

ART NOT EVIDENCE

The use of art as evidence against the artist in British criminal proceedings has precedent. During Oscar Wilde's first trial for gross indecency in 1895 he was cross-examined about his work and the work of his acquaintances. The jury were hung in that first trial but he was convicted in the retrial. This is an extract from his Preface to 'the Picture of Dorian Gray':

Thought and language are to the artist instruments of an art.

Vice and virtue are to the artist materials for an art.

From the point of view of form, the type of all the arts is the art of the musician. From the point of view of feeling, the actor's craft is the type.

All art is at once surface and symbol.

Those who go beneath the surface do so at their peril.

Those who read the symbol do so at their peril.

It is the spectator, and not life, that art really mirrors.

ART NOT EVIDENCE

Art Not Evidence (ANE) is a coalition of lawyers, MPs, journalists, artists, academics, youth workers, music industry professionals and human rights campaigners who have come together to combat the misuse of rap music as evidence in UK courts. It was founded by Elli Brazzill, music editor at Napster. Members include the author of this article but also **Arlette Piercy** and **Sheryl Nwosu** of 25 Bedford Row. Sheryl is chair of the Black Music Coalition. Arlette presented the appeal in the case of *Alimi* [2014] EWCA Crim 2412, the first defence-friendly judgment in this area of law. She also represents one of the 'Manchester 10' applicants whose applications for leave were last week granted by the Court of Appeal. This case has the potential to be important for the future of group prosecutions and the use of drill music as evidence. Also appearing in that appeal is Keir Monteith KC from Garden Court Chambers, leading another important ANE supporter, Audrey Cherryl Mogan.

ANE's open letter to the Secretary of State for Justice:

“In recent years, courtrooms across the country have gained an alarming new soundtrack. Prosecutors — with increasing frequency — put lyrics, music videos, and audio recordings in front of juries to help secure criminal convictions. In many cases, these creative expressions have no connection to the serious crimes alleged, and are used to paint a misleading and prejudicial picture, conflating art with evidence. Specifically, police and prosecutors use the act of writing, performing, or even engaging with rap music to suggest motive, intention, or propensity for criminal behaviour. This is particularly prevalent in controversial "joint enterprise" and conspiracy cases, in which music, lyrics, and videos are used to drag multiple people into criminal charges, often under sweeping definitions of “gang” activity. This practice disproportionately affects young Black men and boys from under-resourced, marginalised communities... Rap music, including the drill sub-genre, is one of the most popular forms of music across the country, and a significant cultural force...

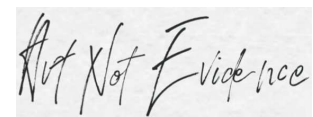
Yet, despite being known for its storytelling, symbolism, figurative language, and hyperbole, police and prosecutors invite judge and jury to take rap music literally, as direct evidence of criminal intent or behaviour.

Research produced by journalists and university academics have identified over 100 cases in the UK since 2005 in which rap music was used as evidence. The majority of these cases involved multiple defendants, making use of the doctrine of joint enterprise. In the last three years alone, at least 240 people have had their fate in court decided, at least in part, by their taste in music...

The indiscriminate use of creative expression as evidence in court risks miscarriages of justice, perpetuates harmful racist stereotypes, and contributes to a racially discriminatory criminal justice system that stifles creativity and freedom of expression...

We call for police and prosecutors to stop relying on irrelevant, unreliable, and highly prejudicial evidence in pursuit of convictions; for defence lawyers to challenge prosecutors; and for judges to exclude such evidence.

We propose legal reform to limit the admissibility of creative expression as evidence in the criminal courts.”



THE PROBLEM

So, what gives rise to the grievances expressed in the open letter?



