivocal and untested.¹⁰⁹

The CPS has not always taken such a critical stance; it has been criticised by the Anti-Slavery Commissioner for being too quick to drop prosecutions on the basis of a brief letter from the SCA, without obtaining the decision minute or examining the evidence on which it is based.¹¹⁰

In *M*, the Divisional Court rejected the DPP’s arguments and upheld the District Judge’s decision. Expert evidence was admissible as to the factors that were relevant to determining whether someone was a victim of trafficking, and it was also admissible as to whether the individual defendant was a victim: ‘A person with the necessary expertise can give context to the factors by reference to their wider experience of other cases.’ Even if the evidence appeared to determine one of the ‘ultimate issues’ in the case, it would be admissible in a similar way to psychiatric evidence of diminished responsibility.¹¹¹ Although the minute had not been

¹⁰⁹ *M* [2020] EWHC 3422 (Admin), [18].

¹¹⁰ Independent Anti-Slavery Commissioner, *The Modern Slavery Act 2015 Statutory Defence: A Call for Evidence* (2020), 8.

¹¹¹ [2020] EWHC 3422 (Admin), [46]; cf. *Pora* [2015] UKPC 9; [2016] 1 Cr. App. R. 3, [24-7].

prepared for use as expert evidence, the decision maker was ‘acting under a duty’ and with an awareness that the minute might be used as evidence, either in court or in a tribunal in relation to an asylum claim. The judge could assess the evidential basis of the finding, including the extent to which it relied on hearsay evidence from the defendant, but that was a matter of weight, rather than admissibility.¹¹²

The objections to admitting the SCA minute have much in common with the objections that could be made by the defence to police evidence about gangs. Essentially, the argument is that the defence is simply using the ‘expert’ decision-maker as a conduit for hearsay. The fact that by virtue of their institutional position someone has access to a range of ‘extraneous material’ does not make them an expert. Either they are expressing an opinion based on what they have been told or they are simply passing on the ‘equivocal and untested’ hearsay as evidence of the matters of fact stated in it. In the earlier case of *GS*,¹¹³ the Court of Appeal suggested that at trial (as distinct from an appeal) such evidence would be inadmissible on a basis analogous to the rule in *Hollington v Hewthorn*:¹¹⁴ like the decision of another court, or the findings of a judicial inquiry,¹¹⁵ it would be the non-expert opinion of the decision-maker on the matters which the jury had to decide.

While these objections have considerable force, there are a number of factors specific to the s. 45 defence which weigh in favour of allowing the defendant to rely on the SCA decision minute.

First, in cases where the alleged offence occurred before the statutory defence was available, it had long been common practice to rely on the SCA decision as evidence in support of an

¹¹² *M* [2020] EWHC 3422 (Admin), 52-3].

¹¹³ *GS* [2018] EWCA Crim 1824; [2019] 1 Cr. App. R. 7, [69].

¹¹⁴ [1943] KB 587; *S(G)* [2018] EWCA Crim 1824; [2018] 1 Cr. App. R. 7, [69].

¹¹⁵ *Three Rivers DC v Bank of England* [2001] UKHL 16; [2001] 2 All ER 513.

application to stay the prosecution as an abuse of process. The abuse of process jurisdiction gave the courts a way to oversee prosecution decisions in cases where the defendant was suspected to have been a victim of trafficking.¹¹⁶ The significance of the Competent Authority's decision (in most cases one of two Competent Authorities that existed before the SCA was created in 2019) was not that it was expert evidence but that, as a decision by the body responsible for ensuring that trafficking victims received the assistance to which they are entitled under international law, it was something that the prosecution was obliged to take into account in deciding whether to prosecute.¹¹⁷ If the prosecution disregarded the decision without good reason, this would be a breach of the 'non-punishment principle' under the Council of Europe Convention (art. 26) and, in consequence, an abuse of process. Where the statutory defence applies, there is no abuse of process in the prosecution deciding to test in court whether the defendant is truly a victim and if so, whether they were compelled to do the act or, in the case of a defendant under 18, whether a reasonable person with same relevant characteristics would have done the same.¹¹⁸ If the defence were precluded from adducing the SCA decision as evidence, the effect of the statutory defence would be to put defendants in a much worse position than they were in when there was no defence in cases falling short of duress. The Divisional Court decision avoids this perverse result.

Secondly, the *Hollington v Hewthorn* principle is subject to an important exception which, surprisingly, the court in *M* omitted to mention. In the civil courts, the principle does not apply to a report made by a body such as the Air Accident Investigation Branch that inquires into a subject on which it has special expertise, rather applying a general skill in the evaluation of

¹¹⁶ *L and Others* [2013] EWCA Crim 991; [2014] 1 All ER 113

¹¹⁷ *L* [2013] EWCA Crim 991; *Joseph* [2017] EWCA Crim 36; [2017] 1 WLR 1453.

¹¹⁸ *S(D)* [2020] EWCA Crim 285.

witness evidence as a judicial inquiry does: such a report can be admitted as hearsay evidence of expert opinion.¹¹⁹ The decision in *M* is consistent with this approach.

