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I hope one day to be able to write an introduction to The Advocate that isn't overshadowed by Covid…

While the arrival of the Omicron variant has not (yet?) led to the re-introduction of significant restrictions, we have entered another period of uncertainty when what the CJS is crying out for is stability. As before, we'll probably muddle through: the sheer bloody-minded persistence of our members is astonishing, but there is a palpable sense - across both branches of the profession - that the breaking point is imminent (or maybe we're already at it?).

As both our immediate Past President and incoming President emphasised in the AGM speeches (reproduced in this issue), CLAR is probably the final opportunity to reverse years of politically-motivated decline that have imperilled the fabric and viable future of criminal justice in this country. The Association has done as much as it can to steer the review in the right direction, and we must hope that our submissions have been heeded.

As well as a review of the successful AGM, this edition contains articles on how the test for dishonesty has developed over recent decades and on the risk posed to young BAME defendants of misconceived bad character evidence of gang affiliation. Bruce Reid expresses his concerns about how the society generally, and the CJS specifically has failed, abjectly, to protect the victims of domestic or misogynistic violence.

Ed Smyth, Editor
(esmyth@kingsleynapley.co.uk)

LCCSA NEWS

JOINT INTERIM INTERVIEW PROTOCOL

The arrival of another Covid variant serves to remind us that custody suites continue to pose a very real infection risk. We recommend reading and saving this interactive document to familiarise yourself with what to expect in a custody suite, all forces in the UK are at least at 'standard' level and will continue to be over the winter.

We are under no illusion that officers uniformly keep to these standards, but the more of us who hold the police to account by demanding compliance the more they will have to change. Version 4 of the joint interview protocol allows for remote interviews if the police cannot adhere to these standards (in particular read paras 19 and 23.d) and if standards are poor, make representations to the custody officer that the interview cannot lawfully proceed. The police will be sensitive to any suggestion that an interview may be rendered inadmissible later, the CPS take a keen interest in this too. You can find the protocol here. We will monitor the situation on a national and regional level and will argue for a resumption of remote assistance when necessary.

All claims from the LAA for remote advice have to demonstrate compliance with the JIIP in force at the relevant time. We understand that in some instances investigating officers have proposed remote interviews when none of the exceptions in v4 apply. While some people, aware of the change, have declined the offer there have been instances when interviews have proceeded. Please remind all colleagues to study v.4 and only to advise remotely if they believe an exception applies. They should not defer to the judgement of an OIC.

AGM AND DINNER

The evening of 15th November saw members gathering at Frederick's restaurant in Islington for the Association's AGM and dinner, always an enjoyable and convivial occasion.

As well as hearing from the outgoing and incoming Presidents (of which more below), those in attendance heard from DJ Brennan (thanking members on behalf of the district bench for their efforts over the last difficult year to keep the CJS show on the road) and Matt Foot (in

typically ebullient form). The Association was also glad to welcome Jo Sidhu QC, chair of the CBA and was very grateful for the support of our sponsors for the evening, Forensic Equity.

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LCCSA COMMITTEE 2021-22

Hesham Puri - President

Mark Troman - Past President
Adeela Khan - Vice President
Fadi Daoud Junior - Vice President
Alison Marks - Secretary
Rumit Shah - Treasurer
Ed Jones - Law Reform
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Danielle Reece-Greenhalgh
Claire Dissington
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Co-Opted Members:

Jonathan Black
Steve Bird
Malcolm Duxbury
Rhona Friedman
Kerry Hudson
Raymond Shaw

New committee members:

Leah Connolly (Sonn Macmillan Walker)
Bartholomew Dalton (Hickman & Rose)
Lara Ideo (GT Stewart)
Grace Loncraine (Commons)
Rebecca Von Blumenthal (Edward, Fail, Bradshaw and Waterson)

Retirees:

Rakesh Bhasin
Peter Csemiscky
Matthew Hardcastle

Steve Bird - Life membership Award:

Mark Troman was pleased to bestow a life membership award on Steve Bird, a colleague who has, for many years, been part of the engine room of the Association's analysis, and whose experience and input has been invaluable to 15 Presidents.

Such is his length of service that, when he joined, the committee meetings would have been a smoke-filled affair, as this was before the smoking ban.

