R v Evans: An Uneasy Precedent?

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INTRODUCTION

In this piece, I discuss the recent case of *R v Evans*, in which the Court of Appeal allowed the defence to adduce evidence regarding the complainants' sexual history with third parties in the context of a rape trial. I will assess the academic debate surrounding the controversy the case brought through the expansion of s 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999 to allow such evidence to be adduced. As such expansion has been criticised on the basis that it has created a tension between the complainant's right to privacy and the defendant's right to a fair trial, I will outline the criticism of *Evans* by various academics, addressing whether these criticisms are sound, and put forward my ideas regarding how the problems of *Evans* can be resolved (i.e. through a cultural change, as opposed to legislative change).

In recent years, there have been several high-profile cases involving victims of sexual offences speaking out. It appears therefore timely to review the current law of evidence in this specific context. In particular, the current law concerning sexual history evidence (SHE) has been criticised on the basis that the ruling in *R v Evans*[1] extends the law too far such that it imbalances the trial by working to the detriment of the complainant, particularly her right to privacy. Indeed, there has been a sense that *Evans* has led to a regression in the law. The Youth Justice and Criminal Evidence Act 1999 was implemented to protect complainants and

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[1] [2016] EWCA Crim 452.

prevent against the so-called 'double myth', however, with *Evans* as precedent, their protections have been put at risk and the 'double myth' has returned.

Firstly, this article will outline the law on SHE and give a brief overview of the *Evans* case. Then, it will assess whether the law needs reform, drawing on academic debate. Finally, this article will discuss current proposals for reform and put forth its own reform idea. This article strongly argues that the current SHE regime works to the detriment of the complainant in some instances, however, this is due to a misapplication of the law rather than a problem with the law itself. To reform the law and make it more restrictive would work to the detriment of the defendant and his right to a fair trial. Thus, instead of reforming the law, a cultural change is needed regarding the public perception of sexual offences and gender roles. This cultural change would alleviate issues such as deterring victims and victim-blaming. More importantly, this reform option would not compromise either the right of the defendant or the complainant.

I. UNDERSTANDING THE CURRENT LAW

The admissibility of SHE is governed by the Youth Justice and Criminal Evidence Act 1999. According to s 41, there is a general ban on the admission of SHE so that the defence is not allowed to ask questions in cross-examination or adduce evidence of the complainant's sexual behaviour. Sexual behaviour is defined under s 42(1)(c) as meaning previous sexual encounters with the defendant or any other person. In some instances, however, the court may grant leave to the defence to adduce SHE contained in s 41(3)(a), (b) and (c). Per s 41(3)(a), a court may grant leave if SHE is relevant to an issue other than the issue of consent. Other issues include: whether the defendant had a reasonable belief in consent,[2] whether the offence was fabricated, or whether there is a false identity issue. Meanwhile, s 41(3)(b) allows the defence to adduce evidence where there is evidence of sexual behaviour "at or about the same time" as the offence. In the case of *R v A*, "at or about the same time" was defined in *dicta* as being constrained to twenty-four hours.[3] Finally, s 41(3)(c) provides that evidence of sexual behaviour may be adduced where it is "so similar" to any sexual behaviour the complainant engaged in with the defendant or which took place at the same

[2] *Y* (2001) The Times, 13th February.
[3] (No 2) [2001] UKHL 25.

place/time. This was seen in *R v T*[4] where it was held that the fact that the complainant had engaged in sexual behaviour previously with the defendant at the same place made it more likely she consented.

However, these exceptions found within s 41(3) are subject to further restrictions. First, the evidence must relate to "specific instances" of sexual behaviour;[5] second, a refusal of leave might have the result of rendering an unsafe verdict;[6] finally, the purpose must not be to impugn the credibility of the complainant.[7]

Case law has further expanded the instances where SHE may be adduced by the defence and this has been evidenced by both *R v A* and *Evans*. In *R v A*, the House of Lords allowed defence counsel to adduce evidence of SHE between the complainant and defendant to provide the jury with context to make a fully informed decision. Indeed, there were concerns that the current regime prevented the jury from knowing the context and potentially prevented the defendant from putting a defence forward. Thus, the court found that the legislation was too restrictive in this respect. The court went as far as to say that preventing the jury from knowing the context could amount to a violation of the defendant's right to a fair trial per Article 6 of the European Convention on Human Rights. Hence, the court introduced an implied provision based on fairness through their s 3 power of the Human Rights Act (HRA). This provision established that if it is necessary to adduce SHE for fairness then it is admissible.[8]

