The Interpretation of s. 41 of the Youth Justice and Criminal Evidence Act 1999 and the Impact of R v A (No 2) ([2002] 1 AC 45) Armando Andrade v R [2015] EWCA Crim 1722

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Rape, sexual history evidence, admissibility, s. 41 Youth Justice and Criminal Evidence Act 1999, fair trial

The appellant appealed against his conviction for rape on two grounds. The first ground of appeal (to which this case note relates) was that the judge had wrongly excluded evidence of a previous consensual sexual encounter between the appellant and the complainant (C). The second ground of appeal (which is not considered in this case note) concerned the admissibility of evidence ~~concerning~~ two text messages sent by the appellant's friend (D) to C shortly after the alleged rape.

C had been drinking in a pub with her friend (M) and a man with whom C had engaged in a brief sexual encounter two days earlier. C began texting another man (D) and left to visit D's flat. On arrival at the flat she was taken upstairs to a bathroom where she had consensual sexual intercourse with D. The appellant, who was D's friend, then had sexual intercourse with C in the bathroom, which C maintained was against her will. Upon leaving, C telephoned M, who described C as being in a distressed state. M asked C if she had been raped to which C replied that she had. M contacted the police who collected C from a nearby bus station. The appellant was arrested, along with D and two other men who had been present at the flat. No further action was taken against anyone other than the appellant. It was the Crown's case that the appellant had forced C to have sexual intercourse against her will. The appellant contended that the intercourse was consensual.

During a police interview, the appellant said that he had met C on the stairs of D's flat and they started to chat. The appellant also maintained that he had met C on a previous occasion during which consensual sexual intercourse had taken place. He stated that during his conversation with C, it became clear that she wanted to do the same again so they went upstairs to the bathroom. Consensual sexual intercourse took place but this was interrupted when the appellant's telephone rang. He left the bathroom to take the call, but when he returned he found that C had left. C took part in a video identification procedure ~~which~~ included the appellant but she could not identify the second person with whom she had sexual intercourse as she said that she had not seen him. At trial, the defence were not permitted to question C about the alleged previous sexual encounter between the appellant and C, which he had referred to in his interview. During cross-examination, the appellant repeated his version of events and maintained that the sexual intercourse had been consensual. When asked why he thought C consented, the appellant said that they had met previously. C meanwhile maintained that she had never previously met the appellant.

During her evidence she spoke of having left the pub and made her way to D's flat after receiving text messages from D asking her to go there. When she arrived she was led upstairs to the bathroom where consensual sexual intercourse took place with D. Another man was then invited into the bathroom at which point D left to take a phone call. C alleged that, when D returned, she was raped by the other man in D's presence and with D's assistance.

The defence made two separate and unsuccessful applications to adduce evidence of the previous sexual encounter but failed to give formal written notice as required by Criminal Procedure Rules made under s. 41 of the Youth Justice and Criminal Evidence Act 1999. Comments in the appellant's interview referring to the previous sexual encounter were excised from the version of the interview given to the jury. Despite the absence of a formal application, it appears that confusion arose from comments made in the defence statement which said: 'The defendant will in due course formally apply under section 41 to cross-examine on the defendant's previous sexual intercourse with the complainant' (at [18]). Moreover, at previous directions hearings, orders had been made for the prosecution to respond to the s. 41 issue. The Court of Appeal observed that whilst such directions may have been premature given the absence of a formal s. 41 application, they may have led the defence to believe that a formal s. 41 application was not required.

HELD, ALLOWING THE APPEAL, although the absence of a formal s. 41 application amounted to a serious failing on the part of the defence, the trial judge had 'dealt with the applications before him on the merits of the oral arguments that were presented before him' (at [20]). The judge had erred, however, by failing to give adequate consideration to the decision in R v A (No.2) ([2002] 1 AC 45). In that case the House of Lords held that where the exclusion of evidence under a strict interpretation of s. 41 endangers the fairness of the proceedings, the court may be required by s. 3 of the Human Rights Act 1998 to adopt a Convention-friendly interpretation of s. 41 to give effect to the defendant's fair trial rights under Article 6. The judge's failure to consider the full impact of that decision in the present case meant that the relevance of the appellant's alleged previous consensual sexual encounter with C was not properly addressed.

Commentary

The present case demonstrates that difficulties remain with the interpretation of s. 41 of the Youth Justice and Criminal Evidence Act 1999. The provision radically departs from its predecessor, s. 2 of the Sexual Offences (Amendment) Act 1976, which afforded considerable discretion to judges to determine the relevance of sexual history evidence. By stark contrast, s. 41 adopts a 'pigeonholing' approach to the admissibility of evidence and in doing so predetermines relevance through a closed list of categories or 'gateways' contained in ss 41(3) or (5). In addition to removing judicial discretion by enacting s. 41, Parliament evoked further controversy by extending the 'rape shield' to include evidence of previous sexual behaviour between the complainant and the defendant. In contrast, the 1976 Act had only applied to 'third party' sexual history evidence, meaning that evidence of previous sexual behaviour occurring between the complainant and the defendant could be adduced by the defence without first having to seek the permission of the judge. In R v A (No.2) ([2002] 1 AC 45), Lord Steyn expressed his opposition to the widening of the 'rape shield' in s. 41, which, considered in light of the strict categories approach to admitting sexual history evidence, he described as 'legislative overkill' (R v A (No.2) at [67]). The exclusion of evidence concerning the previous incident in the present case (which contributed to the accused's conviction being quashed) can be attributed to two factors, namely the absence of a formal s. 41 application and the judge's failure to adequately assess the impact of R v A (No.2).

