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CHAMBERS

CONSENT & THE IMPACT OF INTOXICATION IN SEX CASES

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Exploring the impact of intoxication on the issue of consent as it relates to sexual offences under Sexual Offence Act 2003, including a discussion on recent case law.

Rape - Definition

- Conduct (and Circumstance) Element
- *Archbold*: 20-39, 20-41 / *Blackstone's*: B3-28 to B3.30
- The defendant penetrated 'the vagina, anus or mouth' of the complainant 'with his penis': SOA 2003, s 1(1)(a).
- 'Penetration is a continuing act from entry to withdrawal': s 79(2).
- 'References to a part of the body include references to a part surgically constructed (in particular, through gender reassignment surgery)': s 79(3).
- "'Vagina" includes vulva': s 79(9).
- The complainant did not 'consent to the penetration': s 1(1)(b).



Rape continued

- Mental Element
- *Archbold*: 20-40, 20-42 / *Blackstone's*: B3.36 to B3.39
- **The defendant penetrated the complainant 'intentionally': s 1(1)(a).**
- **The defendant did not 'reasonably believe' that the complainant consented: s 1(1)(c).**
- Reasonableness of belief depends on 'all the circumstances', including any steps that the defendant took to ascertain consent: s 1(2).



Assault by Penetration - Definition

- Conduct (and Circumstance) Element
- *Archbold*: 20-51, 20-53, 20-55, 20-56 / *Blackstone's*: B3.57 to B3.60
- **The defendant penetrated 'the vagina or anus' of the complainant 'with a part of his body or anything else': s 2(1)(a).**
- **The penetration was sexual: s 2(1)(b).**
- 'Sexual'? That is 'if a reasonable person would consider':
 - (i) 'whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual': s 78(a); or
 - (ii) 'because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual': s 78(b).



Assault by Penetration continued

- The court should direct the jury to answer two questions: (i) whether the jury considers that the touching 'could be sexual'; and (ii) whether the jury considers, given 'the circumstances and/or the purpose of any person in relation to the touching (or both), the touching was in fact sexual': *R v H [2005] EWCA Crim 732, paragraph 13*.
- **The complainant did not 'consent to the penetration': s 2(1)(c).**



Assault by Penetration continued ...

- Mental Element
- *Archbold*: 20-52, 20-57 / *Blackstone's*: B3.61
- **The defendant penetrated the complainant 'intentionally': s 2(1)(a).**
- **The defendant did not 'reasonably believe' that the complainant consented: s 2(1)(d).**
- Reasonableness of belief depends on 'all the circumstances', including any steps that the defendant took to ascertain consent: s 2(2).



Sexual Assault - Definition

- Conduct (and Circumstance) Element
- *Archbold*: 20-54 to 20-56 / *Blackstone's*: B3.68
- **The defendant touched the complainant: s 3(1)(a).**
- Touching includes touching (i) 'with any part of the body', (ii) 'with anything else' and (iii) 'through anything': s 79(8).
- **The touching was 'sexual': s 3(1)(b).**
- Again, see s 78 and *R v H* (above).
- The complainant did not 'consent to the touching': s 3(1)(c).



Sexual Assault continued ...

- Mental Element
- *Archbold: 20-52, 20-57 / Blackstone's: B3.69*
- **The defendant touched the complainant 'intentionally': s 3(1)(a).**
- **The defendant did not 'reasonably believe' that the complainant consented: s 3(1)(d).**
- Reasonableness of belief depends on 'all the circumstances', including any steps that the defendant took to ascertain consent: s 3(2).



CONSENT – SECTION 74 SEXUAL OFFENCE ACT 2003

- **General Position**

- A person consents ‘if he agrees by choice, and has the freedom and capacity to make that choice’: Section 74.
- Issues about consent ‘should normally be left to the jury’. It is ‘only in clear cases that a judge should conclude that there is no evidence on which the jury could properly convict’ and, therefore, accept a defence submission of ‘no case to answer’: *R v Ali* [2015] EWCA Crim 1279, paragraph 60.



INTOXICATION & CONSENT

VOLUNTARY INTOXICATION

- **General Position**
- Applying the definition of consent as outlined in Section 74 SOA 2003
- It does not, in itself, preclude consent. However, capacity to consent ‘may evaporate well before a complainant becomes unconscious’; a court must determine the issue in the particular case before it: *R v Bree* [2007] EWCA Crim 804, paragraph 34.



