

ENGLAND AND WALES / JUDGMENT

R v Kevin Horswill

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REX V KEVIN HORSWILL

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MR B AINA KC and MS C SKEET appeared on behalf of the Appellant MR A JACKSON appeared on behalf of the Crown

J U D G M E N T

Approved LORD JUSTICE FOXTON: 1. On 25 January 2025, in the Crown Court at Chelmsford, the appellant was convicted of murder. He now appeals that conviction with the leave of the single judge. The facts 2. 3. 4. 5. 6. 7. On 17 March 2024 Richard Langley (“the deceased”) was found

dead in the garden of his flat. His shirt had been pulled up and was wound tightly around his neck. The appellant and the deceased were known to each other, both living in Thaxted. On the day of the deceased's death, the appellant and his partner Catherine Fox were in the Star Inn Public House. They were intoxicated. The deceased was also present. There was an interaction between the deceased and Catherine Fox, in the course of which she ended up on the floor. CCTV footage shows her on her knees at about 22.55, and shows the appellant repeatedly threatening the deceased, telling him "Richie, you're a fucking dead dude". At 23.00 the deceased was escorted from the pub by bar staff and he went home. The appellant and his partner left the pub at 23.03, initially heading in the direction of their home. While the appellant's partner continued to go home, the appellant turned back and went to the deceased's flat in Orchard Close. At 23.27 the deceased's upstairs neighbour, Grace Sanderson, heard the sounds of a struggle outside. At 23.39 CCTV cameras captured the appellant at the exit of Orchard Close walking back home. At 00.34 the following morning, a 999 call was made for an ambulance to attend Orchard Close where the deceased was found dead. The appellant was arrested for murder at 01.24. After initially giving a no comment interview, the following day he submitted a prepared statement in which he expressed shock at the deceased's death, denied any intention to kill him or cause him serious harm, and said he had been forced to defend himself as he had feared he was going to be killed by the deceased. A post mortem showed bruising and abrasions to the deceased's face, arms and neck, petechial haemorrhaging and the fracture of the thyroid cartilage in the deceased's neck. The pathologist concluded the cause of death was compression to the neck and expressed the opinion that strangulation might have occurred either as a result of the deceased's clothing being used as a ligature or from manual strangulation. The trial 8. The prosecution case was that the appellant went to the deceased's flat angry and intoxicated to assault him and enact revenge for what had happened that evening. The prosecution submitted that the injury could not have happened accidentally and that the appellant overpowered the deceased, pulled his clothing around his neck and did so with enough force and for long enough to kill him. 9. The appellant's case was that he went to the deceased's address to find out why the deceased had assaulted his partner and to have robust words with him, but that when he got there, the deceased attacked him with a weapon and he had acted in self-defence.

10. The defence case statement filed on 6 August 2024 also said this: "The Defendant will say that Richard Langley is locally known within the community as a drug dealer. He will say that Richard Langley has an alleged history of violence and intimidation that is well known within his village." And a little later on: "The Defendant will say he has previously seen Richard Langley sell drugs on his street from an electric scooter."
11. On 9 September 2024, at a mention hearing, the appellant outlined an intention to adduce evidence of the deceased's bad character, stating that when the altercation took place, the appellant knew of reputation of the deceased amongst the Thaxted community as a drug dealer and a violent man. The Court was referred to a document in the Digital Case system setting out the material as known to the appellant prior to disclosure.