Meanwhile, in *Evans*, the court expanded the s 41(3)(c) provision by allowing SHE regarding conduct between the complainant and third parties to be adduced. The context was that the defendant (Evans) was initially found guilty of rape in 2012. The defendant appealed his conviction; new evidence was brought to light concerning two other men. The two men claimed they had sex with the complainant around the same time as the alleged rape and described their encounters as similar to Evans' account. Indeed, the Court of Appeal identified the following 'similar' elements: the complainant "had been drinking"; she

[4][2004] EWCA Crim 1220.
[5] 41(6) of YJCEA.
[6] 41(2)(b) of YJCEA.
[7] 41(4) of YJCEA. For further elaboration see *R v Martin* [2004] 2 Cr App R 22.
[8] (n 3) at [46].

"instigated certain sexual activity"; she "directed her sexual partner into certain positions" and "used specific words of encouragement." [9] This was enough to satisfy s 41(3)(c) and so, the defendant was acquitted. However, some commentators have been particularly critical of these developments, arguing that reform is necessary because (a) the current law tilts the balance too heavily in favour of the defendant at the expense of the complainant's right to privacy;[10] and (b) it creates a significant risk that the jury takes irrelevant evidence into account.[11]

II. CONSIDERING THE ARGUMENTS FOR REFORM

Certain commentators have viewed *Evans* and *R v A* as setting an uneasy precedent which effectively deters victims from reporting sexual offences through the fear of cross-examination of their sex life. Indeed, by establishing that sexual behaviour does not have to be "bizarre" or "unusual"[12] effectively sets a very low bar on the admission of SHE. However, others have read the ruling in a more sympathetic light. Dent and Paul, for instance, disagree with this claim and argue that it is not the law that deters victims from reporting but the media coverage of sexual offences.[13] In contrast, McGlynn uses empirical data, like surveys and police records, to highlight that the court process, including admission of SHE, does impact on complainants' decision-making.[14] McGlynn shows that the admissibility of SHE results in many complainants withdrawing their claims for fear of the potential invasion of their privacy and that their sex life may be the subject of the trial, and concludes that there is a need for reform. Indeed, by sacrificing the complainant's private life, this interpretation of the provision arguably goes against Article 8 of the European Convention on Human Rights. Hence, a "legal system that allows extensive examination might one day be contrary to Article 8."[15]

[9] [2016] EWCA Crim 452.
[10] Claire McGlynn, 'Challenging the law on sexual history evidence: a response to Dent and Paul' [2018] Crim LR 216. Vera Baird et al., *Seeing is believing: the Northumbria Court Observers Panel Report on 30 Rape trials 2015–2016*.
[11] Matt J Thomason, 'Previous sexual history evidence: A gloss on relevance and relationship evidence' [2018] 22 E & P 342.
[12] *R v A* [2001] UKHL 25 para. 135.
[13] Nick Dent and Sandra Paul, 'In Defence of Section 41' [2017] Crim LR 613, at 11.
[14] McGlynn (n 10) at 10.
[15] *DS v HM Advocate* [2007] UKPC 36 per Baroness Hale of Richmond.

Some have also argued that the ruling of *Evans* evidences a need for reform because the current law encourages victim-blaming.[16] Arguably, with *Evans* we see a shift in attention from "probative credibility" to "moral credibility".[17] Moral credibility "refers to the general ability of a witness to tell the truth."[18] Moral credibility is problematic since it can "distract jurors attention from the consideration of rape, directing them towards that of sex"[19] and thus lack of consent versus consent. This 'Madonna-whore complex' (in which chastity is moral, and so, trustworthy, whereas unchastity is immoral, and so, untrustworthy) finds that "women of ill-repute are not to be trusted in their testimony."[20] Indeed, Smart observes in a rape trial the complainant's previous sexual relations are "reconstructed into a standard form of sexual fantasy… in which she becomes the slut who turns men on and indicates her availability through every fibre of her clothing and demeanour"[21] and so, during the trial, the body "becomes literally saturated with sex."[22] In this respect, SHE "risks introducing irrelevant or prejudicial material which may distort rather than promote the fact-finding role of the trial"[23]. Instead, it makes the complainant's sex life, and behaviours more generally, the subject of the trial. Thus, jurors focus on the 'respectability' of women complainants, with evidence of previous sexual activity or any other activity that attracts moral judgement reducing their 'respectability' which, in turn, reduces the assessment of credibility. This essentially shifts legal and moral blame from the defendant to the complainant.

