Neutral Citation Number: [2024] EWCA Crim 1514

Case Nos: 202302859 B5
202303874 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT MAIDSTONE
His Honour Judge Julian Smith
T20197418

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2024

Before :

LORD JUSTICE EDIS
MRS JUSTICE McGOWAN
and
HIS HONOUR JUDGE BLAIR KC, HONORARY RECORDER OF BRISTOL
Sitting as a judge of the Court of Appeal (Criminal Division)

- -

Between :

(1) LEONARD WILSON	
(2) FRANK SMITH	**Appellants**
- and -	
THE KING	**Respondent**

- -
- -

Terence Boulter (assigned by the Registrar) for the appellant **Leonard Wilson**
Gordon Ross (assigned by the Registrar) for the appellant **Frank Smith**
Sarah Morris (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates : 12 November 2024

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JUDGMENT

This judgment was handed down by release to The National Archives
on 12 December 2024 at 10.30am

Lord Justice Edis:

Introduction

1. This case raises an issue concerning section 41 of the Youth Justice and Criminal Evidence Act 1999 in circumstances which are, in some respects, unusual. The sexual behaviour evidence which this case concerns was evidence of prior consensual sexual activity between the complainant and one of two people accused of raping her in August 2018. It was not evidence of sexual activity between her and third parties. She complained to the police within one week of this event, now over six years ago. The trial which eventually reached a verdict in July 2024 was the third attempt to try the case. In August 2018 one of the protagonists was 17 years old and the other two were 18. The fact that so much time passed between the event and the verdicts is principally attributable to the pandemic, but other factors also affected this case which we will describe briefly below. It is a matter of profound regret.

2. The appellants were each convicted of a count of rape of the same woman ("C") on the same occasion (count 3, Wilson, and 4, Smith). Smith was acquitted of one count of sexual assault and one further count of rape against C. These counts, counts 1 and 2, related to conduct which occurred immediately before the conduct which was the basis of the convictions.

3. The appellants each have the leave of the single judge to advance one ground of appeal. Other grounds were refused leave and these applications are not renewed. The single ground is that the judge ought to have permitted Wilson to adduce evidence of, according to him, two previous occasions when he had had sexual intercourse with C in the same way and at the same place. In evidence C said, without being asked about the matter, that there had been one such

occasion, although she had previously said it happened twice. Because permission to cross-examine had not been given, the matter rested there and there was no further cross-examination about the sexual element of the previous meetings. Defence counsel merely established that there had been previous meetings and did not ask any questions about any sexual activity on any of those occasions. If the judge had permitted it, C could have been cross-examined about having sexual intercourse by consent with Wilson on these earlier occasions, Wilson himself could have given evidence about them, and counsel could then have dealt with this evidence in closing submissions. Further, Wilson submits that the judge should not have directed the jury that the evidence which C had volunteered about the previous sexual contact between her and Wilson was irrelevant. He complains that these things render the conviction unsafe.

4. Smith submits that if Wilson succeeds on this ground then the safety of his conviction should also be in doubt because of the very close connection in time between the acts of sexual intercourse which resulted in the convictions of both appellants. They were indicted separately but the allegation was, in reality, of a joint offence.

The facts

5. C complained that she was subject to a series of four separate sexual offences after she and some friends met the appellants in a public park. She had invited them to the park and there had been some messaging between them. She said that there had come a time when she and Smith had gone to a shop in his van and, on the way back, he had sexually assaulted her (count 1). She then said

that after their return they hung around for a while in a group, before she went with him to the other end of the park, where, she said, he raped her. He had pushed her over a bench with her head caught between the bench and some railings and, while she was trapped in that position, raped her from behind (count 2). The jury acquitted Smith of these two counts. The defence was consent,. Smith admitted the sexual acts but denied any coercion or force. He said that she clearly and expressly consented. The acquittals must have been because the jury thought either that she may have consented or that he may have reasonably believed that she did consent.

6. After Smith had finished penetrating C over the bench in this way, he ejaculated on to her leggings. His semen was later found there. He had realised that Wilson had arrived. It was agreed that Wilson then also penetrated C from behind. She said that she did not even realise Wilson was there when this began and that she certainly did not consent to having sexual intercourse with him. She said that she only realised it was not Smith who was continuing to have sex with her when she saw Smith standing beside her watching. Wilson and Smith both said that Wilson had asked her whether he could "have a go" and she had said "Yes, you've done it before". The jury clearly rejected this account and convicted Wilson of count 3.

7. After Wilson stopped having sexual intercourse with C, Smith penetrated her again in the same way as he had before. He said that she consented to this, which she denied. Again, the jury rejected Smith's account and convicted him of count 4.