12. After disclosure, a bad character application was made on 30 September 2024 which stated: “At the time of the altercation the defendant knew that the reputation of the deceased among the Thaxted community was that the deceased was a drug dealer and a violent man. This information influenced and affected his judgment when acting in reasonable self-defence whilst he was being attacked by the deceased who was holding a metal implement.”
13. At that stage the bad character evidence the appellant was seeking to introduce included a 1995 conviction for possession of a controlled drug with intent to supply, a 2005 conviction for attempted rape of a 16-year old woman, a 2014 conviction for disorderly behaviour or threatening words likely to cause harassment, alarm or distress and also various statements from other Thaxted residents to the effect the deceased was a drug dealer and accounts from four of those individuals of alleged violence on the deceased’s part, much of it of a hearsay nature.
14. After the prosecution had responded to that application, the appellant uploaded a further bad character application dated 12 January 2025. This was divided into two parts, one which it was said would be made at the close of the prosecution case and one which it was said would apply once the appellant started to give evidence.
15. Once again the bad character evidence sought to be introduced included the attempted rape and Public Order Act convictions, evidence that the deceased was violent and confrontational (much of it hearsay) and evidence of drug dealing.
16. By that stage, the bad character evidence was being put forward by the appellant for two distinct purposes. First, to explain why the appellant went to the deceased’s address that evening after the altercation in the pub. Second, for the purpose of showing propensity on the deceased’s part to initiate confrontations and resort to violence. It was suggested the deceased was more likely to have been the aggressor in the confrontation with the appellant, starting the physical altercation using a weapon.
17. The judge requested that an addendum be served to the Defence Case Statement clarifying the appellant’s case. This was done on 14 January. It stated: “The Defendant knew the deceased had a reputation in the community for continuing confrontations. He had friends and associates who had been assaulted by or had confrontations with the deceased, where the deceased had sought to go to their homes and accost them in the street or in a public house to continue the confrontation, both men and women, and the defendant did not want the deceased to come to his home and continue the confrontation with himself, his partner or his daughter.” 18. Sensibly, efforts were made by both prosecution and defence to narrow the scope of any issues and by the time the application came to be ruled on by the judge, the extent of the dispute and the extent of the application being made were captured in a document headed “Proposed agreed facts, Richard Langley character, showing areas of agreement and disagreement with the prosecution.” It relied on the following matters:

- (1) The 2005 conviction. As we have said that was for attempted rape, but the proposed agreed facts suggested it should be put forward to the jury on the basis that it involved attacking a woman in the street, punching her to the head, right eye and cheek. Admissibility was disputed.
- (2) The 2014 public order conviction. Admissibility was disputed.
- (3) The deceased headbutting a man in an unprovoked incident in a pub in October 2019 which led to him being barred from the pub and being required to attend an anger management course. It was accepted that that should be admitted.
- (4) The deceased pushing a man into a road on 8 September 2021 following a verbal argument, going to the man's house pushing the man's partner in the chest multiple times and assaulting the man. It was agreed that should go before the jury.
- (5) Evidence from Helen Coughlan that the deceased spat at her neighbour, kicked the neighbour in the stomach in August 2023 and that he later verbally abused Ms Coughlan's daughter at the Star Inn. Admissibility was disputed.
- (6) Evidence from Derek Oswald, the deceased's neighbour for 11 years, that he was confrontational, that six months before he had tried to kick down a neighbour's door and about a year before had assaulted a female neighbour, albeit Mr Oswald had not witnessed the assault. Admissibility was disputed.
- (7) Evidence that on 16 January 2024 the deceased had followed a woman driving home to swear at her about her driving. Admissibility was disputed.
- (8) Evidence from Nina Major that in 2021 the deceased threatened to punch her in the face in a pub, leading to a physical altercation between the deceased and Mrs Major's husband with subsequent harassment of Nina Major by the deceased. Admissibility was disputed.
- (9) Evidence from Colin Balding that on one occasion the deceased shoved his wife over a bench. Once again, admissibility was disputed.
19. We will refer to those matters which were not agreed as the "disputed bad character evidence", whilst noting that they do not extend to all the material which at one time or another the appellant had sought to place in evidence.
20. The judge held that none of the disputed bad character evidence was admissible when ruling at the end of the prosecution case. She began her ruling by noting that the deceased's conduct on the night in question in assaulting the appellant's partner in the pub was before the jury, as was evidence of the significant injuries the appellant had sustained in the subsequent confrontation. As to the individual matters, she said that the 2005 conviction was old and in any event was a sexual offence which the appellant wished to present to the jury on the false basis that it was purely an offence of violence. The public order conviction was over 10 years old and there was no detail of the offence. As to the evidence of Helen Coughlan, the judge noted that video footage viewed by the prosecution showed the

deceased and the victim engaging in a confrontation, with the neighbour having to be dragged back into her house by her partner. The judge said that disputes about what had actually happened on that occasion and why would raise real issues of satellite litigation. As to the evidence of Derek Oswald, that was hearsay so far as the assault was concerned. She noted that there was no evidence of the defendant's knowledge of the incident and it was an untested allegation that the jury could not safely rely on to make a finding of propensity for violence. The evidence of the deceased following a woman driving could not assist the jury. As to the evidence relating to Nina Major, the judge noted that Ms Major's partner had been arrested in relation to that incident and that Ms Major herself had made no formal complaint. The judge said that admitting that allegation would raise satellite litigation concerns and that, even if proved, the conduct would not assist the jury. As to Mr Balding's evidence, the judge noted there was no date for or detail of the offence. Mrs Balding had not provided a statement and the matter was only raised after the deceased's death.

