**Sexual history evidence** – *R. v T* [2021] EWCA Crim 318, unreported, 25 February 2021, CA.

 **Legislation**: Section 41 of the *Youth* *Justice and Criminal Evidence Act* 1999 (CLW/99/31/20) provides that “(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.”

 Sexual orientation or sexual identity are capable of constituting “sexual behaviour” for the purposes of section 41. Whether they do so in a particular case will depend upon the circumstances. In the instant case (a defendant charged with two counts of raping his ex-wife), the proposed questioning, included questions relating to whether she was conflicted about her sexuality during her marriage to the defendant and whether she had made false allegations against the defendant as a means to justify a change in her sexual identity, was suggestive of sexual activity and therefore capable of being sexual behaviour, and leave under section 41 was required. The trial judge had been correct to refuse the section 41 application. The proposed questioning was wholly generalised, falling foul of the requirement in section 41(6) that the questioning be limited to specific instances of conduct. The basis for the questioning was entirely speculative; no explanation was provided for how challenging the complainant’s sexual identity could logically have any bearing on her asserted motivation for making false allegations. The trial judge had been justified in seeing this line of questioning as having the main purpose of undermining the complainant’s credibility, contrary to section 4(4). This was a paradigm case of questions being sought to be asked that would have needlessly humiliated and invaded the privacy of a complainant. Even if, contrary to the court’s view, section 41 had no application, the line of questioning would nevertheless fall to be excluded on ordinary evidential principles as speculative, irrelevant and of no probative value.

 **Key cases cited**: Considered – *R. v A (No. 2)*, CLW/01/20/8, [2001] UKHL 25, [2002] 1 A.C. 45, HL; *R. v B*, CLW/07/38/8, [2007] EWCA Crim 23, [2007] Crim.L.R. 910, CA.

***Archbold* 2021 reference**: 1999 Act, s. 41, § 8-285.

COMMENT:

At trial, defence counsel had applied under section 41 for permission to ask the complainant whether she was “conflicted” or had “anxiety” about her “sexuality” or ‘sexual identity’, and whether she had a “sexual interest in women”. The Court of Appeal expressed some disquiet that leave had been granted to appeal on a point that had not been raised in the court below, namely that section 41 was not applicable because these were not questions about “sexual behaviour”. Indeed, it seems surprising that leave was granted at all given that, on any view, the questions failed the fundamental test of relevance (at [53]).

‘Sexual behaviour’ is defined in section 42 of the 1999 Act as “any sexual behaviour or other sexual experience, whether or not involving any accused or other person”. The failure to further define either “sexual behaviour” or “sexual experience” has long been criticised (see, e.g., Kelly, Temkin & Griffiths, *Section 41: an evaluation of new legislation limiting sexual history evidence*, Home Office Online Report 20/06). However, section 42 (“or other sexual experience”) makes clear that “sexual experience” need not involve “behaviour”. Contrary to the assertions of defence counsel, the wording of section 42 therefore indicates that actions or conduct are not required; the section is capable of encompassing a person’s experience of sexual attraction without behaviour involving “any … other person”. In the present case, the court held (at [45]) that each case turns on its own facts and, in the particular circumstances, questions about the complainant’s sexual orientation were questions about sexual behaviour because they were “suggestive of sexual activity”.

Having determined that the questions were about the complainant’s “sexual behaviour”, the Court of Appeal noted that they fell foul of sections 41(2)(b), (4) and (6). Accordingly, section 41 rendered the line of questioning inadmissible unless the court was required to “read down” section 41 in the manner explained in *A (No. 2)*. In that case, it was suggested (at [79]) that questions about sexual behaviour may be admissible if they are relevant to a complainant’s motive to fabricate evidence. In the present case, the Court of Appeal emphasised (at [48]) that care is needed to ensure that questioning purporting to be directed to such a motive is not, “in truth, an obfuscation of the real or main purpose: that is to say, to undermine a complainant’s credibility”, as was the case here. In addition, the court agreed (at [50]) that the submitted questions were ‘entirely speculative’; as the trial judge had noted (at [34]), there was no direct evidence that the complainant was ‘conflicted’ about her sexual orientation at the relevant time.

The proposed questions appear to have been based on material that formed part of pre-trial disclosure, which included letters and notes from a community mental health practitioner. These stated (at [28] and [29]) that the complainant “has deep seated anxiety about her sexual identity” and experienced “[r]ejection from strictly religious parents … in relation to her sexuality”. The judgment gives no clues as to why this material was disclosed. On the face of it – and given the court’s conclusion that questioning on these parts of the psychiatric records was speculative and irrelevant – they do not appear to be capable of either undermining the prosecution case or assisting the case for the defence (which initially made no reference to sexual orientation as a possible motive for fabrication).

Section 41 was enacted in an effort to combat the “twin myths”, that: (1) previous consent makes present consent more likely; and (2) a promiscuous complainant is less worthy of belief. As the Court of Appeal noted in the present case (at [39]), “there clearly was another and wider purpose behind the legislation: and that was to prevent unfair harassment, humiliation and demeaning of witnesses (usually women) giving evidence in trials involving sexual offences”. The fact that questions are said by the defence to be relevant to whether the complainant had a motive to fabricate evidence is not decisive. Here, the suggestion that the complainant had a motive to fabricate evidence because she was conflicted about her sexual orientation appears to have been premised on heteronormative attitudes, which have no place in a modern courtroom. As the Court of Appeal observed in *B* at [15], questions about a person’s sexual orientation are “not necessarily going to admit a simple yes/no answer” and may therefore become “a trawl through the complainant’s sexual experiences”, which is the very thing section 41 seeks to avoid.

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