

Bad character – to rap or not to rap? Presence in You Tube Videos not enough

Applying the guideline case of *R v Lewis and others 2014 EWCA Crim 48* in relation to alleged gang affiliation being evidenced in You Tube Video material, the Court of Appeal held that presence alone was not enough and quashed convictions arising from a gang related shooting at police officers in Hackney.

The Court of Appeal decision of November last year *R v Adebola Alimi 2014 EWCA Crim 2412*.in which I appeared, is now reported in the wake of the Crown Prosecution Service offering no evidence in advance of the re trial which was due to take place 5th October at the Central Criminal Court. The Judgment of Lord Justice Jackson was initially embargoed pending the re trial. The Court of Appeal, back in November 2014, quashed the appellant's convictions and ordered a re-trial in one of the first appeal cases applying the general guidance given by Sir Brian Leveson in the case of *Lewis*. Given the current explosion of multimedia based bad character evidence across the board in criminal law the authority is now an extremely useful tool for those seeking to have such material excluded at trial. Counsel Arlette Piercy. Solicitor, Collette Kelly, Shearman Bowen and Company.

You Tube Videos, photos, Facebook, I messaging, text messages, chat logs and smart phone downloads are now omnipotent in the arsenal of the Crown Prosecution Service for the increasing avalanche of bad character applications. Much of the time this material is voluminous and sometimes written or spoken in impenetrable street language.

In the wake of the 2011 riots the Court of Appeal in the conjoined appeals in *Lewis* sought to give some guidance in relation to the admissibility of such material. Of course, these appeals arose in the somewhat toxic atmosphere with pervaded in the wake of the riots and the facts of some of the cases heard in those conjoined appeals are particularly chilling.

However, post *Lewis*, and with the wind behind their sails, the approach of the Crown Prosecution Service seems to have been to 'scatter gun' as much as possible of such material in bad character applications and wait to see whether the defence mount detailed objection. Post *Lewis*, Counsel and Solicitors are very familiar with downloads running to thousands of pages, multiple videos, photographs and chat logs being attached to bad character applications with no attempt being made to filter or direct submissions in relation to them.

The overarching way in which smart phones and social media is filtering into all of our lives (most pervasively, of course, in relation to our young people) is such that this area is one which is only set to expand exponentially in future cases.

The guidance given by Sir Brian Leveson in *Lewis* remains the starting point. Accordingly, there are four questions that a Judge has to consider:

- (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?

Turning then to the Alimi case. On 10th January 2012 police officers in a vehicle were shot at by gang members riding bicycles in opposing gang territory in Hackney East London. Thankfully, no officer was hit. Somewhat bizarrely, the Metropolitan Police posted a video of the shooting onto You Tube in the wake of the conviction of Mr Alimi and his two co accused in May 2013 (this can be viewed by typing the words 'gang members open fire on police in Hackney into You Tube').

The case for Alimi at trial was alibi. It was his case that he was not one of the three on the bikes and that the cell site and positive alibi evidence positively located him elsewhere at precisely the time of the shooting.

The Crown relied upon a plethora of gang related BBM messages and rap video as against the two co-accused in order to prove gang membership and hence attach them to motive in this case. In relation to Adebola Alimi this material was limited simply to his presence in two rap videos produced and rapped by his co-accused. These two songs were called **Here I am** and **Keep Stacking** and can also be viewed on you tube by typing the name of the artist Rimzee and the song title. Alimi does not rap. In the first he is an extra and can be seen drinking and swaying to the music. In the second, Keep Stacking – a rap about the financial benefits of drug dealing (not that this was a drugs case in any event), Mr Alimi can be seen sitting in a motor vehicle whilst others dramatically count out the alleged spoils of their drugs related business.

The Court of Appeal held it was an important distinction in the case of Alimi that his role was simply as an extra and he spoke no gang related lyrics whatsoever. Simply put the answer they gave to question 3 in Sir Brian Levesons four stage process was 'no'. It is hoped that armed with at least one example of the Court of Appeal drawing the line in favour of the defendant, more progress can be made in stemming the tide of admissibility of such material in the future.