21. At trial, the appellant gave evidence in chief about the events at the Star Inn, including by reference to the CCTV. He was asked by his counsel why, having started towards his home that evening, he had turned towards the deceased's address. His answer was: "I wanted to know why he saw fit to assault Catherine and to - to basically draw a line for any future confrontation from him." He was then asked: "Why did you think there might be any future confrontation from him?" The appellant answered: "Because he had a reputation of..." At that point the judge sent the jury out and referred counsel to her earlier ruling. When asked by the judge what evidence the question was intended to elicit, defence counsel said that he expected the appellant to say he was aware of the man having a reputation for not "letting things go". The judge indicated at that point that that suggestion had not featured before. The position may in fact have been more complicated than that because the appellant's case when the bad character application was made was indeed that the deceased had a reputation for continuing confrontations and that he wanted to ensure that a line was drawn under this incident, albeit that was the case that the appellant said he wished to support by bad character evidence rather than being relied upon as bad character evidence in itself.
22. Defence counsel said that he had always intended to adduce this aspect of the bad character evidence once the defendant had begun to give evidence. We can understand the difficulty the judge had with that submission, at least without further exposition, because it ran contrary to the approach the judge had made it clear she was adopting when the bad character application was argued and involved the obvious risk of no ruling being given as to the admissibility of evidence until after that evidence had already been placed before the jury. Had a submission been clearly made at that stage that the appellant wished to adduce evidence to support his state of mind by a further bad character application, the issue might have emerged more clearly. But in any event the judge treated the appellant as having made a further bad character application at that point to address evidence of the deceased's reputation. 23. It became apparent from further exchanges that the appellant wanted to adduce evidence of a particular concern on his part in relation to his partner and daughter because of what was said to be a reputation on the deceased's part that he would not let

things go when he had an argument with women. Beyond that, no explanation was given to the judge of the alleged relevance of the material which had been the subject of the prior bad character application as to the appellant's state of mind.

24. The appellant accepted through his counsel that some of the evidence he planned to adduce was not consistent with the judge's earlier ruling. Following exchanges between the judge and defence counsel, it was effectively agreed that the appellant would give evidence of the deceased having a reputation for not letting things go, but no more, that being the permissible extent of any evidence in the light of the ruling the judge had already given. In the event, the appellant gave that evidence, but also gave evidence as to the reason for his particular concern, namely that given the deceased's alleged reputation for not letting things go, he was particularly concerned about his partner and daughter. The appellant then gave his account of arriving at the deceased's house, where he said the deceased pulled him into the backyard where the appellant lost his footing and fell to the ground. He said the deceased repeatedly hit him over the head with a bar or a hammer. He had grabbed the deceased's collar and pulled him back down, trying to take control of the deceased's arm and hold him as tightly as he could in self-defence. He said it was possible that he had used the deceased's clothing to get control of him. When he heard the deceased snoring he left and went home where he lost consciousness.
25. In summing-up, the judge directed the jury in relation to the two incidents of bad character by the deceased that had gone in by agreement, noting that both were incidents of violence and neither had resulted in a conviction. The jury was told that the appellant's case was that the two incidents showed that the deceased had started this incident and the jury was directed to take them into account when deciding whether or not they were sure the appellant had started the violence and whether his use of force was unlawful.
26. As to the appellant's evidence as to why he went to the deceased's flat that evening, the judge summarised the effect of the appellant's evidence as being that he was concerned about his daughter and partner "because Richie would not let things go".
27. The jury returned a majority verdict (11 to 1) of murder. The appeal
28. The appellant submits that the judge erred in law in her ruling on the bad character application and in her ruling in relation to the scope of the appellant's evidence-in-chief. It was submitted the judge had misapplied the decision in *R v Braithwaite* [2010] EWCA Crim 1082 and as a result had refused to permit the appellant to give evidence of his state of mind. It was suggested that if there was independent evidence which supported the appellant's state of mind, that evidence might enhance his credibility.
29. In the case put to the Court of Appeal it was suggested that it was anticipated that, if the evidence had been permitted to continue, the appellant would have given evidence about a concern that his partner and daughter might be targeted by the deceased and would have explained his knowledge of previous confrontations by the deceased with members of the Thaxted community as set out in the non-defendant bad character application. We would note there was no suggestion when the exchange took place with the judge about a targeting of the appellant's family

members.

