**Sexual history evidence** – *R. v Constanzo and Orlando* [2021] EWCA Crim 615, [2021] Crim.L.R. 710, CA, 21 April 2021.

The trial judge in a rape case was entitled to consider that the admission of evidence relating to the complainant’s previous sexual history would go further than was necessary to rebut or explain her evidence within the meaning of section 41(5) of the *Youth Justice and Criminal Evidence Act* 1999 (CLW/99/31/20). The thrust of her evidence was that she could not remember what had happened, but that she did not believe that she would have consented to a threesome in the club with two strangers (the appellants) or have given that impression, because she had never done that before. If there had been any evidence to the contrary, then section 41(5) may well have bitten. But there was no such evidence and no proper basis for questioning necessary to enable the complainant’s evidence to be rebutted or explained. The fact that the complainant did or may have had any number of sexual liaisons with different men (who were known to her and one at a time) in completely different circumstances over the preceding days was neither here nor there. Cross-examination about those matters would not rebut or explain the assertion made by the complainant. Rather, it would offend the objection to one of the twin rape myths, namely that a woman’s previous sexual conduct sheds light on whether she consented on the occasion being litigated.

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

Commentary by Dennis J Baker at [2021] Crim.L.R. 712.

As Dennis Baker notes in his commentary in the Criminal Law Review, the real issue in this case was whether the complainant had the capacity to consent to sexual intercourse and/or whether the applicants might reasonably have believed she was consenting. Although “drunken consent is still consent”, it is well established that “capacity to consent may evaporate well before a complainant becomes unconscious” (*Bree* [2007] EWCA Crim 804 at [34])). A complainant’s inability to remember whether she consented is not fatal to the prosecution case (*R v Bree* [2007] EWCA Crim 804*; R v H* [2007] EWCA Crim 2056). Issues of consent and capacity to consent are for the jury to determine.

Here CCTV footage from the club showed the complainant: “leaning and swaying”; being “held, steadied and prevented from falling” by the applicants; being “manoeuvred” by the applicants; “stumbling”; “bent at the waist”; and, “effectively bundled” into a storeroom where the offences took place. Under cross examination, she “agreed with many propositions as to what the CCTV showed”. For example, she accepted that she could be seen kissing the applicants. She could not remember stroking the genitals of one of the applicants, nor allowing him to reciprocate, and said that “did not sound like [her] at all” (at [20]). She could not remember what happened in the storeroom. When asked whether she “might well have [consented] by the way she behaved and by being an active participant”, she replied “Yes” (at [20]). After an overnight adjournment, she stated in re-examination that she would not have consented in those circumstances.

Following the dismissal of their applications for leave to appeal by the single judge, the applicants sought to rely on two fresh grounds, neither of which related to the issue of capacity. The prosecution had failed to disclose a DNA report, which was said to be relevant to the s.41 application. In addition, the applicants argued there had been a major change in the complainant’s position on consent between the first day of her evidence (when she appeared to concede that she may have been consenting) and day two (when she “clarified” that she would not have consented to a threesome with two strangers in a nightclub).

***Previous sexual behaviour***

In re-examination, the complainant said she had never been in a threesome before and had never had sex in a club before, adding “that’s just not something … that I do” (at [23]).

Section 41(5) provides that a judge may give leave to adduce evidence, or cross-examine a complainant, about her sexual behaviour 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.

Section 41(6) states makes clear that the evidence or question “must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant”.

It was argued that the applicants ought to have been permitted to adduce evidence of, and ask the complainant about, DNA profiles that were found on her underwear and on intimate swabs. In addition to such evidence/questions going further than necessary to rebut the suggestion that she would not have consented to a threesome or to sex with strangers in a nightclub, there was simply no evidence of a specific instance(s) of sexual behaviour. It is difficult to see how this line of questioning could amount to anything other than attack on the complainant’s credibility, designed to suggest that the existence of other sexual partners made it more likely that she was consenting on this occasion.

Given that there was no basis for calling evidence about the complainant’s sexual history, the prosecution’s failure to disclose the DNA report on the unused schedule was an error, but not one that could possibly have any impact on the safety of the conviction.

***Change in position***

When adjourning the case overnight part way through the complainant’s evidence, the judge warned her not to speak about her evidence to anyone who was going to be a witness in the case. The next day she returned to court and asked whether she could clarify her evidence. She was not permitted to do so until, in re-examination, prosecution counsel asked her what she wished to clarify. At that point she stated “I’ve never been in a threesome before. I’ve … never had sex in a club before. I’ve never been with two guys before, that’s just not something … that I do.”

A statement before the Court of Appeal confirmed that the complainant’s boyfriend had been present during the first day of her testimony and had been “deeply affected” and “very upset” by what he had heard. Counsel for the applicants argued that the jury should have been told this was a “plausible reason” for her change in stance.

In a subsequent statement, the complainant said she had not spoken to her boyfriend about her evidence that night, so the concerns that led to convictions being quashed in *R v Shaw* [2002] EWCA Crim 3004simply did not arise. She also stated (at [26]) that she felt she “had just let them walk all over [her] and was now questioning [herself] as a person…”, adding that she “wanted [her] voice to be heard and was not being given a fair chance to tell [her] truth. [She] was not the person they suggested [she] was. [She] did not give consent to those two men and [she is] not that kind of person.”

The Court of Appeal concluded (at [27]) that the complainant’s “clarification” in re-examination was not the “profound change” contended for by the applicants. It was “foreshadowed by her earlier answer” that the behaviour alleged “did not sound like [her]” and had to be considered in light of the fact that she had “no relevant memory”.

The applicants’ arguments on this issue were also problematic for two reasons that are not articulated in the judgment. First, it does not appear that there was any challenge to the complainant’s assertion that she could not remember anything. It is therefore unclear why she was required to watch the CCTV footage and express an opinion about what might have been in her mind based on what she could now see. She was, in effect, being invited to speculate. There is now much greater knowledge and understanding of the effect on sexual offence complainants of the “re-traumatising propensities of the adversarial structure” (L. Ellison and V.E. Munro, ‘Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process’ (2017) 21(3) E. & P. 183, 191). Yet this complainant was forced to watch footage of events immediately prior to her alleged rape, and to what end? She did not dispute what the footage showed and could not assist with what (if anything) was going through her mind at the time.

Secondly, this was a witness who had made two conflicting statements in cross examination (saying first that the behaviour did not sound like her, then later speculatively agreeing that she may have consented). Even if she had not asked for permission to clarify her evidence, it is inevitable that prosecution counsel would have re-examined on that inconsistency and elicited the same answer, i.e. that she would not have consented to sex in those circumstances. Had her evidence been “clarified” in the latter manner, it seems unlikely there could have been any objection to it. For similar reasons, the Court of Appeal’s suggestion that trial counsel for the applicants could have cross-examined the complainant about the reasons behind her clarification in re-examination is flawed. Further cross-examination would require leave, which may well have been refused on the basis that she was merely explaining an apparent inconsistency in her evidence.

A possible course that might have obviated this ground of appeal would have been to find out what the complainant wanted to clarify in the presence of the parties but in the absence of the jury. The issue could then have been addressed during the course of the trial rather than on appeal.