Compound Injustice

In April this year the results of a University of Manchester review of the use of rap music evidence in UK criminal trials were published. 'Compound Injustice', authored by Professor Eithne Quinn, journalist Will Pritchard and research associate Erica Kane (University of Leeds), delivered the following unhappily predictable findings:

- The majority of cases are joint enterprise prosecutions.
- Children and young People are frequently the subject of such prosecutions.
- A large majority of the defendants are black or black/mixed.
- 'Gang' labels are widely and indiscriminately used.
- Cases are heavily concentrated in London but also happen unevenly elsewhere.

Joint Enterprise

The study looked 68 cases involving 252 defendants, an average of 4.7 defendants per case. 80% of those cases involved more than one defendant, 53% of the cases involved 'joint enterprise' prosecutions. A CPS pilot study of all joint enterprise cases found an average of 3.1 defendants. The area of 'joint enterprise' (JE) is already a highly controversial one. If the average number of defendants in JE cases involving rap music is higher than the average it lends some support to the suspicion that music may be being used to artificially inflate the numbers of people charged in such cases.

Age and seriousness of the offence

A cautious approach on the part of the courts to potentially unreliable evidence deployed against younger defendants might be hoped for or expected. The Compound Injustice report however found that *at the*

time of trial, 15% of defendants in the dataset were children (17 years and under) and 67% were young people (18-24 years). These figures would be even higher if calculated at the date of the offence. There was at least one child charged in 27% of the cases, and 34% of the JE cases in the dataset. Of the children charged, 88% of them were charged with murder.

Ethnicity

Consider also the background of those defendants typically affected. 84% of defendants across the dataset were ethnic minority people. Two-thirds (66%) of the defendants were black (compared to 4% of the overall English and Welsh population), with a further 12% black/mixed.

'Gang labels' and 'Region'

63% of the dataset cases had a prosecution 'gang' narrative and the majority (56%) of these cases were prosecuted in London. 5 cases were prosecuted in Manchester.

The use of rap evidence targets predominantly young people, particularly black or black/ mixed boys; it exacerbates the dangers of injustice already inherent in joint enterprise cases; rap music is being used to amplify or justify a prosecution 'gang narrative'. Often the children or young person's presence at, or 'involvement' with, an event would have made no difference at all to what transpired.

Evidential Dangers

The practice of prosecutors using art, specifically rap music, as evidence begins in about 2005. Drill music is the form of rap music currently in the sights of prosecutors. Drill is music made by young people for young people. Most genres of music begin in the same vein. It tends to alienate and offend older people. This can be a deliberate feature of drill music. The more older people take offence, the greater the allure of the music to the young. The most offensive content creates the biggest stir. This is a well-trodden path of course. From Jazz ('the Devil's music') in the 1920s, Rock and Roll and Teddy boys in the 1950s, Mods and Rockers in the 60s, Reggae and Punk in the 70s, Acid House at the end of the 80s, though to grunge, metal, EMO and so on. The music and culture of the young is not generally intended to be understood by older people. When it was suggested to Joe Strummer that the Clash's lyrics were hard to understand he replied: *"To me our music is like Jamaican stuff – if they can't hear it, they're not supposed to hear it. It's not for them if they can't understand it."* In terms of modern UK Rap music:

“In terms of culture, UK rap artists are generally first or second-generation Brits, many of whom are West African and/or Afro-Caribbean. For this reason, the accents and lingo that dominate both grime and drill are huge blends of pidgin English and patois, sprinkled with British, Somali, and Arabic slang.”

<https://www.acrosstheculture.com/media/music/history-drill-music/>

Given the long history of music that is created by the young for the young, when it comes to the prosecution presenting this evidence to jurors, who is it that explains the ‘meaning’ of the lyrics or symbolism in rap music? A young person? A black or black/mixed young person? Someone from the same estate as the defendants? Of course, there would be challenges in setting up a young person from the same estate as the defendants as an expert in a serious criminal trial! But what would be the next best thing? Perhaps a person from the music industry who understands the genre intimately, an expert or academic in youth culture, Multicultural London English (MLE), or Urban British English (UBE)? In fact, what typically happens is that this evidence is presented by a police officer or former police officer (in the writer’s experience almost always white males, in their late 30s or older) with no real life qualification whose expertise is proved by the fact they have prosecuted or investigated ‘gangs’ in a certain area or closely monitor YouTube and watch hours of drill videos there.

