

Response to the CPS consultation on “gang” related offences guidance and musical expression in evidence.

This submission is presented on behalf of The Criminal Bar Association

Question 1

The CPS guidance on ‘gang’-related offending is intended to emphasise the importance of guarding against unconscious bias and making assumptions based on racial stereotypes. Some argue, however, that the mere existence of guidance on this issue is problematic, in that it may inadvertently reinforce such concepts, and that specifically drawing attention to the concept in separate guidance might be less preferable than other measures to guard against unconscious bias.

Question 1: In your view, should the CPS continue to have separate guidance on “gang” related offences? If not, should it address unconscious bias in other guidance, such as the joint enterprise guidance?

1. Yes. The CBA Committee felt that the CPS guidance, ‘Gang-related offences - updates: 04 November 2021, 22 July 2025’ should be updated, as the assertions are outdated, sometimes inaccurate and not evidence based. A starting point for the new guidance should be that prosecutors must not use the term “gang” unless there is compelling independent evidence to support that assertion and convictions could not be obtained without such evidence. In these rare circumstances independent expert evidence and a strict application of the Myers test would be required.
2. The CPS are invited to stop using the term “unconscious bias” for issues that fall firmly under the right to non-discrimination (human rights frameworks) and the Equality Act 2010. The term “unconscious bias” (also known as “implicit bias”) was first coined in 1995 by psychologists Mahzarin Banaji and Anthony Greenwald in their article on implicit social cognition. Yet, it is often used to absolve persons from interrogating the root causes of these ideas, which is racism. This issue was shown by US law professor Jonathan Kahn in his book *Race on the Brain: what implicit bias gets wrong about the struggle for racial justice* explicates the political problems when ‘implicit bias’ morphs ‘from a useful psychological theory of cognitive function into a master narrative framing legal and policy response to race and racism in America today’¹.
3. Discussing racism is difficult. It is a hard conversation to start, sustain and bring to a successful conclusion. However, in the context of this consultation the CPS

¹ To provide a resume of his arguments: it denies history; it reduces racism to merely another form of ‘bias’, it obscures power relations which undergird contemporary race relations, it promotes a mirage of an easy pain-free way to fight racism, it is overenthusiastic about a technological fix for what is fundamentally a complex social, political and historical problem and it opens the door to the biologicalisation of racism.

must engage with the issue and, in doing so, the correct terminology should be used. Obviously, for a state agency to deploy a “gang” narrative against black or other ethnic minority defendants, when there is no gang, amounts to racism and or institutional racism. Any guidance on “gangs”, and we agree that there should be, should also acknowledge the fact that criticisms have been raised suggesting that the police are “institutionally racist”². A significant proportion of the CBA Committee felt that this reflects the reality of the current situation and has a direct impact on whether such evidence should be deployed by the CPS in criminal proceedings.

4. It was felt by several of the CBA Committee that all those involved in drafting and implementing this new guidance should ensure they are well versed in “whiteness studies”³ and that the correct framing of this issue is one of human rights (right to non-discrimination) and equalities⁴.
5. The use of the word ‘gang’ has been heavily criticised⁵ most recently by the respected charity APPEAL after a 6-month in-depth study of cases at the Central Criminal Court. It was felt by members of the CBA Committee responding to this consultation, that the report, ‘Joint Enterprise on trial’⁶ should be compulsory reading for all involved in the CPS consultation. In terms of gangs that report stated:

‘Prosecution storytelling was entangled with racialised constructions of crime and criminality, including stereotypes about gangs, drugs and knife crime, which appeared to be relied on to strengthen the prosecution’s case.

In others, the narrative was more subtly evoked. The term ‘gang’ was explicitly used in just five cases. However, where the offence was categorised as gang-related, the gang narrative dominated trial proceedings. In such cases, the prosecution placed undue weight on proving motive to establish intent, leaning heavily on gang-related evidence to do so.

