Cross-examination of complainants in rape trials has become so stringent that a defendant cannot have a fair trial

Introduction

It may come as a surprise to those unfamiliar with the criminal justice system that the issue as to a defendant's ability to have a fair trial in a rape case is a matter of such fierce debate among criminal practitioners. The consensus among the media largely reflects the view infamously expressed by J Temkin: a complainant's experience of giving evidence in court in a rape trial is 'worse than rape itself'[1]. Campaigners have called for section 41 of the Youth Justice and Criminal Evidence Act 1999 ('YJCEA'), a piece of legislation which places prohibitions on defence advocates introducing evidence or questions about a complainant's sexual history unless strict exceptions are satisfied, to be made more restrictive. In 2017 Harriet Harman MP called for a complete prohibition on complainant's being cross examined on their sex life[2]. Yet, this essay will argue that it is not complainants who are disadvantaged by section 41 YJCEA, it is defendants.

Laura Hoyano puts it best: 'allegations of criminal sexual assault are quintessentially contests of credibility'[3]. The credibility of a defendant and a complainant is often at the heart of rape trials, meaning interests such as a defendant's right to a fair trial, a complainant's right to privacy, and the public interest in ensuring victims of rape feel emboldened to engage in the criminal justice system are routinely drawn into sharp conflict. This essay argues that legislation must acknowledge that the law, in attempting to shield complainants from harmful sexual stereotypes, is in danger of threatening a defendant's right to a fair trial.

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[1] J Temkin, *Rape and the Legal Process* (2nd edn, OUP, Oxford 2002) at p. 10

[2] House of Commons, 'Notice of Amendments given up to an including 23rd March 217, Prisons and Courts Bill' (Parliamet, UK) <https://publications.parliament.uk/pa/bills/cbill/2016-2017/0145/amend/prisons_rm_pbc_0323.1-2.html> accessed 26th July 2023).

[3] L Hoyano, *The Operation of YJCEA 1999 section 41 in the Courts of England & Wales: views from the barristers' row*, Crim. L.R. 2019, 2, 77-114, 77.

The Twin Myths & Section 41 YJCEA

Some form of restriction on the circumstances in which a complainants' sexual history evidence can be put in evidence is necessary. The previous sexual history of a complainant should not be introduced to espouse, as McLachlin J in the Canadian case of *R v Seaboyer* [1991] 2 SCR 577 put it, the twin myths 'that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief'[4].

Section 41 provides four exceptions to the prohibition on the cross examination of a complainant's sexual history by the defence, namely:

a. S41 (3)(a): that issue is not an issue of consent;

b. S41(3)(b): the issue is consent and the complainant's sexual behaviour is alleged to have happened about or at the same time as the sexual activity at issue at trial;

c. S41(3)(c): the issue is consent, and the sexual behaviour of the complainant is so similar to their sexual behaviour which took place as part of the event which is an issue at trial or to any other sexual behaviour of the complainant which took place at the same time as that event, and that similarity cannot be reasonably explained as a coincidence.

d. S41(5): where evidence or questions in cross-examination are necessary to rebut prosecution evidence.

Where a judge finds one of the gateways in subjection (3) is met, it must then be determined that the main purpose of the evidence is not to impugn the credibility of the complainant. For all of the exceptions, the evidence must relate to specific instances of sexual behaviour and refusal of leave might render the conclusion of a jury or the court unsafe.

[4] R v Seaboyer (1991) 83 DLR (4th) 193, 258

The steps away from the past culture of victim blaming is evidenced by the CPS finding that conviction rates for rape have increased from 81.9% in Q2 2022/2023 to 82.4% in Q3 2022/2023[5]. However, the difficulty defendants have in successfully using S41 to introduce sexual history into rape trials is demonstrated by the finding that S41 applications were made in just 13% of cases in a CPS study of 309 rape cases in 2016[6]. Overly restricting what evidence a defendant can question or rely on in a trial which often boils down to the question of who the jury is more inclined to believe raises concerns as to the extent a defendant can robustly challenge their prosecution. In the words of Gudrun Young KC; 'we are in danger of forgetting that defendants who are (...) prevented from properly defending themselves, are victims of the criminal justice system too'[7].