30. The appellant submits that the material which the judge held to be inadmissible was both important explanatory evidence and of substantial importance in the context of the case as a whole. It was said to be relevant to the appellant's state of mind based on his prior knowledge that the deceased had acted in this way before, repeatedly caused difficulties in the local area, would not let matters drop and had issues with certain people on numerous occasions. We will refer to that as the "state of mind basis".
31. There was also a faint suggestion that it may have been relevant to the state of mind of the appellant actually at the time of the confrontation in the deceased's garden. There were obvious difficulties in the appellant advancing that case, given his case of self-defence and his claim to have been the victim of an unprovoked attack. That was not the way in which the matter was put before the judge at trial. 32. It was also said that the evidence supported the appellant's case the deceased was an aggressor and had used a weapon as an aggressor rather than self-defence. We shall refer to that as the "propensity issue". The law
33. We turn to the applicable law. Section 98 of the Criminal Justice Act 2003 defines bad character as follows: "References in this Chapter to evidence of a person's 'bad character' are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which— (a) (b) has to do with the alleged facts of the offence with which the defendant is charged, or is evidence of misconduct in connection with the investigation or prosecution of that offence."
34. The subject of non-defendant bad character is addressed in section 100 which provides: "(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if— (a) (b) it is important explanatory evidence, it has substantial probative value in relation to a matter which— (i) (ii) is a matter in issue in the proceedings, and is of substantial importance in the context of the case as a whole, (c) or 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 its value for understanding the case as a whole is substantial. (b) (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;
 - (c) where— (i) (ii) the evidence is evidence of a person's misconduct, and 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) (ii) the evidence is evidence of a person's misconduct, 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.” 35. In *R v Braithwaite*

[2010] EWCA Crim 1082, a challenge was made to the judge's decision on an application when admitting non-defendant bad character evidence to distinguish between evidence of offences resulting in convictions, cautions and penalties (which was admitted), and allegations reported in police crime reports but not the subject of any formal disposal (which was not admitted). At paragraph 12, the Court gave the following guidance:

(1) The test of 'substantial probative value' is not the same as the test for gateway (d) of section 101(1) in relation to the common case of bad character evidence affecting the defendant . (2) If the conditions of section 100 are met there is no residual discretion on the judge's part to refuse to admit the evidence.

(3) Except where all the parties agree, bad character evidence cannot be adduced by any means, including cross-examination of the witness, without leave. (4) In relation to section 100(1) (b), which is the substantial probative value category, the judge must identify the issue to which the evidence goes, determine whether that issue is of substantial importance in the context of the case as a whole and whether the evidence has a substantial probative value in relation to that issue.

(5) The probative value of evidence advanced falls to be assessed in the context of the case as a whole. That means that in some cases, it may be appropriate to consider whether the evidence adds significantly to other more probative evidence directed to the same issue.

36. At paragraph 20, the Court said that where the evidence sought to be adduced was in the nature of evidence of an allegation, it would be in the nature of hearsay and given the difficulties for the jury in assessing such evidence it would be rare for evidence of this kind to be regarded as of substantial probative value. If the complainant had refused to support the allegation or the police had decided not to pursue it, that would substantially diminish any probative value.

