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Albion Chambers CRIME TEAM NEWSLETTER

Social networking and bad character

The ubiquity of social networking sites such as Facebook and MySpace is a striking feature of modern life. Many people feel the need to place into cyberspace their innermost thoughts as well as an account of their daily lives, however mundane. In the context of the criminal law Facebook can serve a very different function. It can give insight into the minds and activities of those who may be about to play a significant part in a criminal trial as a defendant or witness.

The issue of the "bad character" of a defendant has been discussed at length in many recent authorities, but until recently the issue of the "bad character" of non-defendants has been rather overlooked. The Court of Appeal in a number of recent authorities has addressed this position. One of those dealt specifically with the approach to be used in relation to material displayed on Facebook [1].

The defendant in this case was convicted of wounding contrary to Section 20 of the Offences Against the Person Act having struck the victim in the face with a glass. The defendant said that he was acting in self-defence because he had been under attack from the victim. The defendant knew that the victim had his own Facebook page and promptly told his legal team that it contained potentially useful material. An application was made under S.100 of the Criminal Justice Act 2003.

The judge allowed the defendant to adduce evidence from the victim's page on Facebook in which he described that he would, on his own admission be *"most likely to be arrested for assault"*, and that if the defendant was not convicted he would sort him out himself. Other statements of an aggressive nature from the victim's pages were also admitted. The judge however did not admit a photograph of the victim, posted on the same page, in which the victim adopted a boxing pose, naked to the waist displaying his tattoos and showing that *"he clearly has a strong physique"*. The judge thought that image was more prejudicial than probative given that in the course of the incident the victim was not stripped to the waist so the defendant's impression of the victim as an aggressor would have been quite different to that of someone viewing the photos.

The defence appealed on the basis that the photograph should have been admitted. The court, rather surprisingly, didn't feel it necessary to address the question as to whether or not the photograph fell within S.100 of the criminal Justice act 2003. Standing in a boxing pose in an aggressive manner is certainly capable of being reprehensible behaviour within S. 98, particularly when accompanied on the same page by reference to the victim's willingness to exact revenge upon people. In this instance, the judge certainly did have the power to decide whether or not the photograph was sufficiently probative to warrant admission.

If in this case the evidence of the photograph was regarded as being bad character then the criteria in S.100 would have had to be applied. In the recent authority of *R v Braithwaite [2010] EWCA Crim 1082* the application of S.100 was considered in some detail.

Section 100 provides:

(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 agree to the evidence being admissible.

A distinction was drawn between material such as convictions and cautions, which would be admissible, and evidence contained in police crime reports, which would not. The reason being that such reports provided no proof of guilt. If they could not establish guilt then it was unlikely that they would have substantial probative value at trial.

Consideration was also given to the issue of whether or not a judge had a discretion to admit such evidence if it satisfied that the statutory criteria. The Court of Appeal ruled that it was a matter of judicial judgment as to whether the criteria were satisfied in the context of the case being tried. If it did then there was no discretion for it to be excluded.

Applying this approach to the facts of Delaney it is apparent that the correct approach would have been to exclude evidence of the photograph as failing to satisfy the test in S.100 (a matter of judgment). If it was regarded as not being evidence of bad character, the judge could exclude it under the common law discretion to exclude any evidence, which is more prejudicial than probative. The common law discretion is of general application and hence cannot have been abolished by S.99 of the Criminal Justice Act 2003, which abolishes the common law in relation to the admissibility of bad character evidence only.

What can be derived from these cases is that when faced with evidence from Facebook or other social networking sites it is important to identify the way in which the evidence is to be admitted. It will inevitably throw up issues in relation to disclosure, continuity of evidence, hearsay as well as bad character. In the absence of clear guidance from the Court of Appeal it is vital that all potentially relevant evidence is analysed and sought to be adduced through the relevant evidential gateway to avoid it being ruled inadmissible either as an exercise of judicial judgment or judicial discretion.

[1] *R v Delaney [2010] EWCA Crim 105*

Stephen Mooney

Seventy years good?

A member of chambers, who shall out of modesty remain nameless, turned seventy last month and as a testament to a life spent for the most part at the Bar and all of that in Albion Chambers, I thought it would be of interest to look at what has changed for criminal practitioners in that time.

In those halcyon pre-**Criminal Justice Act 2003/Criminal Procedure Rule** days it is trite to say that things were very different. It wasn't quite the time of William Garrow but, to continue with the television drama theme one only has to remember the consternation shown by all in the episode of Mad Men when one of the young account executives confessed to making love to men, to appreciate just how far we have come in those seventy years.

And perhaps it is in the area of sexual offences and the linked issues of victim care that the most noticeable changes have been made. For it wasn't until the **Sexual offences Act of 1956** that homosexual acts between consenting males became lawful. Prior to that consent was not a defence meaning that in a case where both parties had been consenting both would be liable to prosecution. That legislation is also notable for being retrospective, I suspect to reflect public opinion and indeed it is that same public opinion that has been successful in bringing about many of the changes in this area of legislation (the man on the Clapham Omnibus must have unusually become more rather than less liberal as he aged). For instance the age of consent for buggery under the **1956 Act** was 21 but that was lowered first to 18 and then to 16 though it took a further 45 years from the passing of the legislation to achieve parity between consenting heterosexual and homosexual acts.