Thirdly, it is significant that when adduced on behalf of the defence the SCA decision does not have to satisfy any standard of proof – it need only be sufficient to raise an issue, both as to the defendants’ being a victim of trafficking and as to their being compelled to commit the offence or subject to the lesser degree of pressure required if they are under 18. When the Law Commission drew up the lists of factors now enshrined in CPD 19A, it envisaged that the burden and standard of proof applicable to the evidence would be taken into account in determining how solid a foundation was needed for the evidence to be ‘sufficiently reliable to be admitted.’¹²⁰ A decision might have significant weaknesses, for example as to ‘the completeness of the information which was available to the expert, and whether the expert took account of all relevant information’,¹²¹ but be sufficiently reliable to meet the evidential burden. In this context, it is acceptable to treat the unreliability of the evidence as a matter of weight and place the onus on the prosecution to point out any weaknesses to the jury.

A fourth factor is one that postdates the Divisional Court decision but may be crucial if (as is reportedly under consideration at the time of writing),¹²² the DPP appeals to the Supreme Court. It concerns the implications of the recent ECtHR decision in *VCL and AN v UK*.¹²³ The Court stated in its judgment that ‘Evidence concerning an accused’s status as a victim of trafficking is ... a “fundamental aspect” of the defence which he or she should be able to secure without restriction.’¹²⁴ Where there are reasons to suspect that an individual is a victim of

¹¹⁹ *Rogers v Hoyle* [2014] EWCA Civ 257.

¹²⁰ Law Commission, *Expert Evidence in Criminal Proceedings*, [3.113].

¹²¹ CPD V Evidence 19A.5 (f).

¹²² S. Mennim, case comment on *DPP v M*, J. Crim. L., forthcoming.

¹²³ Apps. nos. 77587/12 and 74603/12, (ECtHR, 16 Feb 2021).

¹²⁴ *VCL v UK* (ECtHR, 16 Feb 2021), [196].

trafficking, the state has an obligation under art 4 to ensure that those claims are assessed by someone trained and qualified to investigate them.¹²⁵ A finding that the individual concerned is a victim of trafficking does not confer complete immunity from prosecution, but it does require the state to consider whether prosecution is consistent with its duty to protect the victim.¹²⁶ Where the Competent Authority (in the sense used in the Council of Europe Convention)¹²⁷ has determined that a defendant is a victim of trafficking, it is open to the prosecution to show that the Authority was mistaken, or that there was no ‘nexus’ between the trafficking and the offence charged; but it must do so in terms consistent with the Council of Europe Convention and the Palermo Protocol, rather than with domestic legislation alone.¹²⁸ If a defendant were convicted after a trial in which they were not permitted to rely on the decision of the Competent Authority, this would, in the light of *VCL and AN*, be a clear breach of both art 4 and art 6 ECHR.

For all these reasons, we accept that the defence should be able to rely on the SCA decision and the reasoning behind it as raising an issue as to whether the s. 45 defence applies. It will often be in the interests of justice to treat hearsay statements in the minute as admissible,¹²⁹ even if the very fact that the minute is likely to be used as defence evidence makes it a document prepared for the purposes of criminal proceedings, so that hearsay statements contained in it are not admissible under the ‘business documents’ exception.¹³⁰ The position would be different were the *prosecution* to seek to rely on an *unfavourable* decision of the SCA. In this context, there is no human rights-based obligation on the court to consider the evidence. Given the high standard of proof, the prosecution has to meet they can be expected to adduce their

¹²⁵ *VCL v UK* (ECtHR, 16 Feb 2021), [160].

¹²⁶ *VCL v UK* (ECtHR, 16 Feb 2021), [158-9].

¹²⁷ Convention Against Trafficking in Human Beings, 2005, art 10.

¹²⁸ *VCL v UK* (ECtHR, 16 Feb 2021), [162], [172].

¹²⁹ Criminal Justice Act 2003 s. 114(1)(d).

¹³⁰ Criminal Justice Act 2003, s. 117(4)(a).

own evidence in support of the grounds for rejecting the defence, rather than relying on hearsay opinion evidence. The very fact that a conclusive grounds decision is reached on the balance of probabilities suggests that it is not ‘sufficiently reliable to be admitted’, and the risk that a jury might defer to the SCA’s view despite the lower standard of proof it applies is a prejudicial effect that militates against admitting the report.

Conclusion

People whose work regularly involves investigating a certain type of criminal activity may well build up a body of knowledge about such activities that enables them to understand the circumstances surrounding a particular crime in a way that would not be possible for someone without that knowledge. The fact that such people tend to work for the police or some other government agency is not in itself an objection to their giving expert evidence. Rather than dismissing ‘the use of police officers as experts [as] no more than the prosecution calling itself to give evidence’,¹³¹ it is important to insist that when police officers, Home Office civil servants and others provide expert evidence are held to the same standards of reliability and impartiality as other experts. They must show that they possess ‘a balanced body of specialised knowledge which would not be available to the tribunal of fact’¹³² and which is sufficiently reliable to be admitted, according to broadly similar criteria to those that apply to scientific evidence. Who should be ‘permitted to assume the robe of expertise’¹³³ depends on the evidence of their reliability and impartiality but may also, as we saw in the case of human trafficking, depend on the legal context and in particular on who bears the burden of proof.

¹³¹ JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice System* (2021) para 2.51.

¹³² *Myers* [2009] UKPC 40, [58].

¹³³ *Myers* [2009] UKPC 40, [58].