When considering this point in the context of *Evans*, the argument concerning moral credibility is particularly persuasive. *Evans* has been viewed by some as particularly invasive of the complainant's private life. Baird, in particular, fears that with *Evans* as a precedent, rape trials could become inquisitions into the complainant's sex life,[24] and within the adversarial trial, these inquisitions can be

[16] McGlynn (n 10) at 7.
[17] Aileen McColgan, 'Common Law and the Relevance of Sexual History Evidence' [1996] 16 OJLS 275.
[18] Thomason, (n 11) at 351.
[19] McGlynn (n 10) at 5.
[20] Thomason (n 11) at 352.
[21] Carol Smart, 'Law's power, the sexed body, Feminist discourse' [1990] Journal of Law and Society 17(2), 194, 205.
[22] Smart (n 21) at 203.
[23] McGlynn (n 10) at 6.
[24] Vera Baird et al., *Seeing is believing: the Northumbria Court Observers Panel Report on 30 Rape trials 2015–2016*.

quite terrifying seeing as the prime tactic is to discredit complainants. Complainants have, therefore, described the task of appearing in court as "worse than the rape itself."[25] *Evans*, in this respect, effectively perpetuates the 'double myth' that because a woman consented on one occasion, she is more likely to consent on another. Likewise, it perpetuates the 'double myth' in the minds of the jury that because of the complainants' previous sexual activity, she is morally questionable and so, untruthful. Thus, this type of evidence being adduced may, as Redmayne suggests, result in a prejudicial effect whereby the jury might "take a dim view of the complainant."[26] The law on the admissibility of SHE, therefore, needs to be reformed because concerns surrounding the moral credibility of the complainant could result in prejudicial effect against her, which could sway the jury in the defendant's favour. However, Dent and Paul are critical of the arguments stating that *Evans* represents a return to the 'double myth.' Instead, they highlight that s 41 is a high bar for SHE to be admitted, and that *Evans* was a very particular case with a particular set of facts, so it is more the exception than the rule.[27] Yet, this is not the case. As shown by *Evans*, the threshold is not that high.[28] Indeed, in *Evans*, evidence was admitted because in previous sexual encounters, the complainant had been drinking and had used a particular phrase/position. Such commonplace behaviour was considered unusual and this significantly lowers the bar for 'similarity'. Thus, reform is necessary to overcome issues surrounding moral credibility and prejudicial effect.

Finally, commentators such as Redmayne have argued that *Evans* is problematic in that it assigns probative value to SHE, when such evidence has little probative value.[29] Indeed, just because someone consents to someone on one occasion, that does not make it more or less likely that they will consent to that person (or another person) on another occasion. There "is no probative connection between consenting to one person and consent to a different person."[30] Criticisms that *Evans* has brought to light regarding the perpetuation of the so-called 'double myth' has led to increased calls for reform.

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[25] Jennifer Temkin, *Rape and the Legal Process* (2nd edn, OUP 2002) at 10.
[26] Mike Redmayne, 'Myths, relationships and coincidences: the new problems of sexual history' [2003] E & P 75, 82.
[27] Dent and Paul (n 13) at 7.
[28] McGlynn (n 10) at 4.
[29] Redmayne (n 26) at 6.
[30] McGlynn (n 10) at 4.

III. PROPOSALS FOR REFORM

There have been several proposals for reform. For instance, the Harman reform proposed a complete abolition on s 41 exceptions, such that complainants should never be cross-examined regarding their sex life.[31] Commentators such as McGlynn have argued in favour of the Harman reform on the basis that SHE should always be excluded since it is irrelevant.[32] They ask: what is the relevance between consenting to one person on one occasion and consenting to another person on another?