It would be wrong to suggest that such input could never be of assistance to a court. In cases where lyrics are said to refer explicitly to real life events then of course an investigator would be likely to have relevant expert knowledge of those events.

But what of the music and the language itself?

It is diminishingly rare to come across any focused or deep etymological discussions in prosecution expert reports about language or lyrics. One doesn’t see language described in the scholarly terms such as MLE or UBE. Instead, catch-all terms such as ‘street-slang’ are employed. One reads that the witness has undertaken courses or training which provide them with their expertise or augment it. But these are invariably courses put on by the police themselves. The Metropolitan Police designed their own training programme, Project Insight, which was launched in 2021 *“to identify and train MPS personnel who have expertise in urban street gangs and slang”*¹. So, police officers identified and trained by police officers, who

¹ <https://www.college.police.uk/article/analysing-gang-related-music-linked-serious-violence>

are then used by the police to give evidence in cases where the police have a vested interest. It is not difficult to see why some observers refer to this practice as the 'prosecution calling itself to give evidence'.

If a prosecution expert witness purports to have expertise over both the activities and practices of criminal gangs in a particular area and language, music and culture, how can they realistically guard against subconscious bias when 'interpreting' the latter?

Leaving aside bias, subconscious or otherwise, a lack of understanding or genuine expertise leads to assumptions dressed up as conclusions, all the more dangerous if presented as expert evidence.

Two brief examples here:

I. 'Gun fingers'

A lay person, especially from an older demographic, might automatically interpret such a gesture as an endorsement or promotion of serious criminality. 'What else could it mean?'. Yet this is a gesture that Adele has been pictured making on numerous occasions singing ballads. Prince Harry was photographed making the gesture, something which was interpreted to as a joke by The Telegraph. Adèle Oliver (the author, not the singer) gives a more comprehensive explanation of the history of the gesture, which has long been used by people at social, recreational gatherings to demonstrate approval or celebration of the music being played, and which can be traced back to Jamaican sound system culture². The standard response of a police expert to this type of alternative explanation is the simple assertion that in this context it relates to gangs.

² Deeping It: Colonialism, Culture & Criminalisation of UK Drill, Adele Oliver, Inklings 2003.



2. Balaclavas

The average juror may think that the only reason someone would want to cover their face in a music video is to avoid identification by the police. Such a one-dimensional approach is dangerous. Yet, in 2019 the fashion magazine 'The Face' published an article on the subject,³ offering a more balanced view. Balaclavas and face coverings were just 'an integral part of the UK scene's visual aesthetic'. The author Ciaran Thapar does acknowledge that one reason for wearing face coverings whilst rapping is to avoid detection. However not merely by the police:

"I've seen it develop as a trend in my youth work, whilst talking to teenagers in community spaces and schools, as boys increasingly refer to the need to protect themselves from being surveilled by policeand from being spotted by rival groups, family members, university admissions tutors, or even their church pastors"

The rapper SI is quoted in the article: *"Some people cover up their face because their family don't know they're rapping or in a gang. But also, I've been around a load of yutes who wear masks and balaclavas, and they've got no participation in madness. They're good kids, but they're trying to be like rappers, so they cover up."*

Thapar added:

³ <https://theface.com/music/bally-on-me-why-uk-rappers-cover-their-faces>

“... garments like balaclavas and masks have become genuine artefacts of modern fashion for young people, as well as a way for artists to stand out and consolidate their own entertainment value. Drill and rap music are become strengthening vehicles of social mobility for young artists who are able to earn legitimate incomes from racking up millions of YouTube views and streams, get booked for regular shows and festivals, and in the case of MCs like Russ, Unknown T and Digga D, make the official UK charts.”