37. As to the test to be adopted in relation to a challenge to the trial judge's decision to refuse

[2024] EWCA Crim 1355, the to admit bad character evidence on appeal, in *R v BVY* Court stated at [27]: “In his judgment in *R v Braithwaite* [2010] EWCA Crim 1082; [2010] 2 Cr App R 18 handed down two days before *Brewster*, Hughes LJ stated that whether the relevant evidence has substantial probative value is a matter of judgment for the trial judge (see [12]). Accordingly, this court will not interfere with the evaluation made by a judge on such an issue unless he has misdirected himself on a matter of legal principle, or his judgment was plainly wrong, that is, it was one to which no judge acting reasonably could have

come... “ Analysis and conclusion

38. We deal first with the suggestion that the bad character evidence should have been admitted on the basis that it was important explanatory evidence within the section 100(1)
- (a) gateway. We can deal with that briefly. Bad character evidence is only important explanatory evidence if, without it, the court or a jury would find it impossible or difficult properly to understand other evidence in the case and its value for understanding the case as a whole is substantial. The disputed bad character evidence here does not satisfy either limb of that test. If that disputed bad character evidence was to be admitted in this case it had to get through the section 100(1)(b) gateway. 39. In relation to that issue, as Braithwaite makes clear, it is first necessary to identify the issue to which the evidence goes. By the time of the oral application before the judge the evidence was said to go to the two issues of propensity and state of mind and in our view it is important to consider the section 100(1)(b) gateway by reference to each of those in turn. We would observe the judge was not assisted in resolving the bad character application in this case by the appellant's failure clearly to distinguish between these alternative bases when applying to adduce that evidence, and the distinction between the two categories was not always observed in argument before us.
40. We take the propensity issue first. We remind ourselves, as the judge did, of the evidence already going before the jury of relevance to that issue: (1) (2) First, the unprovoked October 2019 headbutting, in which the deceased was the aggressor initiating a confrontation and being the first to use violence. Second, the evidence of the altercation in September 2021 with the deceased initially pushing a man into a road outside a pub, coming round to that man's house about three hours later, barging through the door, assaulting the man and, when the man's partner tried to prevent the assault, pushing her multiple times in the chest and shoulders, as well as punching the man twice in the head and pushing him to the wall. That was evidence not simply of the deceased confronting and assaulting a man on two occasions, the first in the pub and the second at home, but of the deceased continuing that confrontation some three hours later and also assaulting the man's partner.
- (3) Third, the evidence of a confrontation with the appellant's partner on the evening in question. While the origins of that altercation were to some extent in dispute, there was undisputed evidence that Catherine Fox had ended up on the floor. The general sense of the evidence was that she had been assaulted by the deceased. One witness described the deceased as the most aggressive of those involved and gave evidence of the deceased pulling Catherine Fox by her hair down to the floor and holding her on the floor by her throat.
41. As to the disputed matters, we agree with the judge that none of these met the test for admission under section 100(1)(b), particularly having regard to the matters that were already going to be in evidence:

- (1) The 2005 conviction for rape was nearly 20 years old, an offence of a different character, and in our view the judge was right to conclude that the probative value of this incident on propensity was very limited. The judge was also right to be concerned at the proposal to place the description of that offence before the jury in misleading terms.
- (2) The 2014 public order conviction was 10 years old, involved no actual violence and almost nothing was known about the incident. Once again we are satisfied that the judge reached the correct conclusion in relation to this conviction.
- (3) As to evidence from Helen Coughlan, that had been reported to the police in August 2023. The police report recorded no injuries. Video footage of the incident showed both the complainant and the deceased aggravating each other, with the complainant having to be dragged into her house by her partner to stop her “kicking off”. No police action was taken at the complainant’s request. Ms Coughlan does not appear to have provided a witness statement. We agree with the judge, particularly in the light of the clear guidance given in Braithwaite, that this evidence did not have substantial probative value on the propensity of the deceased to initiate confrontations, still less to do so with a weapon.
- (4) The evidence of verbal abuse involving no violence was of no obvious relevance, even assuming Ms Coughlan had herself witnessed the incident, although the evidence suggests it was hearsay. We would also note that there was no contemporaneous complaint by the victim of that verbal abuse and that Ms Coughlan told the police when interviewed in March 2024 that she did not know the deceased personally and could not give any evidence relevant to the events of the night the deceased died.
- (5) The evidence of Derek Oswald involved an incident of alleged criminal damage for which there was no context, which was not arguably of substantial probative value, and it was not clear whether Mr Oswald had actually witnessed it. There was also hearsay evidence, again without any context, of a physical assault. The hearsay nature of that evidence, the lack of detail and the absence of any complaint at the time by the alleged complainant prevented that evidence from having substantial probative value.
- (6) The crime report that the deceased had followed a woman and swore at her about her driving did not involve actual violence. The source of the report was unclear and the judge was right to conclude it was not of substantial probative value.
- (7) Nina Major’s evidence involved the deceased threatening to punch her in 2021. She did not identify who as between the deceased and her partner initiated the subsequent altercation between them. Ms Major’s partner was arrested, no action was taken against the deceased and no contemporaneous complaint was made by Ms Major. (8) Finally, Colin Balding’s statement that the deceased had shoved his wife over a bench in May or June 2022 was hearsay because he did not claim to have witnessed the incident. The nature of the alleged violence was a shove and no report of it was made until after the deceased’s death and, even then, no statement was provided by Mrs Balding.