Yet this article does not favour such a drastic option. Instead, to view SHE as never relevant is equivalent to viewing the offence of rape from the perspective of the complainant only. This is problematic because the law is already too restrictive. It is, as Birch claims, "draconian" and amounts to "legislative overkill" which goes too far against the rights of the defendant.[33] Hoyano's study also revealed that many within the law profession viewed the law as already too restrictive.[34] The Canadian court considered an option similar to the Harman reform and concluded that a complete prohibition is inconsistent with the fundamental rights of the defendant to a fair trial.[35] Thus, to reform the law in this way would imbalance the law such that the complainant receives too much protection at the expense of the defendant's right to a fair trial. This can result in "miscarriages of justice"[36] because to abolish the s 41 exceptions would mean that the jury has no context upon which to base its decision. This could ultimately lead to unsafe convictions, and perhaps more worryingly, it could lead to false convictions. False convictions should be avoided at all costs since they can have

[31] Harriet Harman MP proposed an amendment to the Prison and Courts Bill. Available at: https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0145/amend/prisons_rm_pbc_0323.1-2.html accessed 20 November 2019).
[32] McGlynn (n 10) at 10.
[33] Diane Birch, 'Rethinking sexual history evidence: proposals for fairer trials' (2002) Crim LR 531, 1.
[34] Laura Hoyano, 'The Operation of YJCEA 1999 section 41 in the Courts of England & Wales: views from the barristers' row' (An independent empirical study commissioned by the Criminal Bar Association (2018)).
Also see Laura Hoyano, 'Cross-Examination of Sexual Assault Complainants on Previous Sexual Behaviour: views from the barristers' row' [2019] Crim LR 77.
[35] *R v Seaboyer* [1991] 2 SCR 577.
[36]Dent and Paul, (n 13) at 11.

"deleterious consequences" which can result in "social, psychological and economic damage."[37]

Instead, this article favours the view that there is no problem with the existing law itself. It has simply been misapplied. Indeed, commentators such as Dent and Paul have attempted to reconcile *Evans* on the basis that it is a simple application of the law. Dent and Paul claim that due to the similarity between the sexual behaviour of the complainant with the defendant and the complainant with third parties, the case is somewhat analogous to *R v T*. However, such an argument is unpersuasive because *Evans* and *R v T* are not analogous. The case of *T* concerned SHE between the complainant and the defendant, not the complainant and third parties (like in *Evans*). Stark's claims are more persuasive in that the court has "misdirected" its attention to s 41(3)(c) when it should have invoked s 41(2)(b).[38] Thus, the law itself does not need to be reformed, but rather attention should be refocused to s 41(2)(b) as opposed to s 41(3)(c). By focusing on s 41(2)(b) as opposed to s 41(3)(c) would mean the complainant would not have their private life scrutinised as harshly, and so their right to privacy would be upheld.

Rather than a change to the existing law, a better option is a cultural change in people's attitudes. This change would more easily accommodate the current law without compromising either the right of the defendant to a fair trial or the right of the complainant to privacy. Changing the law is unlikely to have a practical impact especially where those applying these rules of evidence have entrenched views on women and how they behave. When SHE is admitted, even where it is relevant, juries will place considerable weight upon it and effectively create a "smokescreen of immorality around the complainer."[39] Rape complainants are therefore judged on the basis that women should be adhering to certain moral standards. Failing these standards means there is a high price to pay in that it is unlikely that the jury will trust their testimony. Public and jury education is necessary for this improvement to take place. This would ensure that unfair

[37] Rinat Kitai, 'Protecting the Guilty' [2003] Buffalo Criminal Law Review Vol. 6, No. 2, 1169.
[38] Findlay Stark, 'Bringing the Background to the Fore in Sexual History Evidence' [2017] 8 Archbold Review 4, 7.
[39] Jennifer Temkin, 'Sexual history evidence - beware the backlash' [2003] Crim LR 217, 220.

acquittals based on stereotypes would not take place. Where there is a cultural change to people's attitude on rape, issues such as deterrence and victim-blaming will rarely arise. Whilst such an option may not seem attainable, with the growing awareness concerning sexual crimes, especially in light of #MeToo, we are arguably seeing this cultural change take place, albeit slowly. In the meantime, the law should follow Stark's recommendations that greater attention should be redirected towards s 41(2)(b) rather than the similarity gateway. However, for the law to work effectively in the long term, a change in cultural beliefs about women is necessary such that cases like *Evans* never occur again.

CONCLUSION

To conclude, *Evans* is certainly a problematic case in that it has expanded the scope of s 41(3)(c) such that SHE is much easier to adduce due to the low bar (not having to be 'unusual or 'bizarre'). Yet to reform the law in the complainant's favour would make the law too restrictive and would come at the expense of the defendant's right to a fair trial. Although there are certainly persuasive reasons pointing to the need for reform, reform to the law is not necessary. Cultural change combined with a refocusing of the court's attention to s 41(2)(b) could overcome issues such as victim-blaming and deterrence, without compromising either the defendant's right to a fair trial or the complainant's right to privacy.