Back then you could spend a whole day challenging a committal for trial and be paid for it. Alexander Litvinenko was still ordering Sushi and Saddam Hussain's lawyers were advising that a whole life tariff would represent a good outcome. Notably, for one of Steve's persuasion, Arsenal had just moved into a world-beating new stadium fit for a team ready to dominate the premier league…

COMMITTEE MEETINGS

The LCCSA committee meets on the second Monday of each month at 6:00pm. All members are welcome to attend (in person or remotely) and if you wish to participate please contact the editor or Sara Boxer (admin@lccsa.org.uk).

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PAST PRESIDENT'S ADDRESS

Good evening, ladies and gentlemen, friends and colleagues.

I have been reminded by Judge Brennan that the PET form allocates me 10 minutes for this speech. But as usual that depends on how difficult my audience plans to be.

At last year's AGM, held on Zoom, I closed my inaugural speech with a hope, that we would all gather again at the summer party, basked in glorious late-evening sunshine.

Well, we were unable to deliver on that hope but here we are! Better late than never. Of course an LCCSA party is not the only promise to be late in delivery, and, with the Independent Review of Criminal Legal Aid entering its

4th year of gestation, I think you will forgive us for making you wait 4 months.

And in being here I want to congratulate you, for making it through this period. For carrying on through a terrible 20 months, on the back of a drab decade for criminal lawyers. You would not be criticised if you had walked away.

The pandemic has given us a new perspective on our health and wellbeing, and has perhaps shown to us that for too long we have neglected these concerns, whether in working hours or conditions. But even so, when many other public services ground to a halt, we continued to play our part in keeping the criminal justice system going. Going out to police stations, courts, and prisons when it was necessary, and perhaps too often, when it was not.

It is my task to review the year passed and the work of the Association on behalf of its members before giving thanks to those who have helped me. After launching our new website, in January we were pleased to deliver on our promise to join the court's identity card scheme while creating a more efficient application system. The process took hours of engagement and planning with HMCTS but we have created something that will benefit our members for years to come.

Our new and more widely accepted cards remain free to members, and many have upgraded during the year. Avoiding a search upon entry to court could not have come at a more important moment, as we launched it at the height of the winter surge in infections.

One of the first tasks of the year was to respond to a consultation on Extended Hours of Operation, or was that flexible hours? Or even COVID hours? You can tell an idea is being rehashed if it has no less than three titles. We resisted breakfast and supper court sessions in 2011 and in 2017 and had to do it again this year. My thanks to Danielle Reece-Greenhalgh in particular for her work on our response.

In January as we returned to work from the Christmas break in the middle of a lockdown, our courts were overcrowded and unsafe. Those in charge had failed to react quickly enough. The Association issued a Call for Action from HMCTS, listing ten urgent demands to protect advocates in London's magistrates' courts. It caused more urgent engagement and a number of our demands were acted upon. Perhaps the most important was the recognition that remote advocacy would be the default position, drastically reducing footfall into court buildings.

Other ideas such as marshals in public areas and denying entry to members of the public not involved in the hearings also helped. The listing of cases was dialled back, and HMCTS were forced to accept a new backlog of cases was required to protect us all.

As we exited lockdown we called for the retention of many of the safety measures currently in place and have repeatedly argued for the permanent use of block listing in magistrates courts.

My predecessors called upon the MoJ to review and uprate the means test for criminal legal aid applicants and for most of this year it has been my task to engage with proposals which are due to be announced soon. It is likely that generous increases will be made in the magistrates' and Crown Courts and there are signs our concerns about the administrative burden on practitioners have been heeded in some areas.

The concerns we expressed over the new scheme allowing for pre-charge engagement were *not* heeded however. The scheme gave too much power to investigators on whether to initiate, did not pay for much of the initial work and offered the derisory hourly rates we have had 25 years to become familiar with.

Our concerns *were* understood by the Law Society however, and we supported their decision to challenge the Ministry. As a consequence of that challenge we will be tasked with responding to a new consultation and we can only hope they will get it right, second time around.

