# Section 41 YJCEA 1999

The impact of *R v Evans*
[2016] EWCA Crim 452

# The issue(s)

- In what circumstances should D be allowed to adduce evidence relating to C's previous sexual behaviour on the basis that it shares similarity with the behaviour in the incident alleged?
  - What degree of similarity?
  - Must it be "peculiar" as well as similar?
  - Must it be previous sex *with D*?
  - Of what issue at trial must it be probative?

# Section 41 YJCEA Framework

- Is D charged with a sexual offence?
- Does D seek to adduce evidence about the complainant?
- Does D seek to adduce evidence about any sexual behaviour?
- If so s 41 provides a shield.
- Judge can give leave for defence to adduce evidence if:

Section 41(3)

- Relevant to issue other than consent: 41(3)(a)

or

- Issue is consent and C's behaviour at or about that time: 41(3)(b)

or

- Issue is consent and V's conduct so similar that no coincidence: 41(3)(c)

AND

- Refusal might result in unsafe conviction: 41(2)
- Must not be wholly/primarily to attack pure credit: 41(4)
- Must be based on specific instances, not general: 41(6)

or

Section 41(5)

- Evidence to rebut Crown's evidence: 41(5)
- Provided also refusal might result in unsafe conviction: 41(2)
- Must be based on specific instances, not general 41(6)

- (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.

- **Section 41(3)**
- **D seeks to adduce sexual behaviour of C**
- **Issue to which it is relevant is consent**
- C's earlier sexual conduct so similar to

  – (i) conduct forming part of this offence or
  – (ii) conduct at or about the same time

  – That similarity cannot reasonably be explained by coincidence

- Provided <u>also</u> refusal might result in unsafe conviction: 41(2)
- Must not be wholly/primarily to attack pure credit
- Must be based on specific instances, not general 41(6)

# Purposes of section 41

- To reduce the amount of sexual behaviour evidence adduced at trial
- To protect complainants' privacy
- To protect against jurors engaging in "twin myths"
- A major policy shift.
- Move away from more open judicial discretion under  Sexual Offences (Amdt) Act 1976
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# Understanding scope of s 41(3)(c)

- Cannot be read literally
- Admissibility cannot be simply a question of whether C has previously engaged in similar acts
- What types of similar conduct?
- Read too widely s 41(3)(c) the potential to undermine the policy
  - Similar sexual position?
  - Similar method of flirting in a bar?
  - Similar use of social media app to meet dates?

# “Coincidence” dimension is vital

- Beyond the fact of similarity ask what relevance does the previous similar consensual act have to the likelihood of consent.
- It will usually be a rather weak argument:
  - C previously had consensual sex involving “doing activity *x*”
  - Consent is not a transferable commodity, *but*..
  - The fact that C did *x* before makes it more likely she consented this time when she did *x* too….

# Coincidence relevant to consent

- Given C previously engaged in sexual conduct "*x*"
- Given that C was consenting when doing so
- Given that C engaged in similar conduct in the incident alleged
- What does the similarity tell us about how likely it was C consented on this occasion?
- Can it reasonably be explained as a coincidence that C did a similar thing before when consenting if she was not consenting when doing it this time?

# Coincidence rebutted?

- D and C previously engaged in same conduct
- D claims that is relevant to consent
  - She met me in the same bar!
  - She had a drink with me!

- Mere coincidence because commonplace when people meet socially and sometimes that leads to consensual sex

# Uncontroversial example 1

- R v T [2004] 2 Cr App 552
  - T alleged to have raped C in a climbing frame in a playground
  - C has had sex with T in that place 3-4 weeks before
  - Previous conduct consensual
  - Previous conduct similar
  - T claims C consented on this occasion
  - Does the fact that C has previously consensually had sex in that manner and place have probative value as to likelihood of consenting to similar act?
  - Coincidence if she had not consented on this occasion to identical acts in same venue?

# Coincidence rebutted?

- Where previous similar behaviour by C when consenting with someone other than D, and D unaware of that
- Repeated behaviour with D is relevant
- Renders D's account more plausible.

