In what circumstances can evidence of a non-defendant’s previous acquittal be adduced?

In robustly defending our clients we are always looking at ways in which we can use both case law and legislation to assist that cause in pro-active ways. Some of the tools in our armoury we regularly use, such as the making of non-defendant bad character applications, or hearsay applications under the Criminal Justice Act 2003. A lesser-known example is that of, where relevant, seeking to utilise to our advantage the fact of the prior acquittal of others. In fact, using such a tool is somewhat easier than a cursory look at Archbold might suggest.

When looking at the question of when it is permissible to admit evidence of the previous acquittals of non-defendants, a first blush reading of Archbold would make it seem very challenging. Archbold downplays the usefulness of a number of authorities on point which are of real assistance to the defence in any attempt to do so, particularly the case of *R v Terry [2005] QB 996*. While Blackstones deals with *Terry* and other helpful case law in a little more detail, it still focuses in the main, on cases that take a strong position against the admission of such evidence.

In addition, most of the case law in this area concerns situations where the defendant is attempting to adduce evidence of his or her own previous acquittals as part of the defence case, or where the prosecution are trying to do so. Therefore, much of the reasoning in these cases is largely irrelevant to any consideration of the admission of non-defendants previous acquittals.

The relevant section in Archbold 2016 “Adducing Evidence of Relevant Previous Acquittal” (4-400) begins with the following statement of law;

"In the absence of some exceptional feature, such as the effect of an acquittal on the credibility of a confession or the evidence of a prosecution witness, evidence of the outcome of an earlier trial arising out of the same events is irrelevant, and therefore inadmissible, since it amounts to no more than evidence of the opinion of the jury in the earlier trial: *Hui Chi-Ming v. R.* [1992] 1 A.C. 34, PC. A"

First, this rational is inapplicable in many cases, as often previous convictions will not arise out of the same facts. In addition, this is a very narrow view of when such evidence may be admitted. In *R v Terry* (at para 34) it was held that;

"The rationale of the exceptions stated, by way of example in that proposition [in *Hui Chi-Ming*], appears to be that where an earlier acquittal is arguably attributable to some aspect of the evidence which is common to both trials and/or otherwise relevant to an issue in the second, evidence of the acquittal may be admissible in the later trial."

When seeking to admit evidence of a non-defendant’s previous convictions, a more thorough examination is needed of the case of *Terry* and its rationale. Disappointingly, neither Archbold nor Blackstones deals with this case in any great detail.

In *Terry* the court held that, when determining the admissibility of such evidence, the critical question is whether or not the evidence in question is relevant to an issue in the case and whether it is fair to admit it.¹

*Terry* embarked on a thorough analysis of the case law in the area. It examined the case of *R v Z [2000] 2 AC 483* where the House of Lords found that Crown should be permitted, in a rape trial, to call a number of previous complainants to give evidence of the defendant’s

¹ See Blackstones 2016 at F11.23
conduct towards them in order to negate the defendant's defence of consent, arguing this was admissible as similar facts evidence. The defendant had been acquitted in previous cases concerning these complainants. The court in Terry approved Z and expanded on this reasoning, holding;

"There can be no logical basis for restricting the House of Lord's ruling [in Z] to similar fact evidence, the critical questions are whether the evidence in question is admissible, whatever its species, as relevant to an issue in the case and whether it is fair to admit it. It just so happened that the evidence in question in R v Z was relevant because it was similar fact evidence."  

It was argued in Terry that R v Hay 77 Cr App R 70 3 was authority for a wider exception, namely that the earlier acquittal should not only be admissible on the grounds of relevance in such circumstances, but should also be treated as positively conclusive for all purposes of innocence of the offences of which the person in question had been acquitted. However, the Court decided that they did not consider that Hay to be a binding authority for that proposition 5 and that it was plainly inconsistent with the rationale of the decision of the House of Lords in Z.

In addition to Terry defence counsel may generally find the authority of R v Dootsi (1986) 82 Cr. App. R. 181 useful. This was a case in which in nature and circumstance of the acquittal was akin to the one for which he was then being tried and the police officers were the same in both cases. At trial the defendant was cross-examined as to his previous convictions. However, he was not permitted to give evidence of his previous acquittal. It was held the defendant should have been permitted to adduce such evidence. The court also held that the acquittal did not necessarily mean that the officer was lying or was unreliable; the acquittal was consistent with the jury not being sure whether the case had been made out.

Therefore, in conclusion, evidence of a non-defendant's previous acquittals may be admitted, while not as conclusive evidence of innocence, where the evidence is relevant to the case being heard. The evidence need not be similar fact evidence and no special feature need exist. In these circumstances, perhaps it is an approach we should attempt more often than hitherto.

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2 at para 45  
3 at para 31  
4 at para 36  
5 at para 37