

DRILL MUSIC – ART OR AN INSTRUMENT FOR INCITING VIOLENCE?

The Use of Lyrics as Evidence in Criminal Proceedings

Imagine writing a song which is political, anti-establishment, angry, territorial and more. You may say, many songs written by artistes fall into this category. But how many then have the songs used as evidence against them? Defendants in criminal proceedings are increasingly being confronted with lyrics as evidence in criminal trials. Many of the recent cases concern lyrics contained within drill music.

Yasin Patel and Amy Hazlewood look at the area of drill music and the law. This article is split into two parts: the first part of this article looks at the imposition of injunctions against artists who make drill music. The second part discusses the admission of lyrics as bad character in a criminal trial.

Introduction

Drill music is becoming increasingly popular in the UK with drill songs entering the UK charts since 2017. In May 2018, YouTube deleted dozens of drill music videos at the request of Metropolitan police commissioner, Cressida Dick, after she claimed the videos were inciting violence. This particular genre of music has come under increasing scrutiny after it was blamed for rising gun and knife crime in London.

Whilst inciting violence is a crime, there is a real concern that the law is being used to blur the lines between those who are using their freedom of expression to talk about what they see in lives, and those who are clearly inciting violence.

Injunctions

There is now a trend within the criminal justice system where the courts are increasingly using injunctions against drill artists who are accused of inciting violence with their lyrics.

An injunction is a Court order prohibiting a person from taking a particular action (a *prohibitory injunction*) or requiring them to take a particular action (a *mandatory injunction*).

In August 2018, Drill artists *Skengdo* and *AM* (real names Terrell Doyley and Joshua Malinga) were subjected to an injunction restricting them from entering the SE11 postcode or making various provocations in their lyrics. In January, two 21-year-olds pleaded guilty to breaching this injunction order after a video of them performing a song, (which police say incites violence) was posted to social media.

In June 2018 members of a drill group called *1011* were also issued with one of these orders, banning them from mentioning death or injury, and from mentioning named postcodes in a gang context. The order further specified that they must also notify police within 24 hours of releasing new videos and give 48 hours' warning of the date and location of any performance or recording and permit officers to attend. (One was not aware that the Police Force are big fans of drill music that their attendance has to be ordered in an injunction!)

Standard of Proof

One concern is that the civil standard of proof, 'on the balance of probabilities' as opposed to the criminal standard of 'be sure' is used in what will amount to a criminal sanction if the Defendant is found guilty.

The Policing and Crime Act 2009, section 34 as amended by s.51 of the Serious Crime Act 2015 imposes injunctions. These injunctions are also known as gang injunctions or Criminal Behaviour Orders (CBO's).

Under s.34, a court may grant an injunction against a respondent aged 14 or over if, on the balance of probabilities, it can be shown that the respondent has engaged in or has encouraged or assisted gang-related violence, or gang-related drug-dealing activity (s.34 (2)) and when an injunction is necessary for either or both of the following purposes:

- To prevent the respondent from engaging in, or encouraging or assisting, gang-related violence or gang-related drug-dealing activity; or
- To protect the respondent from gang-related violence or gang-related drug-dealing activity (s.34 (3)).

Jerome Jones sought to challenge a s.34 injunction imposed on him. He wished to do so on a number of grounds, including the fairness of the civil standard. The higher, criminal standard often referred to as 'beyond reasonable doubt' or being 'sure' would have made obtaining an injunction much more difficult. Whereas on the lower civil standard, the party seeking an injunction must show that the conditions are satisfied on the balance of probabilities, i.e. more likely than not. Jerome Jones argued that if the proceedings were not criminal in nature, the balance of probabilities test violated his right to a fair trial under Article 6 of the European Convention of Human Rights (ECHR).

On this point, the Court of Appeal rejected the notion that Article 6 requires the criminal standard to be applied simply because an application is based on criminal or quasi-criminal behaviour or where its being granted would result in restriction of individual liberty. The Judge further stated that there was no support for this 'wide-ranging proposition' in case law. [51, 58].