42. We would also note that an attempt was made in the second bad character application to argue that the evidence of the deceased's drug dealing somehow helped to establish a propensity to be confrontational and initiate violence because "those involved in drug dealing are more likely to use violence either as a means for protection, as part and parcel of their drug dealing through threats or the actual use of violence, or to prevent themselves from being caught." That was, with respect, a completely hopeless submission which never had any prospect of satisfying the section 100(1)(b) gateway. 43. In short so far as propensity is concerned we are not persuaded that the judge's decision to exclude the disputed bad character evidence was wrong.
44. We turn to the state of mind evidence. We observe at the outset that considerable difficulty was caused by the fact that at no stage did the appellant clearly identify what incidents he had heard about and which were said to have contributed to the state of mind he said he had when turning round on the night in question to go to the deceased's address. The original defence case statement said nothing about what the appellant had heard about incidents involving the deceased or how it affected his conduct at the time in question.
45. The case advanced in September 2024 was that the defendant knew of the reputation of the deceased amongst the Thaxted community as a drug dealer and a violent man. On 3 September it was suggested that this influenced and affected his judgment when acting in reasonable self-defence, but neither document identified clearly whether the appellant was aware of any particular incident and, if so, which. The suggestion that the reputation of the deceased had influenced the appellant's conduct when he arrived at the deceased's flat did not sit well with the defence case that the only reason he went there was for a discussion to avoid any violence, only to be attacked without provocation or warning. The suggestion the evidence was relevant to the appellant's state of mind during the physical confrontation at the deceased's flat was not a matter, so far as we can see, which was pursued when the judge heard submissions at the close of the prosecution case, nor thereafter when the issue arose in examination-in-chief. Rather, when the appellant responded to the judge's request to serve a clarification to his defence case statement, the evidence put forward did not relate to the state of mind during the attack, but his state of mind when going to the deceased's house, in which he said that he wished to draw a line under the incident against a background of the deceased having a reputation for continuing confrontations. Whilst the addendum did say the appellant had personal knowledge of individuals who had been assaulted by or had confrontations with the deceased, it did not specify which particular incidents which were the subject of the bad character application, if any, were known to the appellant.
46. The revised bad character application of 12 January grounded the application on the propensity issue, which we have already addressed, and the reliance on evidence said to go to state of mind when the appellant went to the deceased's flat was limited to an attempt, not subsequently pursued, to adduce evidence of the deceased's drug dealing.

