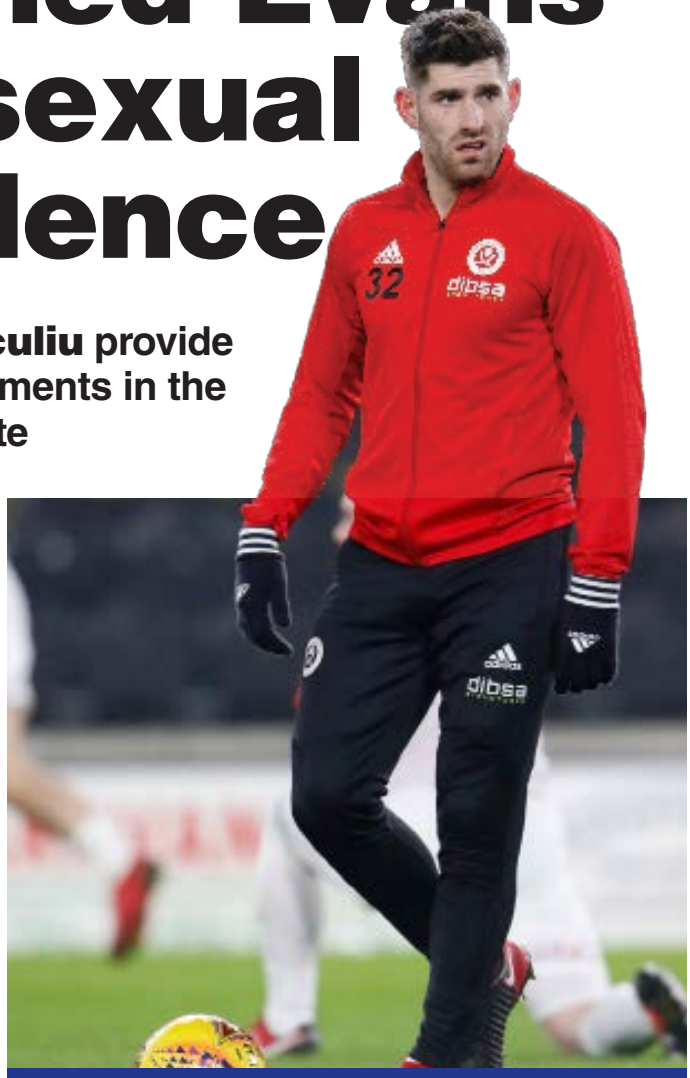
The post-Ched Evans debate on sexual history evidence

Ali Naseem Bajwa QC and **Eva Niculiu** provide a critical overview of the main developments in the ongoing sexual history evidence debate

The high-profile case of Ched Evans, acquitted of rape at a retrial in October 2016, ignited a wider public debate about the use of complainants' sexual history evidence in sex offence trials, as governed by s 41 of the Youth Justice and Criminal Evidence Act 1999 ('s 41'). This 18-month-old debate shows no sign of abating. Politicians, public figures, interest groups and campaigners, lawyers, academics and others have contributed to the issue. Meanwhile, the extensive (if often inaccurate) media coverage has ensured the debate has filtered – albeit distortedly – into the forum of public opinion. This article aims to provide a critical overview of the main developments in this area since *Evans*.

By way of brief reminder, s 41 provides that a defendant in a sexual offence trial may not adduce or elicit evidence of the complainant's sexual history unless such evidence is admitted by leave of the court, and then only if a number of stringent statutory criteria are met: including (but not only) that the evidence must relate to a relevant issue in the case, not be designed mainly to impugn the complainant's credibility, and that without the evidence, the verdict might be unsafe. In a piece published here in December 2016 we suggested that the *Evans* case was merely an unremarkable application of this section to its facts, which neither set a precedent nor widened the ambit of the s 41 exception.



Ched Evans: despite backlash back on the field whilst politicians and campaigners continue to propose amendments to s 41

Proposed changes to s 41

On 13 February 2017, in the wake of the negative media reaction to *Evans* by politicians and campaigners, the then Justice Secretary announced a government review of the operation of s 41. That review, published in December 2017, is discussed below. Meanwhile, in early 2017, two proposed amendments to s 41 were tabled in the House of Commons.