But even when rappers cover their faces so they cannot be seen by police, that in itself should not always lead automatically to the conclusion that they are involved in serious crime. Rappers in the UK have received suspended sentences of imprisonment merely for performing (AM & Skengdo). Bearing in mind, the police surveillance of the genre’s output online, it is little wonder that artists might not want the police to be able to immediately identify them.

For British Drill Stars, the Police Are Listening Closely

The New York Times

Recent court rulings require officers to keep watch over rap lyrics, which prosecutors say celebrate gangs and violent crimes.

Skengdo and AM: the drill rappers sentenced for playing their song

**The
Guardian**

Case Studies

Compound Injustice cited a case examined by David Conn of the Guardian in 2021. His newspaper report is recommended reading⁴. The case involved the use of a music video by the prosecution against the defendants in a murder trial. The track itself was entitled 'AO' or 'Active Only'. The video was filmed at a youth club and had been arranged by Kemoy Walker, an award-winning youth worker, now head of year at a large school and an ambassador for Manchester City Council. The shoot was carried out by a film student at Manchester Metropolitan University who had answered a call on social media for somebody with the necessary skills. Mr Walker described the meaning of the title of the track as a term that young people in Moss Side used: *"They used to say, 'I'm active,' meaning they're up for going out. 'Active only' meant a group that was always out and about."*

In 2017 the video would be used as a key piece of evidence to convict 7 teenagers of murder and 4 of manslaughter in a 'joint enterprise', gang-narrative case. *"That was not a gang video,"* Walker said. *"It was a project we did."* Walker did not appear as a witness in the trial.

Three of those convicted of murder, Nathaniel "Jay" Williams, 17 at the time, Reanu Walters, then 18, and Durrell Goodall, then 19, have prepared an appeal to the Criminal Cases Review Commission (CCRC), contesting the gang narrative constructed against them, and the evidence, including the video, which was deployed in support of it. They are represented by Keir Monteith KC in a case with the potential to be significant in this area.

"The Manchester 10"

Only last week the Court of Appeal granted leave to appeal for all seven appellants following submissions on 12th July before the full court.

The case had caused Manchester Central MP Lucy Powell to write to the then Justice Secretary Dominic Raab to raise concerns, describing the application of the law around conspiracy charges as *"seriously flawed"*.

⁴ <https://www.theguardian.com/world/2021/jun/05/one-death-11-jailed-teenagers-was-a-moss-side-trial-racist>

Much of the media attention has focused on Ademola Adedeji who had an offer to study law at University and had addressed MPs at Parliament before being convicted for his alleged role in a conspiracy to commit GBH. A Channel 4 documentary, 'Jailed Over a Group Chat', featured his particular case.

The case against him essentially hinged upon 11 messages he sent in a group chat over the course of 20 minutes on a single day. The group was set up as a 'memorial' chat following 16-year-old John Soyoya's murder. Adedeji's messages included the post code of a person he believed was responsible for killing their friend. He was not alleged to have participated in any violence, nor to have been present at any violent incident. The success of the prosecution case depended on a narrative that the young defendants were all part of a gang with a common purpose and intent on revenge. As referred to at the leave hearing by Arlette Piercy, the word gang was used incessantly throughout without any attempt to explain to the jury what it actually meant. In order to support this gang narrative, the prosecution relied upon 9 seconds of a music video that Adedeji denied being in, an image of Adedeji wearing a blue bandana and an image of him holding cash to his ear. This latter piece of evidence was relied on by the prosecution to demonstrate involvement in gangs and drug dealing. Senior music hip-hop music executive Kevin Liles⁵, provided a witness statement for the purposes of the appeal as fresh-evidence, described this connection as demonstrating 'breathtaking cultural ignorance'. The "money-phone" pose struck by Adedeji was described as commonplace in hip-hop and did not indicate membership of a gang, he said. This expert evidence was not available to the jury in the original trial.