# Uncontroversial (?) example 2

- D alleged to have raped C
- In previous consensual sex with X, C always insists on using explicit language in Italian (though not a native – she thinks it is sexy)
- 6 months later D alleged to have raped C
- C used similar Italian language throughout
- What relevance does the similarity have to whether C was consenting this time?
- Can it be coincidence that she would use that explicit Italian if she was being raped, given that she used it in consensual sex?

# How to assess coincidence?

- How is the court to decide what forms of sexual behaviour are reasonably explicable as a coincidence relative to consent?
- Does the court have to maker assumptions
  - Are many people do that type of thing frequently?
  - Are many people of this type (young people? those in a particular sub culture?) doing it frequently?
- Will courts be comfortable making that assumption?

# The legislative context

# The legislative history

- Heilbron Committee suggested a “striking similarity test” in 1975
  - Report of the Advisory Group on the Law of Rape
- Amendment to YJCEA in HL debates
  - C has consensually engaged in re-enactments of Romeo & Juliet scene with lovers on her balcony
  - D alleged to have raped C having scaled her trellis
  - D claims C told him she wanted to re-enact Romeo & Juliet scene
  - C’s previous consent to that similar conduct probative of her consent on this occasion
  - HL Debates 8 Feb 1999, Vol 597 Col 45 Baroness Mallelieu

# Lord Williams of Mostyn

- "The term strikingly similar does not include evidence of a general approach towards consensual sex such as a predilection for one night stands, or for having consensual sex on a first date. Still less does it include the fact that the complainant has previously consented to sex with people of the same race as the defendant or has previously had sex in a car for example before alleging that she was raped in a car. Such behaviour could reasonably be explained as coincidental, as it falls within the usual range of behaviour that people display. Behaviour that can be admitted under subsection (3(c)(i) must be the sort of behaviour that is so unusual that it would be wholly unreasonable to explain it as coincidental"
  - Hansard 23 March 1999, col 1218

# Comments on the Act

Temkin, *Rape and the Legal Process (2nd ed)* p 215-216

- "hard to conceive of any cases that will fall within [section 43(1)(c)]"

- "could undermine the very purpose of this type of legislation"

# Interpreting s 41

# *R v A [2001] UKHL 25*

- Overarching conclusion from *A* is

- Does the evidence of previous sexual behaviour have so much probative value in relation to consent that the fairness of the trial would be at risk if not admitted?

# The matter is one of relevance

- 31. As 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. It is a species of prospectant evidence which may throw light on the complainant's state of mind. It cannot, of course, prove that she consented on the occasion in question. Relevance and sufficiency of proof are different things. The fact that the accused a week before an alleged murder threatened to kill the deceased does not prove an intent to kill on the day in question. But it is logically relevant to that issue. After all, to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue. It is true that each decision to engage in sexual activity is always made afresh. On the other hand, the mind does not usually blot out all memories. What one has been engaged on in the past may influence what choice one makes on a future occasion. Accordingly, a prior relationship between a complainant and an accused may sometimes be relevant to what decision was made on a particular occasion.
- Per Lord Steyn

# Lord Clyde

- 137. The question then is whether or not the evidence which is sought to be led in the present case can fall within the scope of section 41(3)(c). This will depend upon a careful assessment of the presence or absence of a similarity beyond coincidence between the previous and the critical occasions. That is properly a matter for the trial judge to determine. In interpreting the section he must bear in mind that he may require to adopt the special standard laid down in section 3 of the Human Rights Act.

# Lord Hutton

- 151. The second observation is that whilst there can be no dispute that the Minister of State was correct to say, in the passage from the debate in the House of Lords which I have set out above, that "The fact that a complainant has consented previously does not mean that she will consent again", it does not follow, in my opinion, where there has been a recent affectionate relationship between a woman and a man, that one cannot say that the fact that she has consented previously is relevant in deciding whether she consented when there was intercourse with the same man a relatively short time later. I consider that there is much force in the statement of Professor Galvin, at p 807 of her article, that
- "Even the most ardent reformers acknowledged the high probative value of past sexual conduct in at least two instances. The first is when the defendant claims consent and establishes prior consensual sexual relations between himself and the complainant … although the evidence is offered to prove consent, its probative value rests on the nature of the complainant's specific mindset towards the accused rather than on her general unchaste character."