8. An important feature of the part of the incident which occurred when Wilson was on the scene at the bench was that Smith and Wilson both said that Smith had filmed Wilson having sex with C on Smith's mobile phone. He had earlier asked Wilson to film him while he was having intercourse using the same phone. Smith said in evidence that he had deleted these videos from his phone. When he was arrested he did not produce this phone to the police but gave them his grandmother's phone instead. The police never recovered the relevant phone. Smith said in evidence that he had sold it after the police interview. He was asked in cross-examination why he had done this since the footage may have confirmed his case that C had consented to the act of sexual intercourse with Wilson, which was the subject of counts 3. He said that he had learned that C did not want to talk to him any more, and explained:-

> "My family use my phone, so I was concerned they may find them if I didn't delete them. I didn't want to keep them if she did not want to talk to me any more."

9. It was open to the jury to conclude that Smith had deleted the videos and disposed of his phone because they showed an act, count 3, which was clearly rape. If they reached that conclusion, this would be some evidence from a source other than C which supported her account. This is a clear difference between the state of the evidence on counts 1 and 2 and on counts 3 and 4. If C had been raped by Wilson, count 3, this would also tend to negate consent for the subsequent repeated act of intercourse with Smith, count 4.

10. According to C, Smith and Wilson then dropped her off at the house of a friend. As she got out of the van, Wilson told Smith he'd "got hisself a rape charge", to which Smith replied, "[C] won't say anything, will you". He then told her

that his family would "get to" her family. In fact she did tell her friend and her friend's mother what had happened that evening, and about a week later told her father. That is when the police were informed of her account.

The submissions and the judge's ruling

11. These events occurred in August 2018. The appellants were sent for trial in November 2019 and the progress of the case was delayed during 2020 both by the pandemic and by the need to obtain medical evidence about Wilson's mental state. It was thought that he might be unfit to plead. A trial began in 2021, but was adjourned because C was unwell. She was taken to hospital from the court. A second attempt to try the case took place in December 2022, but that trial also did not reach a conclusion. The judge, His Honour Judge Julian Smith, directed that a recorded cross-examination of C should take place under the provisions of section 28 of the Youth Justice and Criminal Evidence Act 1999 during the time which had been set aside for the trial and this occurred. Before it happened, the judge heard argument on the application by Wilson for leave to adduce evidence of Wilson's previous sexual acts with C under section 41 of the same Act. Other issues were also raised, but it is not necessary to address these in this judgment.

12. The judge gave a written ruling on 14 December 2022 and the cross-examination of C took place on 16 December 2022. The ruling is careful, clear and considered. Mr. Terence Boulter, who appeared for Wilson at trial and before us, had argued for three routes to admissibility:-

a) Wilson's reasonable belief in consent;

b) Motivation for making a false complaint of rape; and

c) Consent.

13. Mr. Boulter placed less emphasis on the second of these three arguments before the judge and it has not featured in the oral submissions before us. We will not address it further. The real burden of Mr. Boulter's submissions may be summarised in this way:-

i) The previous sexual conduct evidence is admissible because it is relevant to the issue of whether the prosecution can prove that Wilson did not reasonably believe that C consented to sexual intercourse with him. This is not an issue of consent, and so the evidence may be admissible under section 41(3)(a) of the 1999 Act.

ii) The circumstances of the previous sexual acts were so similar to those of the activity which was the subject of count 3 of the indictment that they could not be explained by coincidence and so the evidence may be admissible under section 41(3)(c) of the Act.

14. Mr. Boulter had provided a document to the judge identifying the factual similarities which are said to be relevant to both grounds. He recorded the fact that during contact between the police and C she disclosed that she agreed with the assertions made that she had consensual intercourse with Wilson at the same location, and could not recall the use of contraception but that she was on the pill at the relevant times. The similarities were listed thus:-

Location

> All instances of sexualised conduct between C and Wilson take place in the immediate area of a children's playground in the same park.
>
> **Presence of others**
>
> On each occasion penetrative sex took place it always followed a routine of general chat amongst a small group followed by a trip to the children's playground. They never met alone or attempted to hide the fact of where they were going together.
>
> **Absence of foreplay**
>
> Wilson would say that no pre-penetrative behaviour, such as touching or kissing ever took place between them at any time.
>
> **Time**
>
> In every instance sexual contact appears to take place in the late evening as well a summer night. The previous incidents had occurred about 12 months before, in July or August and September 2017.
>
> **Unprotected Penetration**
>
> There was never any discussion about contraception.
>
> L**iaison without commitment**
>
> Neither of them had any interest in any sexual relationship beyond that of immediate sexual gratification as demonstrated by the previous occasions this has happened and the rather perfunctory contact between the parties.