² Head of Britain’s police chiefs says force ‘institutionally racist’ Guardian news report by **Vikram Dodd** Police and crime correspondent Fri 5 Jan 2024 05.00 GMT <https://www.theguardian.com/uk-news/2024/jan/05/head-of-britains-police-chiefs-says-force-is-institutionally-racist-gavin-stephens>

³ Dr Janine Francois explains that, “We need to call out whiteness. When we are not candid about whiteness, we uphold a lie. We lie about who is absent and we lie about who is taking up space. In exposing whiteness, we make visible the invisible. We call to attention how it exists as a covert system of power, masquerading as the norm and instrumenting language like standard, traditional or conventional to disguise and to refer to its existence.”

⁴ The UN working Group of Experts in their 2023 UK country visit found, “The overbroad exercise of joint enterprise laws has inappropriately recast expressions of Black culture, including drill and rap music, mere presence in digital forums and the use of Black British English as markers of criminality. The racially discriminatory effect is clear, affecting rights protected under the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights.”

⁵ Dr Patrick Williams and Beck Clarke Dangerous Associations 2016 P10 ‘It is clear that the gang label is disproportionately attributed to BAME people, when compared to both the size of the BAME populations within each of the cities presented and the numbers of white British people flagged or registered as involved with gangs. From Manchester, through to Nottingham and London, the gang construct is racialised to Black and Brown men’

⁶ Authored by Dr Nisha Waller and Tehreem Sultan | 26th June 2025

In the opinion of the CBA Committee, one of the most troubling findings was the frequent and impermissible suggestion of guilt by association. In some of the observed cases, the prosecution inferred the defendants' motive and intent from 'tenuous associations—relying on mutual rather than direct connections with others and referencing previous violent incidents that did not involve the defendants themselves, but people they knew.'

6. Misuse of the "gang" construct has resulted in convictions for murder being referred to the Court of Appeal [The Moss Side case]. When this occurred on the 19th November 2025 the Chair of the CCRC, Dame Vera Baird KC said:

"This referral highlights the need for safeguards to protect defendants against the risk of unfairness from a too readily adopted gang narrative, based on inappropriate labelling. It is possible that there are other cases which would benefit from guidance on this issue, where the fear may be that stereotypes can be wrongly introduced as evidence."

7. We suggest that whenever the 'gang narrative' is deployed in criminal proceedings the CPS should guard against a propensity to rely upon non-criminal behaviours and youth culture, especially when the other evidence in the case is weak.
8. In Dr Nisha Waller's report she describes this as 'conviction-maximising'; where the gang is appropriated as a net-widening resource and used to infer criminality on the non-criminal behaviours of children and young people.
9. The Crown Prosecution Service six-month pilot scheme⁷ monitored joint enterprise prosecutions for racial bias, and has shown that black people are 15.7 times more likely than white people to be prosecuted under the joint enterprise doctrine. That pilot notes that *"using the term "gang" inappropriately risks casting the net of liability beyond that which can be established. It also disproportionately affects minority ethnic people. For these reasons, prosecutors must not use the term "gang" unless there is evidence to support that assertion."*
10. The CBA Committee feels that the updated guidance should emphasise that the CPS should not deploy a gang narrative in a criminal case unless there is compelling⁸ evidence of the same. Through adoption of these suggestions, the present guidance would be enhanced and strengthened.

⁷ Crown Prosecution Service Joint Enterprise Pilot 2023: Data Analysis 29 September 2023

⁸ Some members of the CBA Committee felt that this evidence should also be "independent".

Question 2

The term “gang” (often used interchangeably with “street gang”) can be defined in various ways to describe a wide range of collective behaviour or allegiance in the context of criminal offending - from localised street activity to international organised crime. Stakeholders have adopted different definitions, and some examples are shown below.

Question 2: In your view, how should the Crown Prosecution Service (CPS) define the term “gang” in its guidance (whether specific guidance, or in its guidance in general)?