The first came on 8 February 2017 in a private member's Bill (the Sexual Offences (Amendment) Bill) by Liz Saville-Roberts MP. It suggested a prohibition on cross-examination concerning a complainant's 'appearance, behaviour or sexual history with unrelated third parties… if the purpose is to undermine the credibility of the complainant unless it would be manifestly unjust to treat them as inadmissible'. The second proposal came from Harriet Harman MP. On 23 March 2017, she tabled an amendment to the Prisons and Courts Bill, to transform s 41 into an absolute prohibition on the defence adducing or asking about any sexual behaviour of the complainant.

Both proposals, ultimately overtaken by the dissolution of Parliament in May 2017 for the General Election, were, in our view, entirely misconceived. Ms Saville-Roberts' added nothing, save some questionable drafting, to the already stringent criteria of s 41. Ms Harman's amounted to an endorsement of unfair trials and unsafe convictions – since leave may only be granted under s 41 if refusing to admit the evidence would risk an unsafe conviction; and even then, the Court of Appeal in *R v A (No 2)* [2002] 1 AC 45 held that s 41 is already so restrictive that it would sometimes need to be read down to comply with the right to a fair trial.

Research on the use of s 41

Three reports published in 2017 on the practical operation of s 41 have contributed substantially to the debate – mostly by campaigners using the first two to criticise the third.

First, Vera Baird, Police and Crime Commissioner for Northumbria (and former Solicitor General) set up a court observation scheme whereby, over a period of 18 months and on an individual or paired rota basis, 12 members of the public watched, and then reported on, 30 rape trials at Newcastle Crown Court. The ensuing report, *Seeing is Believing*, contained the headline findings that (i) sexual history evidence/questioning was introduced in 11 out of 30 trials and (ii) often, such evidence was introduced either through late s 41 applications, in breach of the Criminal Procedure Rules ('CrimPR'), or without any application at all.

However, the scheme had grave methodological problems, undermining any validity, reliability, and generalisability of its

findings. These include the very small sample from a single court centre, and the reliance on the subjective, decontextualised and unverifiable reports of self-selecting, lay spectators, who were absent from the pre-trial legal arguments. Moreover, the subsequent reporting of sexual history being used 'in 37% of trials' is misleading as a criticism of (the ambit of) s 41: in four of the 30 trials, evidence was introduced without an application; therefore in only seven trials (23%) was sexual history evidence admitted under s 41. The reasons for late applications remained unexplored. In any event, CrimPR non-compliance is not an indictment on the substantive law, and the introduction of inadmissible evidence without any application at all has nothing to do with the operation of s 41, either substantively or procedurally, since both preclude such conduct.

Another report which caused misleading media stories was based on a survey conducted by *LimeCulture*, an organisation which provides training to Independent Sexual Violence Advisors (ISVAs), who support complainants during sexual offence trials. The report concludes that s 41 is not being applied properly in line with the CrimPR. However, the report's statistical findings suffer from similar difficulties to *Seeing is Believing*, including that the small, self-selecting respondent ISVA sample of 36 was apparently not asked to distinguish between whether sexual history was introduced by the Crown or the defence. The report makes the unworkable and unnecessary suggestion that 'victims' should have access to independent legal advice and representation to protect them from having their sexual history disclosed.

Finally, in December 2017, the Ministry of Justice published its report on the operation of s 41, *Limiting the Use of Complainants' Sexual History in Sex Cases*. By an examination of CPS files from 309 randomly selected 2016 rape cases, the report concluded that s 41 applications were made in 13% (40) of cases, and granted in 8% (25) of cases. This reassured the government that s 41 was working as intended, being invoked exceptionally, and granted even more exceptionally. We should add that these statistics accord much more closely with the experience of those of us who practise daily in this area of law. The report made the following recommendations, all of which have now been implemented: (i) a new training course on s 41, mandatory for all RASSO prosecutors, (ii) mandatory online legal guidance for prosecutors, and (iii) an update to the CrimPR.