15. The judge ruled that the previous sexual conduct was not admissible, and that no evidence could be adduced about it.

16. In relation to the reasonable belief issue, he said that this did not really arise because the differences between the accounts of C on the one hand and the appellants on the other were so stark. She said that she had been making it absolutely clear that she did not consent to any of the sexual activity and they said that she had given her consent expressly and that she appeared to be enjoying it. He said this:-

> "The prosecution's case is based on the force used on the complainant, her repeated requests for them to stop and her telling them no. She was forced to cross the field and pushed over a bench and struck her head on the railings before the penetration continued. The men were in each other's company for the later sexual activity and each would have been aware of her response and the actions of the other. There is a clear dispute regarding consent with each accused maintaining they were specifically given consent and [C] specifically alleging there was no request for or granting of consent and indeed she had said no and stop. Miss Morris concedes that unless the jury are sure of [C's] account of the events, the prosecution will not have proved the facts establishing that there was no consent to what took place. If they are not sure [C] is telling the truth about what happened – and her case is that she was manhandled, her will overborne and force used upon her to put her over the bench – then they will have failed to prove the lack of consent and the case will fail. If the defence establish that what they say happened did **or may have** happened, in terms of consent and physical contact then the jury would not be sure the prosecution case is proved and are required to find them not guilty. …..The issue here is again the starkness of the challenge as between the account given by [C] and that of Wilson. I repeat that the issues to be resolved in relation to consent are such that the jury's conclusions on the facts will necessarily resolve the matter and I remain concerned that the focus on a reasonable belief is to invite the jury to reach conclusions regarding consent on the basis of her previous sexual history. The response to Smith's application relates to Wilson as well and I repeat what was said above, i.e. that the issue is so stark that belief in consent would not on any realistic consideration of the case be an issue to resolve."

17. In relation to the argument based on similarities being relevant to the issue of consent, the judge said that the similarities were not so striking that the previous sexual conduct was admissible. He distinguished the decision of the Court of Appeal in *R v. T* [2004] EWCA Crim 1220 saying:-

> "The geographical location is not exceptional in my judgment given the circumstances of the participants, their ages and the locations available to them that could be considered private. Not the same as partners of two years who are able to exercise complete choice as the circumstances and locations of their sexual activity but yet choose circumstances that are specific and distinctive, and that also demonstrate a clear choice on their part, given the alternatives that are presumably available. Sexual

> activity of such a nature that mirrors an earlier and very specific set of choices is relevant to the assertion of consent because those distinctive features may suggest a choice exercised by both participants."

18. Therefore, there were no questions asked in cross-examination about the previous sexual relationship between C and Wilson. She volunteered that there had been one such occasion, whereas in her recorded interview with the police she had said it had happened twice. This was edited out of that interview. Wilson's case was that it had happened twice. It seems likely that if the issue had been explored the jury may have concluded that he was right about the number of occasions.

19. The section 28 cross-examination was edited to remove occasions when C had left the video recording room in distress, which happened on a number of occasions. However, it was not edited to remove her reference to the previous occasion which she had mentioned when she had had sexual intercourse with Wilson. This was explained to us by Ms. Morris who appeared at trial and on appeal for the prosecution. She said that she had taken the view that if the evidence had been taken in the usual way, then what C had blurted out would have been before the jury. She said that in fairness she did not think it right to deprive the appellants of any benefit which might result from this, simply because editing was available in a recording when it would not have been if the evidence had been given live. She told us that both defence counsel were in favour of this approach.

20. The trial then took place in July 2024, and the evidence of C was played to the jury. Before that happened a further application was made to adduce the evidence of previous sexual conduct between C and Wilson. This was advanced

under section 41(5) of the Act. It failed. The defence invited the judge to revisit his ruling made in December 2022. The judge said that the position had not altered from the ruling he had previously given.

21. The evidence which she gave included the following when she was asked by defence counsel about her previous meetings with Wilson: "I had met Leonard Wilson before. I have met up with him once or twice. I have not met him on three occasions. I have slept with Leonard once". It was put to her that she had met Leonard Wilson on three or four occasions and she denied that was so. She agreed that she had met him at the same park once before. She said "I admit that I slept with Leonard Wilson, yes, I did but I can't remember anything else about it. There's no point asking me questions about it". Her evidence suggested that the previous sexual intercourse had happened in the same area of the same park as the incident which led to the current allegations.

22. There was some evidence about C's general conduct before the jury, given by her father. She had apparently been troublesome to her parents who had ejected her from their home. The judge said this in summing up about some submissions which had been made about her:-

> "And can I ask you to be cautious in your response to [C] and some of the comments made about her? There were remarks made about how young people lived in 2018, and the reality of sharing images and the like, and how they come in to socialise with each other in a way that is different, perhaps, from Mr Boulter's experience, and possibly yours and mine. And in particular, in relation to [C], that she was presenting with troubling behaviour, in particular by reference to the statement made by her father and what he said about her. Mr Boulter suggested that in relation to [C], the "rot had set in long before the 28th of August of 2018", and made reference to inappropriate relationships and the like. Can I remind you that you're considering this allegation on this occasion, the 28th of August

> 2018. You only know of [C's] history to the limited extent that she disclosed it in cross-examination. You must not permit yourself to speculate about her background or seek to form an inappropriate judgment regarding her behaviour on limited or no information. You are assessing the evidence given in relation to those allegations. Please retain your focus on that."

