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## England and Wales

#1 *R v P (R)* [2013] EWCA Crim 2331, [2014] 1 WLR 3058 – Indecent Assault – Whether Proposed Cross-Examination Permissible – Youth Justice and Criminal Evidence Act 1999, Section 41

### Why Is It On the List?

This case contains an important discussion of the scope of section 41 of the Youth Justice and Criminal Evidence Act 1999, which restricts the admissibility of sexual history evidence.

### Facts

The defendant was charged with indecently assaulting his stepdaughter R when she was in her early teens. The defence sought to cross-examine the complainant about the defendant's role in providing emotional and financial support in respect of a termination of a pregnancy that she had undergone at 17. The judge would not permit this questioning and the defendant was convicted.

### Holdings

The Court of Appeal addressed, first, the potential relevance of the evidence:

In our judgment, this proposed questioning was relevant to the issue before the jury. It did tend to detract from her account that she viewed the defendant with distaste, because of his improper conduct, notwithstanding her continued dealings with him on less personal and intimate matters. This was broadly the basis on which counsel put the matter to the judge. (at [25])

The next question was whether section 41 of the Youth Justice and Criminal Evidence Act 1999 was applicable to the proposed questioning. Section 41 imposes a *prima facie* prohibition on the admissibility of evidence about a complainant's 'sexual behaviour'. The Court of Appeal did not consider

that to ask a person about whether someone has assisted her in and about the obtaining of a lawful abortion can be said to be a question

‘about’ sexual behaviour. Self-evidently, it is not. The fact that an abortion cannot result unless there has been antecedent sexual behaviour does not make the question about the fact of the abortion a question ‘about’ any sexual behaviour. ... We recognise that a question about an abortion might in some cases be a way of asking about a person’s sexual history, in which case it would be a question ‘about’ sexual behaviour, but we do not see that a question asked of a formerly pregnant woman about events surrounding a termination of pregnancy would in itself amount to a question about sexual behaviour. (at [33])

In the final analysis, however, the Court considered that, while ‘the judge did prevent the putting to R of potentially permissible and relevant questions’ (at [39]), this had not prejudiced the defendant, since

counsel for the defence at trial had made considerable headway in cross-examination with R to establish her ongoing relationship with the defendant after the separation of her mother from him and after abuse had ceased. This laid ground for the submission to the jury that this was an inconsistency with the past abusive behaviour that she was alleging. The [proposed questioning] could not have added significantly to the point. (at [56])

Accordingly, the Court considered the convictions to be safe and the appeal was dismissed.

### **Commentary**

This decision suggests a narrow view of the question whether particular evidence constitutes evidence ‘about’ sexual behaviour under section 41 of the Youth Justice and Criminal Evidence Act 1999, so that the protections afforded by section 41 bite. Notably, the Court of Appeal rejected the submission that a question should be treated as one ‘about’ sexual behaviour provided that it ‘is on a subject which necessarily leads to the fact or inference of the fact that there has been some sexual behaviour in the past’ (at [34]). Against that background, the care demonstrated by the Court in this case in assessing whether the defendant had been tangibly prejudiced by the failure to allow the questioning is commendable.

## #2 *R v Gjoni* [2014] EWCA Crim 691 – Rape – Whether Evidence of Conversation between Defendant and Third Party Admissible – Youth Justice and Criminal Evidence Act 1999, Section 41

### Why Is It On the List?

This is a decision on aspects of section 41 of the Youth Justice and Criminal Evidence Act 1999, an important provision which restricts the admissibility of sexual history evidence.

### Facts

Gjoni was charged with rape. The complainant alleged that she had woken up to find Gjoni having sexual intercourse with her, while her boyfriend K and another man, 'Lee', were watching. Gjoni sought to adduce in evidence a conversation that he had had with Lee in which Lee had said that he had had sexual intercourse with the complainant on a previous occasion when K was in the house. The judge would not permit this and Gjoni was convicted.

### Holdings

The Court of Appeal considered, *inter alia*, the implications of section 41 of the Youth Justice and Criminal Evidence Act 1999. This imposes a *prima facie* prohibition on the admissibility of evidence about a complainant's sexual behaviour: leave to introduce such evidence may be granted only if its refusal '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' (section 41(2)(b)) *and* if the evidence falls within one of four specific gateways. One of these gateways covers evidence of sexual behaviour that 'relates to a relevant issue in the case [which] is not an issue of consent' (section 41(3)(a)). This is subject to section 41(4), which provides that 'no evidence ... 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'.