# Subsequent case law

- *R v X* [2005] EWCA Crim 2995
  - D accompanies C to a hotel after meeting in a club. C intends sex. Hotel full. D rapes her in a car park. C had previously gone to that hotel with another man she met. – *such similarity as there is lacks relevance to issue*
- *R v MM* [2011] EWCA Crim 1291
  - Previous consensual anal sex in her bedroom when house empty not similar to anal sex in C's room when parents prowling outside. *No similarity*
- *R v Harris* [2009] EWCA Crim 434
  - D, homeless man, wants to ask C about statements 12 months ago to psychiatric nurse about binge drinking and engaging in "risky sexual liaison". *No sufficient similarity*

# General approach of CACD

- Establish facts on this occasion
- Identify alleged similarity with previous behaviour
- Establish degree of similarity
- Assess whether that similarity has a relevance to *C's likely consent* to D's acts

# R v Evans [2016] EWCA Crim 452

- C adopted “doggie” position and requested D to “go harder”
- C’s conduct on previous occasions
  - C did so in consensual sex with another
  - C also previously asked partners the morning after sex if any sex occurred
- Is that sufficiently similar?
- Is it explicable as coincidence?
- What probative value does it have as to her likely consent?

# The decision

- On previous occasions C adopted same position and used same language
- Assumed that C on those occasions was consenting / had capacity to consent
- Similarity between previous and alleged
- Is similarity/repetition explicable as coincidence?
- What probative force does it have in this case?
- NB Issue is whether C had capacity to consent

# Similarity/ coincidence

- C’s conduct clearly similar
- Is the similarity reasonably explicable as coincidence?
- How common place is this conduct?
- Is it “fairly unremarkable behaviour“
- If it is, arguably the evidence should have been inadmissible as not probative of consent

# Views?

- "This to me is an arguable point... The sexual position adopted and words used are almost a modern "porn trope" and are far more common nowadays perhaps than in the youth of the Court of Appeal judiciary."
  - The Secret Barrister

# Evans and capacity

- A clearer basis for excluding in *Evans*
- The degree of similarity is present
- But the conduct is not probative of the issue in this case – *capacity* to consent

# Coincidence relevant to capacity?

- If V previously behaved in a similar way when sober and (or at least capable of) consenting DOES THAT have probative force as to consent at the time of this alleged conduct when she was heavily intoxicated?

# Coincidence and capacity

- What types of behaviour performed during sexual activity when sober and which are indicative or consistent with consent would, if similarly performed when heavily intoxicated, also indicate or be consistent with consent?

- How much cognitive effort did it require?

# Similarity indicative of capacity?

- X has sex with C
- C says “oh oh oh”
- D is alleged to have raped C
- C was saying “oh oh oh” at the time
- Issue is capacity
- What does similarity tell you about C’s capacity to consent?

- X has sex with C
- C sings national anthem standing on one leg
- D alleged to have raped C
- C was on one leg singing national anthem
- Issue is capacity of C
- What does similarity tell you about capacity to consent… quite a lot!

# Evans – Expressed concerns

- Similarity of words can now trigger s 41(3)(c)(i)?
  - Not a necessarily a problem in principle – it depends on how similar/unusual the words

- Potential deterrence to complainants
  - It does not create a new precedent
  - We need to explain that it is not a new authority, just an application to facts

# Evans – Expressed concerns

- Does it create a precedent?
  - It is the CACD
  - But admitted by CACD to be
    - "exceptional"
    - "Rare"
- Subsequent CACD cases decided soon after choose to ignore it
  - *G* [2016] EWCA Crim 1633
  - C [2016] EWCA Crim 1631

# G [2016] EWCA Crim 1633

- G alleged to have raped brother's g-f V
- G alleged to have done so after threats with violence and in retaliation for brother's behaviour
- G claims that V has previously had consensual sex with him and that the sex on this occasion was consensual
- CACD – nowhere near the high threshold set by 41(3)(c) - not similar enough.

