Restrictions on the Use of Sexual History Evidence: an Examination of Section 41 of the Youth Justice and Criminal Evidence Act 1999

Zain Khan*

Abstract – This article explores the impact the enactment of section 41 of the Youth Justice and Criminal Evidence Act 1999 has had on the admissibility of the complainants’ sexual history evidence in trials. In particular, the article delves into the issues of whether section 41 has achieved its aim of restricting as much of the complainants’ sexual history evidence out of trials as possible, with the exception that it is admitted in limited circumstances where it is really relevant to an issue at trial, as set out in one of the four exceptions under subsection 41(2). In concluding that section 41 achieves its aim of restricting the complainants’ sexual history evidence, this article argues that section 41 has also created many problems, including: (i) no overriding discretion to admit evidence which the exceptions in subsection 41(2) of the Act exclude, (ii) section 41 does not differentiate between the complainants’ sexual history with the defendant and third parties, and (iii) in certain situations section 41 conflicts with the accused’s right under Article 6 of the European Convention of Human Rights (right to a fair trial).

Keywords: Sexual History Evidence, Section 41, Youth Justice and Criminal Evidence Act 1999

*Zain graduated with a Bachelors of Law from the University of the West of England where he was a Junior Researcher for the Innocence Project. Zain also worked as a Legal Summer Student in Ontario, Canada. Contact: zain.khan1@outlook.com.
1. Introduction

The intention of the Youth Justice and Criminal Evidence Bill was to restrict as much of the complainants’ sexual history out of trials as possible. The reason for this is that evidence based on sexual history should only be admitted in limited circumstances; that is where the sexual behaviour is relevant to an issue in the trial. As a result of this, section 41 of the Youth Justice and Criminal Evidence Act 1999 (“the Act”) placed a general ban on the accused adducing evidence or cross-examining the complainant regarding the complainant’s sexual behaviour. Under section 41 of the Act the defence can only adduce evidence or cross-examine the complainant if the sexual behaviour evidence is admissible under one of the exceptions found within section 41(2) of the Act. Furthermore, if the evidence was not permitted, it would render an “unsafe conclusion” by the jury on “any relevant issue in the case”. Section 41 of the Act has achieved its aim of restricting as much of the complainants’ sexual history evidence from trials as possible, but as a result, it has had other, less positive effects which will be discussed in part 3.1 below.

2. Position Prior to the Youth Justice and Criminal Evidence Act 1999

In order to understand what the purpose of the introduction of section 41 was, the state of the law prior to the introduction of the Act needs to be assessed. For this purpose, both the common law (summarised by the Heilbron Committee) and the Sexual Offences (Amendment) Act 1976 (later amended by the Act) need to be examined. Under the common law, after the decision of DPP v Morgan it was felt that sexual history evidence in rape trials had been used “to discredit and
demean the complainant's evidence”\textsuperscript{10} and that this had influenced the jury’s “perception of its veracity”\textsuperscript{11}. It was assessed by the Heilbron Committee that the common law had allowed a wide scope of sexual history evidence to be adduced against the complainant due to decisions being based on common false beliefs and misconceptions associated with rape.\textsuperscript{12} Arguably, these common false beliefs led to the humiliation of complainants in rape trials and further discouraged victims from reporting sexual offences.\textsuperscript{13} Evidence also suggests that two out of three such beliefs are “illogical and at odds with any system of morality which places a value on the individual's right to self determination”.\textsuperscript{14} Also, the Heilbron Committee suggested that cross-examinations in rape trials had become “inimical to the fair trial of the essential issues”.\textsuperscript{15} The Committee came to the conclusion that unless certain restrictions on the use of sexual history evidence were introduced,\textsuperscript{16} sexual history evidence would continue to be admissible; which did not “advance the cause of justice”\textsuperscript{17} but instead put women on trial.\textsuperscript{18} But it was also felt that allowing sexual history evidence to go unchecked could lead to unjust acquittals.\textsuperscript{19} As a result, the Sexual Offences (Amendment) Act 1976 was introduced to clarify this grey area of law.