The Lammy Review stated that gangs are hard to define⁹. The problem is that gangs are, by their very nature, hard to pin down – and ‘gang offending’ even more so. As the Gang and Group Offenders Handbook produced by the Metropolitan police puts it, ‘gangs in London are very fluid and chaotic – individuals may move in and out, and between gangs fairly rapidly, and will not always fit a precise definition. It is important that we recognise that not all groups of young people are gangs, and that we target the criminal and violent behaviour of individuals rather than the group.’

As such the starting point in potential “gang” cases should be that the CPS concentrate on what individuals allegedly did rather than their associations.

The purpose of section 34 Policing and Crime Act 2009 is to deal with injunctions to prevent “gang related violence and drug dealing activity”. The difficulty in applying the narrow definition set out at s34(5) in isolation is that it lacks reference to criminal conduct and simply says that which is set out above.

In our opinion, the CPS guidance should use very similar language to that act, but should encapsulate the fact that a gang ‘engage in criminal activity’. This helps to avoid references to vagaries such as names, emblems or colours and focuses upon the real concern.

We suggest the CPS define “gang” in a succinct and easily understood way; **A group of three or more persons who share an identity and engage in criminal activity**.

Should there be concern over the specific inclusion of “engagement in criminal activity” and its potential to limit the definition, then we suggest, “A group of three or more persons who share an identity and has as one of its main purposes the facilitation of criminal activity”.

⁹ “Despite the High Court ruling [R v Jogee], experts in the field remain concerned about some of the legal practice on Joint Enterprise. Many are not convinced that the line between ‘prohibitive’ and ‘prejudicial’ information is drawn appropriately in the evidence put before juries when cases reach trial. People must be tried on the basis of evidence about their actions, not their associations - and the evidence put before juries must reflect this. The CPS should take the opportunity, while it reworks its guidance on Joint Enterprise, to consider its approach to gang prosecutions in general.”

In our opinion, both of these definitions protect against overreach and avoid unnecessary assessments of the ways in which these individuals are linked. We suggest that the CPS avoids references to “clothing, colours, emblems, areas / locations, symbols or the need for a degree of organisational structure”.

Members of the CBA Committee take great issue with the examples provided, notably the definition by Youth Endowment Fund. This definition links an entire population class (Children and young people) with a negative behavior practiced by only a few of its members which can only be understood as bigotry. Those members were concerned that none of the definitions explicitly call out the issue of gang narratives being inherently linked to black boys, stereotypically. Those members felt that any use of the word “gang” by the CPS must have a specific caveat that recognises this¹⁰.

The CBA Committee would wish to remind those at the CPS that in February 2025 Amnesty International UK¹¹ accused the Metropolitan Police of “supercharging racism” after claiming some people were added to its revamped Violence Harm Assessment database because of where they live, their friends or for making drill rap.

Members of the CBA Committee also invite the CPS to have their own internal guidance on “anti-Blackness” due to their concerns that this consultation may be masking many of the points such as unconscious bias; when evidence shows this issue mainly affects black people. Accordingly, they invite that the language and guidance given should reflect this.

Question 3

The current CPS guidance states that prosecutors should guard against unconscious bias and should not make assumptions about gang membership.

Question 3: Is this the correct approach for the CPS to set out in its guidance, and if so, what else can be included in guidance to ensure prosecutors guard against racial stereotypes concerning gang membership or affiliation?

Yes. The guidance should continue to include the requirement to avoid unconscious bias and to not make assumptions about gang membership.

Our recommended phraseology for dealing with this part of the guidance is:

“Prosecutors must ensure that decisions concerning alleged gang membership or affiliation are based solely on admissible evidence of conduct and intent, and must not rely on assumptions, stereotypes, or generalisations linked to race, ethnicity, nationality, religion, socioeconomic background, or areas / locations of residence.”

¹⁰ Black people featured disproportionately on the unlawful gangs matrix database and similar such databases (In July 2016, a more detailed demographic breakdown of those on the matrix revealed that (78 per cent were black).

¹¹ [“Automated Racism” 20.2.25](#)

Membership or affiliation allegations must be supported by evidence demonstrating knowledge and voluntary participation in a group's criminal objectives, rather than mere proximity, familiarity, or social interaction.