47. We are left with the distinct impression, as we suspect the judge was, that the appellant's legal team were rather casting around to find a basis to get this evidence before the jury, generating something of a moving target. Whilst it might be said the judge's ruling on bad character did not engage to a significant degree with the argument that the evidence was relevant to the appellant's state of mind when going to the deceased's flat, we do not find that surprising given the absence of any attempt by the appellant to link the specific incidents which were the subject of that application with the evidence it was said the appellant would give. 48. It was common ground at the trial, and indeed until very shortly before this appeal, that the evidence from the appellant as to his understanding of the deceased's reputation did constitute bad character evidence. We accept there will be cases when a defendant in giving evidence of his state of mind may wish to refer to his belief or understanding about someone else's character, without that necessarily constituting bad character evidence. In *R v Hussain*
- [2008] EWCA Crim 1117, for example, the appellant made an application to adduce evidence of the bad character of a co-defendant, for the purpose of advancing the defence of duress, the intended evidence being the co-accused had been tried for murder (albeit not convicted). It was going to be the appellant's evidence that he believed the co-defendant had been convicted of murder. That application had been refused by the trial judge but on appeal this court (Hughes LJ, Treacy J and Sir Peter Cresswell,) took a different approach to the admissibility of the evidence (although it was found that the conviction was not unsafe and so the appeal was dismissed): "12. We agree that the appellant was entitled to give evidence of what he believed Miah had done in the past and/or what he believed Miah to be capable of as at the time of the alleged duress. Hussain was also entitled if there existed evidence that his belief had some kind of foundation in fact to adduce evidence of that foundation. In the context of a defendant who is seeking to advance a defence of duress, evidence that his belief had some foundation in fact would in the circumstances of this case be capable of going to (i) the truthfulness of his evidence that that is what he believed, (ii) the reasonableness of his belief in a danger of immediate or near immediate death or serious injury, and (iii) the reasonableness of his response in committing the offence.
13. The difficulty for the Recorder is that all this was presented on all three sides as a question of bad character evidence. On the way that the application was argued before him we are not particularly surprised that he refused it. Gateways apart, the Recorder was plainly right to say that a mere charge, unproved, could not be evidence of bad character, still less could it be bad character itself. Bad character evidence is evidence of something bad done by the person in question in the past. That is a commonsense summary of what it is, but it is also effectively the statutory definition which is to be found in section 98 of the Criminal Justice Act 2003. Omitting irrelevant words that reads: 'References in this Chapter to evidence of a person's "bad character" are to evidence of, or of a disposition towards, misconduct on his part...' Misconduct is then defined in section 112(1) in this way: '... "misconduct" means the commission of an offence or other reprehensible behaviour...' Note that it is the misconduct

which is bad character. Evidence is simply the means by which the misconduct is proved. It is not unusual to see the concept of bad character wrongly elided with that of conviction. It may well be that often they go together, but a conviction is not by itself misconduct. Its status is that it is excellent and very often irrefutable evidence of misconduct. A mere charge unproved cannot begin to be conduct. 14. In this case, in so far as the application was to adduce bad character, that is to say misconduct of Miah, the Recorder was right to say, whichever might be the gateway suggested, that the only available evidence of misconduct was evidence of a conviction for assault occasioning actual bodily harm. That was the only conviction which had resulted. It proved misconduct to that extent and no further. If, however, the Recorder had been asked to admit the evidence of what Hussain believed about Miah, however mistaken it might have been, and together with that to admit evidence that Miah had in the past been tried for murder, on the different basis that this might help to show that there was some foundation for Hussain's asserted belief, then it seems to us, for the reasons which we have already given, that it would have been relevant evidence which ought to have been admitted.

15. Miss Cripps, who has appeared for the Crown today and for whose assistance we are grateful, is, as it seems to us, correctly unable now to suggest any reason why the evidence if put on that basis could have been excluded. Of course it would no doubt have been followed by a response from either Miah or the Crown or both. It might have been open to either Miah or the Crown or both to adduce evidence which cast doubt upon the veracity of Hussain's belief. As to that we do not know. What we do know is that the evidence which Hussain sought to adduce was admissible, although not within the bad character provisions which was the way that the application was couched."
49. A trial judge will need to be astute that evidence said to go to the defendant's state of mind is not being adduced solely for the purpose of placing bad character evidence before the jury without meeting the requirements of section 100, all the more so if the effect of doing so would be to circumvent a ruling previously given by the judge that the evidence sought to be adduced did not meet the s.100 test. We also accept that drawing a line between evidence going solely to the defendant's belief as to someone's character, where the defendant's belief is what matters, and evidence of that character itself, which might then be a matter for bad character within the statute, will not always be straightforward. In many cases the essence of a defendant's case will be the jury should accept the evidence they give as to their state of mind because it is objectively well-founded given actual bad conduct on the part of that person. As the court noted in Hussain, the defendant may wish to adduce evidence about actual bad character of the relevant party for precisely that purpose.
50. On the particular facts of this case, we are satisfied the judge was right to have a concern that this was simply an attempt to adduce the bad character evidence which the judge had ruled to be inadmissible and also right to explore that issue with the appellant's counsel before the examination-in-chief of the appellant continued. As we have said, the issues to which the bad character evidence was said to be relevant had been something of a moving

target and included, at least on one occasion, an obviously outlandish justification. Despite ample opportunity in the defence case statement and the addendum and again during the bad character application, to explain the evidence the appellant intended to give in relation to his state of mind, and which bad character material (if any) was relevant to that and why, no clear or coherent explanation had been advanced nor was such an explanation given when the judge raised the issue in the early stages of the appellant's examination-in-chief.