The final outcome and judgment is awaited in that case and other than the fact of leave being granted no further details can be discussed. This week's news however is obviously encouraging in terms of the willingness of the Court of Appeal to consider grounds of appeal based around the themes discussed above.

For those involved with ANE or affected by the criminalisation of rap music however, even a completely positive outcome for the appellants is unlikely to represent a silver bullet.

The promising decision in Alimi, now 10 years old, was followed by a series of Court of Appeal decisions that have only emboldened the prosecution in their willingness to deploy art as evidence, presented by police witnesses and not always thoroughly challenged by the defence.

⁵ https://en.wikipedia.org/wiki/Kevin_Liles

Defenders of the status quo will doubtless point out that there are safeguards in place in the law as it stands. Defence practitioners must of course be aware of these and seek to use them where possible.

It was *R v Myers*⁶ in which the Privy Council confirmed that police officers with special training and consideration and experiences of the activities of criminal gangs could give evidence on their culture, geographical gang locations, and signs of gang membership as experts. Myers does not however provide carte blanche for prosecutors. The Court stressed that the requirements for expertise must be properly established and the ordinary rules about giving expert evidence observed. Those rules are now governed by p.19 of the Criminal Procedure Rules. The Court in Myers stated that any officer giving such evidence 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. Care had to be taken that simple anecdotal evidence was not permitted to assume the robe of expertise. Compliance with the exacting standards required of an expert witness could be difficult for a police officer who was effectively combining the duties of active investigator with those of independent expert. When considering an application to adduce the evidence of a police expert, it was incumbent upon a judge to satisfy himself that those duties were recognised and discharged” (paras 57-61).

See too *R v Hodges* [2003] EWCA Crim 290:

“It is particularly important that [a police expert] witness should fully understand that once he is tendered as an expert he is not simply a part of the prosecution team, but has a separate duty to the court to give independent evidence, whichever side it may favour. In particular a police expert needs to be especially cautious 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 had based that proposition.”

Whilst therefore there are aspects of previous decisions which one can advance when challenging police expert evidence, there is plenty of encouragement to enthusiastic prosecutors. In *R v O* [2010] EWCA Crim 2985, the caution suggested for assessing expertise in *Myers* or *Hodges* was not apparent. The prosecution case against *O*, 17 at the time of the offences, was that the appellant was in possession of a firearm and ammunition with intent to endanger life. In support of their case that *O* was a member of a

⁶ *Myers v R* [2015] UKPC 40

violent and territorial gang they relied upon a YouTube video showing the appellant rapping along with others and using words which were said to relate to guns and gangs. The defence case so far as the YouTube video was concerned was that it was an attempt to gain attention in the commercial music market and the references to guns and violence were metaphorical.

A WPC Haynes gave evidence relating to the video. She was a local police officer, with knowledge of the area. She claimed insight as to 'street language' but she was not put forward as an expert and did not purport to be one. Notwithstanding this, she was permitted at trial to give evidence of her understanding that the purpose of a gang making such a video for posting on YouTube was to incite violence from one gang to another. Additionally of her understanding of certain phrases and lyrics in the video.

The application on behalf of the prosecution was to admit this as important explanatory material under gateway (c). The judge in admitting the video into evidence, did not say in terms that he was doing so through gateway (c). It was plain from his directions that the video was left to the jury as a matter going to the propensity of the appellant to use gun violence as a gang member.

The defence submitted on appeal, firstly, that the YouTube video should not have been admitted at all, and secondly, even if it had been properly admitted, WPC Haynes' comments on the lyrics were inadmissible as opinion evidence given by someone who was not an expert.

The court held that the judge was entitled to admit the video under gateway (d). Since the trial judge admitted it under gateway (c), he did not go on to consider, under [section 101\(3\)](#), whether it appeared to the court that the admission of the evidence would have such an effect on the fairness of the proceedings that the court ought not to admit it.