The use of proxy indicators that disproportionately impact racial or ethnic groups—such as area / location-based assumptions or unverified intelligence records—must be approached with caution and shall not be determinative without corroboration.”

One way in which this guidance could be reinforced might be to state that when evidence of gang membership or affiliation is relied upon by the prosecution (either at pre-charge or during trial) and consequently the likely sentence, post-conviction, is increased, the evidentiary basis to include such evidence should be specifically documented.

Question 4

Question 4: Is there anything else you think CPS guidance on “gang related offences” should include to support fair, effective and independent prosecutorial decision making?

1. In our opinion, consideration should be given to creating a non-exhaustive list of factors which, absent meeting the criteria (as aligned to the particular issues in the case) set out in paragraph 82 of Sir Brian Levenson's judgement in *R v Lewis [2014] EWCA Crim 48*, should be assumed to be insufficient to establish gang membership or affiliation.

The following factors, in our opinion, should be upon such list:

- a) Music, written lyrics or cultural expression,
- b) Social media without criminal context,
- c) Clothing, colours or emblems,
- d) Residence in a particular area / location

Prosecutors should, however, be reminded within the guidance that there will be occasions where evidence is perfectly admissible, and indeed its admission is desirable, where it meets the relevant gateways under sections 101(c) (important explanatory evidence) or 101(d) (relevant to an important matter in issue between the defendant and the prosecution) of the Criminal Justice Act 2003.

2. Expert witnesses

The CPS always has a duty to undertake appropriate care in identifying a suitable expert. Particular care must be taken in the area of gang evidence.

Even in cases not involving musical expression evidence, consideration should always be given to the instruction of an appropriately qualified independent expert, assuming somebody can be found with appropriate credentials and detailed subject knowledge.

Only independent experts who truly understand the material and have a knowledge and understanding of how racism could result in false positives should be instructed. Police officers should not be presumed to be experts or independent¹².

The CBA Committee suggest that the updated version of the JUSTICE recommendations, as proposed in *Oni and Ors [2025] EWCA Crim 12* are adopted. This would involve the CPS paying particular attention to the dangers of deploying prejudicial forms of gang evidence without the use of properly informed experts¹³.

Cases where it is proposed that a police officer gives evidence about local gangs

In some cases, a police officer may be the only person able to give this evidence. In principle, such expert evidence can be given by an appropriately qualified Police Officer. See *R v Marvin Edokpolo Joshua Alexander [2025] EWCA Crim 1534*¹⁴.

If it is proposed that a police officer is to give expert evidence about local gangs, particular care must be taken to ensure that he or she fully understands the onerous duties on an expert witness and that the duty to give unbiased independent evidence must override any obligations or loyalties the officer may have to the Police.

The CBA Committee suggests the following form of words might best be used,

"Prosecutors are strongly encouraged to consider the use of independent experts...with genuine understanding of the relevant genre and of creative expression more broadly. Expertise may best come from those with knowledge of music and culture, not solely from a criminal justice perspective. Prosecutors should consider calling an independent expert for the purpose of dealing with the musical expression while potentially relying on a suitably qualified Police expert for dealing with the aspects concerning the general activities of the local gang issues".

3. Consideration should be given to a case conference significantly in advance of trial, with reviewing lawyer and prosecution trial counsel present, so that each may independently satisfy themselves of the credentials of the proposed expert, of his / her likely ability to convey evidence to a jury, to test by way of general

¹² See JUSTICE 2021; T. Ward and S. Fouladvand (2021)

¹³ Some of the CBA Committee felt it should be acknowledged that this problem is endemic within the criminal justice system.

¹⁴ One of the facets of the evidence given concerned song lyrics (para 12), albeit the CACD's specific approval of PC Wright as a Hackney gangs expert (paras 25 – 26) did not include specific consideration of the song lyric point.

questioning the expert's knowledge of the subject matter (including his / her understanding and reading of wider subject literature), and in particular to ensure that he / she is cognisant of the utmost importance of giving balanced unbiased evidence, including information which may detract from the prosecution case.