51. It is clear from the judge's intervention when the appellant was asked about the deceased's reputation that the judge understood her ruling to prevent the appellant giving evidence of his understanding of the deceased's conduct towards other members of the Thaxted community. We would note that the only material included within the bad character application which might be said to be capable of supporting a belief on the appellant's part that the deceased would not "let things go" and would follow through with further violence, was evidence which the judge had admitted as to the events of 8 September 2021. When we asked Mr Aina whether he could point to any other material capable of supporting the appellant's belief that the deceased was unwilling to let things go, he was unable to take us to any such material. We would note that even in relation to the events of 8 September 2021, no evidence was adduced that the appellant was aware of that incident or that it had influenced his state of mind on the night in question. We do not accept that such questions were foreclosed by the judge's ruling. She had made it clear that she was not going to permit questions which would involve a circumvention of her ruling but she had allowed evidence of 8 September 2021 incident to go before the jury. 52. In these circumstances, we are satisfied the judge was right to conclude that the real purpose and effect of the evidence which the appellant wished to give was to adduce the very evidence of bad character the judge had refused to admit and the judge was entitled to take appropriate and proportionate steps to prevent that happening. She did that by allowing the appellant to give evidence that he went round to the deceased's house because of the latter's reputation for not letting things go and evidence that when the appellant went to the deceased's house his particular concern was the deceased not letting things go so far as his partner and daughter is concerned. As we have said, she had already allowed evidence to be given about an incident capable of lending support to a reputation on the deceased's part for not letting things go and following up with subsequent violence. 53. For those reasons we are satisfied the judge's ruling both on the bad character application, on the basis it was made to her, and in relation to the steps taken in relation to the evidence to be given by the appellant in chief, were steps that she was fully entitled to take and in those circumstances we reject the application to appeal conviction on that ground.

54. There was an attempt before us today to advance, for the first time, a further challenge to the judge's conduct of the trial in relation to the summing-up. It was said that in relation to those two incidents of bad character on the deceased's part that did go before the jury, the judge, whilst giving what we regard as an impeccable direction in relation to the propensity question, should have gone further and given a direction as to the relevance of that material to the appellant's state of mind when he took the decision to go to the deceased's flat rather

than continue home. However, there was no evidence that we have seen that the appellant was ever asked about any knowledge he had of those incidents or indeed that any suggestion that that material was relevant to the defendant's state of mind was made at the trial, either in the course of exchanges with the judge or in the course of closing speeches. Nor was there any objection to the summing-up at the time it was given, when there would have been ample opportunity to do. In those circumstances, we are satisfied the proposed additional ground is not realistically arguable and we refuse leave.

55. Even if we accepted the appellant's criticism of the judge in any of these respects, the court would have been left with the overarching issue under section 2 of the Criminal Appeal Act 1968: is the conviction safe? As to that, the key issue in this case was whether, when he got to the deceased's home, the jury was sure the appellant had attacked the deceased or whether, as the appellant submitted, it may have been the case that the deceased attacked him with some form of instrument, forcing him to defend himself. The cross-examination of the appellant understandably was largely concerned with the compatibility of the appellant's account with the forensic evidence of how the deceased had been killed. The effect of the expert pathology evidence was the appellant's initial account of how the deceased may have come to have been strangled was not very plausible, and indeed unlikely, and in fact that appellant offered no real account of how the deceased may have come to be strangled in cross-examination. There was also the CCTV evidence of the appellant very shortly before the attack threatening to kill the deceased. We note the appellant was the larger and heavier man and the deceased had defensive injuries. It was the appellant who fled the scene. Finally, there was rightly no criticism of the judge's direction on the key issue on self-defence. 56. In those circumstances, we are not persuaded that the decision to prevent the appellant from offering additional evidence to bolster his alleged state of mind about the deceased having a reputation for not letting things go was one fairly capable of affecting the jury's decision at all, or the safety of the conviction, so we would in any event have dismissed the appeal on that basis.

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