Sexual history evidence: fair game?

Ali Naseem Bajwa QC and Eva Niculiu look at the issues raised by use of the complainant's sexual history in the Ched Evans rape retrial

On the night of 29-30 May 2011, a professional footballer, Clayton McDonald, on a night out in Rhyl, North Wales, met a 19-year-old waitress who was heavily intoxicated. McDonald took her back to his hotel room. Subsequently, his friend and fellow professional footballer, Ched Evans, went to the hotel and, upon entering the room, saw McDonald and the woman having intercourse. Evans joined in having sex with the woman. About half an hour later, McDonald and Evans departed the hotel separately.

The next morning, the woman woke alone in the room and had concerns about her condition. She reported the matter to the police, telling them she had no memory of the events on the preceding night. Upon being arrested and interviewed, both McDonald and Evans admitted that they had had sex with the complainant. Evans told the police that the complainant was an enthusiastic and entirely consensual sexual partner, including a claim that she initiated him having sex with her on all fours ('doggie style') and, in that position, urged him to penetrate her harder.

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Both men were charged with rape on the basis that the complainant was so drunk that she lacked the capacity to give consent. At the trial in April 2012, Evans' evidence was consistent with the account he had given to the police. McDonald was acquitted of rape but Evans was convicted and sentenced to five years' imprisonment.

In November 2012, the Court of Appeal refused Evans' application for leave to appeal against his conviction. In October 2015, the Criminal Cases Review Commission referred Evans' case back to the Court of Appeal for reconsideration on the basis of fresh evidence from two men to the effect that, around May 2011, each of them had had consensual sex with the complainant during which she had initiated doggie style sex and urged the man to penetrate her harder. In April 2016, the Court of Appeal quashed Evans' conviction on the grounds of the fresh evidence. The court ordered a re-trial.

At Evans' re-trial, the trial judge permitted the jury to hear the fresh evidence from the two men about the complainant's sexual behaviour. On 14 October 2016, after just two hours of deliberation, the jury acquitted Evans of rape.

Reaction

Following Evans' acquittal, there was an outpouring of opinion from commentators and campaigners on just about every aspect of the case, in particular what it meant for the treatment of complainants in sex cases. Vera Baird, the former solicitor general, contended that the Court of Appeal had lowered the bar of admissibility for evidence of complainants' sexual history, and set an example that put rape cases back 30 years. No fewer than 37 female Members of Parliament wrote an open letter to the Attorney General demanding a change in the law, claiming that the Court of Appeal had fallen into 'serious legal error' and that the 'verdict and events in the case' had set a dangerous precedent. Polly Neate of Women's Aid warned of a big risk of a negative impact on the already-low reporting rate in sex cases.

Sexual history evidence

Until 1976, evidence of a complainant's sexual history was governed solely by common law. The admissibility test of relevance was applied inconsistently and often undiscerningly. As late as 1959, the Court of Appeal held that evidence that the complainant was a prostitute was relevant to the issue of consent. Not only were trials rendered unfair; victims of sexual offences were deterred from coming forward and being subjected to an ordeal in evidence. Legislation to limit unwarranted attacks on complainants' sexual behaviour was clearly called for. The Sexual Offences (Amendment) Act 1976 (SOA 1976) restricted the cross-examination of a complainant in a rape case as to her previous sexual experience with persons other than the defendant. Whilst this was an improvement on the common law, the practice of unfair attacks on complainants' character through their sexual history

Ched Evans and his fiancée Natasha Massey leaving Cardiff Crown Court on 14 October 2016 at the end of his retrial for rape during which he was acquitted.

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remained widespread. Further legislation was needed, therefore the SOA 1976 restrictions were significantly extended by the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999).

Section 41(1) of YJCEA 1999 protects complainants in proceedings involving all sexual offences by prohibiting evidence or questions about any of their sexual behaviour, whether or not with the defendant, without the leave of the court.

- The court may not grant leave unless the evidence or question relates to a relevant issue in the case (s 41(3)).
- If the issue in the case is one of consent, the court may only grant leave in two circumstances: first, the behaviour is alleged to have taken place at or about the same time as the alleged offence (s 41(3)(b)) or second, the behaviour is so similar to the complainant's behaviour at that time that it cannot reasonably be explained as coincidence (s 41(3)(c)).
- Alternatively, the court may grant leave if the evidence goes no further than is necessary to enable the accused to rebut or explain evidence of the complainant's sexual behaviour that has been adduced by the Crown (s 41(5)).
- Finally, the court must also be satisfied, first, that to refuse leave might result in an unsafe conclusion (s 41(2)(b)) and second, that the main aim of the evidence or question is not simply to impugn the credibility of the complainant as a witness (s 41(4)).

Fair game?

In our view, the Court of Appeal and, subsequently, the trial judge were perfectly entitled to allow Evans' application under s 41(3) YJCEA 1999 to admit the fresh evidence of the complainant's sexual behaviour. The reasoning for admitting the evidence is rather straightforward:

- If Evans' case that the complainant initiated doggie-style sex and urged him to penetrate her 'harder' was or may have been true, it suggested that the complainant was consenting; alternatively that Evans reasonably believed she was consenting.
- The two men gave accounts that were so similar to Evans' of the complainant's sexual behaviour to make it more likely that Evans' account was true.
- When Evans first gave his account in his police interview, he could not have known (and therefore could not have invented an account to fit) what others would say about the complainant's sexual behaviour.

Put another way, had the jury not heard the evidence of the two men, they may unfairly have rejected as untrue Evans' case that the complainant was an enthusiastic and entirely consensual sexual partner. The evidence had nothing to do with attacking the complainant's character through her sexual history, and everything to do with establishing matters that were highly relevant to the key issue in the case, namely consent and/or belief in consent.

The presumption built into s 41 YJCEA 1999 is that a complainant's sexual behaviour will not be admitted into evidence. That is only right. That presumption will only be overridden if the defence can establish the true relevance of the evidence to the issues in the case and satisfy a judge that to refuse leave would result in an unsafe conclusion and that the main aim is not simply to impugn the complainant's credibility. There can be no complaint about that. The law must do its best to weigh up competing interests and strike a fair balance. To tip the scales towards an extreme position is a recipe for injustice. Those demanding a change in the law would do better to trust judges and, if an application gets past a judge, juries to recognise an improper attack upon a complainant's character.

The Evans case demonstrates neither a flaw in the current legislation nor an error in its application. The decision of the Court of Appeal (or, for that matter, the ruling of the trial judge or verdict of the jury) sets no new precedent regarding the interpretation of s 41 YJCEA 1999, nor does it extend its ambit, or lower the protection afforded to sexual complainants. If there is a threat to the low reporting rate in sex cases, it is created by the misreading of, and extraordinary overreaction to, the case.

Important as it was, it may be that the evidence of the complainant's sexual behaviour was not decisive in Evans' acquittal. The crucial evidence could well have come from this cross-examination by Evans' counsel, Judy Khan QC, which was not an attack upon either the complainant's credibility or her sexual morality:

Q Having seen that [CCTV] footage you know that at times when you say you have no memories, just a complete absence of consciousness, you were moving around. I'm going to say that on occasions you were clearly making reasonable, rational decisions, yes?

A Yes.

Q A memory blackout does not mean unconscious, not capable of moving, not capable of making decisions. Would you agree with that?

A Yes.

In light of this skilled and sensitive cross-examination, and the evidently honest answers it elicited, it would have been very difficult for a jury to convict Evans; a lesson perhaps for advocates in such cases. ●

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