Dismissing the appeal, the Court of Appeal held that the evidence of the conversations had not been improperly excluded. The Court acknowledged that 'there will be circumstances in which evidence of a conversation between the defendant and a person other than the complainant will have probative value in relation to the issue of honest and reasonable belief in consent. Each application must be decided according to its own circumstances.' (at [26]) However, on the facts of this case, the Court rejected the argument that the evidence could be regarded as relevant to whether Gjoni honestly and reasonably believed that the complainant was consenting:

[W]e do not consider that the admission of the full content of these conversations would have improved the appellant's standing in the eyes of the jury or, more particularly, that it was necessary to admit the evidence to avoid an unsafe conclusion by the jury. The fact that Lee told the appellant he had had sexual intercourse with the complainant on a previous occasion cannot have amounted to any justification for a belief held by the appellant that she would consent to sexual intercourse with him when she had explicitly rejected him. Furthermore, the line of reasoning required was exactly that prohibited by section 41(4): that a woman who consents to intercourse with one comparative stranger will, a week later, and in different circumstances, consent to have intercourse with another. (at [29])

## Commentary

This decision is a welcome one which ensures that the protections afforded by section 41 of the Youth Justice and Criminal Evidence Act 1999 are not diluted. The holding by the House of Lords in *R v A* [2001] UKHL 25, [2002] 1 AC 45 that the gateways to admissibility available in section 41 may, in effect, be interpreted flexibly under section 3 of the Human Rights Act 1998, if such an interpretation is necessary to ensure compliance with the guarantee of a fair trial under article 6 of the European Convention on Human Rights, has proved controversial. Seen in that context, the care taken here by the Court of Appeal in determining the applicability of the gateway under consideration is commendable.

### #3 *R v Bowman and Lennon* [2014] EWCA Crim 716 – Evidence of Defendant’s Bad Character – Admissibility – Criminal Justice Act 2003, Section 101(1)(d)

#### Why Is It On the List?

This is a decision on the fourth - and by far the most important - of seven gateways in the Criminal Justice Act 2003 that allow for the admissibility of evidence of defendants’ bad character (which encompasses evidence of previous convictions). This gateway, section 101(1)(d), concerns evidence that ‘is relevant to an important matter in issue between the defendant and the prosecution’.

#### Facts

Bowman and Lennon were charged with firearms offences committed in 2012. They had travelled by car from London to a West Yorkshire house occupied by one Aslam, where a gun was fired when they were inside the house. At issue was the admissibility, under section 101(1)(d), of evidence of (1) B’s 1990 convictions for conspiracy to commit affray, possessing a firearm without a certificate, and wounding; and (2) Lennon’s 2005 conviction for possession of a firearm with intent to cause fear of violence.

#### Holdings

On the defendants’ appeal against conviction, the Court of Appeal held that the judge had not erred in admitting these items of evidence. In relation to the evidence pertaining to Bowman:

Although this earlier offending occurred in 1990, in the earlier case and in the present trial there was the distinctive feature that the gun was allegedly carried in a motorcar in order to enable the occupants to commit another offence (*viz* affray and robbery). The question is whether it was an impermissible exercise of discretion for the judge to admit this suggested evidence of bad character. ...

We readily accept that some judges may have reached a different decision, but in our judgment the judge addressed the correct questions and we do not conclude that he erred in exercising his discretion in admitting [the evidence].

The judge's directions to the jury were faultless, and we particularly stress that he reminded the jury of the defence arguments on this issue and he directed the jury that this evidence went no further than demonstrating a relevant propensity to be associated with firearms and that it did not prove the allegations faced by the appellant on the present indictment.

In all the circumstances [the evidence] was properly admitted and we dismiss Bowman's appeal against conviction.

(at [58], [61]-[63])

In relation to the evidence pertaining to Lennon:

We are unable to accept Mr Winter's suggested approach to the 'important matter in issue', namely that the prosecution should first have adduced primary evidence that the appellant was in possession of the gun when he left London before the court could properly consider admitting his previous conviction. The CJA does not contain such a precondition. Section 101(1)(d) is not directed at evidential sufficiency but instead it principally concerns the relevance of the evidence that it is proposed should be introduced, and particularly it focuses attention on the issue of whether the bad character evidence will throw light on the real issue or issues in the case. ... [T]he statute does not create the additional admissibility hurdle of requiring that the important matter in issue has been made out by *prima facie* evidence. ... Therefore, for the purposes of strict admissibility, when resolving whether the evidence is to be admitted as relevant to an 'important matter in issue' the court does not, as a discrete question, need to satisfy itself as to the strength of the prosecution's case as regards the particular 'matter'. ...