Section 2(1) of the Sexual Offences (Amendment) Act 1976 restricted the accused from adducing evidence and cross-examining the complainant about any “sexual experience”\textsuperscript{20} with a person other than the defendant. The restriction extended to any person other than the accused, therefore the accused would still be able to question the complainant regarding their past sexual experiences.\textsuperscript{21} However, the accused could only adduce evidence or cross-examine the complainant with the leave of the judge\textsuperscript{22} on the condition that the judge would be satisfied that

\textsuperscript{10} Chambers and Millar, \textit{Prosecuting Sexual Assault} (Scottish Office Central Research Unit, 1986), Page 126. 
\textsuperscript{11} \textit{ibid}, 126. 
\textsuperscript{13} \textit{ibid}. 
\textsuperscript{15} Home Office (n 12). 
\textsuperscript{16} Home Office (n 12). 
\textsuperscript{17} Home Office (n 12). 
\textsuperscript{18} Home Office (n 12). 
\textsuperscript{19} Home Office (n 12). 
\textsuperscript{20} Sexual Offences (Amendment) Act 1976 s 2(1) (Sexual Offences Act). 
\textsuperscript{21} \textit{ibid}, s 2(1). 
\textsuperscript{22} \textit{ibid}, s 2(1).
it would be “unfair to the defendant”\(^{23}\) to refuse to allow the evidence or cross-examination.\(^{24}\) The Sexual Offences (Amendment) Act 1976 was the first attempt to regulate sexual history evidence in England and Wales but research revealed the “intention of the legislature was rapidly undermined”.\(^{25}\) This is because the wording of the Sexual Offences (Amendment) Act 1976 provided judges with too much discretion,\(^{26}\) as it left it entirely up to the judge to decide how relevant the complainant’s behaviour was and whether the evidence should be allowed. This was seen as problematic because “the content of any relevancy decision”\(^{27}\) would be filled by the judge’s own experience, common sense and logic.\(^{28}\) Therefore, there was a risk that the judge’s decision as to whether the evidence was relevant to an issue may be “informed by stereotype and myth”,\(^{29}\) such as the stereotypic belief that “unchaste women”\(^{30}\) were more likely to consent to sexual intercourse and were less worthy of belief.\(^{31}\) In the Canadian case of \(R v\ Seaboyer\), McLachlin J. commented that “such generalized, stereotyped and unfounded prejudices”\(^{32}\) had no place in the legal system.\(^{33}\) This and other lessons from abroad have prompted the introduction of section 41 of the Youth Justice and Criminal Evidence Act 1999 which challenged similar myths. However, Professor Spencer suggests that section 41 was introduced merely because “feminists complained that judges gave leave too readily”.\(^{34}\)

3. The Effect of Section 41

Section 41 of the Act restricted the accused from adducing evidence\(^{35}\) or cross-examining\(^{36}\) the complainant regarding the complainant’s sexual history.\(^{37}\) The accused would only be able to

\(^{23}\) *ibid*, s 2(2).
\(^{24}\) *ibid*, s 2(2).
\(^{25}\) L Kelly, J Temkin, S Griffiths ‘Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials’ (Home Office Online Report 20/06) (2006), Page 6, Paragraph 3.
\(^{27}\) Seaboyer (1991) [1991] 2 SCR 577 McLachlin J.
\(^{28}\) Seaboyer (McLachlin J) (n 27).
\(^{29}\) Seaboyer (McLachlin J) (n 27).
\(^{30}\) R v A (No.2) [2002] 1 AC 45 (Lord Steyn, 27).
\(^{31}\) R v A (No. 2) (n 30).
\(^{32}\) R v A (No. 2) (n 30).
\(^{33}\) R v A (No. 2) (n 30).
\(^{34}\) Spencer, ‘Rape Shields and the Right to a Fair Trial’ [2001] C.L.J. 452.
\(^{35}\) Youth Justice and Criminal Evidence Act s 41(1)(a).
\(^{36}\) *ibid*, s 41(1)(b).
\(^{37}\) *ibid*, s 41(1).
adduce evidence or cross-examine the complainant regarding the complainant’s sexual history if the sexual behaviour was admissible under one of the four exceptions in subsection 41(2) (further discussed in part 3.1 below). Furthermore, if the sexual history evidence was admissible under one of the four exceptions, the judge would still have to be satisfied that not admitting the evidence would render an “unsafe conclusion” on a relevant issue by the jury under subsection 41(2)(b) of the Act.