INVOLUNTARY INTOXICATION: PRESUMPTIONS: SECTION 75 SOA 2003

- **Evidential presumptions about consent**
- (1) If in proceedings for an offence to which this section applies it is proved—
- (a) that the defendant did the relevant act,
- (b) that any of the circumstances specified in subsection (2) existed, and
- (c) that the defendant knew that those circumstances existed,
- the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.



Presumptions: Section 75 SOA 2003 continued...

- One of the circumstances to be proved under ss (2) in order for the evidential presumptions to arise is under s 75(2)(f) which provides that 'any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act'.
- In practice, these presumptions rarely arise. They do not reverse the ordinary burden of proof: *R v Ciccarelli* [2011] EWCA Crim 2665.



CAPACITY:

- 'Capacity'
- *Blackstone's*: B3.31, B3.33, B3.34
- The SOA 2003 does not define the concept of 'capacity'. When summing up, the judge in a case should give the jury some assistance as to the meaning of 'capacity' in circumstances where voluntary intoxication has significantly affected a complainant.



- The judge may need to address the following points:
- Even if consumption of alcohol or (other) drugs has caused a complainant to consent to an activity that they would ordinarily refuse, that is consent, in spite of any subsequent regret. That said, there is no duty to use the phrase, ‘a drunken consent is still a consent’, so long as the judge addresses the important points. (See, in particular, *Blackstone’s*, B3.33 to B3.34, for more on this issue.)
- Still intoxication can affect a complainant to the point that they no longer have the capacity to consent.
- That lack of capacity may arise even before a loss of consciousness.
- But capacity should not be left to the jury when it is not ‘a live issue’ in a case: *Blackstone’s*, B3.34.



- Crown Court Compendium
- Part I, December 2020: 20-24
- ‘Directions
- 12. Depending on the evidence, the prosecution may put its case in the alternative: (a) that W lacked the capacity to give consent and (b) that W did not consent, in which event the jury should be given directions about each. The jury should not be directed about lack of capacity if this has not been a live issue in the case.
- 13. If the jury are sure that W was unconscious, W could not have consented because W would not have had the freedom or capacity to do so.
- 14. If the jury are sure that, although W was not unconscious, W was so intoxicated by reason of drink or drugs that W was unable to make a free choice, W was not consenting.
- 15. If the jury consider that W had, or may have had, the capacity to make a choice they must go on to consider whether W did in fact consent bearing in mind:
 - (1)that alcohol (and some drugs) can make a person less inhibited than he/she might be when sober;
 - (2)consent given when a person is under the influence of drink and/or drugs is still consent even if it would not have been given when sober.’



Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (2000, volume 1) [<https://lawbore.net/articles/setting-the-boundaries.pdf>]

- The report endorses the Law Commission's recommendation as to the meaning of 'capacity' for the purposes of any non-consensual sexual offence:
- '(1) a person should be regarded as lacking capacity to consent if at the material time: (a) the person is by reason of mental disability unable to make a decision for themselves on the matter in question: or (b) the person is unable to communicate their decision on that matter because they are unconscious or for any other reason; (2) a person should be regarded as being unable to make a decision on whether to consent to an act if: (a) he or she is unable to understand (i) the nature and reasonably foreseeable consequences of the act; and (ii) the implications of the act and its reasonably foreseeable consequences; or (b) being able so to understand, he or she is nonetheless unable to make a decision; and (3) "mental disability" should mean a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.' [P 71, para 4.5.8.]



SECTION 41 YOUTH JUSTICE & CRIMINAL EVIDENCE ACT (YJCEA) 1999:

Evidence of, or cross-examination as to, the complainant's previous sexual behaviour is 'severely restricted'. However, under s 41(3)(c), it is not restricted to 'unusual or bizarre behaviour'. The question is whether or not the behaviour is 'sufficiently similar that it could not be explained reasonably as a coincidence'.

Section 41 applies to trials in the Crown Court and magistrates' courts, committals, applications to dismiss following a notice of transfer, Newton hearings and the hearing of appeals. (Section 42(3))



S41 Youth Justice and Criminal Evidence Act 1999

41.— Restriction on evidence or questions about complainant's sexual history.

(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—(a) no evidence may be adduced, and

(b) no question may be asked in cross-examination,

by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—(a) that subsection (3) or (5) applies, and

(b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—

(a) that issue is not an issue of consent; or

(b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or

(c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or (ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.



S41 Youth Justice and Criminal Evidence Act 1999

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question—(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) **the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour** on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

(7) Where this section applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is or are charged with a sexual offence—(a) it shall cease to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but

(b) it shall not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.

(8) Nothing in this section authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section.