23. In this situation the court is charged with the responsibility of ensuring that a complainant's account is fairly judged on a proper basis by the jury, and the judge was performing that task. Section 41 exists, broadly, for the same purpose.

24. The jury sent a note asking "Did Leonard Wilson and C have sex before the 28th August 2018 on the same bench". It was answered in line with the judge's ruling as to the relevance, or otherwise, of that topic in the following way:

> "You must not speculate. No questions have been asked about it and this is because it is not relevant to any issue in the case that you must decide. The fact that Leonard Wilson and C had engaged in sexual intercourse on a previous occasion is something that C elected to tell you and it is, of itself, wholly irrelevant to this case and the issues you must decide. That is because the issues are stark: the Crown say there can be no question of consent or reasonable belief in consent if what C says is true. The defence say that she gave each man consent that night".

25. In summing up this part of the evidence, the judge said:-

> "Asked about Leonard Wilson and their previous meeting, she said, "I'd met Leonard before once or twice. It was a long time ago." It was put, "Well, you've met him on at least three occasions." "I did not meet him on three occasions. But I slept with him once." Can I just be clear, I gave you a direction saying you must focus on the evidence in the case. I have given it repeatedly. Again, you are to focus on - as I answered the question that was posed to me by you during the evidence - you focus on the issues on the 28th of August and the issues that are raised in the evidence and throughout that. Any previous sexual contact between them is of no relevance to those issues, bearing in mind they are saying there was consent that night. And there is a huge dispute on the facts which you are to resolve. So focus,

> please, on the issues on the 28th as I directed you. Any previous sexual contact between them is of no relevance in this case."

26. Because of the way the judge decided the application in the relation to the reasonable belief in consent issue, it is right to set out the way in which he left that question to the jury in summing the case up. Although he had said in his ruling the previous December that it was not really a live issue, he put it in this way:-

> "If you are sure that [C] did not consent, the prosecution must also prove to you that the defendant whose case you are considering did not reasonably believe that she did consent.
>
> So, question number 3: are you sure the defendant whose case you are considering knew [C] was not consenting or did not reasonably believe that she was consenting. To decide this, you need to answer two questions: one, did the defendant genuinely believe, or may he have genuinely believed that [C] consented, and two, if the defendant did, may - or may have, forgive me - believed that [C] consented, was his belief reasonable? You must answer question 1 of those two questions first. If you are sure that the defendant knew [C] was not consenting, or did not genuinely believe that she consented, then you do not need to answer question 2, and you will find him guilty. But if you decide that the defendant whose case you are considering did genuinely believe or may have believed that [C] had consented, you must then decide question 2, which is whether his belief in [C's] consent was reasonable. To answer this, you must decide whether an ordinary, reasonable person in the same circumstances as the defendant would have believed [C] was consenting. You must consider all the evidence in the case, the circumstances of the contact and the meeting, and, although there is no obligation on the defendant to take any specific steps to ascertain consent, whether he did so. If you find the defendant's belief she was consenting was or may have been reasonable, you will find him not guilty. So that is rape."

27. It is also pertinent to observe that the jury did not in fact see the case in such stark terms as the judge had done when making his ruling. They acquitted of counts 1 and 2, and convicted of counts 3 and 4. Grounds of appeal contending that these verdicts are inconsistent were refused leave and have rightly not been pursued. We have pointed out above that the evidence in relation to filming the

activity in count 3 was one perfectly sensible explanation for the different outcomes. There were also features of C's behaviour with Smith prior to the intervention of Wilson which may have caused the jury some concern. It is not necessary to set those out here. What is material for present purposes is that, in the end, the case was not an "all or nothing" decision as far as the jury was concerned. Of course the judge had no way of knowing that until the verdicts were returned.

The law

28. Section 41 of the 1999 Act is in these terms:-

> 41.— Restriction on evidence or questions about complainant's sexual history.
>
> (1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—
>
> (a) no evidence may be adduced, and
>
> (b) no question may be asked in cross-examination,
>
> by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.
>
> (2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—
>
> (a) that subsection (3) or (5) applies, and
>
> (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.
>
> (3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—
>
> (a) that issue is not an issue of consent; or
>
> (b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the

event which is the subject matter of the charge against the accused; or

(c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question—

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

(7) Where this section applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is or are charged with a sexual offence—

(a) it shall cease to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but

> (b) it shall not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.
>
> (8) Nothing in this section authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section.