In interpreting what constitutes 'sexual behaviour' under the Act, section 42(1)(c), defines it as "any sexual behaviour or sexual experience whether or not involving the accused". This excludes anything alleged to have taken place as part of the event which is the subject matter of alleged incident against the accused. Sexual behaviour has also been defined to include the complainant boasting, making statements, talking or bragging about sexual behaviour. Also, in R v Mukadi, sexual behaviour was held to be very easily identifiable and a matter of “impression and common sense”.

The sexual behaviour will only be admissible if it is relevant to an issue in the trial. Under section 42(1)(a), a relevant issue will be any issue to be proved by the prosecution or defence in the trial. However, the sexual behaviour will be restricted and deemed to be not relevant to an issue under the exceptions if the main purpose is to impugn “the credibility of the complainant as a witness”. Therefore, if evidence is admissible under one of the exceptions but it appears to the court that the main purpose of the defence's questioning is to impugn the credibility of the complainant, then the evidence will not be admissible. In R v Martin the defendant was seeking to adduce evidence of prior sexual conduct with the complainant. The court held that while one purpose may have been to impugn the credibility of the complainant, it was not the main

38 ibid, s 41(2)(a).
39 ibid, s 41(2)(b).
40 ibid, s 41(2)(b).
41 ibid, s 41(2)(a).
44 ibid (n 43).
45 Youth Justice and Criminal Evidence Act s 41(3).
46 ibid, s 42(1)(a).
47 ibid, s 41(3) – s 41(5).
48 ibid, s 41(4).
49 ibid, s 41(3) – s 41(5).
50 ibid, s 41(4).
purpose. Instead, the evidence was being adduced to support the defendant’s evidence.\footnote{ibid (n 51)} Furthermore, in order for the sexual history evidence to be admissible under one of the four exceptions,\footnote{Youth Justice and Criminal Evidence Act s 41(3) – s 41(5).} the evidence or cross-examination must relate to a specific instance of alleged sexual behaviour on the part of the complainant.\footnote{ibid, s 41(6).}

Although section 41 of the Act aims to limit sexual history evidence against the complainant, one area it does not cover is that of false allegations or lies made by the complainant. This is because in such case the evidence or cross-examination does not relate to past sexual behaviour but to past lies.\footnote{R v T [2004] 2 Cr App R 551.} If the accused states that the allegations the complainant made against them are false, then the defence will be able to adduce evidence and cross-examine the complainant regarding the complainant’s sexual behaviour under section 41 of the Act. However, before the defence can do so the judge must be satisfied that the defence has evidence that the allegation was made by the complainant and that it is false.\footnote{R v E [2004] EWCA Crim 1313.} Also in \textit{R v MH} it was held that the defence must have a proper evidential basis for asserting that the previous statement made by the complainant was untrue.\footnote{R v MH (2002) Crim L.R. 73.} In \textit{R v Murray} the court explained that proper evidential basis is a strong factual foundation for concluding that the previous statement was false.\footnote{R v Murray [2009] EWCA Crim 618.}

\subsection*{3.1 The Four Exceptions}

The first exception under section 41(3)(a) of the Act will apply when the evidence or question relates to a relevant issue in that case “that is not an issue of consent”.\footnote{Youth Justice and Criminal Evidence Act s 41(3)(a).} Therefore this exception concerns non-consent issues.\footnote{ibid, s 41(3)(a).} Furthermore, under section 41(1)(b) an issue is one of consent if it concerns whether or not the complainant consented to the conduct with which the defendant was charged.\footnote{ibid, s 42(1)(b).} This definition does “not include any issue as to the belief of the accused that the complainant consented”.\footnote{ibid, s 41(1)(b)} Therefore, if the accused mistakenly believed that the complainant
consented, then the test is whether the evidence or cross-examination relates to a relevant issue in the case. However, the test of relevance will be strictly applied. In *R v Barton*, where the defence argued that the defendant mistakenly believed the complainant was consenting, the Court of Appeal drew a distinction between the belief that a woman *would* consent if asked and the belief that a woman *is* consenting to a particular act of sexual intercourse. Another issue that will be considered as a non-consent issue is where the evidence is relevant to support the defendant’s credibility. In *R v F* photographic evidence of a sexual nature showing the couple happy was admissible under section 41(3)(a) of the Act. This is because the evidence was relevant to the defence of false allegations since the evidence was inconsistent with the complainant’s allegations. Other issues that are non-consent issues under section 41(3)(a) include identification and denial of the act having taken place at all.