Even though the judge did not address fairness the Appeal Court considered that *'prejudicial as such evidence necessarily is, it would not have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'*⁷

They further rejected the defence argument that the video, having been recorded 6 months previous, was too remote temporally from the events the jury were considering.

⁷ Para 24, R v O, supra.

The fact they agreed that WPC Haynes' comments on the lyrics were improperly admitted as opinion evidence of a non-expert ultimately did not assist the appellant. Even in making that concession to the appellant, they considered that much of her evidence about gangs in the locality and so forth was factual evidence not expert evidence which she was thus permitted to give. Further, *“It may even have been, if the ground had been properly laid, that that local experience would have been sufficient for her to have given evidence as a local expert”*.

It is difficult to succeed in an appeal against conviction, and therefore it is imperative to ‘get it right first time’. Even in a situation where a police officer trespassed into giving evidence on an inadmissible basis, it did not affect the safety of the conviction.

Note also the well-known *R v Awoyemi* [2016] Crim EWCA 668, paragraph 33, where the evidence was described as *“prejudicial but inevitably so and not unduly so. It went far beyond simple membership of a gang, the love of RAP music, hyperbole or appearance on a video. It indicated the extent to which the individuals concerned had signed up to gang and gun culture.”*

So, welcome though it would be to see the appellate courts adopting a stricter approach towards admissibility of rap music in criminal trials, ANE will continue to call for a tighter approach to admissibility to be codified in legislation.

The Private Members Bill

The ‘Criminal Evidence (Creative and Artistic Expression) Bill’⁸ proposed by ANE does not suggest that lyrics could never be used in evidence against a defendant. Lyrics tantamount to a confession or an admission would still be admissible. What it would bring into law is the following:

Section 1

That a person’s creative or artistic expression, their own or borrowed/copied, cannot be used in evidence against them or another in a criminal trial unless a court is SURE that the following conditions are met:

⁸ <https://driftime.notion.site/Criminal-Evidence-Creative-and-Artistic-Expression-Bill-2554634113ef463bb8b42534d262b34d>

Section 2

- a) The expression has a literal, rather than figurative or fictional, meaning;
- b) If the expression comes from another person or is copied, the person who copied it intended to adopt the literal meaning of it;
- c) The expression refers to the specific facts of the crime alleged;
- d) The evidence is relevant to a disputed issue of fact; and
- e) That it is necessary to admit the evidence as the issue cannot be proven by other evidence.

Section 3 stipulates that in coming to decisions on 2 (a) to (e) there be an obligation upon Judges to have regard to the linguistic and artistic conventions of the expression, the social and cultural context of the expression, and the context in which the expression was created. This includes (but is not limited to): how far the expression conforms to the conventions of its genre, when the expression was created relative to the date of the alleged offence, in the case of written or spoken words - who wrote them, in the case of music - how the lyrics were intended to be heard, where a video is involved what role the defendant played, if excerpts are used how those excerpts fit into the wider context of the expression.

Section 4 implements a requirement that the court only determines the factors in subsection (2) when assisted by the written or oral evidence of an independent expert who, in the opinion of the court, “is suitably qualified to give evidence about the linguistic and artistic conventions and the social and cultural context of the creative or artistic expression”.

Sections 5 and 6 dictate that should such evidence be admitted, that any part where the prejudicial effect outweighs the probative value should be redacted, and the jury should be given a direction that the jury should guard against stereotypes when considering the evidence.

There is ample room within this proposed legislation for a prosecutor to employ references to real life events. But if the prosecution cannot establish that close connection assisted by proper and truly independent expert opinion, let art be art and not evidence in serious criminal trials.



*I'm a rapper that's my title,
someone's idol
So I'm mindful when I talk, cos if not, they'll cancel me to be spiteful,
It's all a cycle*

Rhys Herbert 'Digga D', excerpt of 'Fighting for My Soul' 2023

Nick Whitehorn
25 Bedford Row