29. This provision has been the subject of a great deal of academic and political debate, and the Law Commission has published Evidence in Sexual Offences Prosecutions, consultation paper 259. The final report is expected in Spring 2025. There appears to be agreement about only one thing: section 41 is a highly problematic provision. It is, of course, our task to apply it as best we can. Both the Law Commission Report and the academic literature have addressed the relationship between regimes concerning sexual behaviour evidence and bad character evidence. The approaches taken in the 1999 Act to the former and the Criminal Justice Act 2003 to the latter are phrased differently. This is not because sexual behaviour evidence is evidence of previous reprehensible conduct, but because the concerns which promoted a legislative desire to control admissibility are similar. A recent contribution to the debate which includes reference to other substantial contributions can be found in *Excluding Sexual Behaviour Evidence: Back to First Principles*, by Dr Matt Thomason, [2024] Crim. L.R. 10, 692-719.

30. Although we have considered these materials with interest, our approach to the construction and application of section 41 in this case is based on the words of that provision and previous decisions of this court, and the House of Lords, about it.

31. The underlying rationale of the exclusionary rule concerning sexual behaviour evidence in section 41 is that evidence of previous sexual behaviour is genuinely

probative only in certain quite specific circumstances. It carries with it a danger that it will fuel stereotypical assumptions about rape and victim behaviour and it will always increase the stress and humiliation which witnesses feel when questioned about intensely personal and private matters. Because of these two dangers and the limited probative value of such evidence it is strictly controlled.

32. As is not uncommon, the submissions before the judge and his ruling were articulated by reference to gateways (a) and (c) in section 41(3). All three gateways in subsection (3) require as a precondition to admissibility that the "evidence or question relates to a relevant issue in the case". A relevant issue in the case is defined as "any issue falling to be proved by the prosecution or defence in the trial of the accused", see section 42(1)(a). The exclusionary rule therefore applies to evidence which would otherwise be admissible.

33. Gateway (c) is particularly difficult to construe, and is also given a rather wider construction since *R v. A (No 2)* [2001] UKHL; [2002] 1 AC 45. This is sometimes called the "ECHR Gloss". The House of Lords applied section 3 of the Human Rights Act 1998 and decided that section 41 had to be "read down" so that it was compatible with the Article 6 fair trial right of defendants. That case concerned cases where the sexual behaviour evidence in question was evidence of previous sexual behaviour between the complainant and the defendant, but the principle is of wider application. This court rejected a submission that *R v. A (No 2)* was confined to cases where the sexual behaviour evidence involved the complainant and the defendant in *R. v. Hamadi Zeeyad* [2007] EWCA Crim 3048 at [21], but it is in these cases where it most directly applies. The certified question before the House was:-

> "May a sexual relationship between a defendant and complainant be relevant to the issue of consent so as to render its exclusion under section 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?"

34. The most difficult cases arise where the issue is consent and the sexual behaviour evidence concerns previous activity between the complainant and the person accused of a sexual offence. It is here that sexual behaviour evidence may be, or appear to be, most probative see *R. v. A (No 2)* at [45] per Lord Steyn, [125] per Lord Clyde, and [151] per Lord Hutton. At [133] Lord Clyde said this:-

> "The context and the purpose of the evidence is not so much to show from past events that history has been repeated, as to indicate a state of mind on the part of the complainant towards the defendant which is potentially highly relevant to her state of mind on the occasion in question."

35. Although the principle in *R v. A (No 2)* extends to cases where the sexual behaviour evidence concerns activity between the complainant and persons other than the defendant, it is likely that cases where evidence of sexual behaviour involving third parties is admitted will be very rare: see [32] per Lord Steyn, [77] per Lord Hope, [125], [127] and [130] per Lord Clyde and [148] per Lord Hutton who confined his speech to

> "…a case such as the present one where a defendant seeks to give evidence of the complainant having had previous consensual sexual intercourse with him."

36. The phrase in section 41(3)(c) which caused the principal difficulty requiring this reading down of the provision is perhaps the stipulation "that the similarity cannot reasonably be explained as a coincidence". This is a rather unhappy transfer into a different area of a concept which formerly existed as "similar fact evidence" prior to the defendant bad character provisions of the Criminal Justice

Act 2003. The solution to this difficulty was to read these words down, at least in cases where the sexual behaviour evidence concerned the complainant and the defendant. This may mean that the exclusionary rule in cases of sexual behaviour evidence concerning the complainant and the defendant lacks clarity.

37. However, even if the evidence passes through a gateway in sub-section (3), the inquiry is not over. By subsection (2)(b) leave to adduce evidence or ask a question cannot be given unless "refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case." This requirement was described as "oft neglected" by Professor Findlay Stark in a *Bringing the Background to the Fore in Sexual History Evidence* Arch. Rev. [2017] 8, 4-8. Professor Stark proposed that an answer to some of the problems in applying section 41 may lie in giving section 41(2)(b) greater prominence. Although this note is quoted in Sexual *Offences Law and Practice* 6th Edition, by Rook and Ward at 26.125 and 26.180 its invitation does not appear to have been accepted.