4. A copy of the trial Opening Note and Defence Statement must be made available to the expert

This should include a discussion of the duties of a police officer giving expert gang evidence and should involve the prosecution team taking the proposed witness through a summary of the principles set out in paragraphs 57 – 72 of *Myers v The Queen [2015] UKPC 40*¹⁵.

5. A strategy document should be drawn up in accordance with the principles set out in *Myers* and uploaded to the CCDCS, so there is a clear understanding between prosecution, defence and the Court as to how the Prosecution is to approach this evidence.

If prosecution counsel and the reviewing lawyer are not satisfied of these matters, the proposed expert should not be used, and any materials already generated will need to be scheduled as unused material and consideration given to disclosure to the defence.

6. Where a proposed expert indicates an intention to rely upon intelligence, prosecutors will have to take the utmost care to ensure that (a) the evidence can be given in a form which allows it properly to be tested by the defence and that (b) consideration is equally given to any intelligence which may pass the disclosure test. Very careful attention should be paid to sensitive material in this regard, and the prosecution must have in mind at all times have its obligations in accordance with *R v H and C [2004] UKHL 3*¹⁶.

¹⁵ <https://www.bailii.org/uk/cases/UKPC/2015/40.html>

¹⁶ <https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd040205/hc-1.htm>

Musical expression consultation questions (all mandatory)

Introduction:

Question 1:

Question 1: What action should CPS consider concerning current content on drill music in the “gang-related offences” guidance? You may also wish to provide your reasons why.

- a) Remove it from the “gang related offences” guidance and create separate, reframed guidance on musical expression evidence specifically?
- b) Keep it in the “gang related offences” guidance but reframe the content?
- c) Retain the guidance in its current form, without making changes?
- d) Remove it entirely from all forms of guidance, as guidance on this issue is counter-productive?

The CBA Committee encourages the CPS to consider the following:

1. Remove content relating to drill music from the “gang related offences” guidance and create separate, reframed guidance on musical expression evidence specifically. However, within the guidance on gang-related offending, prosecutors should be instructed to consult the guidance on musical expression when considering the use of music as evidence.

Our reasoning:

Separate guidance on musical expression is required because, while many cases involving musical expression are framed as ‘gang cases’, music has been used as evidence in non-gang cases. Regardless of the nature of the case, prosecutors must be alert to the guidance on musical expression. Such guidance should not hyper-focus on drill music and certainly not in a way that conflates drill with gangs. At the same time, the guidance should recognise, and account for, the fact that rap (including drill) is the form of musical expression most used as evidence in criminal cases.

As far back as 2019, The House of Commons Digital, Culture, Media and Sport Committee stated in their report “We welcome the abolition of the Metropolitan Police’s form 696 following concerns that it unfairly targeted certain artists and audiences, but it is concerning to hear that prejudices against urban acts persist. The Department for Digital, Culture, Media and Sport, the Ministry of Housing, Communities and Local Government and the Home Office should work together to develop guidance for licensing authorities, police forces and music venues on how to collaborate on managing risks to ensure that urban music acts are not unfairly targeted.” The CPS should look into the targeting of Black Music to ensure their policies and practices do not unfairly target urban / black music.

The art forms of Rap and Drill, the only art forms mentioned in this consultation, are art forms created by black people. Black people are the ones overrepresented at the

charging stage by the CPS for joint enterprise, where the gang narrative is often relied upon. It is black language practices that are unfairly scrutinised within rap videos which then leads to the employing of criminal tropes onto words used by every day black British English speakers. An example of this being the police and or police experts interpreting the word “ting” as meaning a gun when the word derives from Jamaican Patwa and can be used to literally describe anything.

The CBA Committee are concerned that this sort of practice by the Police and the CPS through the engagement with such expert evidence at trial can amount to anti-black linguistic racism¹⁷.