'Sexual offence' includes:

- any offence under Part 1 SOA 2003
- offences as outlined in Section 62 YJCEA 1999 or any relevant superseded offence.
- Cases alleged to have taken place before the enactment of the Sexual Offences Act 2003



Meaning of sexual offence

Section 62 YJCEA 1999 — Meaning of “sexual offence” and other references to offences:

(1) In this Part “*sexual offence*” means any offence under—

(a) Part 1 of the Sexual Offences Act 2003 or any relevant superseded offence; or

(b) Section 2 of the Modern Slavery Act 2015 (human trafficking) committed with a view to exploitation that consists of or includes behaviour within section 3(3) of that Act (sexual exploitation).



Meaning of '*Issue of Consent*':

- The term "*issue of consent*" means any issue as to whether the complainant in fact consented to the conduct constituting the offence with which the accused is charged.
- It does not include any issue as to the belief of the accused that the complainant so consented.





RELEVANT CASE LAW

R v G [2016] EWCA Crim 1633

- **Appeal dismissed; conviction upheld.**
- **Held: On the facts, there was ‘no sufficient chronological nexus’ between the alleged rape and the alleged consensual activity to make the behaviour probative. S 41(3)(c) retained a ‘high threshold’.**
- **S 41(3)(c) does not require ‘striking similarity’, but there must be ‘relevant similarity’ to demonstrate necessity to avoid unfairness to defendants.**
- At trial, the prosecution alleged that the defendant had vaginally raped the girlfriend of his brother. The jury found him guilty of rape.
- On appeal, the main issue was whether or not the appellant’s evidence of a history of consensual sexual behaviour between the complainant and himself was sufficiently similar for the purposes of s 41(3)(c) (§9).
- The threshold is not ‘striking similarity’; it is ‘relevant similarity’ (§10).
- The gaps in time was deemed not to establish a ‘chronological nexus’ that satisfied s41(3)(c) (§12).



R v Aidarus (Fesal) [2018] EWCA Crim 2073

- **Appeal dismissed; conviction upheld.**
- **Held: The trial judge was entitled to refuse leave to admit proposed evidence of the complainant's behaviour in relation to oral penetration with other people. Such evidence was not so relevant that its exclusion would create unfairness.**
- **The judge was entitled to rule that the sexual behaviour was not sufficiently similar to satisfy s 41(3)(c)(ii).**
- On appeal, the appellant sought to rely on s 41(3)(c)(ii) in order to admit proposed evidence of previous incidents of oral penetration with other people.
- In relation to the first incident of sexual behaviour, it was held that the judge was entitled to reach the conclusion that 'the similarity is not so great that it could not reasonably be explained as a coincidence' (§21).
- In relation to the second incident of sexual behaviour, which post-dated the offence at trial by around two years, it was held that the judge was 'unquestionably entitled' to reject the application. That application, in particular, 'seems to have tested to the very limit the very rationale for enacting section 41 in the first place'. That could also be said of the first application (§22).



R v Moody (Macaulay) [2019] EWCA Crim 1222

- **Appeal dismissed; conviction upheld.**
- **Held: The trial judge was entitled to refuse the application under s 41(3)(a) and (2), since it encouraged ‘no more than speculation’ about previous sexual behaviour.**
- At trial, the prosecution alleged that the defendant had committed the offence of assault by penetration, having digitally penetrated the vagina of the complainant while she was asleep. There was a broader issue of ‘pregnancy fear’.
- At trial, the defence sought to rely on previous incidents involving two false complaints. However, the trial judge considered that the first incident significantly predated the allegation to which the trial was concerned, and the second incident was not followed by any actual allegation.
- On the first ground of appeal, the appellant submitted that the trial judge had wrongly refused the application under s 41 to permit questioning of the complainant about ‘the pregnancy dialogue’.
- The COA reasoned that this was precisely the subject-matter that s 41 was ‘designed to exclude’, as it was ‘no more than speculation’ (§23).