38. Section 41(2)(b) and its interplay with the proper construction of gateway (3)(c) received limited attention in *R v. A (No 2*). At [32] Lord Steyn quoted a passage from Professor Birch identifying the problem and suggesting that the constraints go too far because a category of background evidence was required to place some cases in their proper context. He did not, however, suggest that the answer lay in section 41(2)(b), whose purpose is to protect the defendant from an unfair trial. He then said:-

> "After all, good sense suggests that it may be relevant to an issue of consent whether the complainant and the accused were ongoing lovers or strangers. To exclude such material creates the

> risk of disembodying the case before the jury. It also increases the danger of miscarriages of justice. These considerations raise the spectre of the possible need for a declaration of incompatibility in respect of section 41 under section 4 of the Human Rights Act 1998."

39. Section 41(2)(b) did not feature in *R v. Evans* [2016] EWCA Crim 452.

40. This provision allows for a situation whereby the evidence is within one or other of the section 41(3) gateways but nevertheless falls to be excluded if a conclusion on an issue would be safe without it. There are, of course, a number of ways in which a conclusion might be unsafe because of the absence of some evidence, but one of them, perhaps the most common, arises when the significance of that piece of evidence is disputed. In such a case a court can ask itself whether the evidence has substantial probative value in relation to a matter which is a matter in issue in the proceedings, and is of substantial importance in the context of the case as a whole. If the evidence satisfied that test (drawn from section 100 of the Criminal Justice Act 2003, non-defendant bad character) then it is likely that its exclusion would fall foul of section 41(2)(b) and it would be admitted. If it met that enhanced test for evidential importance its exclusion might have the result of rendering a conclusion on a relevant issue unsafe. This enhanced test has proved effective in protecting witnesses, see the analysis of the principles in *R. v. BVY* [2024] EWCA Crim 135 at [29]. Section 41 is not the same as section 100(1)(b) of the 2003 Act in that its focus is on the safety of a conclusion on an issue and also in that that issue cannot be the credibility of the complainant. However, in our judgment it does not offend the language of section 41 to carry across the language from the later statute when the question under consideration is whether the sexual behaviour evidence is of sufficient importance to justify its admission.

41. The statutory wording of section 41(2)(b) is not the same as that which was later be to create a restriction on the admissibility of non-defendants' bad character evidence by section 100(1)(b) of the Criminal Justice Act 2003 but it must include a test which amounts to the same thing. It would be incoherent to have different tests in provisions which are designed to achieve related objectives. As we have observed, the House of Lords in *R v. A (No 2)* did not consider this provision in any depth and there is relatively little authority about it. It is therefore open to us to reach the conclusion which we have.

42. This is not inconsistent with the decision of the Court of Appeal in *R v. Guthrie* [2016] EWCA Crim 1633 where the court summarised the overall effect of section 41 and explained that it provides a high threshold for admissibility. We in no way intend to lower that threshold. The court in *Guthrie* said:-

> **"10** The principles engaged by section 41 can be summarised briefly. It is accurate that striking similarity is not required: see *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45, para 133. There must be relevant similarity between the previous and current alleged conduct which necessitates an exploration of the circumstances so as to avoid unfairness to the defendant: see *R v M (M)* [2011] EWCA Crim 129 at [48]. Third, if it would be tantamount to saying that the complainant was a person who was engaged in casual sex in the past and therefore would have been likely to do so on the occasion that the complainant was with the defendant, that cross-examination will not be allowed (*R v Harris (Wayne)* [2009] EWCA Crim 434 at [17]), that the principal purpose of cross-examination must not be to impugn credibility (*R v Harris (Wayne)*, at para 20), but must be truly probative to the issue of continuity: *R v Hamadi (Zeeyad)* [2007] EWCA Crim 3048. Furthermore, there must be a sufficient chronological nexus between the events to render the previous behaviour probative: see *R v M (M)* at para 48. Finally, there is the exercise of judgment in connection with the application.
>
> **11** It is an exercise of judgment whether or not to permit leave and its exercise demonstrates the height of threshold in section 41(3)(c) of the Act: *R v Hamadi*, para 23. In that case, this court found that the following similarities could reasonably be

> described as mere coincidence falling short of a threshold in paragraph (c). These were that the complainant herself instigated sexual activity, that the activities took place outside in relatively public places in winter and while the complainant was involved in a relationship with her boyfriend."

43. We think the word "continuity" in [10] of that judgment must be a mistake for "consent".

44. We are dealing with a case where the sexual behaviour evidence related to sexual conduct between the complainant and the defendant. The position therefore is that to be admissible where the issue in such a case is consent, the evidence must pass through three filters:-

i) The evidence must pass the similarity test in section 41(3)(c) as explained in *R v. A (No 2),* or the contemporaneity test in section 41(3)(b);

ii) It must either have substantial probative value on an important issue, which is likely to be the issue of consent, or there must be some other reason why its exclusion might render a conclusion on that issue unsafe. This flows from our construction of the section 41(2)(b) filter;

iii) It must not be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness, see section 41(4).