However, on 8 January this year, Ms Harman and Ms Baird wrote an open letter to the Justice Secretary and the Attorney General, criticising the government review as 'completely flawed' on several grounds. The only potentially valid of these is that s 41 applications made during trial might not have been recorded on CPS files. The other main criticism, that the review included guilty pleas, is misconceived. Including guilty pleas is the right approach if one of the review's aims is to reassure victims that they can confidently report rape to police in the knowledge that if the perpetrator is charged, their sexual history is very unlikely (8%) to feature in the case.

Cross-party campaign

On 29 January, a cross-party campaign coalition led by Ms Harman and Ms Baird was launched to propose, yet again, amendments to s 41 and its operation, to be incorporated in the *Domestic Violence and Abuse Bill*. Claims about 'overwhelming evidence' of a problem were repeated, and in support were cited the *Seeing is Believing* and *LimeCulture* reports, unhelpfully presented as 'ground-breaking' research. It appears that Ms Harman has retreated from proposing a complete ban on sexual history evidence. The proposals now include that 'a complainant's sexual activity with anyone other than the defendant should not be admissible as evidence of consent' and 'the complainant is given a right to participate and be represented in the hearing of any [s 41] application'.

In our view, this latest campaign is simply a repetition of past errors. Any blanket ban on third party sexual history evidence would produce injustice. The idea that every possible scenario can be imagined and any possible reasoning chain making some feature of previous sex with a third party relevant to the issue of consent can be dismissed in principle, is fanciful. Demanding more stringent restrictions for third party evidence appears to be based on a mis-reading of *R v A*. That authority held that there were strong reasons for a *narrower* prohibition in respect of third party evidence (ie the opposite of the current proposal), since it would be harder to justify on the grounds of relevance in the first place; but that it was right for s 41 to make no legislative distinction between conduct with the defendant and with third parties, because decisions are case-dependent, so setting down absolute rules would be dangerous.

Giving the complainant the right to participate in s 41 applications is simply a bad idea. Not only would it needlessly usurp the prosecutor's role, but allowing the main witness of fact to participate in a pre-trial legal argument where the defence case is discussed in detail and the complainant's evidence is potentially tested in a *voir dire* is likely to create complications in the trial. Notably, the Domestic Abuse Bill consultation, which opened on 8 March and closed on 31 May, contains nothing about these proposals.

If it ain't broke...

Ultimately, the research into s 41 is at most suggestive of procedural non-compliance and inconsistency. These are neither reasons for substantive legislative amendment, nor are they peculiar to the area of sexual history evidence. In any event, they are already being addressed in CrimPR changes and the new training. Ultimately, however, procedural compliance and due process cannot be achieved without proper funding for the criminal justice system more generally.

The campaigners, relying on poor quality and subsequently misrepresented 'research', and disingenuous soundbites in the media, have failed to engage on a principled basis with s 41. Glib assertions are made that sexual history evidence is 'irrelevant', despite the term being meaningless without a context against which to judge relevance. Underlying many of the calls for reform are apparent assumptions that all complainants are victims, that s 41 is a 'loophole' for *a priori* unmeritorious defence ploys, and that the paramount aim is to increase rape conviction rates.

A suggestion worth considering was advanced by Findlay Stark in an article entitled *Bringing the Background to the Fore in Sexual History Evidence*. He proposes redrafting (or reading down) s 41 so that its focus becomes the oft overlooked criterion that 'refusal of leave might have the result of rendering unsafe a conclusion of the jury'. This he equates with the test for important explanatory evidence, that without the evidence 'the jury would find it impossible or difficult to understand other evidence in the case, and its value for understanding the case as a whole is substantial'. He proposes that this should become the overarching admissibility test, with the s 41(3) and (5) criteria becoming simply factors for the court to consider when deciding on the main test.

This appears to us a promising plan for recasting a convolutedly drafted provision, except that the unsafety test is not the same as the important explanatory evidence test, and keeping the former is preferable – the defendant's account may well be comprehensible, just not plausible, without the context of the additional evidence.

Ultimately, there is no safe evidence that the test or practice for the admission of complainants' sexual history is broken. Therefore, we consider there is no need to attempt to fix it, especially since any such attempt risks becoming a Pandora's box. ●

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