

Sexual Offences

Section 41 Youth Justice and Criminal Evidence Act 1999

From the Police Station to Trial

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Suggested Reading

- Sections 41, 42 and 43 YJCEA 1999
- Criminal Procedure Rules 2005- rule 36.1
- Regina v A [2001] UKHL 25, [2002] 1 A.C

Contents

1. Section 41 – a guide.
2. At the Police Station – Interview
3. How to make an application – Skeleton argument
4. Case Study
 - a. What questions we want to ask and why.
 - b. Ruling – Did we succeed?

Chapter III Protection of complainants in proceedings for sexual offences

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.

- 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.

42 Interpretation and application of section 41

- 1) In section 41
 - a) “relevant issue in the case” means any issue falling to be proved by the prosecution or defence in the trial of the accused;
 - b) “issue of consent” means any issue whether the complainant in fact consented to the conduct constituting the offence with which the accused is charged (and accordingly does not include any issue as to the belief of the accused that the complainant so consented);
 - c) “sexual behaviour” means any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in section 41(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused; and
 - d) subject to any order made under subsection (2), “sexual offence” shall be construed in accordance with section 62.
- 2) The Secretary of State may by order make such provision as he considers appropriate for adding or removing, for the purposes of section 41, any offence to or from the offences which are sexual offences for the purposes of this Act by virtue of section 62.
- 3) Section 41 applies in relation to the following proceedings as it applies to a trial, namely
 - a) proceedings before a magistrates' court inquiring into an offence as examining justices,
 - b) the hearing of an application under paragraph 5(1) of Schedule 6 to the [1991 c. 53.] Criminal Justice Act 1991 (application to dismiss charge following notice of transfer of case to Crown Court),
 - c) the hearing of an application under paragraph 2(1) of Schedule 3 to the [1998 c. 37.] Crime and Disorder Act 1998 (application to dismiss charge by person sent for

trial under section 51 of that Act),

- d) any hearing held, between conviction and sentencing, for the purpose of determining matters relevant to the court's decision as to how the accused is to be dealt with, and
- e) the hearing of an appeal,

and references (in section 41 or this section) to a person charged with an offence accordingly include a person convicted of an offence.

43 Procedure on applications under section 41

- 1) An application for leave shall be heard in private and in the absence of the complainant.

In this section "leave" means leave under section 41.

- 2) Where such an application has been determined, the court must state in open court (but in the absence of the jury, if there is one)
 - a) its reasons for giving, or refusing, leave, and
 - b) if it gives leave, the extent to which evidence may be adduced or questions asked in pursuance of the leave,

and, if it is a magistrates' court, must cause those matters to be entered in the register of its proceedings.

3) Rules of court may make provision

- a) requiring applications for leave to specify, in relation to each item of evidence or question to which they relate, particulars of the grounds on which it is asserted that leave should be given by virtue of subsection (3) or (5) of section 41;
- b) enabling the court to request a party to the proceedings to provide the court with information which it considers would assist it in determining an application for leave;
- c) for the manner in which confidential or sensitive information is to be treated in connection with such an application, and in particular as to its being disclosed to, or withheld from, parties to the proceedings.

What does S. 41 mean?

Regina v A [2001] UKHL 25, Per Lord Slynn of Hadley

“In recent years it has become plain that women who allege that they have been raped should not in court be harassed unfairly by questions about their previous sex experiences. To allow such harassment is very unjust to the woman; it is also bad for society in that women will be afraid to complain and as a result men who ought to be prosecuted will escape.”

Applies to sexual offences, not just rape.

Section 41(1) – There can be no questions about a complainant’s sexual behaviour without the leave of the court.

Bad Character

Applications made under S41(3) should not be confused with bad character applications.

If the purpose of the application is largely or even entirely to impugn the credibility of the witness the application will not succeed.

e.g – IP says she was sexually assaulted by a male friend of her boyfriends whilst he was walking her home from a club. D is the accused. In interview D says that it happened but that the IP consented. He says that everyone knows she is loose. She has had at least 10 boyfriends and slept with them all. He admits that she is not known as a cheat.