2. Recognising the following within the updated guidance on drill music:

- (a) Drill is a lawful, legitimate and mainstream form of musical entertainment and that the genre's lyrics necessarily include reference to violence, firearms and gangs;
- (b) The work of academics such as Dr Abenaa Owusu-Bempah in articles such as 'Scrutinising rap evidence: Heslop ' and 'The irrelevance of rap ' demonstrate the real issues with this kind of evidence being adduced;
- (c) Rappers rap in the first person and it is common to reference provocatively real life events;
- (d) The valid concerns of the Art not evidence movement. The CBA Committee members in their entirety agree that a defendant's “fate in court MUST NOT BE decided, in part, by their taste in music”;
- (e) There is a very real risk of racial stereotyping and prejudice in adducing this evidence, as drill music is very much a part of black youth culture;

3. The CBA Committee urge the CPS to reflect upon “The Restoring Artistic Protection Act of 2022 in California¹⁸ as we feel its terms and their consequent effect upon trials, aligns with our views.

3. Taking the following approach to the admissibility of drill music at pre and post charge:

¹⁷ Dr April Baker Bell explains Anti-black linguistic racism as the following - The linguistic violence, persecution, dehumanization, and marginalization that Black Language (BL) speakers endure when using their language in schools and in everyday life. It includes teachers' silencing, correcting, and policing students when they communicate in BL. It is the belief that there is something inherently wrong with BL; therefore, it should be eradicated. It is denying Black students the right to use their native language as a linguistic resource during their language and literacy learning. It is requiring that Black students reject their language and culture to acquire White Mainstream English2(WME), and it is also insisting that Black students code-switch to avoid discrimination.

¹⁸ “Limitation on admissibility of defendant's creative or artisitic expression. Rule 416.

(1) The Crown's default position is that it will not rely upon drill music (be that in videos, music or lyrics)¹⁹;

(2) If a drill / rap video (or any part thereof) contains evidence that is probative of an important matter in issue then consideration will be given to seeking to adduce it²⁰.

(3) As part of that consideration process, the following factors will be considered:

- (a) The likely prejudicial effect of adducing the evidence;
- (b) Whether the evidence can be established in some other way; and
- (c) That the evidence will be presented to the jury in the least prejudicial way. For example, by agreed fact. Only when it is impossible to adduce the relevant evidence without doing so, will a video be sought to be played to a jury.

Question 2

Drill music, while sometimes associated with gang activity, is also a widely accessible and mainstream form of musical expression that often does not relate to real life criminality, providing a creative outlet and a path to success for many artists. Stakeholders and academics have noted that much of the content in musical expression is fictional or exaggerated for artistic purposes. However, there are also instances where lyrics or videos do relate to actual criminal activity and where it is relevant and admissible evidence.

Question 2a: When considering the use of musical expression – such as drill music – as evidence in criminal proceedings, what information would assist prosecutors to make informed decisions, whether about context or to assess the reliability of evidence?

Question 2b: Should contextual information be provided to prosecutors through guidance? If you think it should, what content would it be useful to include?

¹⁹ Some members of the CBA Committee felt that the following wording should also be included, others did not, “*in any trial for any reason*”

²⁰ Some members of the CBA Committee felt that the wording should be written more strongly, as follows: “evidence that is exceptionally probative of a highly relevant issue in the case then consideration will be given to seeking to adduce it.”

Question 2a:

The paragraph on 'Gangs, drill music and social media' in the existing guidance on 'Gang-related offences' is inaccurate and inappropriate and should be removed. The current guidance conflates drill music with criminality and fails to warn against the dangers of uncritically adopting a literal interpretation of creative expression.

Specific guidance on musical expression is required. Prosecutors are not disbarred from using such evidence but must approach it with care in accordance with the Guidance. Guidance should not hyper-focus on drill music, whilst at the same time recognising that black music genres (including drill) are particularly vulnerable to misuse as evidence.