In January members responded to our appeal for examples of their delays to Crown Courts trials and we achieved national publicity under headlines such as "4-year waits for Crown Court trials". We connected the abuse of the RUI system with pre-existing Crown Court delays to ensure that articles reflected the underlying fragility of the sector in any COVID-focussed reports.

From March to May the Association spent a great deal of time preparing its contribution to the Independent Review of Criminal Legal Aid. This included two meetings with the Chair, Sir Christopher Bellamy, and a lengthy response to the consultation, suggesting improvements to every aspect of criminal legal aid. The Committee answered my calls for assistance and sent me important contributions to include in the text, if I list the names here it might tire our guests. So thank you to all who helped. Special thanks go to Steve Bird and Ray Shaw for their in-depth contributions and to Danielle Reece-Greenhalgh who provided valuable editorial support.

Throughout the year I attended meetings to deepen or maintain our abilities to provide advice remotely in courts and police stations. In the magistrates' courts it was to enhance and further our opportunities to do so, in the police stations it has been to prevent a sudden removal, notwithstanding the end of national restrictions.

It will be for my successors to consider, outside a pandemic, how much of these new working arrangements should be retained and in what circumstances.

In the short term we must not accept there is no longer any need for them. I recently called for the restoration of widespread use of remote advice in the police station, to recognise the threat posed by increased rates of infection and hospitalisations. The Association is listening to its members and is focussed on increasing options for those concerned, as well as addressing the lax standards we find in police custody suites.

There is not enough time to cover all of the meetings and issues we have been consulted on and I apologise if I have missed something out. To mention in passing: we presented ideas simplify the new LA contracts, (for example they will now require duty solicitors to report a 50 hours work per month for instead of 14 or 61 hours), we have contributed to many nightingale court implementation groups (Adeela and Danielle) and the infamous Common Platform roll out (Diana)

I close with the work yet unfinished. I hand over to Hesham just weeks before the Ministry of Justice issues its response to the CLAR review. We have been waiting since 2018 for this moment. Our numbers have fallen to worryingly low levels but it would have been much worse had this review not been promised.

If it fails to put right 25 years of neglect of all criminal legal aid lawyers, if it offers little but restructuring of this miserly budget, if it fails to recognise the true cost of criminal justice in a digital age we have one last opportunity to act, before an exodus. It will be a small window of opportunity. We must unite, with other solicitors, and with the bar.

I welcome Jo Sidhu QC, our guest tonight. I see in him a man we can work with and a recognition of the need to support each other in the times ahead. I will say no more on that subject knowing that others will do so later on.

I said at the start the, we have gained a new perspective from the tumult of recent years. Our members have shown their dedication and resilience in times of adversity. That is our strength, we must show it again this year as we seek renewal.

NEW PRESIDENT'S ADDRESS

Good evening ladies and gentleman and it's a pleasure to see so many friend and colleagues

Can I thank Mark and the committee who have worked tirelessly during what has been a very difficult time. As Vice-President I have seen how much work Mark put in despite having a very young family and a busy practice.

It is an honour and privilege to be President of this association and for me personally this is a day I won't forget.

I have had several moments in my professional life that stood out. I can still remember the day I was offered my training contract in small high street firm in Lewisham. That was followed by the day I qualified which, for a long period in my life, didn't seem possible. I was a criminal solicitor and I felt proud. I was the first lawyer in my family.

I then remember my first week on my feet in Greenwich Magistrates Court appearing before DJ Riddle. I remember the feeling excitement and nerves, but also realised the gravity of the profession I had joined: I was representing those who liberty was at stake! That is a huge responsibility.

I have another significant milestone ahead next year as I will be 50, which will make me the average age of a Duty solicitor. I have been reflecting about this and there is nothing average about being a criminal lawyer: we work above average hours, and the effort we put into preparing our cases, in my humble opinion, is anything but average.

We, along with our sister profession the Bar, have been providing an outstanding service to the public

Yet we are paid well below average for the work we do. The conditions we work in are below average. One only has to look at the state of some of our courts and police stations.

This has resulted in us and the Bar losing significant numbers. Within my own firm in the last 18 months, five senior lawyers have left to join the CPS. When asked why, they all said they love the profession but can no longer tolerate the uncertainty and the low pay. And they understandably want better conditions. We can't compete!