What is the issue at trial?

Should an application be made to cross-examine her about how many boyfriends she has had sex with?

Answer =

Her having had sex with past boyfriends is irrelevant to the issue of consent with a non-boyfriend. The only purpose of trying to put this evidence in is to make her look bad and this application should not be made and would be refused.

When can a S41 application be made?

When to exclude the evidence would be unfair and may render a conclusion unsafe.

S41(2)(b)

It must be relevant to an issue in the case other than consent. S41(3)(a)

If the issue is consent and contemporaneity or consent and similarity. S41(3) (b) and (c)

Or to rebut evidence adduced by the prosecution. S41(5)

Some Examples

Regina v Abdul Tahed [2004] EWCA Crim 1220

In Tahed the IP and D had been in an on off relationship characterised by arguments and some violence. The allegation of rape and indecent assault took place on 18th July 2002 inside an open air climbing frame. It was agreed and admissible that consensual sex had taken place at the same climbing frame 3 days before. What was not admitted was that the same thing had happened 3 or 4 weeks earlier and that the same positions were adopted during sex on that occasion as during the alleged rape. Cross-examination was refused on the basis that the timing was “not sufficiently contemporaneous and therefore not relevant”. On appeal this ruling was overturned and the cross-examination allowed under S41(3)(c)(i) as being similar.

Note the words so similar and not strikingly similar!

Regina v Roderick F [2005] EWCA Crim 493

The complainant alleged that for almost her entire childhood she was raped and assaulted by her step-father. She accepted that she had a relationship with him as an adult as full partners for around 5 years. The crown contended that the adult relationship was a result of grooming and that she was passive to his control. In evidence the IP said she was scared and stayed with him unhappily and unwillingly. D said that there had never been any sexual activity with the IP as a child and they only got together when she was an adult as a result of mutual attraction.

At trial the fact of the adult relationship was allowed as evidence. The judge refused to allow photographs and video evidence of a sexual nature and subsequent cross-examination on their content. In these the IP is considered to look happy and at ease.

It was accepted that the cross-examination of the witness on these photographs may impugn her credibility but that this was not the main purpose in this case.

On appeal the conviction was held to be unsafe and it was ruled that the videos and photographs ought to have been permitted and likewise cross-examination. This would need sensitive handling but their exclusion had deprived D of the opportunity to support his case that the relationship was happy and rebut her assertion that it was not.

Regina v Jason Clive Pemberton [2007] EWCA Crim 3201

D appealed against his conviction for the rape of a 15 year old girl. The IP was with a friend, K at K's flat. D was left alone with IP and raped her. D gave a no comment interview but after charge stated that he had not had sex with IP at all but had had sex with K, a prostitute. After forensic evidence showed otherwise D said at trial that he had had sex with IP but that she consented.

D wanted to cross examine IP that she had been identified by police as having been out soliciting with K the day before. The judge refused to allow this on the basis that it was not at or about the same time.

On appeal the decision not to allow the cross-examination was upheld and the court of appeal gave a different reason. The more compelling reason not to allow the evidence

was under S41(3)(c), that the events of the previous day were in no way similar to the allegation on either version. They had no relevance to the case.

In addition D wanted to ask IP about a previous allegation she had made. D had no evidence that the allegation was false but wanted to ask about her refusal to be examined as she had likewise refused in this case. This was also refused.

Regina v Zeeyad Hamadi [2007] EWCA Crim 3048

The IP was out in a club with her boyfriend. They had a row and she left. D, a stranger, offered her a lift home which she accepted. On the journey the IP said that D pulled over and raped the IP and in doing so tied her wrist with a cable tie. The issue was consent! As the issue was consent and her willingness to have intercourse the judge at 1st instance allowed evidence that she had greeted two male friends by jumping into their arms and simulating sex. She also allowed evidence that she had asked to have her hands tied during sex on one occasion.

