SOUTH EASTERN CIRCUIT RASSO TRAINING SEMINAR 30 MAY 2015

PROSECUTING RAPE AND SEXUAL OFFENCES

Outline

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THE MERITS BASED APPROACH

Background

On 6 June 2014 the Director of Public Prosecutions called for a renewed challenge against persistent myths and stereotypes which are still believed to have a negative impact on rape cases and announced the National Rape Action Plan to address a fall in conviction rates, while maintaining the rise in volumes. The total number of completed prosecutions and convictions had increased, but the conviction rate had dropped from 63.2% in 2012-13 to 60.3% in 2013-14.

Announcing the new plan Alison Saunders, DPP stated:

> *"Our figures show that the proportion of cases ending in jury acquittals has increased by 4.2% over the past year. Myths and stereotypes still pervade throughout society and have the potential to influence jurors too. We have a part to play in fighting any pre-conceptions through the way we handle and present our cases to those juries. Where cases turn on the issue of consent, prosecutors must focus on what steps a suspect has taken to seek consent from the complainant and the extent to which an alleged victim is capable of giving consent."*

The National Rape Action Plan set out a commitment to addressing the issues preventing rape cases from successfully progressing through the criminal justice system.

The rape action plan included:

- Steps to ensure better application of the legislation on consent and that police and prosecutors focus on steps taken by a suspect to seek consent from their alleged victim where this is an issue.
- Updating the joint police and CPS national rape protocol on the investigation and prosecution of rape cases.
- Steps to monitor police decisions to take no further action in rape cases, including the quality of record-keeping and authorisation of decision making.
- New practical guidance for frontline police officers and prosecutors.
- A National Conference later this year with all specialist rape prosecutors and police rape leads to raise awareness of key issues.
- Reviews of the operation of CPS rape and serious sexual assault units and the instruction of appropriate advocates in rape trials.

What is the Merits Based Approach?

The CPS Policy Statement on Rape emphasises the importance of building cases, rather than merely identifying their evidential weaknesses and requires a proactive approach to prosecuting.

When determining whether to prosecute rape cases, prosecutors should adopt a merits based approach to the evidential stage of the Code for Crown Prosecutors full code test and ask whether, on balance, the evidence is sufficient to merit a conviction taking into account what is known about the defence case. This approach was confirmed by the Divisional Court in *R (on the application of B) v Director of Public Prosecutions [2009] EWHC 106 (Admin)*.

CPS online Legal Guidance[1] clarifies the following in relation to the merits based test:

- It is not a different test, merely the approach that must be taken in applying the Code test;
- It does not change, or differ in any respect from, the Code test;

[1] http://www.cps.gov.uk/legal/l_to_o/merits_based_approach/

- It is not new - it is a different way of expressing what has always been there;
- It applies in all cases, not just rape cases;
- It reflects the requirement to assume that every case will be considered by an objective, impartial and reasonable tribunal, properly directed and acting in accordance with the law, who will decide cases in the light of the evidence they have heard in court without being influenced by anything else;
- It requires an objective assessment of the factors which potentially undermine the case for the prosecution or assist the case for the defence. The merits based approach does not involve suspending judgement but it does require prosecutors to take objective decisions that are fair and reasonable. Any decision which takes account of subjective matters such as myths, stereotypes, preconceptions and predictions based on previous cases cannot be an objective decision.
- Note: Prosecutors must not introduce a requirement for corroboration in the review process - one person's word can be enough (and often is) - but the quality of the evidence must be assessed.

R (on the application of B) v Director of Public Prosecutions [2009] EWHC 106 (Admin).

R (B) v DPP concerned the decision of the CPS to discontinue a prosecution where a person with mental health problems had been the victim of an assault. The CPS did so on the basis that the victim was not a credible witness.

The victim had suffered a serious assault and had had part of his ear bitten off. He identified an individual, who he knew, as his attacker. The victim had a history of psychotic illness, during which he held paranoid beliefs and suffered auditory and visual hallucinations. A medical report was prepared by a psychiatrist (Dr C) who concluded that the victim suffered a mental condition that might affect his perception and recollection of events so as to make his account unreliable.

The Divisional Court held that the decision of the CPS was irrational and involved a misapplication of the Code for Crown Prosecutors.

> *50. There are some types of case where it is notorious that convictions are hard to obtain, even though the officer in the case and the Crown prosecutor may believe that the complainant is truthful and reliable. So-called "date rape" cases are an obvious example. If the Crown prosecutor were to apply a purely predictive approach based on past experience of similar cases (the bookmaker's approach), he might well feel unable to conclude that a jury was more likely than not to convict the defendant. But for a Crown prosecutor effectively to adopt a corroboration requirement in such cases, which Parliament has abolished, would be wrong. On the alternative "merits*

based" approach, the question whether the evidential test was satisfied would not depend on statistical guesswork.

51. That is not to say that a Crown prosecutor should be bound to ignore how a jury is likely to see a case. There may, for example, be cases where the prosecutor is satisfied that there is sufficient evidence to show on a balance of probability that the defendant committed an offence in strict law, but where the circumstances are such that a jury is likely to regard the defendant as having acted in a morally justifiable or excusable way and therefore be unwilling to convict. In such a case the prosecutor would have to take a view whether it was overall in the public interest to incur the expense of a prosecution.

...

54 In the present case, if the prosecutor had applied the merits based approach and asked himself whether he thought that it was more likely than not, or at least as likely as not, that [the victim's] identification of [the accused] as the ear biter was the result of an hallucination, I cannot see how merely on the strength of Dr C's report he could have answered that question in the affirmative. There was an opportunity to explore the matter further, because Dr C was due to be available to answer further questions, but the decision to offer no evidence forestalled that.

The Divisional court held that it did not follow from Dr C's report that the jury could not properly be invited to regard the victim as a true witness when he described the assault and the biting of his ear which he undoubtedly suffered. Dr C's report did not say that the victim was incapable of being regarded as a credible witness. Dr C's report was either misread or the decision to not prosecute was based on an unfounded stereotyping of the victim as someone who was not to be regarded as credible on any matter because of his history of mental problems.

Application of the merits based test

In practice the test is of ready application to cases where even though past experience might tell a prosecutor that juries can be unwilling to convict such as, for example, where there has been a lengthy delay in reporting the offence or the complainant had been drinking at the time the rape was committed, these sorts of prejudices against complainants should be ignored for the purposes of deciding whether or not there is a realistic prospect of conviction. In other words, the prosecutor should proceed on the basis of a notional jury which is wholly unaffected by any myths or stereotypes of the type which, sadly, still have a degree of prevalence in some quarters.

Instead of asking 'What is the likelihood of conviction?' we should ask ourselves, 'What would be the merits of a prosecution?' - taking into account what we know about the defence case.

With adopting a merits based approach to prosecution, the CPS are prosecuting more cases that juries find difficult to convict. In building any such case, work is needed on the preparation of the case to challenge myths and stereotypes which have traditionally led to high jury acquittal rates in sexual cases.

The test can be summarised as follows: is there a realistic prospect of conviction by a notional jury unaffected by myths re: delay/distress/ and in particular- these cases- stereotypes about victim behaviour?