The appellant's conviction in 2005, following a trial, concerned an incident in which Lennon was ejected from a public house after a disturbance: he was assaulted and received head injuries. Shortly afterwards, he returned carrying a handgun. At least one shot was fired. He then left the public house and approached two customers, and he behaved in a threatening manner towards them. He then re-entered the bar, still holding the gun.

Although there are obvious differences between the two offences (principally the earlier offence did not involve a drugs robbery), there are also notable similarities. Most particularly, in both cases it was alleged that the appellant was prepared to carry and discharge a loaded firearm in public and he behaved in an entirely reckless and violent manner, with no attempt to hide his identity. We note also that the previous offending occurred about 7 years before the instant offence. As the judge highlighted in his directions to the jury, in the earlier case Lennon had been in possession of a firearm with the intention of causing people to fear he would use violence against them. That conviction tended to demonstrate that Lennon had ready access to firearms and that he was willing to use them in connection with other criminal activity.

In all the circumstances, in our judgment these factors established a proper basis for the judge to admit this conviction, and although not all judges would have made the same decision, the judge did not err in the exercise of his discretion. Put otherwise, this single conviction may properly have helped the jury resolve an important matter in issue in the case – given the similarities in circumstances – namely whether the gun was brought from London by the defendants and taken into the house by Bowman or whether it was produced in the house by Aslam and taken from him by Bowman.

...

In all the circumstances, the judge approached the prosecution's application appropriately, and he gave the jury a careful direction as to how they should approach this evidence and its relevance. The judge carefully weighed the defence submissions on the potential prejudice of these convictions and his decision was, in all the circumstances, entirely sustainable.

We dismiss Lennon's appeal against conviction.

(at [64]-[67], [69]-[70])

## Commentary

While this case may not articulate any new principles, it clarifies existing ones, and also provides useful illustrations of the operation of section 101(1)(d) in



particular factual contexts. The fact-sensitive nature of determinations of admissibility under section 101(1)(d) is clear, as is the degree of latitude that the Court of Appeal is prepared to accord to judges in applying the provision. The fact that what are regarded as careful directions were given to the jury is also treated as an important consideration.

## #4 R v James [2014] EWCA Crim 1215 – Pre-Trial Silence – Adverse Inferences – Criminal Justice and Public Order Act 1994, Section 34 – Direction

### Why Is It On the List?

This case provides an illustration of the implications of section 34 of the Criminal Justice and Public Order Act 1994, which allows a jury in determining guilt to ‘draw such inferences from the failure as appear proper’ from the defendant’s failure during police questioning to mention a fact later relied on in his or her defence.

### Facts

The defendant was charged in connection with four burglaries which had taken place between March 19 and April 16, 2013. When arrested on May 7, 2013, he was wearing Nike trainers. Experts who later compared the trainers with footprint impressions taken at the scene of each burglary concluded that the trainers had been present at each burglary. The defendant had also been seen wearing the same trainers on April 30, 2013. At his first interview, the defendant replied ‘no comment’ to all questions, and at his second interview he replied ‘no comment’ to virtually all questions but said ‘Just for the benefit of the tape, I got the shoes given’. The defendant claimed at trial to have been given the trainers about two weeks before his arrest and to be a hoarder of goods. The judge gave the jury a direction under section 34.

### Holdings

On the defendant’s appeal against conviction, the Court of Appeal held that it had been appropriate for the judge to give the section 34 direction:

The statement given by the appellant at the second interview, that he ‘got the shoes given’ was in the most laconic of terms and, by itself, was not any kind of defence or explanation at all. He could have been given the shoes at any time. It might be thought that what was needed as an explanation was the fact that the shoes were given to him after all four burglaries had been committed and more details as to when and how he

had come by them. Those were all facts upon which the appellant did subsequently rely in his defence at the trial in order to give at least a possibly credible explanation for how he was seen wearing the Nike trainers on 30 April 2013 and why he was wearing them at the time of his arrest on 7 May 2013.

Whether it was reasonable to have expected the appellant to have mentioned such facts in his interview was a matter for the jury to decide ... So, in our judgment, the judge was correct to conclude that he needed to give the jury a s 34 direction in relation to the lack of any proper explanation about the Nike trainers at the time of the appellant's two interviews.