The second exception under section 41(3)(b) of the Act applies to a relevant issue in the case where “consent and sexual behavior of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time”. This exception restricts sexual history evidence because an accused cannot adduce evidence if the complainant’s sexual behaviour does not amount to sexual behaviour “at or about the same time”. The phrase “at or about the same time” has been suggested not to include the complainant’s sexual behaviour which has occurred forty-eight hours prior to the alleged sexual offence. In *R v A* it was held that a gap of three weeks was too long to admit the sexual offence as having occurred “at or about the same time” under section 41(3)(b) of the Act. The court also held that it was irrelevant that the complainant had consensual sex with a third party a few hours before the alleged incident with the defendant. This is because relevance is considered strictly. Also, in *R v Mukadi*, the defendant and the complainant started conversing in a supermarket, went for a picnic in the park and then

---

63 *R v A (No. 2) (n 30).*
64 *R v Barton (1987) 85 Cr App 5.*
65 *Barton (n 64).*
68 Youth Justice and Criminal Evidence Act s 41(3)(b).
69 *ibid*, s 41(3)(b).
70 *ibid*, Home Office Explanatory Note s 148.
71 *R v A (No. 2) (n 30).*
72 *R v A (No. 2) (n 30).*
73 *Barton (n 64).*
later to the defendant’s house where consensual kissing occurred.\textsuperscript{74} The defendant claimed the subsequent sexual intercourse was consensual but the complainant alleged she was raped. At trial, the judge did not allow the defence to allege to the jury that shortly before going to the supermarket, she had been on the pavement when a large and expensive looking car pulled up beside her. The driver was alleged to be a great deal older than the complainant and it was alleged that the complainant and the individual in the vehicle exchanged phone numbers. The Court of Appeal held that a complainant getting into the car of another man several hours before the event was wrongly excluded because it may have portrayed the complainant’s state of mind. Therefore, section 41(3)(b) of the Act restricts the complainant’s sexual history evidence because the accused will not be able to adduce the sexual history evidence if it had not occurred within forty-eight hours before the alleged offence.

The third exception under section 41(3)(c) of the Act concerns an issue relevant to consent where past sexual behaviour of the complainant is so similar to the alleged incident\textsuperscript{75} or to any other sexual behaviour “at or about the same time”\textsuperscript{76} of the alleged offence\textsuperscript{77} that it cannot be classified as a coincidence.\textsuperscript{78} This requires that the evidence of past sexual acts that took place with the complainant’s consent are so similar to the sexual behaviour during, at or about the time in question that the complainant’s behaviour cannot be explained as amounting to anything other than the complainant having consented to the alleged incident.\textsuperscript{79} However, this test is hard to satisfy as the parliament intended it to be a narrow exception.\textsuperscript{80} In \textit{R v T} the defendant was accused of raping the complainant in a climbing frame.\textsuperscript{81} The defendant wanted to question the complainant about an incident which took place three weeks earlier, during which the defendant and the complainant had consensual sex in the same climbing frame and in the same position. The Court of Appeal held that the defendant should have been allowed to adduce evidence and cross-examine the complainant. In contrast, in \textit{R v Harris} the defendant was not able to cross-

\textsuperscript{74} \textit{R v Mukadi} [2003] EWCA Crim 3765; [2004] Crim. L.R. 373.
\textsuperscript{75} Youth Justice and Criminal Evidence Act s 41(3)(c)(i).
\textsuperscript{76} \textit{ibid.}, 41(3)(c)(2).
\textsuperscript{77} \textit{ibid.}, s 41(3)(c)(i)(ii).
\textsuperscript{78} \textit{ibid.}, s 41(3)(c)(i).
\textsuperscript{79} L. Kelly, J. Temkin, S. Griffiths (n 29) Page 17, Paragraph 2.
\textsuperscript{80} \textit{ibid.}, Page 17, Paragraph 2.
\textsuperscript{81} \textit{R v T} [2004] 2 Cr App R 551; 1 WLR 632.
examine the complainant on the fact that several years earlier the complainant had admitted to picking up strangers and having sexual intercourse with them.\(^8^2\)