Societal Myths

A "Myth" is a commonly held belief, idea or explanation that is not true. Myths arise from people's need to make sense of acts that are senseless, violent or disturbing. They attempt to explain events, like rape and abuse, in ways that fit with our preconceived ideas about the world - they arise from and reinforce our prejudices and stereotypes.

It is an unfortunate that myths about rape and sexual violence may be brought into the jury room, and form an obstacle to obtaining convictions. It is therefore imperative that we recognise these myths and challenge them at every opportunity. A series of common myths and their rebuttals can be found here [2].

A summary of general advice on challenging rape myths in court[3]

Advice	Detail
Present your "sex offender who does not want to get caught" case theory in your opening speech	Research shows that jurors formulate their narratives about cases early in proceedings and are likely to interpret all subsequent information in line with that narrative (Carlson & Russo 2001; Clifford 2003). A strong, clear case theory which addresses the rape myths likely to be present on the facts of the case and which reframes the narrative in terms of the defendant's choices in an opening speech is therefore crucial.
Challenge hindsight	Rape myths are supported by the use of hindsight bias. It is easy to attribute responsibility to the victim when you know that an assault takes place.

[2]http://www.cps.gov.uk/news/articles/speech_on_the_prosecution_of_rape_and_serious_sexual_offences_by_alison_saunders_chief_crown_prosecutor_for_london/

[3] As devised by Dr Nina Burrowes *Responding to the challenge of rape myths in court. A guide for prosecutors* (nbresearch) (March 2013)

	Remind the jury that the complainant had no idea what was going to happen, both before and during the attack and that many 1000s of others did what she did that night without incident or attack.
Move the focus from the victim to the defendant	Most rape myths focus on what the victim did/did not do. Invite jurors to question the defendant's behaviour by exploring his behaviours and motives throughout. Invite them to question his motives, choices, and behaviour rather than solely focusing on the complainant.
Reframing acquaintance rape	Offenders need easy access to a trusting victim who is unlikely to report the offence and unlikely to be believed if they do. An existing partner or other acquaintance is likely to meet all of these requirements. Such a person is likely to already trust the perpetrator, be easily accessible to them, and resist reporting to the police as they may blame themselves for the offence or fear that they may not be believed. Evidence for this modus operandi amongst offenders is reflected in crime data – two thirds of victims know their attacker. Having an existing relationship with the perpetrator needs to be re-framed as appropriate 'target selection' by a risk limiting offender. Rapists are able to access people easily through their social network and are unlikely to take the risk of attacking a stranger or invest the effort in befriending someone unknown to them when they have easier and less risky options. As an illustration of this point, imagine being approached by two different people in a bar. One is a stranger; the other is a friend of a friend. Although you may only know the second person marginally more – the degree of trust that you show to them is likely to be significantly greater. A victim is likely to feel that they are 'keeping themselves safe' by successfully avoiding strangers, whereas in reality an effective rapist is easily able to groom people with whom they have a loose connection. This process is made much easier by social network sites as they provide useful information about events such as recent relationship break up and plans to go out that night.

Reframing alcohol and drugs	Intoxicants are useful tools for sex offenders. They increase levels of trust on the part of victims, they reduce the victim's ability to detect danger, they reduce the victim's ability to physically resist an attack, they reduce the chances of the victim remembering the offence, and they reduce the chances of the victim reporting the offence to the police. Intoxicants also help to lower offender inhibitions so that they are able to talk themselves into committing the offence and blame their behaviour on the intoxicant afterwards. The use of intoxicants also significantly reduces the chances of being convicted by a jury. As alcohol and drugs are widely available and widely consumed it allows a rapist to increase the vulnerability of their victim without using more high-risk strategies such as date rape drugs. It also provides a socially acceptable narrative of a 'drunken fling'.

Figures released by the Office of National Statistics on 23 April 2015 as part of the 'Crime Survey of England and Wales' show that the reporting of sexual offences has increased by 32 percent in the last year. It is, therefore, ever more important, that important decisions in sexual offence cases are made having regard to the correct approach to the Code.

VULNERABLE WITNESSES

The Youth Justice and Criminal Evidence Act 1999 [YJCEA 1999] (as amended by the Coroners and Justice Act 2009) introduced a range of measures, known collectively as 'special measures' to facilitate the giving of evidence by vulnerable or intimidated witnesses

Definition of Vulnerable witness

The definition of vulnerable witnesses is contained within sections 16 and 17 of the YJCE 1999.

'Vulnerable' includes those under 18 years of age and people with a mental disorder or learning disability (s.16(2)(a); a physical disorder or disability (s.16(2)(b)); or who are likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case (s.16(1)).

The legislation is now accompanied by the extensive **Criminal Practice Directions** (2013) 1 WLR 3164 [CPD] which came into effect from 7th October 2013 and the amended **2014 Criminal Procedure Rules** [CPR].

CPD 3D.2 However, many other people giving evidence in criminal cases, whether as a witness or defendant, may require assistance: the court is required to take 'every reasonable step' to encourage and facilitate the attendance of witnesses and to facilitate the participation of any person, including the defendant (Rule 3.8(4)(a) and (b)). This includes enabling a witness or defendant to give their best evidence, and enabling a defendant to comprehend the proceedings and engage fully with his or her defence. The pre-trial and trial process should, so far as necessary, be adapted to meet those ends.

3D.3 Under Part 3 of the Rules, the court must identify the needs of witnesses at an early stage (Rule 3.2(2)(b)) and may require the parties to identify arrangements to facilitate the giving of evidence and participation in the trial (Rule 3.10(c)(iv) and (v)).

There are various statutory special measures that the court may utilise to assist a witness in giving evidence. Part 29 of the Rules gives the procedures to be followed.

Courts should note the 'primary rule' which requires the court to give a direction for a special measure to assist a child witness or qualifying witness and that in such cases an application to the court is not required (rule 29.9).

Treatment of vulnerable witnesses at trial

The Criminal Practice Directions made it clear that it was time for change as far as cross examination of children and vulnerable witnesses are concerned.

3E.4 "**The judiciary is responsible for controlling questioning. Over-rigorous or repetitive cross-examination of a child or vulnerable witness should be stopped.**"

This approach has been resolutely adopted and applied by the higher courts in the following cases, amongst others:

- *R v Sandor Jonas [2015] EWCA Crim 562*

  "Advocates must accept that the courts will no longer allow them the freedom to conduct their own cross examination where it involves simply repeating what others have asked before or exploring precisely the same territory. For these purposes defence advocates will now be treated as a group and, if necessary, issues divided amongst them provided of course that there is no unfairness in so doing." [at para 34]

- *R v Pipe [2014]EWCA Crim 2570*

  Appeal dismissed where the complainant, through emotional distress, became unfit to continue with her evidence and her cross-examination was stopped.