# G [2016] EWCA Crim 1633

- Striking similarity is not required: see R v A
- 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 D: *MM*
- Third, if XX would be tantamount to saying that V 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 V was with D that will **not** be allowed

# G [2016] EWCA Crim 1633

- The principal purpose of XX must not be to impugn credibility, but must be truly probative to the issue of continuity
- There must be sufficient chronological nexus between the events to render previous behaviour probative:*MM*
- Finally, there is the exercise of judgment in connection with the application.

# C [2016] EWCA Crim 1631

- First, he concluded that the incidents in issue were not proximate in time to the alleged rape, being seven months afterwards. Second, the incidents were not relevant to the issues before the jury which were largely self-contained. Third, there was evidence that at the time of the later sexual activity the complainant was in a state of confusion and she was not sure whether she loved the applicant or not despite what she was still alleging against him. The judge was of the view that to permit questioning about these incidents risked reinforcing the stereotypical view about the manner in which victims of rape and alleged perpetrators of rape behave towards each other after an alleged sexual assault. Fourth, the judge was of the view that the only purpose of the cross-examination upon these incidents was to impugn the credibility of the complainant by reference to post-rape consensual activity. The object of the question would be to suggest that the earlier incident was consensual and that therefore the complainant was lying.

# Section 41(4)

- Permits cross-exam where the purpose or main purpose is not to impugn the credibility of the complainant.

- If impugning the credibility of the complainant was only *one* of the purposes in the case, cross-exam may be permitted: *Martin* (2004)

# Wider Reaction to Evans

- *“So what’s the problem? It seems that rather than being invoked occasionally as originally intended section 41 is being over-ridden in courts to the degree that its effectiveness as a rape shield is weakening. This was thrown into sharp definition by the Ched Evans retrial. What was previously presumed to be a legal resort for extraordinary circumstances was presented as a successful defence strategy across the popular press and social media, which begs the question: from now on will every man charged with rape seize on this case as a get-out-of-jail-free card, and instruct his lawyers accordingly?”*
  - Ms Saville-Roberts Times 8 February 2017

- The women's Parliamentary Labour Party

- “The verdict and events of this case sets a dangerous precedent about how a victim of rape, usually a woman, has behaved in the past and can be taken as evidence of the way she behaved at the time of the alleged rape. This will deter victims from disclosing their abuse and will reduce the number of victims presenting their cases to the police for fear of having a private lives investigated and scrutinised. Additionally we feel that in an age of social media and online stalking there is a very real likelihood that victims will fall prey to private investigations and the crowd sourcing of information in to their past sexual partners.”

# Attorney General, Jeremy Wright MP

- "There is a concern here and we need to accept that that concern is sensible and deal with it. …We need to understand more about the decision in this particular case, we need to understand whether a change in the law is appropriate, and if not whether it is sensible to look at the guidance that is given to judges about when this evidence is admissible and the guidance that judges give to juries about how that evidence should be used
  - 29th October 2016

# Academic comment

- J Rogers – suggests that trial should not have got past half time
- But that surely ignores
- *Hysa [2007] EWCA Crim 257*
- *Robinson [2011] EWCA Crim 911*

# Possible Future Outcomes

- Maintain training of advocates and judges
- Increase use of Crim PR
  - Temkin et al found very poor compliance rates with Crown Court Rules pre CrimPR
  - NB CA in cases such as *Crossland* [2014] expressing frustration
- Recognise that *Evans* was exceptional
  - In the CACD's own words
  - In light of subsequent case law

# Future

- Wider review of effectiveness of s 41?
  - Kibble CBA sponsored in 2004
  - Temkin et al in 2006 found
    - ¼ rape trials in the sample had an application
    - 2/3 of applications were successful
    - Most applications related to previous relationships
    - More of those applications succeed
    - Critical of defence advocates for failing to respect the regime