45. The second filter in paragraph 44 above requires an evaluation of the *impact* of the evidence. The evidence must be more than merely relevant. The third requires an evaluation of the *purpose* (or main purpose) for which it is being

adduced. It may be that these filters overlap. There may be some cases, perhaps, where although the evidence is of substantial probative value on a relevant issue in the case, it should nevertheless be excluded because the accused or his counsel actually seeks to adduce it in order to attack the credibility of the complainant rather than for that legitimate purpose. It is not necessary to consider this possibility further for the purposes of this case.

Discussion

46. There were, therefore, two ways in which the sexual history evidence fell to be considered for admissibility. The first was where the relevant issue was not consent, but whether the prosecution could prove that Wilson did not reasonably believe that C consented to sexual intercourse with him: section 41(3)(a).

47. The judge's approach to this question was based on his assessment that the issue did not really arise on the facts of this case. Either the jury was sure that C was a truthful and reliable witness or they were not. The account she gave did not permit of any possibility that Wilson believed she was consenting, still less that any such belief would be reasonable. So far as the construction of section 41(3)(a) is concerned this may be open to criticism because the judge did actually leave the question of lack of reasonable belief in consent to the jury. If the issue was one which the jury had to decide, as it surely was, then why should not all relevant evidence be before them? The judge's view is also somewhat at odds with the way the jury actually distinguished between counts 1 and 2 on the one hand and counts 3 and 4 on the other.

48. However, the judge's approach is founded upon the evidence. C gave very clear evidence that she did not consent to intercourse with Wilson on this occasion

and he gave evidence of actual express consent. He did not say that he had come across C and Smith having sex on the park bench, and believed that he could take his turn without asking because of what had happened 12 months before. If he had said this, and if the jury had thought that it might be true, it is very difficult to see how they could have concluded that that belief was a reasonable one. What happened previously appears to have had some similarity in some respects, but there were two significant differences, according to Wilson's own account: first, it was an incident where C had sex with two people, one after the other, and, secondly, it was an incident which was filmed. Those two features of the present incident were not said to have been common to the earlier incident or incidents. It is necessary to consider similarities and dissimilarities for the purposes of this exercise, see *R v. Aidarus* [2018] EWCA Crim 2073. Further, and anyway, the previous incidents occurred a year earlier and there had been no ongoing relationship between the two of them since. This, taken in the round, does not suggest anything meaningful about C's "state of mind towards" Wilson on the relevant day, to use Lord Clyde's phrase quoted above. It is equally consistent with C having no affection for Wilson at all, and *vice versa*. It is not capable of being a reasonable basis on which Wilson may have believed in consent on the relevant occasion.

49. Therefore, if the evidence squeezes through the relevance filter in section 41(3)(a), it founders on the twin rocks of section 41(2)(b) and 41(4). It has no substantial probative value on the issue of reasonable belief in consent and it is reasonable to assume that the purpose (or main purpose) for which it would be adduced or the question asked in this case is to elicit material for impugning the credibility of the complainant as a witness. That conclusion is reinforced by the

passage of the summing up quoted at [22] above. This is a case where the filters in section 41(2)(b) and 41(4) work together as two sides of the same coin.

50. Accordingly, the judge was right to refuse to admit this evidence under section 41(3)(a).

51. Attention then turns to the similarity filter in a consent issue in 41(3)(c). This has been found to apply where the evidence concerns the complainant's sexual activity with third parties. If the accused person has described a particular form of sexual activity and it later transpires that (unknown to the accused when first giving his account) other people have engaged in the same particular form of sexual activity with C on other occasions, then that may suggest that C has a greater propensity to consent to this particular conduct than other people, and also that the accused's first account is more likely to be true than otherwise might be the case. That was the basis on which the evidence was admitted in *R v. Evans*. In a case where the conduct occurred between the same two parties as the incident said to be rape, evidence was admitted in *R v. T* which the judge distinguished in the passage at [17] above. This was an application of the less stringent test required in such cases *by R v. A (No 2)*. We consider that the judge was right to distinguish that decision on the facts for the reasons he gave. The Court of Appeal in *R v. Guthrie*, in the passage at [42] above, set out the relevant test. The threshold for admissibility is high.

52. For the same reasons, set out above at [48]-[49], why any belief Wilson may have had in consent could not be reasonable, the previous sexual history evidence does not have any substantial probative value on the issue of whether C did in fact consent or not. Again, if it squeezes through the first filter it cannot

pass through the second and third. The argument that because she consented to sexual intercourse once or twice with Wilson in the same manner and place in the Summer of 2017, she was always thereafter willing to consent to a repeat event should the opportunity arise is plainly very weak if it can be plausibly stated at all. It is the kind of argument which section 41 is designed to exclude.