  "…the only element of the cross-examination that was cut short was an examination of the complainant with her own medical records. This would have related to potential inconsistencies between what she said at the time of the medical appointment. The judge ruled that there was no prejudice to the appellant because the records (and thus the inconsistencies) could be reduced to agreed facts and placed before the jury in writing. That is what happened. In our view, the Judge was right to reach that conclusion. In cases of this sort, it is often unnecessary and inappropriate for a complainant to be dragged through their own medical records in huge detail, particularly where any potential inconsistencies can be identified and be the subject of written admissions." [Coulson J at para 27]

- *R v Lubemba: R v JP [2014] EWCA Crim 2064*

  In JP, the trial Judge refused to allow the 8 year old complainant to be cross examined on the basis of his own assessment of her capabilities formed in the absence of the counsel for the prosecution and defence. The Court of Appeal held at paras 47 – 49:

  "…we simply do not understand what he was saying as a matter of law, why he concluded the child could not be cross examined and why he did not allow defence counsel to try a few sensitively phrased questions. It is not clear to us whether he had concluded the child was not competent to give evidence, not fit to give evidence, or it would not be good for her to give evidence… He should have considered whether any other special measures such as the services of an intermediary might benefit the witness (section 54 (3)). Furthermore, he could have considered calling for an expert to assist him…If he had then concluded, on a sound basis, that the witness could not be cross-examined, he should have re-visited the provisions of section 27 of the Act and the decision to allow the video recording to be played. He should have considered whether or not it was admissible where the prosecution could not tender the witness as required by section 27 (5) of the Act. Finally, and most importantly, the judge should have openly and clearly given far greater consideration to the impact upon the fairness of the trial of prohibiting the defence from testing the evidence of the main prosecution witness."

  In Lubemba the Judge curtailed the length and content of questioning of a 10 year old complainant. The court held (at para 51):

"In Lubemba … [the] Judge … did not go too far in trying to protect a vulnerable witness. As we have already explained, a trial judge is not only entitled, he is duty bound to control the questioning of a witness. He is not obliged to allow a defence advocate to put their case. He is entitled to and should set reasonable time limits and to interrupt where he considers questioning is inappropriate."

- *R v IA & Others [2013] EWCA Crim 1308*

  This case involved the use of a registered intermediary for a complainant who was deaf. The court rejected challenges to the intermediary's involvement and criticised the length and style of cross examination and *re-emphasised the judgement of R v B, stating: "…we will draw attention to paragraph 42 of R v Barker. There is a need, both for advocates' techniques and court processes to be adapted to enable the witness to give his or her best evidence. That will involve a degree of persistence and patience by all concerned. A witness found competent is entitled to have the best efforts made to adduce his or her evidence before the court, notwithstanding the difficulties that may exist."*

- *R v Barker [2010] EWCA Crim 4*

  R v Barker is considered the landmark case on the approach to cross examination of child witnesses:

  LCJ at paras 42 and 43:

  "...the processes of the court (for example, in relation to the patient expenditure of time) have to be adapted to enable the child to give the best evidence of which he or she is capable. At the same time the right of the defendant to a fair trial must be undiminished. When the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently towards him or her, it should not be over problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to a witness, and fully ventilate before the jury areas of evidence which bear on the child's credibility.

  Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross examination of the child and the advocate may have to forgo much of the kind of contemporary cross examination which consists of no more than comment on matters which will be before the jury in any event from different sources. …. Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence."

- *R v Wills [2011]EWCA Crim 1938*

In dismissing the appeal, the Court of Appeal stated:

"We consider that in cases where it is necessary and appropriate to have limitations on the way in which an advocate conducts cross examination, there is a duty on the judge to ensure that those limitations are complied with…

This case highlights that for vulnerable witnesses, the traditional style of cross examination where comment is made on inconsistencies during cross examination must be replaced by a system where those inconsistencies during cross examination can be drawn to the jury at or about the time when the evidence is being given, and not, in long or complex cases, for that comment to have to await the closing speeches at the end of the trial. One solution would be for important inconsistencies to be pointed out, after the vulnerable witness has finished giving evidence, either by the advocate, or by the judge, after … necessary discussion with the advocates."

- *R v E [2011] EWCA Crim 3028*

  "The real complaint here, in our view, is that the defence was deprived of the opportunity to confront C in what we might venture to call the traditional way". It is common, in the trial of an adult, to hear, once the nursery slopes of cross examination have been skied, the assertion: "you were never punched, hit kicked, as you have suggested, were you?" It was precisely that the judge was anxious to avoid and, in our view, rightly. It would have risked confusion in the mind of the witness whose evidence was bound to take centre stage, and it is difficult to see how it could have been helpful".

The following propositions emerge from the case law and practice directions in relation to cross examining vulnerable witnesses:

- In multi-handed trials defence advocates may now be treated as a 'group' and cross-examination/topics divided between them.
- Children and vulnerable witnesses should be cross examined cross-examined using short and simple questions. Tagged or leading questions should be avoided notwithstanding the fact that in cases involving adult witnesses this forms the basic form of cross examination.
- It is neither necessary nor appropriate to put to a witness every aspect of the evidence that is said to undermine their credibility.
- It is for the judge to ensure at the outset that counsel understand the limitations upon their cross examination – in terms of duration and content – and ensure that those limitations are adhered to.
- Where inconsistency is relied upon, the defence do not have to wait until closing speeches to bring to the jury's attention inconsistencies in the prosecution evidence that would otherwise have been put in cross-examination. In appropriate cases this can be done, by agreement, after the relevant evidence has been given.

Tool kits

The Criminal Practice Directions (at 3D.5) refer to these cases and the fact the case of *Wills*, endorsed the approach taken by the report of the Advocacy Training Council (ATC) 'Raising the Bar: the Handling of Vulnerable Witnesses, Victims and Defendants in Court' (2011).

The report includes and recommends the use of 'toolkits' to assist advocates as they prepare to question vulnerable people at court:
http://www.advocacytrainingcouncil.org/vulnerable-witnesses/raising-the-bar

Further toolkits are available through the Advocate's Gateway which is managed by the ATC's Management Committee. The toolkits currently available are:

- Case management in young and other vulnerable witness cases
- Case management in young and other vulnerable witness cases – summary
- General principles from research: planning to question a child or adult with communication needs
- General principles from research: planning to question a child or adult with communication needs – summary
- Planning to question someone with an autism spectrum disorder including Asperger syndrome
- Planning to question someone with a learning disability
- Planning to question someone with 'hidden' disabilities: specific language impairment, dyslexia and other related specific learning difficulties
- Planning to question a child or young person
- Additional factors concerning children under 7 (or functioning at a very young age)
- Effective participation of young defendants
- Planning to question someone using a remote link
- Identifying vulnerability in witnesses and defendants
- Planning to question someone who is deaf
- General principles when questioning witnesses and defendants with mental disorder
- Vulnerable witnesses and parties in the family courts
- Using communication aids in the criminal justice system
- Witnesses and defendants with autism: memory and sensory issues
- Intermediaries step by step

CPD 3D.7 These toolkits represent best practice. Advocates should consult and follow the relevant guidance whenever they prepare to question a young or otherwise vulnerable witness or defendant.

Judges have been encouraged to refer advocates to this material and to use the toolkits in case management.