But then in 1956 the maximum sentence for an indecent assault was just two years, raised in 1961 to five years if the victim was a girl under 13 but even then only if her age was averred in the particulars. Likewise from 1961 to 1997 a defendant convicted of indecency with a child received a maximum of two years imprisonment, something which in 1997 leapt to ten years. And perhaps the most alarming of all, a man could not be convicted of raping his wife until after the 3rd of November 1994.

We only have to look at the myriad offences created by the **Sexual Offences Act 2003** and perhaps more pertinently, their respective sentences, to appreciate just how society has changed in terms of where it draws its sexual boundaries and how it expects its law makers to reflect that.

Similarly the way that witnesses are treated in Court has undergone a sea change in a very short period of time. Even twenty years ago it would not have been considered the done thing for counsel instructed on behalf of the Crown even to introduce themselves to the witnesses. Move on from that to the special measures meetings not to mention the availability of various special measures themselves, both for prosecution and from this year defendants, to assist them giving the best evidence that they can and those days seem like a lifetime away.

But it isn't just sex that is said to be the British pre-occupation. For historical reasons we have always been staunch defenders of personal property and again that is something that has been reflected in the legislation. Prior to the enactment of the **Theft Act 1968** practitioners were grappling with offences of larceny, embezzlement, obtaining by false pretences and fraudulent conversion as well as considering the doctrine of constructive possession. Life was therefore made so much simpler when the offences of theft, robbery and burglary arrived though it is right to note that in one text book dealing with the law relating to theft, 114 pages are dedicated to the issues surrounding that offence alone while a mere eight are taken up by robbery. But even in 1978, when the Act was amended to plug the lacuna created by those making off without payment, the days of cash machines and bank transfers and the various forms of dishonesty that they would allow for were still a long way off. Indeed, such has been the speed of modernisation that it wasn't until the enactment of the **Fraud Act 2006** that any real attempt was made to allow the law to catch up with technological advances.

But while a whistle-stop tour around the changes in legislation could not miss mentioning the **Police & Criminal Evidence Act 1984**, the **Prosecution of Offences Act 1985** or indeed the much cursed **Criminal Procedure & Investigation Act 1996** it is the life of the Bar itself that has changed more in the last seventy years. Anyone who has read either their copy of Circuit Ghosts or Foote's Pie Powder will already have a rose tinted view of circuit life back then. But it seems that the Circuit had its own problems even then and that issues such as the distribution of briefs, the proliferation of local Bars and most importantly, whether the Circuit should employ the services of a regular wine butler were all pressing during this period.

In relation to the distribution of briefs an important meeting was held in London in 1952 to discuss the distribution of prosecution briefs at what were at that time county sessions. Following (what is ever new?) the extension of rights of audience in 1946 to allow any member of a county session to attend any other county session on the circuit without a special fee, it seems that some prosecuting authorities in some counties began to regularly brief members from other sessions. That unsurprisingly caused disquiet among county practitioners who felt that normal, run-of-the-mill county prosecutions should be sent to members of the county sessions. As a result and in order to ensure the work for the county practitioners, it was decided that the junior of each county sessions should provide a list of members of those sessions, together with a statement confirming that a member of any other county sessions on the circuit might be briefed. All very confusing to today's practitioners but it laid the foundation for the eventual counsel's lists which were provided once the Crown Courts superseded the quarter sessions. Those lists detailed the names of counsel practising in particular areas and allowed for any members name to be entered on two lists.

Again, on the matter of the allocation of briefs, something that again is exorcising minds when thinking ahead to any brave new World, it wasn't until 1968 that the system of dock briefs was abolished. In fact again, as a haunting theme when looking at the history of criminal practice, it was the new provisions for legal aid which made that system unnecessary and I suspect unworkable. Quickly following on the heels of that change, certainly in legislative time, came the abolition of the Assizes and the introduction of the Crown Courts. That meant that rather than High Court Judges travelling about and coming to the people, the people came to them. However, as a consequence of the increase in crime, all criminal practitioners were also allowed for the first time to sit in Judgment on their fellowmen with the introduction of the position of Recorders. Prior to that change there had been specific Recorders such as that of Bath, Bristol and Exeter but the new provisions meant that the opportunity to sit, often seen as the first rung on the judicial ladder, became widely available to all. Circuit Judges also replaced County Court Judges and once more, in a sign of things to follow, in 1977 solicitors were able to apply to sit as Circuit Judges. Again with a sense of

déjà vu, it seems that solicitors were even at that time vying for rights of audience in the Crown Courts, moves which were rejected and which placed relations between the Bar and solicitors at an all time low.