Furthermore, in \(R v A\) (No. 2) the defendant alleged a consensual sex relationship with the complainant and put forth the defence of mistaken belief in consent.\(^8^3\) This evidence was not admissible as being so similar to the alleged incident\(^8^4\) or having occurred “at or about the same time”.\(^8^5\) It was also held that the test of admissibility in these cases was whether the evidence and cross-examination was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 of the European Convention on Human Rights (hereafter referred to as “ECHR”).\(^8^6\) If this test is satisfied then the evidence should not be excluded.\(^8^7\)

The last exception, under section 41(5) of the Act, concerns explaining or contradicting the prosecution’s evidence of the complainant’s sexual behaviour\(^8^8\) and, in the opinion of the court, it would be going no further than necessary to enable the evidence adduced by the prosecution\(^8^9\) to be “rebutted” or explained\(^9^0\) by the accused. As such, this exception will apply if the prosecution adduces sexual history evidence about the complainant’s sexual behaviour and the defence seeks to rebut it.\(^9^1\) In \(R v Tilambala\) the defence tried to cross-examine a witness about a conversation that occurred with the complainant in regards to whether the complainant should go back to a man’s house at the end of the evening (where the complainant did not take up the invitation to do so).\(^9^2\) This evidence was precluded from section 41 of the Act because it was held not to be relevant. Similarly, in \(R v Hamadi\), the court was of the opinion that “adduced by prosecution”\(^9^3\) would not include evidence deliberately elicited from the complainant.\(^9^4\) This has restricted the use of sexual history evidence because the accused will only be able to adduce evidence or cross-examine the complainant if, in the opinion of the judge, the cross-examination or evidence would go no further than necessary to rebut or explain the prosecution’s evidence by

---

\(^8^2\) R v Harris [2009] EWCA Crim 434.
\(^8^3\) R v A (No. 2) (n 30).
\(^8^4\) Youth Justice and Criminal Evidence Act s 41(3)(c)(i).
\(^8^5\) ibid, s 41(3)(c)(ii).
\(^8^6\) R v A (No. 2) (n 30).
\(^8^7\) R v T [2002] 1 WLR 632.
\(^8^8\) Youth Justice and Criminal Evidence Act s 41(5)(b).
\(^8^9\) ibid, s 41(5)(b).
\(^9^0\) ibid, s 41(5)(b).
\(^9^1\) ibid, s 41(5).
\(^9^2\) R v Tilambala [2005] EWCA Crim. 2444.
\(^9^3\) Youth Justice and Criminal Evidence Act, s 41(5)(a).
Furthermore, in *R v Rooney* it was pointed out that section 41(5) of the Act was not subject to section 41(4) of the Act. Therefore, if the defence seeks to rebut sexual history evidence in order to impugn the credibility of the complainant, then this may be allowed.

### 4. Problems Associated with Section 41

Despite achieving its aim of restricting sexual history evidence to limited circumstances, section 41 of the Act has created many problems. It achieves limiting sexual history evidence because the accused can only adduce evidence or cross-examine the complainant regarding sexual behaviour if the sexual history evidence is admissible under one of the four exceptions. However, the exceptions have been described as “narrowly defined” and “draconian”. In other words, this causes problems because there is no overriding discretion to admit evidence the exceptions exclude. The exceptions pose these problems because there is no definite way of foreseeing every event where sexual history evidence may be relevant. As the exceptions are very narrowly defined, if the sexual behaviour cannot fit into any of the four exceptions then the court would have three options. Firstly, it could stretch the exceptions, with or without the assistance of the interpretive obligation under section 3 of the Human Rights Act 1998. Secondly, it could declare section 41 incompatible with the right to a fair trial under Article 6 ECHR and, lastly, it could uphold a conviction obtained in a trial at which significant evidence in the hands of the parties was concealed from the jury.