The costs of running a firm grow each year: firms are shutting down and can't recruit.

The last 18 or so months have made us all reflect on why we work in the profession. We can no longer afford to work for the low pay and the hours of unpaid work. These hours are having an impact not only financially but on our health and well-being.

Where to go from here? We are going to await the outcome of CLAR, and then it is for all of us consider if we are satisfied with the outcome. But something has to be done.

We cannot allow this drain on our profession. Because if we are not careful there will be no legacy to pass on to the next generation. I don't want to get to 60 and for that age be the average age of a duty solicitor. I'm afraid if that happens, we have failed

That leads me to my year as President and what I hope to achieve: my commitment to you is that I, with the support of the committee, will continue the battle to persuade the government that if we do not receive significant investment then this profession is lost.

We are going to have to work alongside the Bar, and I'm grateful to Jo Sidhu QC head of the CBA who has attended today to show his support. If we want change it will have to be done together. This is a time for unity not division.

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ARTICLES

DISHONESTY - IT'S NOT WHAT IT USED TO BE

Paul Bogan QC (23 Essex Street) considers the evolution of the test for dishonesty, from Ghosh to Ivey to Barton, and provides a guide to practitioners to where we are now.

There was a time – for 35 years in fact – when everyone knew where they stood. Criminal lawyers anyway. R v Ghosh [1982] 75 Cr App R 154 reigned. As defined in that case the test of dishonesty was principally objective: the standard of the ordinary decent person.

Ghosh also allowed an escape route where, despite objectively dishonest conduct, an accused genuinely believed that his or her conduct was honest by objective standards. This second limb was the mens rea element of criminal offences learnt at the practitioner's first lecture, the "guilty mind": Sherras v De Rutzen [1895] 1 QB 918.

For the vast majority of contested dishonesty offences the element of dishonesty is not a live issue. For example, in most robbery and burglary cases, once the conduct is proved against an accused it is indisputably dishonest. Cases in which dishonest conduct is arguably open to doubt more often tend to be of the fraud or deception variety.

The safeguard of the subjective second limb of the Ghosh test was a line of defence that only occasionally arose in practice and even more scarcely succeeded. That was because of the credibility gap: the greater the distance between objective honesty and the accused person's subjective view of it, the less likely it was that anyone would accept that, short of mental illness, he or she genuinely believed the conduct to be honest.

Of the few situations in which it has been necessary to delve into the grey areas of dishonesty, at least two are not uncommon. The first is the "borrower" type of case: a person who appropriates money without permission from, say, an employer but with the intention of repaying on pay day. This type of situation had always been considered to give rise to an arguable defence. See for example Boggeln v Williams (1978) 67 Cr App R 50 and R v Feely (1973) 57 Cr App R 312.

The second situation in which the subjective element of dishonesty was considered of significance was where an accused relies on commercial or industry standards of practice for his or her perception of honesty. See for example R v Hayes [2018] 1 Cr App R 10.

Then along came Ivey v Genting [2018] 1 Cr App R 12, a civil case about cheating at gambling. Despite dishonesty not being a factor in deciding the claim, and with no argument whatsoever concerning its meaning, the Supreme Court jettisoned the Ghosh test in favour of a new test:

1. First, ascertain the state of the individual's knowledge or belief as to the facts;

2. Then decide whether the conduct was honest or dishonest by standards of ordinary decent people.

In the Supreme Court's analysis, the subjective second limb of Ghosh should no longer apply because it permitted people to regulate their conduct by their own, potentially warped, standards of honesty.

How might the new test affect the two situations described above? Taking the "borrower" scenario, it is difficult to see how a belief that one will in due course receive payment and an intention on receipt to make recompense could amount to 'knowledge or belief as to the facts (Ivey first limb.)' Might the unintended effect of the Ivey test be to disqualify a defence in such circumstances?

