Neutral Citation Number: [2016] EWCA Crim 452

Case No: 2015/04532/B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
REFERENCE BY THE CRIMINAL CASE REVIEW COMMISSION
UNDER SECTION 9 OF THE CRIMINAL APPEAL ACT 1995.

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/04/2016

Before :

THE RIGHT HON LADY JUSTICE HALLETT DBE,
Vice President of the Court of Appeal Criminal Division.
MR JUSTICE FLAUX
and
SIR DAVID MADDISON

- -

Between :

Chedwyn Evans	**Appellant**
- and -	
Regina	**Respondent**

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- -

Mr Kieran Vaughan QC and **Mr David Emanuel** instructed for the **Appellant**
Ms Eleanor Laws QC and **Mr John Philpotts** for the **Respondent**

Hearing dates: Tuesday 22nd March and Wednesday 23rd March 2016

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Judgment Approved

Lady Justice Hallett, Vice President of the Court of Appeal Criminal Division:

Background

1. The appellant was a professional footballer. On the night of 29 May 2011 he and his friend McDonald had sexual intercourse with a woman (whom we shall call X) in a hotel room. The next morning X woke alone and claimed she had no memory of what had happened. The appellant and McDonald were charged with rape on the basis X was incapable of consenting to intercourse. They stood trial in 2012 and on 20 April 2012, the jury convicted the appellant but acquitted McDonald. The appellant was sentenced to five years imprisonment which he has now served.

2. On 10 August 2012, the single Judge refused his application for leave to appeal conviction. On 6 November 2012, the Full Court refused his renewed application for leave to appeal conviction based on an alleged inconsistency in the verdicts, criticism of the summing up and fresh expert evidence on X's amnesia. The judgment is reported at [2012] EWCA Crim 2559.

3. He appeals against conviction upon a reference by the Criminal Cases Review Commission (the "CCRC") under s.9 Criminal Appeal Act 1995 on the basis that fresh evidence from Tristin Owens, Angela Owens and Steven Hughes undermines the safety of his conviction. The appellant seeks leave to admit the evidence of all three under s.23 of the Criminal Appeal Act 1968. The issues for us are whether the evidence is credible, whether there is a reasonable explanation for the failure to adduce it at trial and whether it would afford a ground of appeal. In this case it could only afford a ground of appeal if admissible under section 41 of the Youth Justice and Criminal Evidence Act 1999 (the "YJCEA").

4. A summary of the evidence called at trial is to be found in the judgment of this court in 2012. We need to rehearse just a few of the details.

5. There is no doubt that X and the accused had all been drinking on the night of the alleged rapes. Some of their movements were captured on CCTV footage around the town centre. Both McDonald and X became separated from their groups and at approximately 04.00 X wandered into McDonald's path. Within seconds, they had got into a taxi together and gone to the Premier Inn where the appellant had previously booked and paid for a room in McDonald's name. During the taxi journey, McDonald called or texted the appellant saying that he had "got a girl" or words to that effect.

6. X and McDonald entered the hotel at 04.15. The night porter, Gavin Burrough, described X as extremely drunk. En route to the room, Mr Burrough overheard her say to McDonald "You're not going to leave me are you?" to which there was no reply.

7. Ten to fifteen minutes later, the appellant arrived at the hotel by taxi with two other men. The appellant persuaded Mr Burrough to give him a key card to room 14, saying that he had booked the room for a friend who no longer needed it. The appellant made his way to room 14.

8. Mr Burrough went to check what was happening in the room and listened outside for two to three minutes. He concluded that a couple were having sex and returned to his

desk. The other two males were seen outside the hotel looking through the bedroom window. They filmed what was happening using a mobile telephone until the curtains were closed.

9. After approximately thirty minutes McDonald left the hotel via reception. He told Mr Burrough that he should look out for the girl in room 14 because she was sick. The appellant left the hotel by an emergency exit. The two men met up outside and returned to the appellant's home.

10. X awoke at about 11.30. She was naked, alone and confused. She says she did not remember arriving at the hotel. She tried to piece together with friends what had happened. Some hours later she contacted the police. She did not allege she had been raped; to this day she has not alleged she was raped or that she was incapable of consenting to intercourse. Her evidence was simply that she did not remember what happened in room 14 and there was no scientific evidence to help.

11. The evidence as to sexual activity in room 14 came solely from the appellant and McDonald themselves. They were arrested on suspicion of rape on 31 May at 16.40. They were interviewed that night, the next morning and on a later occasion in July. Both of them answered all questions. They were aware that no allegation of rape had been made against them, yet they both volunteered that they had sex with X.