Ground rules hearings

Criminal Practice Direction [Criminal Practice Direction (General matters) [2013] 1 W.L.R. 3164: Ground rules hearings to plan the questioning of a vulnerable witness or children

3E.4 All witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can. In relation to young and/or vulnerable people, this may mean departing radically from traditional cross-examination. The form and extent of appropriate cross-examination will vary from case to case. For adult non vulnerable witnesses an advocate will usually put his case so that the witness will have the opportunity of commenting upon it and/or answering it.

When the witness is young or otherwise vulnerable, the court may dispense with the normal practice and impose restrictions on the advocate 'putting his case' where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions.

Where limitations on questioning are necessary and appropriate, they must be clearly defined. The judge has a duty to ensure that they are complied with and should explain them to the jury and the reasons for them. If the advocate fails to comply with the limitations, the judge should give relevant directions to the jury when that occurs and prevent further questioning that does not comply with the ground rules settled upon in advance.

Instead of commenting on inconsistencies during cross-examination, following discussion between the judge and the advocates, the advocate or judge may point out important inconsistencies after (instead of during) the witness's evidence. The judge should also remind the jury of these during summing up. The judge should be alert to alleged inconsistencies that are not in fact inconsistent, or are trivial. "

Criminal Procedure (Amendment) Rules 2015 No. 13 (L.1)

The latest amendment came into force on 6 April 2015 and has amended Rule 3.9 (Case preparation and progression) to provide for 'ground rules hearings'. The amended Rule now reads:

> *Case preparation and progression*
>
> *3.9.— (1) At every hearing, if a case cannot be concluded there and then the court must give directions so that it can be concluded at the next hearing or as soon as possible after that.*
>
> *…*

(6) Facilitating the participation of any person includes giving directions for the appropriate treatment and questioning of a witness or the defendant, especially where the court directs that such questioning is to be conducted through an intermediary.

(7) Where directions for appropriate treatment and questioning are required, the court must—

(a) Invite representations by the parties and by any intermediary; and

(b) Set ground rules for the conduct of the questioning, which rules may include—

- *(i) a direction relieving a party of any duty to put that party's case to a witness or a defendant in its entirety,*
- *(ii) directions about the manner of questioning,*
- *(iii) directions about the duration of questioning,*
- *(iv) if necessary, directions about the questions that may or may not be asked, (v) where there is more than one defendant, the allocation among them of the topics about which a witness may be asked, and*
- (v) *directions about the use of models, plans, body maps or similar aids to help communicate a question or an answer.*

The importance of grounds rules hearings should not be underestimated and the higher courts have been critical of failures to properly identify and deal with appropriate issues at ground rules hearings. The desirability for ground rules hearings was emphasised in *R v Lubemba* (at paras 42 -43)

"The court is required to take every reasonable step to encourage and facilitate the attendance of vulnerable witnesses and their participation in the trial process. To that end, judges are taught, in accordance with the Criminal Practice Directions, that it is best practice to hold hearings in advance of the trial to ensure the smooth running of the trial, to give any special measures directions and to set the ground rules for the treatment of a vulnerable witness. We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances. If there are any doubts on how to proceed, guidance should be sought from those who have the responsibility for looking after the witness and or an expert.

In general, experts recommend that the trial judge should introduce him or herself to the witness in person before any questioning, preferably in the presence of the parties. This seems to us to be an entirely reasonable step to take to put the witness at their ease where possible. The ground rules hearing should cover, amongst other matters, the general care of the witness, if, when and where the witness is to be shown their video interview, when, where and how the parties (and the judge if identified) intend to introduce themselves to the witness, the length of questioning and frequency of breaks and the nature of the questions to be asked. So as to avoid any unfortunate misunderstanding at trial, it would be an entirely

reasonable step for a judge at the ground rules hearing to invite defence advocates to reduce their questions to writing in advance."

Vulnerable Defendants

A substantial number of defendants suffer from disabilities including limited language ability, limited communication skills, mental illness, learning disabilities and suggestibility which makes it appropriate for assistance to be provided to them to enable them to give their best evidence. Yet, whilst special measures legislation applies equally to prosecution and defence witnesses, apart from section 47 of the Police and Justice Act 2006 which enables defendants to give evidence through a live link in limited circumstances, there is still no legislation in force which permits the use of special measures for defendants. The relevant statutory provisions in the Coroners and Justice Act 2009 [s.104] to automatically provide an intermediary for a defendant with similar difficulties to other vulnerable and intimidated witnesses is not yet in force.

Despite the lack of statutory power there are routinely cases where intermediaries have been identified and used to facilitate effective participation of vulnerable child and adult defendants. In *R v Walls [2011] EWCA Crim 443* the Court confirmed an inherent power to consider the use of intermediaries for defendants, in *R v Cox [2012] EWCA Crim 549* the Court of Appeal again re-iterated that special measures for vulnerable defendants are at the discretion of the trial Judge and more recently in *R v Dixon [2013] EWCA Crim 465*, the Court of Appeal highlighted the responsibility on trial judges to "actively ensure the effective participation of vulnerable defendants". In *R v SSJ and Cheltenham Magistrates' Court and CPS and Kids for Law International [2014] [EWHC] 1944 (Admin)*, the divisional court found that a defendant when giving evidence should be in the same position as a witness for the Crown being supported by a registered intermediary matched by the Witness Intermediary Scheme.

The duties of the Court in relation to vulnerable defendants are set out at Part 3G of the CPD:

3G.1 If a vulnerable defendant, especially one who is young, is to be tried jointly with one who is not, the court should consider at the plea and case management hearing, or at a case management hearing in a magistrates' court, whether the vulnerable defendant should be tried on his own, but should only so order if satisfied that a fair trial cannot be achieved by use of appropriate special measures or other support for the defendant. If a vulnerable defendant is tried jointly with one who is not, the court should consider whether any of the modifications set out in this direction should **apply** in the circumstances of the joint trial and, so far as practicable, make orders to give effect to any such modifications.

3G.2 It may be appropriate to arrange that a vulnerable defendant should visit, out of court hours and before the trial, sentencing or appeal hearing, the

courtroom in which that hearing is to take place so that he or she can familiarize him or herself with it.

3G.3 Where an intermediary is being used to help the defendant to communicate at court, the intermediary should accompany the defendant on his or her pre-trial visit. The visit will enable the defendant to familiarize him or herself with the layout of the court, and may include matters such as: where the defendant will sit, either in the dock or otherwise; court officials (what their roles are and where they sit); who else might be in the court, for example those in the public gallery and press box; the location of the witness box; basic court procedure; and the facilities available in the court.

3G.4 If the defendant's use of the live link is being considered, he or she should have an opportunity to have a practice session.

3G.5 If any case against a vulnerable defendant has attracted or may attract widespread public or media interest, the assistance of the police should be enlisted to try and ensure that the defendant is not, when attending the court, exposed to intimidation, vilification or abuse. Section 41 of the Criminal Justice Act 1925 prohibits the taking of photographs of defendants and witnesses (among others) in the court building or in its precincts, or when entering or leaving those precincts. A direction reminding media representatives of the prohibition may be appropriate. The court should also be ready at this stage, if it has not already done so, where relevant to make a reporting restriction under section 39 of the Children and Young Persons Act 1933 or, on an appeal to the Crown Court from a youth court, to remind media representatives of the application of section 49 of that Act.

