

Non-Defendant Bad Character in the context of Sexual Offences

Section 100 Criminal Justice Act 2003

(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—

(a) it is important explanatory evidence,

(b) it has substantial probative value in relation to a matter which—

(i) is a matter in issue in the proceedings, and

(ii) is of substantial importance in the context of the case as a whole,

or

(c) all parties to the proceedings agree to the evidence being admissible.

(2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if—

(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and

(b) its value for understanding the case as a whole is substantial.

(3) In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers relevant)—

(a) the nature and number of the events, or other things, to which the evidence relates;

(b) when those events or things are alleged to have happened or existed;


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(c) where—

(i) the evidence is evidence of a person's misconduct, and

*(ii) it is suggested that the evidence has probative value by reason of similarity
between that misconduct and other alleged misconduct,*

*the nature and extent of the similarities and the dissimilarities between each of the alleged
instances of misconduct;*

(d) where—

(i) the evidence is evidence of a person's misconduct,

*(ii) it is suggested that that person is also responsible for the misconduct charged,
and*

(iii) the identity of the person responsible for the misconduct charged is disputed,

*the extent to which the evidence shows or tends to show that the same person was responsible
each time.*

*(4) Except where subsection (1)(c) applies, evidence of the bad character of a person other than the
defendant must not be given without leave of the court.*

Section 109 Criminal Justice Act 2003

*(1) Subject to subsection (2), a reference in this Chapter to the relevance or probative value of
evidence is a reference to its relevance or probative value on the assumption that it is true.*

*(2) In assessing the relevance or probative value of an item of evidence for any purpose of this
Chapter, a court need not assume that the evidence is true if it appears, on the basis of any*

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material before the court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true.

- In the context of false complaints, the provision means it is to be taken as true that the event of a false complaint has been made - not that the complaint is true.

False Complaints in a Sexual Offences Context - Analysis

- Previous (false) complaints go to a matter in issue in the proceedings – the Complainant’s credibility.
- If a previous complaint was false, section 41 YJCEA 1999 is not engaged.
- Relevant questioning will not be about C’s sexual behaviour but the falsity of the previous statement (*R v BT and MH* [2002] 1 Cr App R 294, [33])
 - Leave under s100 Criminal Justice Act 2003 will be required, as the making of false allegations/statements to the police amounts to misconduct for the purposes of bad character – that is, reprehensible behaviour. (*R v V* [2006] EWCA Crim 1901, [31])
 - The Defence should, as good practice, seek a ruling from the judge that section 41 YJCEA 1999 is not engaged. (*R v V* [2006] EWCA Crim 1901, [25])
- There must be a “proper evidential basis” that the previous complaint was not true; otherwise, section 41 YJCEA 1999 is engaged. (*R v BT and MH* [2002] 1 Cr App R 294, [41])
- A proper evidential basis is:
 - such that, depending on the answers given by the complainant in cross-examination, the jury could be satisfied that the previous complaint was untrue, or material which is capable of founding an inference that the complaint was untrue. (*R v Garaxo* [2005] EWCA Crim 1170, [14])



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- 'less than a strong factual foundation for concluding that the previous complaint was false' but does require 'some material from which it could properly be concluded that the complaint was false'. (*R v M* [2009] EWCA Crim 618, [22])
- The Defence must be able to point to material that is capable of supporting - not which must inevitably support — the inference of falsity. (*R v E* [2009] EWCA Crim 2668, [11])
- A proper evidential basis is a fact-sensitive exercise and a matter of judgment rather than discretion (*R v All-Hilly* [2014] EWCA Crim 1614, [14])
- However, a trend in the case law should be borne in mind:
 - The mere fact that a complaint is raised and not pursued does not necessarily mean it is false (*R v All-Hilly* [2014] EWCA Crim 1614, [19])
 - That the police decided there was insufficient evidence to prosecute does not amount to evidence that the previous accusation was false (*R v D* [2009] EWCA Crim 2137, [18]).
 - The CPS decision not to prosecute is irrelevant — it is for the court to decide whether there is the necessary evidential basis (*R v Davarifar* [2009] EWCA Crim 2294, [10]).
 - Where there was a trial, the falsity of the accusation cannot be inferred solely on the basis that it resulted in an acquittal (*R v Gorania* [2017] EWCA Crim 1538, [25])
- There has been a degree of rebalancing:
 - *R v Conn* [2018] EWCA Crim 1751 – “some material from which it could properly be concluded that [a previous complaint] was false”.

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- Most recently: *R v Gabbai* [2019] EWCA Crim 2287 – which takes a fairly central view, with the end point that it is for the court to decide whether there is the necessary evidential basis to conclude that the allegations are false.

Exclusion by the Crown

- As the bad character evidence is elicited by the Defence, section 78 PACE 1984 does not apply.
- The Crown would primarily rely on the evidence not having “substantial probative value”.
- In assessing what constitutes “substantial probative value”, the exercise which the judge must perform is one of judgment (not prescription), taking into account all relevant factors (*R v S* [2009] EWCA Crim 2547, [45])
- Consider section 100(3)(a) – (c) CJA 2003
- Remember – non-false allegations are not misconduct and therefore cannot be bad character.
 - Allegations often cannot be said to be “false” without significant, time-consuming, and potentially fruitless satellite litigation.
 - The Crown will want to scrutinise all incidents that the Defence raise to see whether, even on Defence case, they amount to misconduct and/or affect credibility. If they do not, they cannot be bad character.
 - Fixed penalty notices – no admission of guilt, therefore arguably not a false allegation.

Practical points

Use the form. It's in the usual spot on the justice.gov.uk website.

CrimPR 21.3 – the Defence application must not be more than 14 days after the prosecutor discloses material on which the application is based. The Crown's response must be up to 14 days after that.

Scenario

Your client in conference has said that the complainant has a reputation for having made false complaints. You have not been provided with any other material on this point from the Crown yet.

- At this stage, the Defence may request disclosure of information surrounding previous complaints. Section 41 YJCEA 1999 makes no reference to matters of disclosure, only to the adducing of evidence at trial.
- It is arguable that knowledge of the content and outcomes of the complaints is in the interests of justice, to avoid D accidentally falling foul of Section 41 YJCEA 1999.
- The Defence should know whether the complaints were false (such that a bad character application under s100 CJA 2003 can be made) or true (such that an application under s41 YJCEA 1999 can be made - if desired and appropriate).

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