12. The appellant said that he had booked a room at the Premier Inn at approximately 16.00 or 17.00 on the afternoon of the alleged rape. After their night out, he received a text from McDonald which said 'I've got a bird.' He decided to go to the Premier Inn with his friend Jack and his half-brother Ryan to look through the windows. When they found the curtains closed, the appellant obtained a key card from reception and entered the room. McDonald was having sexual intercourse on the bed with a woman. McDonald invited the appellant to join in. The appellant performed oral sex on X and then they had sexual intercourse, during which she adopted a position on all fours ('doggie style') and used the words, 'fuck me harder.' McDonald left the room and the appellant followed shortly afterwards, leaving the hotel via a fire escape.

Trial

13. The defence case at trial, confirmed in large part by McDonald, was to similar effect. The appellant claimed that McDonald was having consensual sexual intercourse with X when the appellant entered room 14. As the appellant entered the room, McDonald stopped having intercourse with X and invited the appellant to join in, with X's assent. The appellant performed oral sex upon her at her request and then had vaginal intercourse with her with her consent. During the intercourse she turned over on all fours and invited him to 'fuck her harder.' X moved to the edge of the bed and they changed positions, continuing to have intercourse. She was enthusiastic, awake and gave no indication that she was not capable of consenting. He accepted she may well have been under the influence of something, but asserted that she was perfectly capable of exercising her choice as to whether to engage in sexual activity and took the lead in most of what took place. At the very least, the appellant reasonably believed that she had consented.

14. The defence had intended to make an application under section 41 of the YJCEA to call evidence from two men (Mr Sam Fisk and Mr Lloyd Hobson) to rebut X's

assertion in her third interview that she would not have sex with a stranger. This was abandoned when the Crown decided not to use her evidence to that effect.

15. The issues for the jury were: 1) did X consent (or have the capacity to consent) to sexual intercourse with the accused? and 2) if not, did the accused reasonably believe that she consented?

Post verdicts

16. On 20 April 2012, the day the jury returned their verdicts convicting the appellant but acquitting Macdonald, another man called Tristin Owens contacted the police. There is a note of his call: 'Caller states that two weeks after alleged incident of rape in Rhuddlan he saw female concerned (X). He slept with her and he can't understand why she would sleep with someone so soon after a rape.' He wanted to make a statement. A police officer spoke to him and referred him to the defence solicitor.

17. Many of the appellant's family and friends had been outraged by the verdict and were considering what they could to support an appeal. Mr Owens was approached by one of them, a man called, Jack Higgins who is a mutual friend of Mr Owens and the appellant. Mr Higgins wanted to know if Mr Owens would be prepared to talk to the defence solicitors Brabners.

18. Mr Ripley of Brabners spoke to Mr Owens on the telephone. By this time the focus of the defence team had become X's alleged memory loss after drinking. The defence wished to gather expert and lay evidence on this subject. Mr Owens told Mr Ripley of three separate occasions when he and X spent the night together and the next morning X asked if anything sexual had occurred and a fourth occasion when they had intercourse. Mr Ripley has very few notes of the conversation, but states it would be his normal practice to ask a witness like Mr Owens what, if anything, was said during any sexual activity. His colleague confirms that this was the case; albeit the CCRC has examined Mr Ripley's files and has found no notes to support the assertion. Mr Ripley cannot remember Mr Owens telling him anything about X being vocal. His email report to his supervising partner (the closest we have to a contemporaneous note) makes no reference to anything X said.

19. Mr Ripley drafted the first witness statement dated 16 May 2012, in which Mr Owens stated that he had known X for some time because she lived in the same street as his mother. In the months leading up to 30 May 2011, he was living at his mother's address. During this time, he met X at the Zu Bar on a number of occasions. On at least three of those occasions when both had consumed a lot of alcohol, X propositioned him by saying if he took her home, she would give him a 'good time.' On all three occasions, X went home with him and stayed the night but no sexual activity took place. On each occasion, X claimed she could not recall anything the next morning and asked if sexual intercourse had taken place. There is no mention in this statement of the fourth occasion when X and Mr Owens did have intercourse but it is common ground Mr Owens told Mr Ripley of it. After the statement had been taken, Jack Higgins remained the point of contact between Mr Ripley and Mr Owens for approval of the statement because Mr Owens did not have an email address.

20. This statement was therefore available at the first appeal but was not used because it related solely to the issue of X's loss of memory after drinking and was considered inadmissible and irrelevant.

21. After the first appeal a firm of professional investigators was employed by the appellant's extended family and a Mr Phippard was instructed to interview or re-interview a number of people including Mr Owens. The appellant's sister was the point of contact this time and, by the time Mr Phippard telephoned Mr Owens, he was aware why the defence wanted to speak to him.

22. Mr Phippard has provided a very detailed statement on the method he used to take the second statement and insists that the contents of the witness statement were very much the witness' own words and account. Ms Laws QC for the Crown does not dispute that the statements were properly taken. She questions what information had been fed to Mr Owens or he had acquired before he made the second statement.