The Absence of a Formal s. 41 Application

Criticism had been aimed at judges under the previous law for failing to ensure that the introduction of sexual history evidence followed the correct procedure, which, under s. 2(2) of the 1976 Act, required

applications to made to the judge in the absence of the jury. Non-compliance with the formal application process intensified the distress suffered by complainants who were caught off-guard by evidence that had found its way into the courtroom by illegitimate means. Crim PR Part 22 specifies the correct procedure for making an application to adduce sexual history evidence under the 1999 Act. Most notably, Crim PR Part 22.2 stipulates that s. 41 applications must be made in writing. Part 22.3 provides that the application must:

> (a) identify the issue to which the defendant says the complainant's sexual behaviour is relevant; (b) give particulars of—(i) any evidence that the defendant wants to introduce, and (ii) any questions that the defendant wants to ask; (c) identify the exception to the prohibition in section 41 of the Youth Justice and Criminal Evidence Act 1999 on which the defendant relies…

The circumstances surrounding the previous sexual encounter in the present case could not be fully examined because of the absence of a formal s. 41 application which could have provided further detail in relation to the factors listed in Crim PR Part 22.3. Moreover, the judge had not fully investigated the previous incident during the oral application. This meant that there was insufficient material available to determine whether the previous sexual encounter was sufficiently probative.

The Judge's Failure to Adequately Assess the Impact of R v A (No.2) ([2002] 1 AC 45)

Notwithstanding the absence of a formal s. 41 application which would have enabled a more thorough investigation of the circumstances surrounding the previous incident, the decision of the judge highlights the potential dangers of refusing to depart from a strict interpretation of s. 41. The judge was mindful of the dangers of admitting evidence ~~which~~ the defence seek to adduce on the erroneous basis that because a complainant has consented in the past she must have consented on the occasion in question. In the Canadian case of R v Seaboyer [1991] 2 RCS 577, McLachlin J noted that '[t]he fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused' (at [604]). Whilst it is difficult to disagree with the judge in the present case that past consent is not indicative of present consent, the full impact of the judgment in R v A (No.2) appears to have been disregarded in relation to two fundamental points. First, the judge failed to consider the important distinction made by their Lordships in R v A (No.2) between evidence of previous sexual behaviour occurring between the complainant and the defendant and that involving the complainant and third parties. Lord Hutton in R v A (No2) observed that '[e]vidence or questions about sexual behaviour with third parties is likely to be much harder to justify on grounds of relevancy than evidence about sexual behaviour with the defendant' ~~(R v A (No.2) [2002] 1 AC 45 (at [77]).~~ Lord Steyn also noted that '[a]s a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent' (at [61]). Secondly, it appears that the judge did not fully appreciate the impact of s. 3 of the Human Rights Act 1998 on that decision and its possible application to the present case in relation to the defendant's Article 6 rights. In R v A (No.2) their Lordships were faced with a stark choice: that s. 41 was incompatible with the Convention, under s. 4 of the Human Rights Act 1998, or that s. 41 could be saved by a Convention-friendly interpretation, under s. 3 of the 1998 Act. Section 3 provides that, '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' Their Lordships opted for the latter course, with Lord Steyn proposing a more nuanced test of relevance to meet the needs of the defendant's fair trial rights. He observed,

> [t]he effect of the decision today is that under section 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under section 3 of the Human Rights Act 1998, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so

> relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention. If this test is satisfied the evidence should not be excluded (R v A (No.2) at [69]).

Whilst this test affords some scope to admit evidence that would otherwise have been prohibited under a narrow interpretation of s. 41, it is clear that not all previous instances of sexual behaviour between the complainant and the defendant will be so relevant as to require s. 41 to be read down in this way (e.g. a single historic act of intercourse). Nevertheless, this approach provides a logical basis for assessing the probative value of evidence when faced with the prospect of an Article 6 challenge. Lord Steyn elaborated further, suggesting that:

> it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material (R v A (No.2) at [45]).

Against this backdrop, and as exemplified in the present case, the extent to which the decision in R v A (No.2) permits judges to depart from a literal interpretation of s. 41 continues to be a matter of uncertainty. As a consequence, legislative reform containing clearer guidance on the admissibility of sexual history evidence appears to be the only viable option for preserving the rights of both defendants and complainants. This should have as its primary objective the replacement of the current 'pigeonholing' approach, which relies on artificial predetermined categories of relevance, with a new statutory model that affords discretion to judges to admit sexual history evidence. It is important to stress, however, that such discretion should be coupled with stringent safeguards to prevent abuse; such safeguards were lacking under s. 41's predecessor and this ultimately led to its failure.