The CBA Committee wish to highlight certain aspects of this genre of music and feel that the following information ought be used within the subsequent guidance:

Use of Personas in music

The use of stage names and personas within rap is ubiquitous; artists craft a fictional character and name under which they perform.

Marshall Mathers III, for example, performs under the pseudonyms "Eminem" and "Slim Shady." Mathers once told Spin magazine, "Slim Shady is a name for my temper and/or anger. Eminem is just the rapper. Marshall Mathers is who I am at the end of the day."⁴³ Mr. Mathers's lyrical choices accordingly vary dramatically depending on his persona. The point of view from which the artist raps can be ever-changing. As such, it is important to communicate that the lyrics at play in the trial are just one of potentially many alternative points of view from the manufactured fictional character the artist has created. As such, it is important to communicate that the lyrics at play in the trial are just one of potentially many alternative points of view from the manufactured fictional character the artist has created.

Braggadocio, Hyperbole, and Rap Competitions

Rap music has a long tradition of rap battles that have reinforced the genre's hyperbolic wordplay; as a result, audiences have come to expect tall tales for entertainment value.

Countless rap artists hone their rapping skills through rap "battles," a competitive art form in which rappers attempt to prove that their lyrical skills are superior to those of their competitors. This style of rapping "evolved as a way for rappers to competitively display their prowess to a live audience."

In his book²¹, Paul Edwards explains that, "Bragging and boasting, known as braggadocio . . . have always been an important part of hip-hop lyrics and are an art form all in themselves. This type of content, combined with put-downs, insults, and disses against real or imaginary opponents, makes up the form known as battle rhyming". Edwards describes different techniques such as a punch line, which is, "a particularly strong phrase in the lyrics that 'punches,' or hits, the listener. It can be something funny, an interesting

²¹ "How to Rap: The Art and Science of The Hip-Hop MC" (2009)

metaphor or simile, clever wordplay, or anything that makes an impact.”. The exaggerated and frequent use of wordplay contributes to a misunderstanding that rap battles and diss tracks reflect a rapper’s real-life conduct rather than competitive art forms. Because rap battles help artists hone their craft, the skills and lyrical choices they employ in battle often influence how they craft song lyrics. For those reasons, Rap lyrics, therefore, should be presumed to not be interpreted literally.

Market norms perpetuate use of fictitious lyrics

Prosecutors should be conscious that there is a link the between exaggeration and fictitious lyrics and the commercial success of the artist, particularly in rap music.

Studies²² suggest that violent lyrics are pervasive in rap music because they help boost record sales. Record companies exaggerate violent lyrics as a marketing ploy to maximise sales.

On this point, when asked about his song, “High All the Time” from his album “Get Rich or Die Tryin’”, Curtis James Jackson III, known professionally as 50 Cent, explained, “I don’t drink and I don’t use drugs, and I didn’t back then either. I put that joint on the first record because I saw artists consistently selling 500,000 with that content”.

William Leonard Roberts II, known professionally as the rapper Rick Ross, consistently raps about how he came from humble beginnings and took over the streets as a large scale cocaine trafficker. In reality, Ross worked as a prison guard before he became a famous rapper. In fact, Ross based his entire rap persona on a famous drug kingpin named “Freeway Ricky Ross” who, after being released from prison, filed a right of publicity lawsuit against the rapper.

‘In short, rap personas, especially ones that emphasise hypermasculinity and violence, are ubiquitous. Rap fans know this; boasting and exaggeration are conventional to this musical form, and audiences generally do not equate rap lyrics with the truth.’

Question 2b:

The purpose of any guidance on musical expression must be to prevent its erroneous and unfair use.