In Hayes, a LIBOR rigging case decided a couple of years before Ivey, it was held that industry standards could form no part of the jury's assessment of honesty by the standards of ordinary decent people. However, it was held that such evidence could go to the subjective limb of the Ghosh test: whether an accused believed that he was acting honestly according to the standards of ordinary decent people. Ivey's abandonment of this second limb of Ghosh suggested that such evidence could therefore be of no probative value whatsoever. Thus for example, a young, inexperienced and impressionable employee adopting sector standards which he or she assumes to be honest was to be treated in exactly the same way as the old and savvy operator. Indeed, contemplating an inflexible standard of honesty, the Supreme Court stated that *"[T]here is no reason why the law should excuse those who make a mistake about what contemporary standards of honesty are …"*

Faced with these problems, the Court of Appeal in R v Barton and Booth [2020] EWCA Crim 575 appears to have recognised that in practice many cases are too nuanced for the Ivey test to be applied literally or even strictly. But rather than revert to the Ghosh test, the Court of Appeal sought to give further insight into how the Ivey test should be interpreted and applied. It approved a passage in the civil case of Royal Brunei Airlines v Tan:

"… when called upon to decide whether a person was acting honestly a court will look at all the circumstances known to the [defendant] at the time. The Court will also have regard to the personal attributes of the [defendant], such as experience and intelligence, and the reason why he acted as he did." [Para 107].

The Court in Barton went on to state that:

"… when Lord Hughes talked in [74] of the "actual state of mind as to knowledge or belief as to the facts [our emphasis] he was referring to all the circumstances known to the accused and not limiting consideration to past facts. All matters that lead an accused to act as he or she did will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard. That will include consideration, where relevant, of the experience and intelligence of the accused." [Para 108]

This further guidance plainly diminishes the harshness of the Ivey test. Indeed it seems that despite the Supreme Court's attempt in Ivey to disapply the subjective limb of Ghosh, an accused's belief as to the honesty of his or her conduct can, as a motivating factor, form part of the subjective mental element to be considered when applying the objective standard. In that context the distinction between Ghosh and Ivey, as interpreted by Barton must be this: whereas under Ghosh a genuine belief by an accused that he or she is acting honestly by objective standards was a complete defence, under Ivey / Barton it is now a factor a jury may take into account when applying the objective test.

But the dictum in Barton seems also to have opened a Pandora's box of factors which a fact-finder might take into account when turning to consider objective dishonesty. For example poverty or hunger might well be "matters that lead an accused to act as he or she did" when removing food from a supermarket. An aversion to harming animals may have led an activist to appropriate them from a laboratory.

In a commercial context one might envisage the honesty of certain conduct being considered quite differently depending upon the motivation for it, whether for example it is philanthropic or personal financial gain. A deception which would ordinarily be regarded as innately dishonest may be justified by a worthy motive. Dishonesty might be vitiated by the prospect of an alternative outcome foreseen to be undesirable or even unlawful. In a case such as Hayes, it would now seem that reliance on industry standards may be introduced as a factor to be considered when deciding whether conduct is objectively dishonest.

The practitioner's difficulty in appraising the merits of a defence and advising the client on the issue of dishonesty will have been amplified by the Ivey / Barton test in some cases. This uncertainty appears to have been foreseen by the Court of Appeal in Barton when the Lord Chief Justice warned that: "there will be a range of consequential issues that will need to be decided following the decision in Ivey which will need to be addressed as cases are tried". This warning is unlikely to rank as the most helpful guidance to have been issued by that Court.

Paul Bogan QC of 23 Essex Street represents clients in the most complex and demanding of cases. Conducting defences in both serious fraud and general crime. Vastly experienced in Appeal

work too, he has recently appeared in landmark cases both in the Supreme Court and Court of Appeal.

https://www.23es.com/barrister/paul-bogan-qc/

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THE USE OF GANG AFFILIATION AS EVIDENCE OF BAD CHARACTER

Oliver Mosley (QEBHW) casts a critical eye over the concerning trend of the reliance, as evidence of bad character, on – often tenuous – information suggestive of gang membership or association.

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

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

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

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

While 'reprehensible' is not defined by the Act – earning the label of "an adjective of considerable ambiguity" from Dr Roderick Munday, Reader Emeritus in Law at Peterhouse College, Cambridge – the revision was a clear signal that Parliament had the intention to give juries more information, opening the gates for increased gang affiliation evidence. Defence counsel in Awoyemi and others [2016] EWCA Crim 668 described it as a dramatic change, resulting in far too much prosecutorial enthusiasm.