(at [18]-[19])

Further, while the direction as given was

not verbatim the wording of the sample model direction in the Crown Court Bench Book[,] ... that in itself is not a valid ground of criticism. The issue is whether the necessary elements of the direction were present. In our view, ... they were. First, the judge identified what the appellant did say in interview and he asked whether the jury thought, in the circumstances, it reasonable for the appellant not to say more about what he relied on subsequently at the trial. Secondly, the judge posed the question for the jury: was the case strong enough to require the appellant to respond to it? Thirdly, the judge posed a question for the jury: why did the appellant not say more? ... Fourthly, the judge gave a proper direction on the effect of legal advice being given to someone, not to say anything in interview. Fifthly, the judge directed the jury that it was for them to decide whether any adverse inference should be drawn. The judge was careful to emphasize that the jury could not convict on that factor alone. (at [20])

Finally, the Court observed:

The judge should in our view have discussed with counsel before their final speeches the terms of the s 34 direction and any other relevant direction that he thought needed discussion before giving it to the jury. This court has said many times ... that judges should discuss with counsel the question of whether a s 34 direction is appropriate and, if it is, what form it should take. But in this case that failure of the judge has not caused any injustice. In our view the direction was appropriate and the form was satisfactory, for the reasons that we have given. ...

Moreover, there was powerful prosecution evidence against the appellant. He had been seen wearing the Nike trainers on 30 April. On 7 May he was arrested wearing the same shoes. They matched the impression that was taken at the scenes of the burglaries. If ever a case cried out for an early explanation of how the appellant had come by the trainers, this was it. We are therefore quite satisfied that the conviction is safe and that the appeal must be dismissed.

(at [23]-[24])

### Commentary

Two decades later, section 34 of the Criminal Justice and Public Order Act 1994 remains, in the eyes of some, a controversial provision. This case is very much a 'standard' one, providing a good illustration of a scenario in which issues relevant to section 34 might arise. The arguments put to the Court of Appeal, and its response to them, are consistent with what, over the years, lawyers in England and Wales have come to expect from the jurisprudence on section 34.

## #5 *R v Ferdinand* [2014] EWCA Crim 1243 – Expert Evidence – Admissibility

### Why Is It On the List?

This case addresses, inter alia, the issue of expert evidence, which continues to generate considerable discussion and debate in England and Wales.

### Facts

The facts are neatly summed up by the Court of Appeal in the following passage:

A consultant podiatric surgeon, Mr Barry Francis, gave evidence that he had compared the walking gait of the person he referred to as 'Suspect 2' in CCTV footage recorded in Malden Road at 2.50 pm [on 20 April 2011] with a person recorded by CCTV in the Rowley Estate at 4.35 pm and with an admitted CCTV recording of Hashi in police custody on 27 April 2011. Mr Francis identified several features of walking gait that were common to Suspect 2 and Hashi, and he found no differences that could distinguish them. The prosecution asserted that it was safe to conclude that Suspect 2 ... was Hashi; accordingly that he was one of the attackers who entered Abbey Road Estate at 4.40 pm. (at [23])

### Holdings

The Court of Appeal held:

Comparison evidence founded upon the science and expertise of podiatry is, we recognise, a technique still in its infancy. ... [R]esearch conducted with a view to establishing nationally accepted standards continues to take place. It remains, in our view, a technique that requires careful scrutiny before expert evidence is admitted and, if admitted, rigorous examination of the quality of the images and the opinion expressed by the expert. In the present case HHJ Wide QC ensured that, once admitted, the evidence was subjected to the scrutiny required. We reject the submission that the evidence was so flawed that the jury should not

have been permitted to act upon it. The jury was entitled to conclude that the prosecution had proved that Suspect 2 was the appellant Hashi. (at [77])

## Commentary

This decision provides an illustration of judicial consideration of expert evidence in England and Wales. It should be viewed against the background of a considerable body of criticism of the prevailing approach to the admissibility of such evidence, which is characterised by few guiding principles and, in the main, case-by-case determinations of admissibility. Notably, the Government has rejected the Law Commission's recommendation that a test of sufficient reliability be introduced to govern the admissibility of such evidence: Ministry of Justice, *The Government's Response to the Law Commission Report: "Expert Evidence in Criminal Proceedings in England and Wales"* (Law Com No 325) (2013); available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260369/govt-resp-experts-evidence.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260369/govt-resp-experts-evidence.pdf).

## #6 *R v Najjar* [2014] EWCA Crim 1309 – Identification Evidence – *Turnbull* Direction

### Why Is It On the List?

This case illustrates the approach taken by the Court of Appeal to identification evidence on what appear to be entirely straightforward facts.