3G.6 The provisions of the Practice Direction accompanying Part 16 should be followed.

3G.7 Subject to the need for appropriate security arrangements, the proceedings should, if practicable, be held in a courtroom in which all the participants are on the same or almost the same level.

3G.8 Subject again to the need for appropriate security arrangements, a vulnerable defendant, especially if he is young, should normally, if he wishes, be free to sit with members of his family or others in a like relationship, and with some other suitable supporting adult such as a social worker, and in a place which permits easy, informal communication with his legal representatives.

The court should ensure that a suitable supporting adult is available throughout the course of the proceedings.

3G.9 It is essential that at the beginning of the proceedings, the court should ensure that what is to take place has been explained to a vulnerable defendant in terms he or she can understand and, at trial in the Crown Court, it should ensure

in particular that the role of the jury has been explained. It should remind those representing the vulnerable defendant and the supporting adult of their responsibility to explain each step as it takes place and, at trial, explain the possible consequences of a guilty verdict and credit for a guilty plea.

3G.10 A trial should be conducted according to a timetable which takes full account of a vulnerable defendant's ability to concentrate. Frequent and regular breaks will often be appropriate. The court should ensure, so far as practicable, that the whole trial is conducted in clear language that the defendant can understand and that evidence in chief and cross-examination are conducted using questions that are short and clear. The conclusions of the 'ground rules' hearing should be followed, and advocates should use and follow the 'toolkits' as discussed above.

3G.11 A vulnerable defendant who wishes to give evidence by live link, in accordance with section 33A of the Youth Justice and Criminal Evidence Act 1999, may apply for a direction to that effect; the procedure in Section 4 of Part 29 of the Rules should be followed. Before making such a direction, the court must be satisfied that it is in the interests of justice to do so and that the use of a live link would enable the defendant to participate more effectively as a witness in the proceedings. The direction will need to deal with the practical arrangements to be made, including the identity of the person or persons who will accompany him or her.

3G.12 In the Crown Court, the judge should consider whether robes and wigs should be worn, and should take account of the wishes of both a vulnerable defendant and any vulnerable witness. It is generally desirable that those responsible for the security of a vulnerable defendant who is in custody, especially if he or she is young, should not be in uniform, and that there should be no recognizable police presence in the courtroom save for good reason.

3G.13 The court should be prepared to *restrict attendance* by members of the public in the courtroom to a small number, perhaps limited to those with an immediate and direct interest in the outcome. The court should rule on any challenged claim to attend. However, facilities for reporting the proceedings (subject to any restrictions under section 39 or 49 of the Children and Young Persons Act 1933) must be provided. The court may restrict the number of reporters attending in the courtroom to such number as is judged practicable and desirable. In ruling on any challenged claim to attend in the courtroom for the purpose of reporting, the court should be mindful of the public's general right to be informed about the administration of justice.

3G.14 Where it has been decided to limit access to the courtroom, whether by reporters or generally, arrangements should be made for the proceedings to be relayed, audibly and if possible visually, to another room in the same court complex to which the media and the public have access if it appears that there will be a need for such additional facilities. Those making use of such a facility

should be reminded that it is to be treated as an extension of the courtroom and that they are required to conduct themselves accordingly.

Flexibility of approach

What is now expected from the Courts and from those who practice them is a sensible and flexible approach to cases involving vulnerable witnesses. More recently, the courts under their wide reaching case management powers and inherent duty to ensure a witness is able to give their best evidence, have increasingly adopted more inventive and flexible approaches to ensuring this is achieved.

[4]Judges have accommodated the needs of witnesses and defendants by:

- Helping vulnerable witnesses to begin cross-examination while they are fresh by not requiring them to watch their DVD interview at the same time as the jury (para 29C.4, CPD 2013)
- Using combined special measures to shield the live link screen from the defendant and the public, as would occur if screens were being used for a witness giving evidence in the courtroom (para 29A.2 CPD 2013)
- Turning off or covering the 'picture in picture' on the witness's TV screen, where this may distract the witness
- Permitting witnesses unable to give evidence (e.g. because of distress due to a delayed start or as a result of inappropriate questioning) to come back the next day (if necessary, following a further ground rules discussion between the judge and advocates), rather than dismissing the case immediately.

Judicial decisions in respect of children have included:

- Moving the prosecution and defence advocates into the live link room for cross-examination of young children
- Allowing children to pause cross-examination briefly to relieve stress without leaving the live link room by going under a table, behind a curtain or under a blanket; letting children take 'in room' breaks using a large 30-second egg timer, without releasing the jury; and letting a child with urinary urgency go to the toilet without seeking permission first

[4] Reproduction of updated list by Joyce Plotnikoff from paras 5-8 'Children and Vulnerable adults 'Equal Treatment Benchbook 2013.

- Agreeing that a court usher would knit quietly during cross-examination because it was calming for the child, and meant the usher was not obviously observing; and agreeing to a young child's request that a male usher would cover his face with a cushion when the child had to say 'naughty' words
- Allowing children to reduce their arousal level and 'settle' with rhythmic physical activity during breaks in cross-examination. Agreed activities for four- and five-year olds have involved vacuuming, a tricycle, a mini trampoline and a small rocking chair
- Giving permission for a 15-year-old with psychological and communication problems to pull up her 'hoodie' (something she did when stressed or embarrassed to create a sense of safety) and to write down her answers if unable to speak. This reassurance, along with the presence of the supporter and intermediary, meant that she was able to give her evidence without covering her head.

Judicial decisions in respect of vulnerable adult witnesses have included:

- Arranging for introductions to the trial judge and advocates to take place at a pre-trial visit (coinciding with a pre-trial hearing), rather than at the trial
- Allowing the intermediary to relay the answers of a witness with autism spectrum disorder and behavioral problems who gave evidence with her back to the live link camera; and to relay replies of witnesses who would only whisper their answers
- Letting a man with autism spectrum disorder give evidence wearing a lion's tail, his 'comfort object' in daily life
- Agreeing use of a visual timeline to facilitate questioning about alleged offences over a period of time, e.g. a witness with a moderate learning disability described hotels where she had been assaulted. She identified hotel receipts as accurate, but mixed up locations and dates in interview. The intermediary helped the witness create a timeline marked with years and significant non-evidential events. The witness then added dates and locations from the hotel receipts. By referring to the timeline, she could provide correct information when questioned.

Judicial decisions in respect of vulnerable defendants have included:

- Seating a defendant with impaired vision near the jury while they were empanelled, to enable him to object to jurors if necessary; and seating a defendant with a hearing problem in the body of the court
- Allowing a defendant with mental health issues to take brief pauses during cross-examination to manage his emotional state and remain calm enough to respond to questions
- Allowing a defendant with autism to have quiet, calming objects in the dock to help him to pay attention
- Requesting that all witnesses be asked 'very simply phrased questions' and 'to express their answers in short sentences', to make it easier for a defendant (who had complex needs but no intermediary) to follow proceedings *(R v Cox [2012] EWCA Crim 549).*

Hearsay evidence and vulnerable witnesses

The hearsay provisions are an important tool in the prosecutors arsenal and provide opportunities to admit otherwise inadmissible evidence of vulnerable witnesses.