Accordingly, in granting an injunction pertaining to lyrics, and/or making music perceived to be a threat to or incite violence, it remains the law that the threat of violence needs to be proved on the balance of probabilities.

The discussion so far has focused on the use of lyrics being used as evidence to support an application for an injunction. We now look at the admission of lyrics as bad character in criminal trials.

Bad Character

The following discussion analyses one of the few cases that have gone to the Court of Appeal and specifically addresses the admission of lyrics as bad character in a criminal trial. To this end, the article assesses whether the use of drill lyrics to suggest guilt or bad character may be unfairly prejudicing criminal trials.

Facts of the case

In *R v Zafran Akhtar Saleem* [2007] EWCA Crim 1923, Saleem (the Defendant) had been convicted of causing grievous bodily harm with intent. He was convicted on the basis that he had prior knowledge of an assault and had filmed it.

He admitted that he was present at the time of the attack but denied any prior knowledge of or participation in the assault.

On searching his bedroom, police found rap lyrics that suggested that he had pre-planned a violent assault on the day of the attack.

A number of rap lyrics had originally been downloaded from the internet and were contained in files on the Defendant's computer. One rap had been altered significantly by the Defendant. The prosecution relied on a three-line paragraph on a five-page print-out of the lyrics in the following terms:

"Im gon make history, 1stly dey gon call me mister an dey gon say I dissed ya, I hav 2 b carfull hu I talk 2 becos ur bird wil be da listner, 2ndly February 24th my birth day im gon make it ur worst day, 3rdly do I have 2 have u layin in emergency 2 have dem stitch ya?"

The lyrics, including the short passage set out above, had been created on 7 November 2004. The computer file containing it had last been accessed on 13 February 2005, 10 days before the attack. The significance of this part of the lyric, in the prosecution's submission, was that it referred to the appellant's birthday on 24 February and it referred to an assault resulting in significant injuries was planned for that day.

At trial, the lyrics were admitted as evidence as the judge ruled that they were relevant to rebutting (disproving) the Defendant's defence of innocent presence at the scene of the attack.

The trial Judge directed the jury in the following terms with regards to the lyrics:

"With the rap lyrics found on his computer, if they don't assist you, take no notice of them. They appear to have been downloaded from an internet website and then modified or amended by the user of the computer, presumably Mr. S (the Defendant)".

Two pertinent points were dealt with on appeal:

1. The admission of the lyrics as evidence of bad character; and
2. The trial Judge's summing up to the Jury.

The Admission of The Lyrics as Evidence of Bad Character

Bad character can be admitted under the Criminal Justice Act, 2003 (CJA) section 98 if,

- a) a person's bad character is evidence of, or of a disposition towards misconduct on his part, other than evidence which has to do with the alleged facts of the offence with which the defendant is charged (s.98 (a)), or,
- b) is evidence of misconduct in connection with the investigation or prosecution of that offence (s.98 (b)).

It was contended by the prosecution before the Court of Appeal that the rap lyrics were relevant background and therefore "to do with the alleged facts of the offence with which the defendant is charged" within the meaning of s.98 (30 (i)).

The prosecution further submitted that the evidence of the rap lyrics were to do with the offence, as although written in November 2004, they had been last accessed on 13 February

2005 and showed that at that time, the appellant still had on his mind the planning of a violent assault for his birthday.

The Court of Appeal found this not to be the case. The Court submitted that they do not consider that the evidence in relation to the rap lyrics is admissible as "*to do with the facts of the offence*". The Court stated that in their view, there is an insufficient connection in time with the facts of the offense; these were composed three months earlier, even though accessed about 10 days before the attack. Nor were they evidence of a motive or reason for committing the offense. In short, applying the ordinary meaning of the words "*to do*", they were not sufficiently connected with the facts of the offense to be "*to do*" with them (32).