The first 'test case' for the bad character provisions in relation to gang affiliation evidence was R v Lewis and others [2014] EWCA Crim 48, where multiple defendants were charged in relation to the burning down of a pub and shots being fired at police officers during the London Riots in 2011. The jury were shown rap videos involving footage of guns and threatening lyrics about harming police officers, and told that the defendants were in gangs. The Court held the affiliation was properly adduced, and Sir Brian Leveson set out a 4-stage test for reaching that conclusion:

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

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

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

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

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

It appeared that the test would be a strict check on prosecutorial enthusiasm, and it was applied in Adebola Alimi [2014] EWCA Crim 2412. in the same year. The defence had a positive ID and cell site evidence to show the defendants were not present at a shooting of several police officers, but they were convicted after the Crown adduced evidence of their gang affiliation. The Court of Appeal quashed the conviction: there was no evidence the gang had any hostility to the police and the Crown had failed to demonstrate that the defendants were anything more than affiliated with the gang. The judgement identified two problems with gang affiliation evidence: it is sometimes irrelevant (a legal issue), and the affiliation is sometimes improperly proven (a practical issue).

But the Lewis test was negated in Awoyemi and others, often regarded as the primary case for gang affiliation evidence. Gang affiliation was adduced as the Crown painted an attempted murder as gang related, despite no evidence that the two 'rival' gangs had any hostility between them. The Court of Appeal, when granting leave, appeared to acknowledge the 3rd stage of the Leveson test by stating *"it seems to us arguable that the judge fell into error […] it is arguable that such evidence could only*

become relevant […] if hostility between the two gangs was demonstrated" (Paul McKeown, 'Evidence: R v Awoyemi (Toby)', Crim LR 2017, p133). But this principle was rejected on appeal; the Court concluded that there was no need for the Crown to make out hostility for the gang affiliation evidence to be admissible because gangs "will not necessarily commit their specific feuds to writing". The judgement also held that the Leveson test was specific to the case it was used in and should not be more broadly applied, although there is anecdotal evidence that it is still occasionally relied on by trial judges.

In other cases, the courts have also overruled attempts to read a 'nexus in time' into Section 98 to prevent historic gang affiliation being part of the facts of an offence (see Sule [2012] EWCA Crim 1130 and Lunkulu and Others [2015] EWCA Crim 1350). Most recently the Court of Appeal considered gang affiliation evidence, including drill music, in Shaveek Dixon-Kenton [2021] EWCA Crim 673. One of several drill videos appeared to show gang members mocking the death of the victim. The Court declined to interfere with its admission at a late stage of the trial process, despite the inability of the defence to instruct an expert. There was also no specific reference in their judgement to the ongoing debate about drill music as an evidential source. Overall, there is a clear reluctance to allow the common law to narrow the scope of the situations in which gang affiliation as evidence of bad character can be presented, which is likely to be consistent with Parliament's intentions.

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

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

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

There is no sign that the Court of Appeal is willing to intervene in this area, and the impact of gang affiliation evidence is most keenly felt by BAME defendants. When the then-Government launched a review of racial bias in the criminal justice system in 2016, an MP noted that the use of gang affiliation in policing and prosecutorial strategies was "sweeping up young black and minority ethnic people into our prison system" (Jessica Mullen, 'Government Announces Review of Racial Bias in CJS', (Clinks, 2nd February 2016)). The Lammy Review noted that when 'gang' rather than group or association is mentioned in a courtroom, it can be used to signal ethnicity and promote implicit racial bias, rather than to describe the links between suspects.

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

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

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

Oliver Mosley is a junior barrister at QEBHW. He defends and prosecutes, being a Grade 2 CPS advocate and an appointee to the SFO panel list. His current caseload includes the much-publicised Post Office appeals and the SFO prosecution of G4S.

https://www.qebholliswhiteman.co.uk/site/people/profile/oliver.mosley

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BRUCE REID

I can sense the waves of disapproval coming across the dinner table. I have just been telling my wife about my day and describing making a bail application for a client on domestic common assault charges – he hit her a few times and then poured sugar into a kettle of boiling water and slung it at her – missing her. He was bailed and then went back a few days later to hit her again

She knows the etiquette; don't judge, acting best interests of the client etc. it's just that she's more angry at this sort of thing now. Sarah Everard was abducted ½ mile from our house and when my wife was late home the following day, I was worried and, unusually, phoned her to check she was OK.