53. Therefore, the judge was correct to exclude the evidence.

54. It is necessary to deal with the unusual circumstances of the case which, actually, reinforce the safety of the conviction. The excluded evidence went before the jury, in the way we have explained at [11]-[27] above. We surmise that the long delay between the section 28 cross-examination in December 2022 and the trial in July 2024 meant that the judge did not have the need to check the editing of the excluded passage before the recording was placed before the jury at the forefront of his mind in July 2024. This is hardly surprising. We consider that the passage should have been edited out of the recording and that Ms. Morris's commendable instinct for fairness on this occasion led to error. It was an error which worked in favour of the appellants. The expression used by C was that she had "slept with" Leonard Wilson and she said that she could not remember anything about it. This is certainly not consistent with her making any allegation of rape on that previous occasion and we do not consider that the submission that it was necessary to allow counsel to explore the position to make it even clearer that the previous sex was consensual is well-founded.

55. The evidence was not overlooked by the jury who asked a question about the location of the previous incident. The judge directed them that this was irrelevant, which was, as we have ruled, correct. The point of section 41 is to

reduce the chance of juries deciding cases of this kind on the basis of the "twin myths". The problem was described by Lord Steyn in *R v. A (No 2)* at [27] in this way:-

> "….the discredited twin myths, viz 'that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief': *R v Seaboyer* (1991) 83 DLR (4th) 193, 258, 278c, per McLachlin J. Such generalised, stereotyped and unfounded prejudices ought to have no place in our legal system. But even in the very recent past such defensive strategies were habitually employed. It resulted in an absurdly low conviction rate in rape cases. It also inflicted unacceptable humiliation on complainants in rape cases."

56. In this case an impermissible seed was sown in what turned out to be infertile ground. The complaint made by Mr. Boulter is that he should have been permitted to cultivate it. He was not permitted to cross-examine C about what she had said, and not permitted to call evidence from Wilson on the subject and then make closing submissions about it. Given that the judge's ruling was, as we have ruled, correct, there is obviously no merit in these complaints.

57. Finally, and for completeness we should record that an attempt was made to rely on section 41(5) as a route to admissibility. This was premised on the assertion that the evidence which C volunteered when being cross-examined was "adduced by the prosecution". In one sense perhaps it was, in that the prosecution caused it to be before the jury by failing to edit it out of the recording of the cross-examination. It would, however, usually be a misuse of language to describe things said during the cross-examination of a prosecution witness as evidence "adduced by the prosecution". In *Hamadi Zeeyad* at [21] the Court considered that in the interests of fairness *R. v. A (No 2)* required section 41(5) to be construed so as to allow an accused to:

> "call evidence to explain or rebut something said by a prosecution witness in cross-examination about the complainant's sexual behaviour which was not deliberately elicited by defence counsel and is potentially damaging to the accused's case. "

58. This has recently been followed in *R. v. Hill* [2024] EWCA Crim 1423. There, the court held that evidence volunteered in the cross-examination of a defence witness did qualify as evidence adduced by the prosecution for the purposes of section 41(5), as long as it was not a response to the questioning of defence counsel. The court applied the test in section 41(2)(b) in very much the way we have suggested is appropriate when considering the importance of a piece of sexual behaviour evidence which is contested under section 41. At [48] His Honour Judge Leonard KC giving the judgment of the court said:-

> "We conclude that the admission of this evidence would have been, to use the words of the trial judge, "speculative and without any causative power". In the terms of s.41(2)(b) it may be appropriately put as falling far short of circumstances where the refusal of leave by the trial judge might have the result of rendering unsafe a conclusion of the jury on the issue of how the bruising was caused."

59. In the present case the position is not clear cut. The evidence emerged during questioning by defence counsel about C's previous encounters with Wilson. Defence counsel knew that both she and Wilson accepted that they had had sexual intercourse with each other before the night in question. It cannot have been a great surprise to him or anyone else that she said this.

60. In any event, in the present case Wilson did not wish to rebut something damaging. He wished to exploit something which was helpful to his case, in his view, by asking impermissible questions, giving impermissible evidence and, by his counsel making impermissible submissions. This situation does not

engage the concern in *Hamadi Zeeyad* which led to the broad construction of the phrase "evidence adduced by the prosecution".

61. Accordingly, section 41(5) does not apply. In any event, that subsection only permits such evidence as is necessary to rebut or explain prosecution evidence. Wilson did not wish to rebut the evidence that C had had consensual sexual intercourse with him in the past, and it did not require any explanation.

Conclusion

62. For these reasons Wilson's appeal is dismissed. Smith's appeal is premised on the success of Wilson's and accordingly does not arise for separate decision. It also is dismissed.