The trial Judge's summing up to the Jury.

It was the appellant's contention that the directions in relation to the rap lyrics were an inadequate attempt to direct the jury as to the relevance of the evidence and how they should treat it (19).

On this point, the Court of Appeal submitted that the trial Judge should have given the jury much more help than he did in relation to the rap lyrics. Instead of telling the jury it was all part of the evidence, the jury should have been told simply that the evidence had been placed before them by the prosecution to counter the appellant's explanation that he had been there innocently and had not participated in the attack. It was relevant for that purpose and not to any other purpose, including propensity to commit the offence. The jury should not attach too much weight to it and certainly not conclude that he was guilty simply because of this evidence (47).

The Court of Appeal went on to rule that although the judge should have given the jury much more help than he did, they did not consider that his failure to do so rendered the conviction unsafe, as the jury would have appreciated the relevance of the evidence (50). Accordingly, the appeal against the conviction was dismissed (52).

Lessons from the Case

This case highlights that the criminal justice system is evolving and adapting to the increasing reliance on rap lyrics as evidence against Defendants in criminal proceedings. A number of conclusions can be drawn from trials concerning lyrics used as evidence in criminal proceedings. Firstly, with regards to the admissibility of evidence:

- The ruling in *R v Zafran Akhtar Saleem* [2007] EWCA Crim 1923, when read together with s. 98 emphasizes that there has to be a nexus between the offence and the composition of the song. This nexus can be established in time (i.e. the time of the offence and the time at which the song was recorded),
- The nexus can also be established in facts, i.e. the wording of the song, and the facts of the case).
- There may also be a nexus between motive or reason for the offence.
- If neither of these is sufficiently made out (i.e. if there is no nexus in time, facts or motive, then the admission of rap lyrics under section 98 may amount to the admission of evidence that is not “to do” with the alleged facts of the offence and therefore inadmissible under s.98.

Secondly, with regards to the Judge’s summing up:

- What is clear from this ruling, is that whilst the outcome of the conviction did not change, the trial Judge’s approach to the rap lyric evidence certainly needed to.
- The Jury must be directed properly and carefully when the Prosecution seeks to rely on evidence pertaining to music lyrics.

This case highlights the pitfalls that can come about in the use of rap lyrics as evidence in criminal trials. The evidence, if admitted, is highly prejudicial to defendants. Accordingly, care must be taken by the trial judge before permitting its admission in a trial.

Conclusion

Measures can and should be used to disrupt and discourage gang-related behaviour. A lower standard and pre-emptive measures may or may not be necessary and it is right that such measures, in law, are considered on a case by case basis pursuant to the facts of each particular case. It must also be considered that there are safeguarding intentions behind the issuing of injunctions, as such orders are often made not only to prevent behaviour but also to protect the individual.

The Court of Appeal ruling in *Saleem* suggests that the courts may not be fully attuned to the directions that can and should apply. This is, undoubtedly, a complex and developing area of law. A very delicate balancing exercise needs to take place before a trial judge admits lyrics as evidence in a trial where such an admission can be of enormous prejudice to the Defendant. Whilst the admission of the lyrics did not have a material impact on this trial, in future trials it may. And for this reason, further clarity and clearer guidance is needed in this area of law.

The use of Injunctions should not be only directed at a specific ethnicity or age range. The law rightly prevents people from directly inciting violence, but wide-ranging bans being imposed frequently, and being targeted at a specific section of society is in danger of being perceived as an attacking measure, as opposed to a preventative one.

Lyrics are often an expression of opinions or ideas that can be unpleasant, distasteful or upsetting. But if we continue to resort to punitive measures, we make it harder to engage with sections of society that are already inclined to feel disenfranchised and disaffected. We also make it much harder to address the issues that are being raised in this music. Accordingly, rather than repeatedly resort to measures that seek to silence the artists who make this particular genre of music, perhaps there is some benefit to be gained in listening to them and understanding the world from their eyes (and music).