### Facts

The defendant, who was charged with theft, was alleged to have been captured on footage from a CCTV camera taking the complainant's mobile telephone from the latter's place of work. The defendant maintained that the person seen on the footage was not him. The complainant gave evidence, but the judge directed the jury to ignore her evidence that someone who had been hanging around her place of work was the defendant; rather, the jury was to decide the issue on the basis of the CCTV footage.

### Holdings

Dismissing the appeal against conviction, the Court of Appeal rejected the argument that, in view of the risk that the jury might take the complainant's evidence into consideration despite having been instructed not to, the judge should have given a direction pursuant to *R v Turnbull* [1977] QB 224:

On the facts of this case, in our judgment, [a *Turnbull* direction] given in relation to evidence which he had invited the jury to disregard would have been otiose and confusing to the jury in relation to the simple factual issue they had to decide.

...

We have had the advantage of seeing the CCTV footage which was in colour. It is rare to see footage of such quality or clarity. The person seen stealing the phone walked backwards and forwards before the camera, and then stole the phone in full facial view of the camera, which he looked up at before leaving. The footage provided, therefore, the jury with

the equivalent of a direct view of the incident and an exceptionally clear view of the perpetrator.

(at [15], [17])

### Commentary

This is not in any sense a groundbreaking decision, but it provides an example of the diverse - and sometimes apparently simple - factual contexts in which considerations of identification evidence may arise.



## #7 *R v Mehmedov* [2014] EWCA Crim 1523 – Evidence of Defendant’s Bad Character – Admissibility – Criminal Justice Act 2003, Section 101(1)(g)

### Why Is It On the List?

This is a decision on one of seven gateways in the Criminal Justice Act 2003 that allow for the admissibility of evidence of defendants’ bad character, including evidence of previous convictions.

### Facts

Mehmedov was charged with the murder of his partner Dimitrina Borisova and raised the (partial) defence of loss of control (formerly provocation). At issue, inter alia, was the applicability of section 101(1)(g) of the Criminal Justice Act 2003, which allows evidence of the defendant’s bad character to be admitted if ‘the defendant has made an attack on another person’s character’. The prosecution sought to adduce evidence of Mehmedov’s previous convictions in Bulgaria under section 101(1)(g) on the basis that he had made an explicit ‘attack’ on Ms Borisova’s character that went significantly beyond the facts on which he had relied in his defence statement as supporting his defence of loss of control. While in his defence statement he had relied, inter alia, on Ms Borisova’s false allegations against him of violence towards her and Ms Borisova’s violence towards his 10-year-old daughter F, he alleged at trial, inter alia, that Ms Borisova had made an allegation that F had participated in group sex while living in Turkey. In essence, the allegation, in the words of the judge, was that Ms Borisova was a person prepared to make ‘serious and vile allegations against a 10 year old girl’.

### Holdings

As a preliminary matter, the Court of Appeal considered the applicability of section 73(1) of the Police and Criminal Evidence Act 1984, which provides: ‘Where in any proceedings the fact that a person has in the United Kingdom or any other member state been convicted ... of an offence ... is admissible in evidence, it may be proved by producing a certificate of conviction ... relating to that offence, and proving that the person named in the certificate as having

been convicted ... of the offence is the person whose conviction ... is to be proved.' The Court of Appeal considered it immaterial that, at the time of Mehmedov's convictions in Bulgaria, that country was not yet a member state of the European Union (at [16]).

On the main issue, the Court held that section 101(1)(g) was applicable:

[I]t was submitted that the convictions had little value since they did not demonstrate any tendency in the defendant to tell lies: they were offences of violence. There is, however, no requirement that the evidence of the defendant's bad character, to be admitted under gateway (g), should reach any particular probative value or that the creditworthiness of the defendant should be an issue of substantial importance in the case, or that the conviction should demonstrate any propensity for untruthfulness ... These are factors that are relevant to the fairness of the proceedings but the principal purpose of the section 101(1)(g) gateway is to provide the jury with information relevant to the question whether the defendant's attack on another person's character is worthy of belief. The issue is one of general credibility ... and not propensity to falsehood. The judge was entitled to conclude that the defendant's previous convictions were relevant to the credibility of his attack upon the deceased's character. (at [19])

The Court went on to hold that, while the evidence of the previous convictions was *admissible* under section 101(1)(g), this evidence should have been excluded in the exercise of judicial *discretion*. The Court accepted the appellant's argument 'that the learned judge should have declined to admit the evidence of his convictions since the jury could not have confidence in the fairness of the trial [in Bulgaria] and the propriety of the convictions [in Bulgaria]' (at [20]). Nonetheless, the Court considered that, in all the circumstances of the case, the admission of the evidence had not resulted in an unsafe verdict and accordingly the appeal against conviction was dismissed (at [21]).