The judge refused to allow questions or evidence about whether the IP had been unfaithful to her boyfriend in the last couple of months. She stated in cross-examination that she wouldn't have had sex with a stranger or anyone because she was with someone. This was found not to come under the provisions of S41(5) and did not, even with a broad reading, in this particular case count as evidence adduced by the prosecution. (However there will be cases where it is right to allow evidence to rebut what is said during cross-examination.)

“The judge refused leave to adduce the evidence...because she did not consider that it

had any direct bearing on the issue of consent. In our view she was right to do so. The fact (if it be the case) that the complainant wanted to have sexual intercourse that evening and was willing to have it with someone other than Lee Crawford does not tend to prove that she was willing to have sexual relations with a complete stranger who happened by chance to offer her a lift as she walked home."Per Lord Justice Moore-Bick.

D argued a second ground of appeal under S41(3)(c)(i), similarity. Specifically that she instigated the sexual activity, that it was outside in a public place, in winter time and while she was in a relationship. The court of appeal felt that the similarities could be reasonable explained as coincidence and refused this ground too.

R v A (No:2) [2001] UKHL 25

In *R v A* the defence sought to have admitted evidence of a previous sexual relationship which D alleged he had had with C, as evidence bearing on the issue of consent. It was contended that there was no obvious way of bringing such evidence within any of the four exceptions. The question was, therefore, whether the exclusion of such evidence for this purpose would amount to a contravention of D's right to a fair trial. The H of L exercised its interpretative duty under section 3(1) of the Human Rights Act 1998 and read into section 41(3)(c) an interpretation that evidence should be admitted where it was "so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6". In short, the effect has been that generally speaking a previous consensual relationship with D will be admitted under S41(3)(c).

At the Police Station – Interview

What advice to give will depend in no small way on what defence is asserted.

The most common are likely to be factual dispute and consent or reasonable belief in consent.

In cases where the dispute is factual – it didn't happen – sexual behaviour might not prove to be that relevant.

I didn't do it and by the way she is a prostitute! This sort of statement is unlikely to be of any relevance when it comes to S41 considerations.

I didn't do it and she always lies about sexual assaults! This may be more relevant. Does this count as "sexual behaviour" for the purposes of S41? Would it be excluded by virtue of S41(4)?

The defence must have a proper evidential basis for saying that a statement was (a) made and (b) untrue. Such false allegations fall outside of S41.

Regina v RT : Regina v MH [2001] EWCA Crim 1877

Questions or evidence about false statements in the past by a complainant about sexual assaults or a failure to complain about the alleged sexual assault that was the subject matter of the charge, while complaining about other sexual assaults, were not ones "about" any sexual behaviour of the complainant for the purposes of s.41 Youth Justice and Criminal Evidence Act 1999.

The defendants had both been charged with sexual offences. In each case the defendant proposed to contend that the statement alleged to have been made by the complainant was untrue. On appeal, the defendants submitted that the proposed questions were not ones about the relevant complainant's sexual behaviour but: (i) in RT's case, about the complainant's failure to refer to RT's alleged sexual abuse at times when she was referring to abuse by others; and (ii) in MH's case, about the complainant's actions in telling lies about sexual matters.

The Crown accepted that s.41 could be read in a way that would allow questions about previous lies about sexual assaults to be asked.

The questions sought to be put in both cases were relevant in the normal, non-statutory sense of that term.

In RT's case, the complainant's failure to report RT's alleged sexual assault when asked about such matters and when reporting on other such assaults was a highly material matter.

In MH's case, the complainant's previous fabrications of sexual assault, if established, would be relevant.

Questions about a complainant's sexual behaviour could be admissible if they went to show that the complainant had a motive for fabricating evidence, despite the ban in s.41(4) of the 1999 Act on questions concerning credibility.

Questions or evidence about: (i) false statements in the past by a complainant about

sexual assaults; or (ii) a failure to complain about the alleged sexual assault that was the subject matter of the charge, while complaining about other sexual assaults, were not ones "about" any sexual behaviour of the complainant. They related not to her sexual behaviour but to her statements in the past or to her failure to complain.