> *Hearsay in criminal proceedings is a statement not made in oral evidence in the proceedings that is evidence of any matter stated.* [S.114 (1) CJA 2003]

The admissibility of hearsay evidence in criminal proceedings is set out in sections 114 – 136 Criminal Justice Act 2003 and applies to all criminal proceedings begun on or after 4 April 2005.

Witnesses in fear – S.116

Section 116(2)(e) is the most relevant to cases involving vulnerable witnesses who are unavailable on account of fear is section, for example in sex cases trafficked women, victims of violence and domestic sexual abuse:

> **116** (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,

(b)the person who made the statement (the relevant person) is identified to the court's satisfaction, and

(c)any of the five conditions mentioned in subsection (2) is satisfied.

(2)The conditions are—

…

(e)that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.

(3)For the purposes of subsection (2)(e) "fear" is to be widely construed and (for example) includes fear of the death or injury of another person or of financial loss.

(4)Leave may be given under subsection (2)(e) only if the court considers that the statement ought to be admitted in the interests of justice, having regard—

(a)to the statement's contents,

(b)to any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the relevant person does not give oral evidence),

(c)in appropriate cases, to the fact that a direction under section 19 of the Youth Justice and Criminal Evidence Act 1999 (c. 23) (special measures for the giving of evidence by fearful witnesses etc) could be made in relation to the relevant person, and

(d)to any other relevant circumstances.

(5)A condition set out in any paragraph of subsection (2) which is in fact satisfied is to be treated as not satisfied if it is shown that the circumstances described in that paragraph are caused—

(a)by the person in support of whose case it is sought to give the statement in evidence, or

(b)by a person acting on his behalf,

in order to prevent the relevant person giving oral evidence in the proceedings (whether at all or in connection with the subject matter of the statement).

Admission under this section is commonly utilised in domestic violence cases but has equal applicability to all cases and, provided it complies with the provisions, can be used even if it represents the sole or decisive evidence in the case. Examples would include:

- An account captured on a police officer's body worn camera;
- First account recorded in a pocket notebook;
- Account in a 999 call [may also be covered by *res gestae*];

- Account to a neighbour, friend or family member and recorded in a statement from that person.

The Court will consider carefully the statutory framework and the reliability of the evidence. There must be a legitimate justification for the absence of the witness AND it must be possible to make an assessment as to the reliability of the hearsay evidence.

S.124 is the balance to admissibility under sections 114 or 116 to ensure fairness. Under section 124 of the CJA 2003, if, in criminal proceedings, a written statement is admitted as evidence and the statement maker does not give oral evidence, then:

- any evidence relevant to the witness's credibility is admissible; and
- evidence which could otherwise be put in cross-examination as relevant to his credibility as a witness can be given with the court's leave; and
- evidence that he or she made any other inconsistent statement is admissible for the purpose of showing that the witness contradicted himself.

S.124 necessitates the Crown conducting a full investigation and disclosing all relevant material to enable the court to make a determination. This includes consideration not only of the pre-cons but the facts giving rise to them; previous complaints made to the police by the complainant; intelligence reports and third party material.

'The interests of justice' – section 114

In approiate cases consideration could be given to an application under 114(1)(d):

> 114 (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—
>
> …
>
> (d)the court is satisfied that it is in the interests of justice for it to be admissible.
>
> (2)In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant)—
>
> (a)how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;

(b)what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);

(c)how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;

(d)the circumstances in which the statement was made;

(e)how reliable the maker of the statement appears to be;

(f)how reliable the evidence of the making of the statement appears to be;

(g)whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h)the amount of difficulty involved in challenging the statement;

(i)the extent to which that difficulty would be likely to prejudice the party facing it.

(3)Nothing in this Chapter affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings.

However, the interests of justice section should not be used to get around the other gateways, for example where the witness is reluctant and not truly in fear [*R v Freeman [2010] EWCA Crim 1997*.]

Child witnesses

S.114 (1) (d) has been successfully used to admit previous accounts of witnesses too young to give an account or who have given significant statements to police officers. In *R v SJ [2009] EWCA Crim 1869* a hearsay account in the mother's statement of what her 30 month old had told her about a sexual assault was admitted. In that case the account was corroborated by medical evidence.

R v Barnaby [2015] EWHC

R v Barnaby is an important case as to when the prosecution can rely upon *res gestae* evidence [the admissibility of which has been preserved by section 118 CJA 2003] if there is a real risk that compelling the attendance of a victim would expose them to further harm.

In Barnaby the complainant made a 999 call describing her partner strangling her, officers attended and she complained that her partner had assaulted her. She refused to provide a statement on account of him having beaten her up previously when she had done so. This was recorded by the attending officers in statements. The defendant was arrested and gave a no comment interview.

The court held that evidence of the 999 call and the statements made to the police were admissible as *res gestae.* The calls and statements were made only 6 minutes after the 999 call was made and at a time when she was still distressed. The court said that the allegations revealed a dramatic and startling event that would have dominated her utterances. "It was appropriate to admit this *res gestae* evidence notwithstanding, in a strict sense, [the complainant] was available as a witness, for instance if the court had issues a witness summons. [per Fulford LJ]

COMPETENCY
SS 53 and 54 YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999

Definition of competency

The general common law principle is that any witness is competent if he or she can lawfully be called to evidence. The principle is set out in section 53(1) of the Youth Justice and Criminal Evidence Act 1999 (YJCEA):

> *53. (1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.*

This is subject to the two exceptions set out in subsections (3) and (4):

> *(3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to –*
>
> *(a) understand the questions put to him as a witness, and*
>
> *(b) give answers to them that can be understood.*

> *(1) A person charged in criminal proceedings is not competent to give evidence in the proceedings for the prosecution (whether he is the only person, or is one of two or more persons charged in the proceedings).*

Determining competence

The issue of competence is a matter for the court to determine. All witnesses are generally considered competent and a witness can only be determined to be incompetent if they fall within one of the two exceptions (above). In practice, the exception under section 53(4) will be easily determined.

The procedure applicable in determining the competence of a witness under section 53(3) is set out in section 54:

> *54. (1) Any question whether a witness in criminal proceedings is competent to give evidence in the proceedings, whether raised:*
>
> *(a) by a party to the proceedings, or*
>
> *(b) by the court or its own motion,*
>
> *shall be determined by the court in accordance with this section.*
>
> *(2) It is for the party calling the witness to satisfy the court that, on a balance of probabilities, the witness is competent to give evidence in the proceedings.*
>
> *(3) In determining the question mentioned in subsection(1)the court shall treat the witness as having the benefit of any directions under section 19 which the court has given, or proposes to give, in relation to the witness.*
>
> *(4) In any proceedings held for the determination of the question shall take place in the absence of the jury (if there is one).*
>
> *(5) Expert evidence may be received on the issue.*
>
> *(6) Any questioning of the witness (where the court considers that necessary) shall be conducted by the court in the presence of the parties.*

General principles in relation to competency under section 53(3) derived from s.54 and case law:

- The statutory provisions apply to children, individuals of unsound mind and the infirm.

- The issue of competency can be raised by the parties or the court of its own motion [s.54 (1)].

