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## Court of Appeal

### Admissibility of third party previous convictions under PACE s.74

R v Denham; R v Stansfield [2016] EWCA Crim 1048

*Keywords: criminal evidence; previous convictions; third parties; exclusionary discretion; s.74 Police and Criminal Evidence Act 1984*

D was convicted of conspiracy to sexually assault a child under 13 (count 1A, which was an alternative to count 1, which alleged conspiracy to rape a child). S was convicted of two counts of conspiracy to rape a child (counts 2 and 4). The ground of appeal upon which this case note focuses relates to the prosecution's reliance on the guilty pleas of H (to counts 1, 2 and 4) and K (to counts 1 and 2) as evidence against D and S. The statutory provisions that the judge considered were s.74(1),(2) and s.78(1) of the Police and Criminal Evidence Act 1984 (PACE).

Section 74(1),(2) provide as follows:

(1) In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom or any other member State or by a Service court outside the United Kingdom shall be admissible in evidence for the purpose of proving that that person committed that offence, where evidence of his having done so is admissible, whether or not any other evidence of his having committed that offence is given.

(2) In any proceedings in which by virtue of this section a person other than the accused is proved to have been convicted of an offence by or before any court in the United Kingdom or any other member State or by a Service court outside the United Kingdom, he shall be taken to have committed the offence unless the contrary is proved.

S.78(1) provides that,

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

The judge, having considered previous jurisprudence of the Court of Appeal concerning the relationship of s.74 and s.78 in conspiracy cases (namely *R v Curry* [1988] Crim LR 527; *R v Kempster* (1990) 90 Cr App 14; *R v Smith* [2007] EWCA Crim 2105 and *R v FBMK* [2012] EWCA Crim 2438) had concluded that,

[s]ection 74 is to be approached with caution and it is not to be used as a matter of routine. It is not to be used as a smuggling device to place evidence before the jury which it would be convenient for the jury to hear. The paradigm notions to be applied will be those of relevance and then fairness. (at [34])

The judge had recognised, however, that “it also remains true that such evidence may well be unfair, if the issues are such that this evidence would close off the issues which the jury has to try. But it means just that, to close off, not to make more difficult” (at [36]).

On the facts of the case before him, on the basis that “the real issue was whether the present defendants were party to the concluded agreements, with the requisite intent, or not” (at [36]), the judge held that it was “fair and proper” to admit the evidence (at [37]).

**Held, dismissing the appeal,** the judge had (at [39]),

correctly stated the law which should be applied. The evidence should be excluded if its admission were unfair in the particular circumstances. The admission of prosecution evidence will often raise difficulties for a defence; but it is unfairness to, and not difficulties for, the defence which is the key.

Whilst the decision whether to admit such evidence is often referred to as an exercise of discretion it is better described as “the exercise of a judgment in which a balance has to be struck on the issue of fairness” (at [40]). The significance of this distinction was that, if the decision was a pure exercise of discretion, “the basis of challenge to a judge’s decision might be unduly confined”. Rather, the position was that, “the decision whether to admit evidence in these circumstances is either right or wrong, although whether the conviction is safe is another matter.” However, “such decisions will necessarily be fact sensitive, and the judge will be in a particularly good position to assess the issue of fairness in the context of the dynamics of the trial process” (at [40]).

On the facts of the case,

the admission of the evidence of [the guilty] pleas neither shut off the defences which had been raised in the defence statements, nor close down the very issue the jury had to consider. It was not the defence of either appellant that there were no conspiracies to abuse T, their cases were that they were not a party to such conspiracies... (at [41]).

## COMMENTARY

When it was first enacted, the effect of s.74(1) of PACE was that evidence of third party convictions was admissible to prove that the person convicted committed the offence of which that person was convicted if so to prove was relevant to an issue in the proceedings. The jurisprudence of the Court of Appeal soon established, however, that,

[s]ection 74 is a provision which should be sparingly used. There will be occasions where, although the evidence may be technically admissible, its effect is likely to be so slight that it will be wiser not to adduce it. This is particularly so where there is any danger of a contravention of section 78. (*R v Robertson v Golder* [1987] QB 920 at p. 928).

Thus, in *R v Kempster* (1990) 90 Cr App 14 the Court of Appeal (at p. 19) regarded it as being “of vital importance to distinguish between the extent of the power conferred by section 74, and the circumstances in which evidence should be excluded”. Their Lordships indicated that the power’s extent was “determined” by the wording of s.74(1) which at that time provided that evidence of a person’s conviction was admissible in any proceedings to prove that he committed the offence “where to do so is relevant to any issue in those proceedings”. Their Lordships emphasised (at p. 20) that s.78 raised “a separate and distinct question—whether the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it”.