Section 41 of the Act also restricts sexual history evidence to limited circumstances because it does not differentiate between the complainant’s sexual history with the defendant and with third parties. In contrast, section 2(1) of Sexual Offences (Amendment) Act 1976 only prevented the accused from questioning the complainant about sexual experiences with third parties.

---

95 Youth Justice and Criminal Evidence Act, s 41(5)(b).
96 *R v Rooney* [2001] EWCA Crim 2844.
97 L Kelly, J Temkin, S Griffiths (n 29) Page 17, Paragraph 3.
100 *ibid*, Page 4, Paragraph 4.
102 Youth Justice and Criminal Evidence Act s 41(3) – s 41(5).
104 *ibid*, 446.
105 *ibid*, 446.
106 *ibid*, 446.
Whereas section 41 of the Act prevents the accused from questioning the complainant regarding past sexual behaviour with regards to both the accused and third parties. Although this section achieves its aim of restricting sexual history evidence, it is problematic because a person who has had sexual intercourse with another individual in recent weeks or months before the alleged sexual offence may have been more likely to consent to intercourse with that individual rather than with a complete stranger. It is further problematic because the jury will not be able to understand and assess a case on an alleged sexual offence without knowing the full extent of the pre-existing relationships of the parties. Furthermore, in R v Viola it was stated that sexual history evidence which was excluded after being heard by the jury may have caused the jury to “change their mind about the evidence given by the complainant”.

Section 41 restricts sexual history evidence because in certain situations it conflicts with the accused’s right under Article 6 ECHR (right to a fair trial). In R v A (No.2) the court considered whether section 41 of the Act goes too far in preventing sexual history evidence being adduced by the accused on a consensual sex issue if the evidence cannot be adduced through any of the four exceptions. It was held that section 41 of the Act goes too far in restricting sexual history evidence and it was read down under section 3 of the Human Rights Act 1998. The court also exercised its duty under section 3(1) of the Human Rights Act 1998 and read into section 41(3)(c) of the Act the similarity exception. Lord Slynn stated that the restrictions imposed by section 41 of the Act were prima facie capable of preventing the accused from putting forward relevant evidence, which may be critical to the accused’s defence. Since section 41 severely restricts the amount of sexual history evidence that can be admitted, which causes unfairness to the defendant, a better approach may be to introduce a new exception to the rule of exclusion that would allow evidence of previous or subsequent sexual behaviour with the accused to be admitted under the section.

Moreover, in achieving its aim, section 41 of the Act has created confusion amongst legal practitioners. Interviews with judges and barristers displayed a degree of ignorance about both

109 Andrew L-T Choo, (n 108) 387, Paragraph 4.
110 R v Viola [1982] 1 WLR 1143 CA.
111 R v A (No. 2) (n 30).
112 R v A (No. 2) (n 30). - Lord Steyn, Paragraph 27.
113 L Kelly, J Temkin, S Griffiths (n 29).
law and procedure.\textsuperscript{114} Similarly, many non-legal professionals felt it was impossible to give accurate advice to complainants on this issue with some providing inaccurate information.\textsuperscript{115}

5. Conclusion

Although section 41 of the Act has achieved its aim in restricting the complainant’s sexual history evidence to limited circumstances where it is really relevant to an issue in the trial, it has not comprehensively addressed the shortcomings in the law. As a result, section 41 is more likely to “consume court time, spawn inconsistent decisions and confuse lawyers as to exactly what myths it is supposed to eradicate”.\textsuperscript{116} In order to ease some of the problems associated with section 41 the Act, the Act should require judges to weigh the prejudicial impact of evidence of sexual behaviour against its probative value\textsuperscript{117} and should provide further guidelines, such as those in the Canadian legislation\textsuperscript{118} provided for the provincial court judges to consider in determining if the evidence is admissible.\textsuperscript{119}

---

\textsuperscript{115} L. Kelly, J Temkin, S Griffiths (n 29).
\textsuperscript{116} Diane Birch (n 109), Page 17, Paragraph 2.
\textsuperscript{118} \textit{Criminal Code of Canada}, RSC 1985, c C-46, s 276(1).
\textsuperscript{119} \textit{ibid}, s 276(3).