- The party calling the evidence must satisfy the court on the balance of probabilities.

- The issue of competency should ideally be determined as early as possible and certainly before the witness gives evidence. However, there may be circumstances in which the issue only becomes apparent during the witness giving evidence (for example following the playing of a pre-recorded interview).

- The competency test may be reconsidered at the close of the witness's evidence [*M (2008) EWCA Crim 3*].

- When there is material indicating that the witness satisfies the competency test (such as ABE and intermediary report) the court and the parties should carefully consider whether a competency hearing is, in fact necessary at the initial stage of the case. In some circumstances such a

hearing may serve to do no more than cause delay, increase expense and put unnecessary strain on the witness' [*R v F [2013] EWCA Crim 424].*

- The test in section 53(3) is one of understanding and whether the witness understood what was being asked, and, whether the jury could understand the witnesses answers; the words "put to him as a witness" meant the equivalent of "being asked of him in court." A young child who could speak and understand basic English with strangers would be competent; and there was no requirement that the witness should be aware of their status of a witness [*R v MacPherson [2006] 1 Cr. App. R. 30, CA].*

- A court cannot properly determine that a child is incapable of satisfying the test on the basis of the child's age alone. Children of any age may be called to give evidence; their competence depends upon their understanding not their age. Infants as young 3 ½ have been determined competent as witnesses [*Powell [2006] 1 Cr. App. R. 31, CA].*

- The exception under section 53(3) is entirely witness specific and there should be no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court, nor understand or give a readily understood answer to every single question [*R v Barker [2011] Crim. L. R. 233, CA*].

- Competence should not be confused with credibility or reliability which go to the weight of the evidence and not the issue of competency [*R v MacPherson [2006] 1 Cr. App. R. 30, CA].*

- The assessment of competency should take account of techniques or measures that can be used to assist the witness to give his or her evidence e.g. the use of a registered intermediary [s.54 (3)].

- A registered intermediary must not be asked to give their opinion on credibility or competence, their role is to purely assist the witness to give their evidence.

- In order to determine the ability of a child to give intelligible testimony the court should watch any video-taped interview with the child or ask questions of the child or both [*DPP v M [1997] 2 Cr App R 70].*

- If a judge conducts an enquiry into the competence of a mentally handicapped person, it is not normally necessary to call that person to

give evidence on the subject: the proper approach is to adduce expert medical evidence [*Barratt [1996] Crim LR 495*].

- Whilst delay may impact on the issue of a very young child's competence, delay of itself (not amounting to an abuse of process) will not automatically be a ground for preventing evidence of a child from being given [*R v Barker [2011] Crim. L. R. 233, CA*]. However, significant delay between the alleged offence and trial may render the child incompetent (or more accurately unable) to give evidence; that is because the passage of time may have affected the ability of the child to give intelligible answers to questions about the incident (*R v M.H. [2013] Crim LR 849, CA*). What is important is that where a case depends on the evidence of an infant complainant (1) the interview takes place promptly after complaint and (2) the trial takes place soon after that, fast-tracked wherever possible *[Powell [2006] 1 Cr. App. R. 31, CA].*

S.41 YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999 and S.100 CRIMINAL JUSTICE ACT 2003

Section 41 Youth Justice Criminal Evidence Act 1999

Section 41 of the Youth Justice and Criminal Evidence Act 1999 [YJCEA 1999] was implemented to protect complainants in proceedings involving sexual offences by restricting evidence or questions about their previous sexual history, subject to exceptions.

Section 41 provides a structured approach to the application of judicial discretion and sets out when evidence of previous sexual history can be admitted in rape cases. In essence courts may only give leave if:

- The evidence or questions rebut evidence led by the prosecution[5] or
- The evidence or questions relate to a relevant issue at trial and that issue is not one of consent[6].

If the issue is one of consent, the behaviour to which they relate is either alleged to have taken place at or about the same time as the alleged offence or is so

[5] There is plainly an imbalance between what the imbalance of fairness for the prosecution and defence. In *R v Soroya* the Court of Appeal said that balance could be achieved by use of s.78 by the trial judge.

[6] Two cases are of particular importance: *R v A (No.2) [2002] 1 A.C. 45*, which gives guidance at to when an application is likely to be successful *R v F [2005] 2 Cr.App.R. 13, CA*, which states that once an application is successful, the court cannot limit the extent to which evidence, property admitted, can be excluded.

similar to the complainant's behaviour at that time that it cannot reasonably be explained as coincidence.

The court must also be satisfied that to refuse leave would result in the jury or the court reaching an unsafe conclusion on a relevant issue of trial[7]. The court will also refuse permission if it considers that the main aim of evidence claimed to relate to a relevant issue is simply to undermine the complainant's reliability.

Relationship with section 100 Criminal Justice Act 2003

Nothing in the 'bad character' provisions of the Criminal Justice Act 2003 affects the exclusion of evidence under s.41. *R v V [2006] EWCA Crim 1901* states that where it is sought to cross-examine a complainant about a previous sexual allegation and to suggest that the allegation had been false, it may be necessary to obtain leave under both section 41 and section 100 of the Criminal Justice Act 2003.

In many cases the ruling under section 41 will be the more formidable obstacle. Where there was sufficient evidential basis for asserting that the previous allegation was untrue, questioning as to the incident, would not be as to sexual behaviour for the purpose of section 41 and the test for leave under section 100 of the Criminal Justice Act 2003 Act may be passed. Where in cross-examination thereafter the complainant denied having previously admitted that a prior complaint had been false, it would be open to the defence to call evidence of such admission having been made, and once cross-examination of the previous complaint was admitted under the 2003 Act, the denied statement would be one "relative to the subject matter of the indictment".

An example

R v Gjoni (Kujtim) [2014] All ER (D) 73

G was convicted of raping the girlfriend of a friend of his. The defence case was that another person present in the house had told G that he had had sex with the victim on an earlier occasion with the approval of the boyfriend. At trial the judge ruled, on a defence application under the Youth Justice and Criminal Evidence Act 1999 s.41, that G could give evidence that, as a result of what he had been told, he entered the room where the victim was believing that she would be willing to have sex with him, but that he could not relate the contents of the conversation.

[7] In *R v DB [2012] EWCA Crim 1235* the court determined it "highly questionable whether an issue of motive can be said to constitute an issue in the case as defined by section 42(1) (a)" but note the case of *R v T [2012] EWCA Crim 2358*.

Stages of consideration	Judgment
(a) Was the evidence "about any sexual behaviour of the complainant" (1999 Act s.41 (1))? (b) Did the evidence relate to an issue other than consent (s.41 (3) (a))? (c) Did the evidence of sexual behaviour relate to a relevant issue in the case (s.41 (3))?	It was an issue relating to belief in consent, so it was an issue other than consent, and a relevant one, because the jury had heard that, earlier, the victim had rebuffed G, and in the absence of an explanation the jury might infer that the appellant's intention from the outset was to have sexual intercourse with the complainant with or without her consent.
(d) Did it appear that the purpose of the evidence was to impugn the credibility of the complainant (s.41 (4))?	The purpose was to bolster the credibility of G, not impugn that of the victim.
(e) Would the exclusion of the evidence render unsafe any decision of the jury upon the issue raised (s.41 (2) (b))?	There may be cases where evidence of a conversation between the defendant and a third party could have probative value in relation to belief in consent, such as *Barador [2005] EWCA Crim 396*. But in this case there was considerable doubt whether that was the case.