As the decision of the Court of Appeal in *R v Denham; R v Stansfield* makes clear, the relationship between s.74 and s.78 continues to be one whereby the ambit of s.74 is restricted by the existence of s.78. One point that is not referred to in this recent case, however (though a point that Rao recently recognised in an article in [2016] 6 Arch. Rev. 5) is that since the bad character provisions of the Criminal Justice Act 2003 came into force, the effect of s.74(1) has been that evidence of third party convictions is admissible to prove that the person convicted committed the offence of which that person was convicted only if evidence that the person convicted committed the offence is admissible. Thus, whereas the original version of s.74(1) contained a test of relevance which, subject to the operation of s.78, governed the admissibility of third party convictions, the operation of s.74 in its current form is dependent upon the satisfaction of an external test of admissibility which operates independently of s.74. To apply the terminology used by the Court of Appeal in *Kempster*, “the extent of the power conferred by s.74” is no longer “determined” by the wording of that section. Rather, the position is as follows.

A previous conviction will amount to evidence of the commission of a criminal offence and, thus, under s.112 of the Criminal Justice Act 2003, to evidence of misconduct for the purposes of the 2003 Act’s bad character provisions. Such evidence will, thus, amount to evidence of bad character under s.98 of the 2003 Act unless it is excluded from the definition of bad character by virtue of the operation of s.98(a) or s.98(b), which exclude from the statutory definition of bad character, “evidence which—(a) has to do with the alleged facts of the offence with which the defendant is charged, or (b) is evidence of misconduct in connection with the investigation or prosecution of that offence”.

The admissibility of evidence of the bad character of a person other than the accused is governed by s.100 of the 2003 Act. Under s.100 (and subject to s.78 of PACE if it is tendered by the prosecution) such evidence may be admissible as important explanatory evidence or if

it has substantial probative value in relation to a matter in issue in the proceedings which is of substantial importance in the context of the case as a whole or if the parties agree to its admission. Where evidence falls outside the ambit of the 2003 Act's bad character regime due to the operation of s.98(a) or (b), admissibility is governed by the common law test of relevance (subject to the exercise of the s.78 discretion if the evidence is tendered by the prosecution) (see, for example, *R v Mullings* [2011] 2 Cr App R 2 and *R v Apabhai* [2011] EWCA Crim 917). For example, in *R v Smith*, one of the s.74 authorities relied on by the judge in *R v Denham; R v Stansfield*, the Court of Appeal (at [9]) held that the admissibility of the guilty pleas that the case concerned was not governed by s.100 because "[t]he pleas of guilty were evidence that the girl had committed the very two offences which the jury was trying... This misconduct by the girl did have to do with the offences charged — precisely. Bad character provisions were simply not relevant". And in *R v T* [2007] 1 Cr App R 4, another decision under the post-2003 Act formulation of s.74 in which the Court of Appeal was not applying the s.100 test, the Court of Appeal indicated (at [12]-[13]) that "[as] far as s.74 of the 1984 Act is concerned, that again refers expressly to the fact that the evidence of a conviction has to be "admissible", their Lordships recognising that, "[t]he general principle is that for evidence to be admissible as relevant, it must be logically probative (or disprobative) of a fact in issue between the parties." Thus, before the court is required to consider the relationship between s.74(1) and s.78, on which the Court of Appeal in *R v Denham; R v Stansfield* concentrated, it should first determine which of the two admissibility routes is applicable and consider whether, as a matter of law, the evidence (subject to potential exclusion under s.78) is admissible under the applicable admissibility test. If the evidence is not admissible under the applicable admissibility test it will be unnecessary for the court to consider the fairness of admitting it.

Thus, in the context of a multi-count indictment such as that encountered in *R v Denham; R v Stansfield*, in order to determine which admissibility route is applicable the court should consider whether evidence of a count to which a former co-defendant has pleaded guilty has to do with the alleged facts of a count to which a co-defendant who has pleaded not guilty is charged. For example, *R v Haxihaj* [2016] EWCA Crim 83 concerned two conspiracies to supply a Class A drug (a March 2013 conspiracy, charged as count 1 and a May 2013 conspiracy, charged as count 2). One of the co-defendants, who was charged solely with count 1, applied for leave to adduce evidence of misconduct on the part of his co-defendants relating to count 2 either under s.98(a) and (b) or under s.101 of the 2003 Act and to adduce evidence of misconduct on the part of a former co-defendant who had pleaded guilty under s.100. The Court of Appeal held (at [17]) that the evidence did not fall within the ambit of s.98(a) or s.98(b) because,

[he] was charged with participation in the March conspiracy; these matters all relate, if at all, to the May conspiracy. Secondly, it is said that the evidence is evidence of misconduct in connection with the investigation or prosecution of that offence. Once again, it has to be evidence of misconduct in connection with the investigation or prosecution of the offence with which the defendant is charged, and here it is not.

Accordingly, if this evidence is admissible, it must be pursuant to one of the provisions of the Criminal Justice Act 2003.

This, it is submitted, is the first stage approach that a court should take upon facts such as those as *R v Denham*; *R v Stansfield*, before, secondly, applying the appropriate admissibility test (common law or s.100 of the 2003 Act). Only if the evidence is admissible as a matter of law should it be necessary for the court to consider whether to exclude it under s.78 of PACE.

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