But what is clear from all of the above, both in terms of legislation and practice is that the criminal law is a living, breathing thing and both arms of the profession have had to anticipate and adapt to change time and time again. Throughout the period we have been considering the Bar felt itself to be under threat whether by encroachment from other county practitioners, the abolition of defended divorces or the setting up of the Crown Court system. Equally criminal solicitors have had to deal with their exclusive rights of conveyancing being taken from them and both sides of the profession have had to grapple with their fees being cut to the bone. And when we have the prospect of yet more cuts and the future of both professions, certainly in the way that we know them, being put into doubt, it is worth considering the words of Anthony Harwood, the author of Circuit Ghosts. Writing in 1980 he said "it is fifty years ago, in 1923, that I joined the circuit. We still had the Grand Jury. We still had the commission read… The sessions were still held at the Bar Gate. The trams went underneath and made it impossible to hear what we said… Now all that has changed. No longer have we Assizes and Quarter Sessions. We have only Crown Courts…ceremonial in places has been dropped. Drabness has set in….when I am sitting in the Court of Appeal and hear good counsel, I often look in the Law List to see what is his circuit. Always I find that the best are from the Western Circuit. You still do your work superbly."

That sentiment, that we still do our work superbly, is one that if adhered to by all practising in the criminal law, whether solicitor or barrister, should hopefully ensure the future of both professions. Indeed, as they have in the seventy years that our Albion Chambers member has been alive, who knows they may even flourish rather, than as mooted by some wither on the vine.

Sarah Regan

Editor's note

When considering the use that Facebook is, and can be put to, it is worth noting the case of *(1) Applause Store Productions LTD (2) Matthew Firsht v Grant Raphael (2008) EWHC 1781 (QB)*. That was a claim for damages arising from defamatory information being posted by the defendant on Facebook. It seems that Raphael had set up a Facebook profile in the name of Firsht which contained private information. Linked to that site was a profile which was entitled "has Firsht lied to you?" and contained defamatory material. The Court found both that the site was defamatory and awarded Firsht damages in the sum of £15,000 and the company Applause Store Productions Ltd. £5,000. Further, in respect of a claim for the misuse of Firsht's private information damages were awarded in the sum of £2,000; food for thought when blindly accepting Facebook pages provided by our clients during the course of criminal trials.

The article about the changes over the last seventy years has necessarily only considered the changes in this country. However, another member of Chambers, Tim Hills, has been visiting Uganda for the past few years in an attempt to help with the charitable enterprises that work in that difficult country. Very large members of the population fled their homes during various periods of fighting and now live in refuge camps for Internally Displaced Persons (IDP); camps set up by international charities. Because of that and the problems associated with the spread of HIV/Aids, 70% of the population of Uganda is under 20 years of age.

Surprisingly the country has a fully working legal system and in large part still reflects that set up by the British who left in 1962. Prior to that, the various criminal laws were unified in a single penal code in 1950. That document is in itself an interesting reflection of the values and attitudes of the country at that time. The death penalty which still exists was stipulated for murder, rape and armed robbery. Corporal punishment was provided as a sentence for a wide range of offences and went as far as setting out the size of the rod to be used in metering out that punishment to the number of strokes to be administered. That form of punishment has been abolished but adultery was and still is a criminal offence for which the male offender could be ordered to pay 600 shillings to the cuckolded husband. That sum equates to £30, which for the majority of Ugandans was an enormous sum. Thankfully, for any defendant convicted of such an offence, the law has not been amended to keep up with the rate of exchange which means the sum ordered to be paid today is only 20p, perhaps not the deterrent it was intended to be.

Tim was able to visit Gulu Magistrates' Court where apart from three or four rows of empty seats in the middle of the court room, the court was full. The benches around the walls were crammed with people waiting quietly for the proceedings of that day to begin. Those proceedings were undertaken by two advocates, a woman who was the equivalent of a CPS HCA, and a man in a dark suit representing the accused brought before the Court.

Shortly after they took their seats in the centre of the room the Judge came in and then 40 defendants filed through the court, one after the other in what appeared to be a remand court. Under the Ugandan Constitution everyone who is arrested has to be brought before a court within 48 hours of their arrest. After a number of run-of-the-mill assault or theft matters, a case of "defilement" (rape) was called on. Before anything else happened the advocate for the defendant rose to his feet and indicated that there was some uncertainty as to whether the defendant was 17 or 18 years of age. Under our system, though it would make some, it would not make a great deal of difference. In Uganda it was the difference, in the event of a guilty verdict, between a life sentence or the death penalty. The defendant was accompanied by his grandfather and both had come from one of the IDP camps. He was not sure of the defendant's age and stated that both of his parents were dead. However, he gave what promise he was able for bail and all the while the young defendant, aware of his possible fate, stared unemotionally ahead. That case, as would have happened here, was adjourned for further enquiries to be made.

But what is remarkable is that in a country that has been beset with the problems that Uganda has, Tim saw at first hand that the rule of law continues to operate and is in fact very much respected. That perhaps echoes the sentiments of Anthony Harwood; things on the periphery change but the fundamental principles do not. If advocates can continue to practice, and practice diligently in a country where terrorism and acts of violence and degradation have been common place, how can we not do the same when the worst we face is whether our fees are cut yet further or even paid under a different system altogether?

Sarah Regan

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