Prosecutors should be guided by the content of Art Not Evidence’s Criminal Evidence (Creative and Artistic Expression) Bill, available online here. Given the risk of unreliability and undue prejudice, the starting point for prosecutors should be that musical expression is not to be used as evidence in criminal cases. Members of the CBA Committee felt that departure from this should only be permitted if all of the following conditions are met:

- 1. The expression has a literal, rather than figurative or fictional, meaning;**

²² Charis E. Kubrin & Erik Nielson, Rap on Trial, 4 RACE & JUST. 185 (2014)

- 2. Where, the expression is derivative, the person who created the derivative work intended to adopt the literal meaning of the work as that person's own thought or statement;
- 3. The expression refers to the specific facts of the crime alleged;
- 4. The expression is relevant to an issue of fact that is disputed; and
- 5. It is necessary to rely on the expression as the issue cannot be proven by other evidence.

Other members of the CBA Committee felt that the 'Art not Evidence' substantive criteria were drawn too tightly in what ultimately must be a balancing act, particularly bearing in mind the duty of the CPS towards victims of crime, which, sadly, also often include young black men.

Those concerns were linked to criteria 3 and 5, above, and can be summarised as follows:

With regards to criteria 3, members felt that this rules out what might be termed, "building block evidence". For example, in *R v Alimi* [2014] EWCA Crim 2412 (a case concerning a "ride-out" into the turf of an opposing gang), Jackson LJ accepted the proposition advanced by the prosecution, namely that the videos adduced did indeed evidence, in the case of the other co-defendants, various such matters as the existence of the gang, its territorial ambit (including videos with local turf landmarks prominently in the background), and recent tensions with the opposing gang. Such evidence was relevant to motive, and ultimately to the denial of involvement.

Such evidence, while passing criterion (4), would fail the test at criteria (3) on the basis it was not "confessional" in that the videos, predating the offence, could not speak to the specific facts in the past tense. The implied requirement in criterion (3) that the event must pre-date the expression also rules out evidence where the expression itself is said to be the motive for the crime.

A hypothetical example. In a video posted on 1st January, Gang leader A posts a video rapping that Gang Leader B is a [offensive term] and that Gang Leader B wouldn't dare to come on to his patch and shoot him. On 2nd January, the Prosecution case is that Gang Leader B does just that. Such evidence, while passing criteria (4) and (5) could not be used as the expression by A would arguably not "refer" to the crime later committed by B.

It is for this reason that several members of the CBA Committee felt that criteria 3 should be removed entirely.

With regards to criteria 5, it was felt that the problem with this test is that it is prospective. The particularly acute problem for prosecutors and police is that gang cases often suffer from a dearth of eyewitness evidence due to fear and possibly other factors. Thus, prosecutions in this area are very often "jigsaw" cases of which musical expression evidence may be one part. In such cases it is inherently difficult for a prosecutor to judge whether such evidence is "necessary" or not. Those making this argument appreciated that there is a potential counter argument that in cases like this there must be a temptation on the part of prosecutors to "throw the kitchen sink" at the problem, and that the

risk of miscarriages of justice is increased in such cases. As ever, a balance needs to be struck. The members of the Committee sharing this view felt that something looser for condition (5) would be best – e.g. “prosecutors should carefully weigh the probative value of the expression evidence with the potential prejudice involved, as part of its commitment to conducting prosecutions in a fair and non-discriminatory manner”.

In assessing whether these conditions are satisfied, prosecutors should give due regard to the artistic conventions of the genre, the social and cultural context, and the circumstances of creation. This includes:

1. The extent to which the expression conforms to the conventions of its genre;
2. When the expression was created and whether it was created before or after the alleged crime;
3. Where the expression takes the form of written or spoken words, who wrote the words;
4. Where the expression takes the form of lyrics or music, how the creator intended it to sound or be heard by the listener;
5. Where the expression takes the form of a video, the role played by the relevant participant (mere presence is not enough);
6. Where the party making the application seeks to rely on an excerpt from the expression, how that excerpt fits into the broader context of the expression;
7. Whether the expression contains information not readily available to the individual(s) it would be used against.

Proper application of these conditions will require contextual knowledge of the genre of the musical expression. In most cases this will be rap. A substantial body of research and literature exists on rap music and rap evidence, which should inform CPS guidance and form a recommended reading list for prosecutors seeking to adduce rap as evidence. Resources are available through the Prosecuting Rap website.