The questions sought to be asked in the defendants' cases were not automatically excluded by s.41 of the 1999 Act even if they were seen as principally going to credibility. Appeals allowed.

What to say at interview is often a difficult decision. In R v Pemberton above the D gave a no comment interview. He declined to answer any questions at all. He then gave an account that there had been no intercourse. He was caught out in this lie by forensic evidence and then decided that it had happened but with consent and in her capacity as a prostitute. No wonder he was convicted!

Think carefully about what your client is saying. Be aware of possible S41 issues even at this early stage. There are some assertions that you would want to make early and some you might not!

Also consider the IP. Age may well be a significant factor to think about. Can you or will you be able to prove what you say. If you are unlikely to be able to prove it do you want to assert it yet?

How to make an application

In the Crown Court – Criminal Procedure Rules

EVIDENCE OF A COMPLAINANT'S PREVIOUS SEXUAL BEHAVIOUR

36.1

- 1) An application for leave under section 41(2) of the Youth Justice and Criminal Evidence Act 1999 must be made in writing to the Crown Court officer and must either
 - a) be received by the court officer within 28 days of
 - i) the committal of the defendant, or
 - ii) the consent to the preferment of a bill of indictment in relation to the case, or
 - iii) the service of notice of transfer under section 53 of the Criminal Justice Act 1991
or
 - iv) where a person is sent for trial under section 51 of the Crime and Disorder Act 1998 the service of copies of the documents containing the evidence on which the charge or charges are based under paragraph 1 of Schedule 3 to the 1998 Act,
 - v) or within such period as the court may in any particular case determine; or
 - b) be accompanied by a full written explanation specifying the reasons why the application could not have been made within the 28 days mentioned above.
- 2) Such an application must contain the following
 - a) a summary of the evidence it is proposed to adduce and of the questions it is proposed to put to any witness;
 - b) a full explanation of the reasons why it is considered that the evidence and questions fall within section 41(3) or (5) of the 1999 Act;
 - c) a summary of any document or other evidence to be submitted in support of such

evidence and questions; and

- d) where it is proposed that a witness at the trial give evidence as to the complainant's sexual behaviour, the name and date of birth of any such witness.
- 3) A copy of the application must be sent to all the parties to the proceedings at the same time as it is sent to the court officer.
 - 4) Where a copy of the application is received by the prosecutor more than 14 days before the date set for the trial to begin, the prosecutor must, within 14 days of the receipt of the application, notify the other parties to the proceedings and the court officer in writing whether or not
 - a) he opposes the application, giving reasons for any such opposition; and
 - b) he wishes to be represented at any hearing of the application.
 - 5) Where a copy of the application is received by a party to the proceedings other than the prosecutor more than 14 days before the date set for the trial to begin, that party may make observations in writing on the application to the court officer, but any such observations must be made within 14 days of the receipt of the application and be copied to the other parties to the proceedings.
 - 6) In considering any application under this rule, the court may request a party to the proceedings to provide the court with such information as it may specify and which the court considers would assist it in determining the application.
 - 7) Where the court makes such a request, the person required to provide the information must do so within 14 days of the court making the request or by such time as the court considers appropriate in the circumstances of the case.

- 8) An application under paragraph (1) must be determined by a judge of the Crown Court following a hearing if
 - a) the prosecutor has notified the court officer that he opposes the application; or
 - b) the copy of the application was received by any of the parties to the proceedings less than 14 days before the date set for the trial to begin.
- 9) An application under paragraph (1) must be determined by a judge of the Crown Court following a hearing in any case where he considers such a hearing is appropriate in the circumstances of the particular case.
- 10) The date and time of the hearing must be
 - a) determined by the court or the court officer after taking into consideration
 - i) any time which a party to the proceedings has been given to respond to a request for information, and
 - ii) the date fixed for any other hearing relevant to the proceedings; and
 - b) notified by the court officer to all the parties to the proceedings.
- 11) Except where paragraph (8) or (9) above applies, an application under paragraph (1) must be determined by a judge of the Crown Court without a hearing.
- 12) The court officer must, as soon as possible after the determination of an application made in accordance with paragraph (1), give notice of the decision and the reasons for it to all the parties to the proceedings.
- 13) An application under section 41(2) of the 1999 Act may be made orally where the application is made after the trial has begun.