## Commentary

This case provides a valuable illustration of the operation of section 101(1)(g) of the Criminal Justice Act 2013, the seventh and final 'gateway' in section 101(1) through which evidence of a defendant's bad character (which encompasses but is not limited to evidence of previous convictions) may be admitted. The Court of Appeal would appear to have taken a wide view in this case of the scope of section 101(1)(g). This is counterbalanced, however, by the acceptance

that it would have been appropriate for the judge to decline, in the exercise of discretion, to admit the evidence - even if, ultimately, the Court of Appeal's finding on the facts of the case was that the verdict was not unsafe.

## #8 *R v All-Hilly* [2014] EWCA Crim 1614 – Rape – Whether Questioning about Previous Complaints Permissible – Youth Justice and Criminal Evidence Act 1999, Section 41

### Why Is It On the List?

This case contains a consideration by the Court of Appeal of the scope of the restrictions on sexual history evidence contained in section 41 of the Youth Justice and Criminal Evidence Act 1999.

### Facts

The defendant was charged with rape and sought to question the complainant about her having made previous complaints against other men alleging sexual assault. The judge did not permit this, and the defendant appealed against his conviction.

### Holdings

The Court of Appeal articulated the following legal principles:

It is clear that the restrictions on questions about a complainant's sexual history set out in section 41 of the Youth Justice and Criminal Evidence Act 1999 do not apply to previous false complaints of sexual assaults. Cross-examination is permitted since such complaints are not about any sexual behaviour of the complainant within the meaning of section 42(1)(c) of the Act. However, before any such questions are permissible, the defence must have a proper evidential basis for asserting that any such statement was (a) made, and (b) untrue.

This court observed in *Murray* [2009] EWCA Crim 618 that the difficulty lies in what constitutes a proper evidential basis. The court said that it was less than a strong factual foundation for concluding that the previous complaint was false, but that there must be some material from which it could properly be concluded that the [complaint] was false.

We agree with the observation that the exercise for the judge is fact-sensitive and will not be assisted by an examination of the facts of other

cases. We also agree that it is an exercise of judgment rather than discretion, so that it is for the judge to evaluate the matter on the basis of all the relevant material. The ultimate question is whether the material is capable of leading to a conclusion that a previous complaint was false.

(at [12]-[14])

Applying these principles to the present case, the Court held, dismissing the appeal against conviction:

We have come to the conclusion that the judge properly came to the decision that the material relied on did not satisfy the necessary evidential test. The mere fact that a complaint is raised and is not pursued does not necessarily mean that a complaint is false. Courts should be ready to deploy a degree of understanding of the position of those who have made sexual allegations. Failure to pursue the complaint does not of necessity show that it is untrue. A rather closer examination of the circumstances is required.

...

None of the individual matters raised begins to provide a basis for an inference or conclusion of a false complaint. In those circumstances there is no advantage to the appellant in seeking to rely on an accumulation of negative results. The fact that there is no instance which begins to show falsity cannot be converted into evidence of falsity by the fact that complaints have been raised more than once.

(at [19], [21])

## Commentary

This decision is a welcome one. It confirms that, while the restrictions on the admissibility of sexual history evidence contained in section 41 of the Youth Justice and Criminal Evidence Act 1999 may not apply in contexts such as this, very considerable caution should nevertheless be exercised in determining whether the questioning of complainants about previous allegations that they may have made should be permitted.

#9 *Guardian News And Media Ltd v Incedal and Rarmoul-Bouhadjar*  
[2014] EWCA Crim 1861 – Trial *In Camera* – Anonymisation of Defendants  
– Whether Appropriate

## Why Is It On the List?

This case provides a very important discussion by the Court of Appeal of issues surrounding trials *in camera* and the anonymisation of defendants.

## Facts

In June 2014, the Court of Appeal handed down a decision in an appeal brought against orders made by a judge, in prosecutions for terrorist and identity document offences, for the trial to be *in camera* and for the defendants to be anonymised. In this judgment, handed down in September 2014, the Court of Appeal provided the reasons for its June 2014 decision.