She was, but she's miffed now.

"Why don't people do something about this!! Why doesn't anyone care!!??"

I reflected – "Yeah? Why don't they?"

I am not going into a blaming the police session. Sure I have no time for a Met Commissioner who was in charge of a botched anti-"terrorist" operation where an innocent Brazilian who somehow looked like a jihadi was killed up the road from me and so that Commissioner was promoted accordingly. The same person on whose watch was vetted a man who shouldn't have had access to a pair of handcuffs much less a police firearm. She can't be elevated to the House of Lords fast enough – lives depend on it.

The Sarah Everard murder investigation was, however, quality policing: no-one could have saved the poor woman once she was abducted but the suspect was apprehended swiftly and efficiently.

No, my concern is what will happen to my client. Not much is the short answer.

I haven't had a jail sentence for ANY client in the last year on a common assault charge. I do at least 3 sentences a week on this. Last month I got a suspended on an ABH where the victim lost 5 teeth. OK so I am a quality advocate, but still……

Time was when a defendant up for this got immediate custody unless the victim was pleading with the court to have him back, and then you got a suspended with a serious DV program.

Now it costs too much and the jails are full so we don't do it.

I am not a fan of custody save for the most serious of offences, I am aware of the arguments that short sentences destroy lives and that most of my male clients on this sort of charge are immature idiots so what is the point of jailing them? "But that's just the point" comes the argument across the pasta and the agreeable glass of red. "It's not treated seriously!"

The annoying thing is that this hasn't changed in 40 years. I remember an old girlfriend at college handing me a copy of Germaine Greer's 'The Female Eunuch' and gritting her teeth, saying "I think you need to read this" I did, and the arguments floored me and changed my political perspective forever. Sure the ground has changed since then and it would be phrased differently now but the logic is still unanswerable. So we have had two generations since this information was widely available and we've got zilch; the same stuff as when I was doing a law degree. An unqualified school-leaver might miss out on it but there is no excuse for government, the professions, the judiciary et al.

One of the main points of the Black Lives Matter movement can be paraphrased as "This stuff isn't new, so why haven't you done something about it? You just don't care, do you? If you did, then it would have changed". It's the same here.

We have met the enemy, and he is us.

The whole of the judicial system works to the same end. The police undercharge, the CPS charging guidelines mean that anything short of a broken bone is common assault, anything short of genocide is triable summarily and any custodial sentence that can be suspended, will be. Net result? At most a Building Better Relationships program that probably won't start for months and my client wont complete and won't be breached and won't be punished because the order has expired and etc. etc.

Why isn't this treated seriously; either by making it the norm that a domestic abuser gets jailed or that they end up with Adult Education for months until the rather simple idea that you don't hit women because you are somewhat annoyed with them, actually sticks in their head? In other words, be beaten into them.

Ticking a box that says 'Overarching Principles; Domestic Violence' doesn't do much. Look at the Factors indicating Higher Culpability and Greater Harm on Common Assault – 'Prolonged assault, substantial force, strangulation etc.' Heavy stuff, you say.

So it's a High Level Community penalty as a starting point. Job done, eh? That's the problem solved, then, stop moaning, you whinging feminists.

Since I first drafted this article I defended a guy who on the 1st swung a sledgehammer towards his neighbour and bashed it on her car bonnet. He threatened to burn her house down and had a can of lighter fluid with him when he said that. He was cautioned.

On the 3rd he posted a series of threatening messages through her letterbox and put a lighter in an envelope on her car windscreen. On the 6th he went to her house and threatened to kill her.

He was bailed on suspicion of harassment.

That evening he goes back to the house; more threats. When she activates the alarm on the intercom he tries to grab and destroy the door camera. The following day he is back again and threatening to kill her. At last he is charged with stalking and, despite my best efforts, in custody.

He is mentally ill.

From her perspective that is not the point, is it? She was probably 48 hours away from death.

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