Case Law & Hoyano's study

Case law has attempted to rectify the imbalance skewed in favour of complainants . The House of Lords in R v A [2001] UKHL 25 held that the blanket exclusion of evidence relating to the defendant's supposed relationship with the complainant in the weeks prior to the allegation of rape interfered with the defendant's right to a fair trial. Lord Steyn stated that 'the test of admissibility is whether the evidence is nevertheless so relevant to an issue of consent that to exclude it would endanger the fairness of the trial under Article 6. If the test is satisfied the evidence should not be excluded'[8]. This was followed by R v Evans [2017] 1 Cr App R 13, which allowed on appeal the introduction of the complainant's sexual history with individuals

[5] Publication, Sexual Offences 'CPS Data Summary Quarter 3 2022-2023' (CPS Website) <https://www.cps.gov.uk/publication/cps-data-summary-quarter-3-2022-2023> accessed on 27th July 2023.

[6] Ministry of Justice, *Limiting the use of Complainants' Sexual History in Sex Cases*, (CM 9547, 2017), page 3

[7] Gudrun Young KC, 'The Rights of the Victim v the Defendant: Has the Pendulum Swung Too Far?', (2 Hare Court, Criminal Defence Newsletter) <https://www.2harecourt.com/training-knowledge/rights-victim-v-defendant-pendulum-swung-far/> accessed 25th July 2023.

[8] R v A [2001] UKHL 25, [46].

other than the defendant where her sexual behaviour was similar to that described by the defendant.

While I echo Ben Newton KC's sentiment that Evans is not 'a radical reinterpretation of S41'[9] but an example of the correct interpretation of section 41(3)(c), the judgment has been criticised by opponents including Ann-Marie Sous as an inappropriate expansion of S41(3)(c) which may 'make the complainant's sex life and behaviours (...) the subject of the trial (...) this essentially shifts legal and moral blame from the defendant to the complainant'[10]. Although the rights of the victim are protested in academia, Hoyano's survey of 140 barristers involved in 377 sexual offences cases since 2017 indicates that those at the frontline remain concerned for defendants' rights[11]. The survey established that only 18.6 % of complainants were subjected to S41 orders or agreements and none of the respondents viewed S41 as not sufficiently restrictive[12]. Respondents commented that it is often 'too difficult for the Defence to introduce highly relevant material'[13] and that 'some Judges are (...) far too slavish to the idea that "it has something to do with sex therefore it's inadmissible"'[14]. Defence barristers still struggle to introduce evidence relating to sexual relations between a defendant and complainant (underlined by *R v Guthrie* [2016] EWCA Crim 1633, in which the court refused to admit evidence of the pair engaging in casual sex in the past) due to the current law requiring an understanding of not just YJCEA, but also case law.

[9] Ben Newton, 'R v Ched Evans: A New Season for Interpreting S41?', Doughty Street Chambers Crime Bulletin Issue 2 December 2016 <https://doughty-street-chambers.newsweaver.com/Crime/a23an04g4am?rss=true> accessed 25th July 2023.

[10] Ann-Marie Sous, 'R v Evans: An Uneasy Precedent?', LSE Law Review Blog 2019, <https://blog.lselawreview.com/2019/11/r-evans-uneasy-precedent> accessed 26th July 2023.

[11] N3.

[12] N3, pg 92.

[13] N3, pg 92.

[14] N3, pg 91.

Reform: Codifying R v A

Hoyano's study indicates that the fair application of S41 is dependant upon all those involved in rape trials acting in a "in a common sense way"'[15]. To ensure clarity, the dicta of R v A should be codified into legislation; namely, Lord Steyn's conclusion that where it is 'nevertheless so relevant to an issue of consent that to exclude it would endanger the fairness of the trial under Article 6'[16] should be added to S41(3)(c). This will not only assist in demystifying the application of S41 for lay people, it will also encourage a more consistent application of S41 throughout the criminal justice system, therefore ensuring defendants' are able to introduce relevant evidence into their criminal trials and Article 6 rights are protected.

[15] N3, pg 91.
[16] R v A [2001] UKHL 25, [46].