## Holdings

The Court of Appeal explained the applicable principles as follows:

The Rule of Law is a priceless asset of our country and a foundation of our Constitution. One aspect of the Rule of Law – a hallmark and a safeguard – is open justice, which includes criminal trials being held in public and the publication of the names of defendants. Open justice is both a fundamental principle of the common law and a means of ensuring public confidence in our legal system; exceptions are rare and must be justified on the facts. Any such exceptions must be necessary and proportionate. No more than the minimum departure from open justice will be countenanced. ...

...

It is readily apparent that, from time to time, tensions between the principle of open justice and the needs of national security will be inevitable. ...

It is well established in our law that these tensions are resolved along the following lines. First, considerations of national security will not *by themselves* justify a departure from the principle of open justice ...

Secondly, open justice must, however, give way to the yet more fundamental principle that the paramount object of the Court is to *do* justice ... Accordingly, where there is a serious possibility that an insistence on open justice in the national security context would frustrate the administration of justice, for example, by deterring the Crown from prosecuting a case where it otherwise should do so, a departure from open justice may be justified.

...

Thirdly, the question of whether to give effect to a Ministerial Certificate (asserting, for instance, the need for privacy) such as those relied upon by the Crown here is ultimately for the Court, not a Minister. However, in the field of national security, a Court will not lightly depart from the assessment made by a Minister.

(at [10], [15]-[17], [19]) (*italics in original*)

Applying the above principles, first, to the issue of trial *in camera*, the Court held:

This case is exceptional. We are persuaded on the evidence before us that there is a significant risk – at the very least, a serious possibility – that the administration of justice would be frustrated were the trial to be conducted in open Court. For good reason on the material we have seen, the Crown might be deterred from continuing with the prosecution. The relevant test is thus satisfied. Indeed, we go further: on all the material, the case for the core of the trial to be heard *in camera* is compelling and we accede to it.

...

With a view to minimising any departure from the principle of open justice, we have obviously considered a split trial – ie, with the core of the trial split into open and *in camera* hearings. We are, however, of the clear view ... that in this case it is unreal to contemplate a split trial. It follows, as a matter of necessity, that the core of the trial must be heard *in camera*.

It is important to reiterate that a defendant's rights are unchanged whether a criminal trial is heard in open Court or *in camera* and whether or not the proceedings may be reported by the media: thus the defendant in such a hearing has the right to know the full case against him and to test and challenge that case fully. This is a very proper consideration but it does not, in any way, lessen the need for close scrutiny of any suggested departure from the principle of open justice.

... While we are driven to conclude that the core of the trial must be *in camera*, on the material before us, we are not persuaded that there would be a risk to the administration of justice were the following elements of the trial heard in open Court:

- i) Swearing in of the jury.
  - ii) Reading the charges to the jury.
  - iii) At least a part of the Judge's introductory remarks to the jury.
  - iv) At least a part of the Prosecution opening.
  - v) The verdicts.
  - vi) If any convictions result, sentencing (subject to any further argument before the trial Judge as to the need for a confidential annexe).
- Our Order has been drawn up accordingly.

(at [31], [35]-[37])

On the second issue, anonymisation of the defendants, the Court held:

This issue is to be approached on the footing that the core of the trial is to be conducted *in camera* ... On this footing, we were not persuaded, on the material before us, that there was a risk to the administration of justice warranting anonymisation of the Defendants; nor did we think that, properly understood, the Crown's material supported that outcome, provided the bulk of the trial was *in camera*. In this regard, we respectfully parted company with the Judge and permitted the Defendants to be named. (at [45])

The Court sounded the following general note of warning:

We express grave concern as to the cumulative effects of (1) holding a criminal trial *in camera* and (2) anonymising the Defendants. We find it difficult to conceive of a situation where both departures from open justice will be justified. Suffice to say, we were not persuaded of any such justification in the present case. (at [47]) (underlining in original)



## Commentary

This case will clearly constitute a primary reference point for future considerations of the issues of holding trials *in camera* and the anonymisation of defendants. The discussion by the Court of Appeal of issues of principle is thorough and demonstrates a strong commitment to the ideal of open justice. Notably, however, alongside this Open Judgment, the Court produced a Private Judgment and an *Ex parte* Judgment. In the absence of a perusal of these, it is impossible to make a fully informed assessment of the Court's resolution of the issues before it.

It is notable that the Lord Chief Justice of England and Wales, speaking extrajudicially at his annual press conference in November 2014, expressed strong reservations about the anonymisation of defendants:  
<http://www.judiciary.gov.uk/wp-content/uploads/2014/11/lcj-transcript121114.pdf>.