14) The person making the application under paragraph (13) must

- a) give reasons why the applicant failed to make the application in writing in accordance with paragraph (1); and
- b) provide the court with the information set out in paragraph (2)(a) to (d).

Magistrates Court

Ask for a binding ruling hearing before the trial in front of a bench who will then be prevented from sitting on the trial.

Prepare a skeleton argument as above (the rules are a good guide to what to do at the Magistrates Court).

Case Study

Regina v Jack Jones

Facts

Jack is accused of a sexual assault. Jenny Johnson alleges that her mum's boyfriend, Jack, assaulted her in their home. She alleges specifically that her mother and brother had gone shopping leaving her and Jack Jones alone in the house. Soon after they had gone Jack poured her a glass of wine (she is 16) and suggested they watch a film. On the sofa he started to touch her leg but she didn't say anything as she was scared. He then kissed her causing her to cry out "no" and struggle, he tried to touch her breasts but she pulled away and ran to the next door neighbour's house. He had touched her breasts but only over her top. Jenny says she is upset and scared and doesn't want to see Jack again. She admits that they had a fling that her mum doesn't know about but it ended last week as she decided it was wrong to cheat on her boyfriend and that he knew it was over and shouldn't have done what he did.

Jack said in interview (without a solicitor!) that Jenny has a habit of lying. He said that she recently lied in a mock exam at school and got found out. She is currently suspended. He said that they did kiss and fondle but that she came on to him. He said he stopped it as he realised quickly that it was not right. He said that Jenny is a little slut and this is not the first time this has happened but she never complained before. They often kiss on the sofa while mum is out. She was consenting.

After interview Jack Jones also instructs that Jenny is in a relationship with her boyfriend

and that it is fully sexual. He slept over and they had sex the day before this allegation. He says that this is not the first boyfriend that she has had sex with. He says she is known as the school bike which is a cause of shame for the whole family. No family will give evidence to that effect though as they have taken her side even though she has lied about her uncle in the same way before. She admitted lying in a retraction statement.

The charge =

3 Sexual assault

- 1) A person (A) commits an offence if
 - a) he intentionally touches another person (B),
 - b) the touching is sexual,
 - c) B does not consent to the touching, and
 - d) A does not reasonably believe that B consents.
- 2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
- 3) Sections 75 and 76 apply to an offence under this section.
- 4) A person guilty of an offence under this section is liable
 - a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
 - b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

Discussion

What is the issue at trial?

Will you make a S41 application to ask about her cheating in an exam and therefore being a liar?

Do you need permission to question her about the assertion that she came on to him?

Do you want to put to Jenny that she is a slut and the school bike? If you do, what part of S41 might apply?

Do you want to question Jenny about the fact that she is sexually active with her boyfriend and has been before?

Can you?

What provision would an application about previous consensual sexual conduct be made under and would it succeed?

Do you need permission under S41 to ask about the previous lie she told about her uncle having assaulted her sexually?

These answers would form the basis of any skeleton arguments where appropriate and likewise my idea of what the ruling is likely to be!

Sample skeleton argument on behalf of defence:

Regina v Jack Jones

Defence Skeleton Argument

Facts

1. The Defendant (D) is charged with sexual assault. He denies the assault. Briefly the allegation against him is that he kissed and fondled the breasts of his girlfriend's daughter, Jenny Johnson (C). It is agreed that there have been previous similar incidents between D and C but that these have been consensual. The issue in this case is consent.
2. D wishes to cross-examine C on their previous consensual relationship and on her

previous false allegations of sexual assault. D also seeks leave to question C about her sexual relationship with her boyfriend and the fact that she had sex the day before this allegation. D also seeks leave to question C about the fact that she instigated the kissing.