Ultimately it was agreed that the victim had rejected G's advances. It was incomprehensible that G's knowledge of the other man's experience with the victim could possibly have informed him that, nonetheless, she would be willing. Furthermore, the line of reasoning required was exactly that prohibited by s.41 (4): that a woman who consented to intercourse with one comparative stranger would, a week later, and in different circumstances, consent to have intercourse with another.

The judge's ruling was an appropriate response to the dilemma posed by the fact that the issue whether in fact the other man had had intercourse with the complainant was not admissible under s.41 (3).

The application of s.41 to social media

Sexually provocative postings on Facebook may amount to "sexual behaviour" and will engage the s.41 regime. Applications to adduce such material are likely to fall foul of the credibility restriction in s.41 (1) (see for example *R. v D [2011] EWCA Crim 2305*: where there is no direct connection to the allegation and the messages, such postings are likely to be of little or no relevance to the issues in the case and *R v Ben-Rejab [2011] EWCA Crim 1136* where the court decided that completing online sexual quizzes amounted to "sexual behaviour").

In an instructive analysis of social networking sites as criminal evidence, Michael O'Floinn and Professor David Ormerod [8] observe that the most likely admissibility route for evidence of sexual behaviour in a posting on a social networking site is as rebuttal evidence under s.41(5). This could arise where a complainant has given evidence suggesting that she is monogamous, sexually modest or, in the words of Mackay J. in *R. v D*, a ''complete innocent''. O'Floinn and Ormerod refer to a case reported to them in which a complainant had given evidence that ''she did not go in for one night stands'' and ''did not go prepared with condoms''. In such circumstances, reference to a specific instance or instances of previous or subsequent sexual behaviour in a Facebook posting which rebut this assertion might be admissible under the rebuttal gateway.

False complaints and section 100 CJA 2003

False sexual complaints are not susceptible to section 41, as being false no sexual behaviour occurred. Section 41 will, however, apply to the reverse situation, where a complainant has falsely denied previous true sexual behaviour.

R v All Hilly [2014] EWCA Crim 1614[9]

The Court of Appeal held that the restrictions on questions about a complainant's sexual history set out in section 41 YJCEA 1999 do not apply to false complaints about sexual assaults. Cross-examination is permitted, subjected to application under section 100, since the complaints are not about any "sexual behaviour" of the complainant within the meaning of section 42(1)(c). However, before any such questions are permissible the defence must have a proper evidential basis for asserting that any such statement was both made and untrue. The difficult lies in what constitutes a proper evidential basis as there must be some material from which it could properly be concluded that the complainant was false. In this case four separate unpursued allegations of sexual offences against four separate men were insufficient to establish they were untrue.

Where a defendant seeks to adduce evidence or ask questions about an allegedly false complaint the must seek a ruling from the Judge that section 41 does not apply and provide a proper evidential basis for the allegation [*R v T and H [2001] EWCA Crim 1877]* and will now, necessarily, require an application under section 100 CJA 2003.

Procedural requirements

Part 36 of the Criminal Procedure Rules applies to section 41 applications. It requires a written application which must:

> (a) *Identify the issue to which the defendant says the complainant's sexual behaviour is relevant;*
> (b) *Give particulars of—*
> (i) *any evidence that the defendant wants to introduce, and*

[8] Social networking material as criminal evidence [2012] Crim LR 486

[9] upholding previous lines of authority including *R v R.T & M.H [2002] 1 WLR 632*

(ii) *any questions that the defendant wants to ask;*

(c) *Identify the exception to the prohibition in section 41 of the Youth Justice and Criminal Evidence Act 1999 on which the defendant relies; and*

(d) *Give the name and date of birth of any witness whose evidence about the complainant's sexual behaviour the defendant wants to introduce.*

Despite the apparent strict nature of the rules, failure to follow the rules does not provide the Judge with a discretion to exclude the evidence or questions sought to be adduced under section 41. The Judge may adjourn the case to enable the rules to be complied with and for the prosecution to make relevant enquiries [*R v R.T & M.H [2012] EWCA Crim 2358].*

ISSUES ARISING OUT OF HISTORIC CASES

Indictment

The indictment is the ultimate responsibility of trial counsel. Multiple count, historic sexual offence indictments can be particularly complex and so care should always taken when drafting an indictment in an historic sex case. Regard must be had to the following:

- Identify the correct legislation – e.g. Change from 1956 to 2003 Act.
- Be mindful of changes in sentencing maxima – e.g. Indecency with a child increased from 2 years to 10 years in October 1997.
- Identify the relevant age of the complainant – some offences are age specific and so must be careful drafted to fall within the complainant's relevant birth dates to ensure the offence is made out and the Judge has the requisite sentencing powers e.g. Indecent assault where child under 13, age must be averred after 1 January 1961 (there is also a difference in sentencing 2 or 5 years before 16 September 1985 [when it was then subsequently increased to 10 years]).
- Offences which straddle different statutes- where an allegation straddles the implementation dates of two different Acts, the indictment should contain two counts to reflect that one allegation; one under each Act alleging the offence wither side of the implementation date of the new Act. That is, one count covering the period up to the day before the commencement date and the other starting on the commencement date.
- Be careful not to overload the indictment whilst ensuring that the Judge has sufficient sentencing powers available.

- Consideration of the use of specific/specimen/alternative and multiple incident[10] counts.

- Ensure there is sufficient detail in the count so that it is clear what it refers to, or specify in square brackets e.g. [Specific: oral sex in the bedroom]

Abuse of Process and delay where are we now?

R v Hallahan [2014] EWCA Crim 2079
The Court of Appeal considering allegations dating back to 1976 reaffirmed the view that delay will only lead to a stay of the case if real prejudice can be demonstrated. Essentially the delay must cause prejudice to the defendant which can be specifically demonstrated. Even if it can be established that records created at the time have been lost, this will not suffice in persuading the court to stop the case unless it can be shown that such material would have been probative to the issues in the case.

> *"In considering the question of prejudice…it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to a decisive or strongly supportive evidence emerging on a specific issue in the case. The Court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The Court will then need to go on to consider the importance of missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to the defendant."*

Staying any case for abuse of process has become increasingly difficult in recent years and this ruling is in line with the modern approach which seems to be that unless you can demonstrate real prejudice even the loss of significant documents may not be enough to support a successful application. It is notable that decisions not to stay have been upheld in relation to delays of 28[11], 30[12], 38[13] and 63[14] years.

Disclosure: R v Butler [2015] EWCA Crim 854

[10] Part 14 CPR and *R v Hartley [2011] EWCA Crim 1299*
[11] *R v J [1998] CLR 411*
[12] *R v B [2003] 2 Cr. App. R. 13*
[13] *R v Joynson [2008] EWCA 3049*
[14] *R v RD [2013]*

Recent judgement of 20 May 2015 dealing with the issue of disclosure and admissibility.

ELEANOR LAWS QC

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