Section 41 as it relates to Intoxication:

Archbold 20-16

- *R v Evans (Chedwyn)* [2016] EWCA Crim 452
- **Appeal allowed; re-trial ordered.**
- **Held: Due to the accounts of two other people (with similar detail about the complainant's intoxication, sexual position and words during penetration), it was arguable that the case came within s41(3)(c)(i).**
- **However, the COA was cautious, emphasising that this was 'a rare case'.**



- The prosecution alleged that the complainant had been incapable of consent. The defendant was convicted at trial in April 2012 and served a sentence of five years' imprisonment.
- The complainant had no memory of the incident. She had never specifically alleged that she was raped or that she was incapable of consent.
- On the day of the conviction of the defendant (and the acquittal of his co-defendant, Clayton McDonald), another man contacted the police, referring to sexual activity with the same complainant when they were both heavily intoxicated. There were very similar details about the sexual activity, including the position and the words used during penetration (§18-19, 24). At the initial appeal, this statement was not used, as it was considered inadmissible and irrelevant.
- Another man detailed his sexual activity with the same complainant, who, on several occasions, would engage in such activity when intoxicated. On one occasion, the position and the words used were very similar (§35). The initial trial had not called him as a witness (§34).
- Counsel for the appellant relied upon s 41. Focusing on s 41(3)(c)(i), as to similarity of the complainant's sexual behaviour and the 'cumulative effect' of the similarities (§58).



- The COA in focusing on the ‘ultimate question’ of the admissibility of the evidence at the initial trial reasoned that the defendant had only been able to rely on his own account.
- On the prosecution case, the complainant would not have been capable of participating in the way that the defendant and subsequently others had described (§71-72).
- In granting the appeal, the COA commented that the case ‘may well be a rare case’ and flagged its own ‘considerable degree of hesitation’ and noted the importance of avoiding intrusive and unnecessary questioning about a complainants’ sexual history (§74).

- *R v Evans (Chedwyn)* (October 2016) Cardiff CC
- **Not guilty. [According to news reports, the jury took around two hours to acquit.]**
- As in the original trial, the prosecution case was that the complainant was too intoxicated to have consented.



THE BACKLASH:

The Ched Evans trial showed how rape complainants are still put in the dock:

“Woman was subjected to a grilling about her morality and sexual behaviour that was a throwback to the 1980s” – The Guardian 2016

How Ched Evans used girl's sexual past to overturn his rape conviction:

“FORMER Sheffield United footballer Ched Evans successfully overturned his conviction for raping a teenage girl after uncovering new evidence of her previous sexual history.” – The Yorkshire Post 2016

Harriet Harman: *“Discussing a complainant’s sexual past in a rape trial was “based on the old notion that there were two sorts of women – those who were ‘easy’ and those who were virtuous – and if you were easy, you would have sex with anybody, because you were that sort of woman,” .- The Stylist 2017*

R v Evans [2016] continued ...

- The decision of *R v Evans* [2016] EWCA Crim 452, below, ‘does not represent a lowering of the threshold nor a change in practice’, citing *Aidarus* [2018] EWCA Crim 2073.

Archbold 20-16



R v Gabbai (Edward) [2019] EWCA Crim 2287

- Appeals allowed [though not on the basis of s 41]; convictions quashed.
- Both s 41(3)(a) and (3)(c) applied. However, the sexual behaviour neither occurred as ‘part of the event’, as s 41(3)(c)(i) requires, nor ‘at or about the same time’, as s 41(3)(c)(ii) requires.
- [In this case, intoxication was only one of many issues, but it did form part of the circumstances of many of the complainant’s previous complaints.]
- Following trial, the defendant was convicted of two counts of rape, one vaginal and one anal. The defendant was acquitted of three counts relating to vaginal, anal and oral rape.
- On appeal, counsel for the appellant submitted, in part, that the trial judge had erred in refusing to allow evidence that one complainant had made six previous (and, at times, inconsistent) complaints of rape or sexual assault against six unconnected people.
- There are references to intoxication of the complainant in the alleged previous sexual behaviour (e.g. §40).



- Counsel had initially applied to ask questions of the complainant, including one about the effect of alcohol on her ability to recall detail. The trial judge refused that application (§ 51 - 53).
- The COA reasoned that, though consent could be hard to distinguish from reasonable belief, it was distinguishable here and s 41(3)(a) ‘certainly applied’ (§61).
- So far as the evidence did bear on consent, it was of ‘behaviour highly similar to the evidence to be adduced by the appellant’ under s 41(3)(c) (§ 63). But it failed to meet the requisite standard for s41(3)(c)(i) or (ii).
- While s 41 was not made out in full, there was evidence that should have been admitted under the CJA 2003, s 100 – Bad Character of a Non-Defendant (§64).



Conclusion:

- When considering consent and voluntary intoxication consider the following:
 - (i) Section 74 SOA 2003 – to be applied to the facts of the case.
 - (ii) Section 41 YJCEA 1999
 - (iii) Section 100 CJA 2003

[NB] Section 28 will now apply to complainants so applications under s41 and s100 will need to be considered at an early stage.





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