Law

3. Any cross-examination about sexual behaviour in a sexual assault case can only be done with the leave of the court under S41 Youth Justice and Criminal Evidence Act 1999.

S41 (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.

(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.

Application

4. Leave to cross-examine on previous consensual relationship is sought and D relies on S41(3)(c) of the Act. The issue here is consent. D relies on the guidance of Lord Steyn in R v A [2001] UKHL 25, attached, as support for this application. D and C were in a consensual relationship prior to this incident. D raises the defence of consent and for it to be properly considered the fact of a previous consensual relationship is highly relevant. To refuse evidence of it would cause real unfairness to D at trial. There are real similarities between previous incidents in that they were all at home, all on the sofa, all involved kissing and fondling, and all while mum/girlfriend was out.
5. The questions would be limited to those necessary to establish the fact of the relationship, the length of the relationship, how many incidents of consensual sexual behaviour there were, the type of sexual behaviour and when the last such incident before this allegation was.
6. D also seeks a ruling from the court that leave is not required under S41 to cross-examine C about a previous false allegation that has been made to police in the past about her uncle. This allegation was one of sexual assault and C admitted in a retraction statement that the allegation was false. It is submitted that D is able to show that the statement was made and that it was false and so does not need leave to ask questions about this. D relies on R v RT and R v MH [2002] 1 WLR which confirms that leave is not required if the defence can prove that the allegation

was made and can prove that it was false.

7. D seeks leave to ask C about her sexual relationship with her boyfriend and in particular the assertion that she has sexual intercourse the night before this allegation. The questions D proposes to ask are:

- a. It is right that you are sexually active?
- b. You have been for some time?
- c. You have slept with more than one person?
- d. It is right that you had sex the night before this allegation?
- e. The fact is that you enjoy sex?
- f. And you enjoyed kissing Jack Jones?
- g. You consented didn't you?

8. This application is made under S41(3)(b) on the ground that the activity sought to question about is very close in time to the allegation. It is less than 24 hours between her intercourse with her boyfriend and the sexual contact with Jack Jones. It is relevant to the issue of consent because it tends to show that C enjoys sexual activity and is therefore more likely to consent.

9. Finally D seeks leave under S41 to put to C that it was she who started the kissing on this occasion. This is in issue and is relevant to consent. If she started the kissing the court is more likely to accept that she was in fact consenting. D relies on S41(3)(c) as it was C who always started the kissing and it is therefore so similar to the matter that is the subject of the charge as to be relevant.

Summary

In summary the court is invited to make rulings in the terms sought above and to thereby enable a trial which is fair for D whilst still in the spirit of the protections offered to C by S41.

Sample ruling

We are asked to make rulings on the following 4 points:

1. Whether to allow questioning about a previous consensual relationship.
2. Whether leave is needed under S41 YJCEA 1999 to question about a demonstrably false previous similar allegation.
3. Whether to grant leave to question about current relationships and in particular recent sexual intercourse with a partner other than the defendant, and
4. Whether to grant leave to question on who instigated the kissing on grounds of similarity.

We have read both solicitors helpful skeleton arguments and heard submissions in court today and rule as follows:

1. Leave is given under S41(3)(c) to cross examine on a previous and recent consensual relationship. The issue is consent and to deprive D of an opportunity to put forward a reason, agreed by both sides, as to why this defence is raised is unfair and in our view incompatible with the right to a fair trial.
2. Leave is not so needed under S41 as the questioning does not amount to questions about sexual behaviour where the allegation is demonstrably false.

3. Leave is refused. We can see no basis for this part of the application and do not accept the submission advanced that this is in any way relevant to the issue of consent with her mother's boyfriend. C is entitled to a relationship free from criticism in court when the issue for the bench to decide will be whether she consented to kiss D or whether he thought she did.
4. We do not believe that leave is needed for this part of the application either. It seems to us that the questioning sought is nothing more or less than the usual sort of cross-examination one might expect when there is a dispute of fact. We would not expect the questioning to go further than is needed to establish who started the kissing.

These are our rulings.