## #10 *R v Foran* [2014] EWCA Crim 2047 – Reference from Criminal Cases Review Commission – Robbery – Role of West Midlands Police Serious Crime Squad – Implications

### Why Is It On the List?

This case demonstrates that cases continue to reach the appellate courts for the resolution of issues arising from the well-known revelations concerning the West Midlands Police Serious Crime Squad.

### Facts

Foran's convictions in 1978 for robbery allegedly committed in 1977 were referred by the Criminal Cases Review Commission to the Court of Appeal on the basis that information had come to light that cast doubt upon the prosecution case that the appellant had confessed to the offences. Four police officers who gave evidence against Foran were members of the West Midlands Police Serious Crime Squad in 1977 and 1978. These were Detective Chief Inspector Taylor (the head of the Squad), Detective Sergeant Hancocks, Detective Sergeant Jennings and Detective Constable Davies. Evidence was given, inter alia, that injuries sustained by Foran must have been caused during a fight between the arresting officer, Detective Constable Davies, and Foran when Foran resisted arrest.

The potential implications of the involvement of the West Midlands Police Serious Crime Squad were explained by the Court of Appeal as follows:

In August 1989 the West Midlands Police Serious Crime Squad was disbanded. There followed an investigation into its practices ... under the supervision of the Police Complaints Authority. Efforts were made to trace all of those arrested by the Serious Crime Squad during the years between 1986 and 1989. There was revealed a catalogue of malpractice which included physical abuse, the generation of false confessions, the planting of evidence and the mishandling of informants. At least 33 convictions resulting from tainted evidence given by members of the squad have been quashed by this court including some convictions emanating from the work of officers who were or became members of the Serious Crime Squad as early as the mid-1970s, the most notorious of which were the convictions of the Birmingham Six ... (at [32])

## Holdings

The Court of Appeal described the legal principles applicable to its consideration of the case in the following terms:

Membership by police officers of the Serious Crime Squad in the mid-1970s is not an automatic gateway to successful appeals against historic convictions obtained by evidence of confession. ...

...

The issue that arises in the present appeal is ... whether, in the light of later events, it is demonstrated that the officers' evidence was unreliable and, accordingly, that the verdicts are unsafe. That would involve a consideration by the court of the particular facts of the appeal before them, including the nature of the information available to the court as to the discredit of witnesses who gave evidence in the original trial. ... That issue may be tested, and has been tested in similar appeals, by considering whether, had the material been available at the time of trial, cross examination upon it would have been permitted and, if so, whether that cross examination may have had the effect of casting doubt upon the reliability of the witness and thus the safety of the verdict. However, evidence may be tainted by subsequent events although no specific findings of corruption or perjury have been made against an officer concerned.

(at [34], [36])

Applying this to the case at hand and allowing the appeal against the convictions, the Court of Appeal held:

The question we have to resolve is whether the specific material available for cross examination of Detective Chief Inspector Taylor and the general taint upon the leadership of the Serious Crime Squad in 1977 is sufficient to place the confession evidence in doubt. We consider that cross examination of Detective Chief Inspector Taylor would have had some impact upon the issue facing the jury. That fact was bound to place the evidence of officers of the Serious Crime Squad under pressure, particularly the evidence of Detective Sergeant Hancocks and Detective Constable Davies. Although we readily accept that it is not possible to

assess with any certainty what the outcome would have been, we are clear that the jury would not have approached the evidence in categories each one hermetically sealed from the next. Cross-examination of the head of the Serious Crime Squad as to the honesty and reliability of the investigation may well have had the effect of causing the jury to examine with increased scepticism the issue as to how the injuries to the appellant had been caused. It may also have had an effect on the jury's assessment of the truth and accuracy of the appellant's alibi evidence. Once the jury were faced by this means with a further challenge to the accuracy and truthfulness of Detective Constable Davies' evidence, there would have been a further ripple effect on their examination of his evidence in support of the confession allegedly made [to Davies and Detective Sergeant Jennings] on 3 April 1978 ... While we are quite unable to make findings adverse to the credibility of any officer, we cannot be sure ... that a verdict based upon ... these alleged confessions is a safe verdict. (at [58])

## Commentary

This is a case that perhaps depends very much on its own facts. It demonstrates, however, that appeals against conviction brought on the basis of revelations about activities engaged in decades ago by members of the West Midlands Police Serious Crime Squad have continued to come before the Court of Appeal, and that such appeals may well succeed.