23. In his second witness statement dated 9 September 2013 Tristin Owens stated that he had been acquainted with the appellant for approximately 7 or 8 years and X for approximately 13 years. He socialised with X and there were three occasions at closing time at the Zu Bar when X had asked to come home with him. These all occurred prior to May 2011. He always said yes, hoping X would sleep with him. Once at home, they would go to his bedroom. Whilst kissing and foreplay took place, they did not have sexual intercourse. On each occasion, the following morning X would ask what had happened the night before. He was surprised because she had not seemed that drunk the night before.

24. The last time X visited his home was two weeks after the allegation against the appellant, of which he was then unaware. At closing time in the Zu Bar on a Friday night, X approached him. She was drunk but able to stand and talk. She said, 'if you take me home, I'll show you a good time.' She repeated her request to be taken home. He said yes. They took a taxi home and engaged in kissing and foreplay. X invited him to go on top first and they began to have sexual intercourse. As they were having sex, X was shouting 'fuck me, fuck me harder.' X asked him to change positions and invited him to penetrate her from behind. She got onto all fours to facilitate this. In this position, she continued to shout, 'fuck me, fuck me harder.' They changed positions one more time and X continued to shout the same words.

25. Following sexual intercourse, they both went to sleep. Nothing more was said between them until the following morning when X told him she needed to go home. After X had left, his mother enquired whether he had had sexual intercourse with X. He lied to her because he did not want her to know. His mother then informed him that X had made an allegation of rape against the appellant two weeks ago. She had learned this from her close friend (X's mother). Mr Owens was shocked for two reasons: X had been happy to go out 'clubbing' and to have sex with him within days of the alleged rape and he worried he might be accused of rape himself. X approached him in the Zu Bar a week later and asked to go home with him but he declined.

26. Mr Owens said he called the police after the appellant was convicted because he felt the appellant's conviction was wrong; X had slept with him so soon after the rape (which he thought inconsistent with her being raped) and he thought (wrongly as he now accepts) that she was motivated by greed.

27. A third witness statement was taken from Tristin Owens by the CCRC dated 12th May 2015 in which he confirmed that the comments attributed to X during sexual intercourse were accurate.

28. We were invited to hear from Mr Owens de bene esse by both parties. Knowing the proposed line of the prosecution's attack upon Mr Owens's credibility, we asked what we considered to be the obvious question namely: what material was in the public domain at the time Tristin Owens came forward. We were led to believe that the graphic detail of the appellant's account had not been published. We then heard from Mr Owens.

29. Essentially he provided the same kind of detail as appeared in his second witness statement. He denied that anyone had given him that information and that he had any idea what the appellant had said about the allegation of rape other than that he had denied it. He explained that the reason the detail of X's sexual behaviour did not appear in his first witness statement to Mr Ripley is that he simply answered Mr Ripley's questions and Mr Ripley did not ask him anything about it.

30. His account was supported to an extent by his mother Angela Owens from whom a witness statement was also taken by the CCRC dated 18 August 2015. Mrs Owens was told by X's mother that X was concerned she may have been raped. Within a few days of learning this, Mrs Owens found her son Tristin and X in bed together. Tristin denied having sexual intercourse with X. The same thing happened one to two weeks later. Mrs Owens was unconvinced. On this second occasion, she disclosed to Tristin that X had made a recent report of rape and his actions could cause trouble. Ms Laws did not invite the court to hear from Mrs Owens and therefore we accept the content of her statement as accurate and reliable.

31. We were also asked to receive the evidence of another potential witness Steven Hughes. He made a witness statement to Mr Ripley for the purposes of the trial dated 14 September 2011.

32. Steven Hughes stated that he became acquainted with X via Facebook in March or April 2011. Through various exchanges on Facebook and via text messages, they arranged to meet at the restaurant where X worked. X went back to his home, initially on the basis there was a party there but stayed with Mr Hughes alone. They kissed and X stayed overnight. X returned to Mr Hughes' home the next day and they had sexual intercourse, including oral sex.

33. Subsequent to this, he had sex with X on five or six occasions on a casual basis. The first few times were by mutual arrangement, the last few times were instigated by X. On those occasions, she would text him and meet him for sex, usually late at night after she had been out drinking. On Friday 27 May 2011, X texted Mr Hughes late in the evening from a nightclub and they arranged to meet up and have sexual intercourse.

34. The point of taking a statement from Mr Hughes had been to counter the suggestion X would not have intercourse with a stranger on the first occasion they met. When the Crown decided not to call that evidence and his statement revealed that he did not have intercourse with her on the first occasion, any interest in calling him at trial faded away.

35. The appellant's solicitors took a statement from Mr Hughes dated 3rd December 2015. In it, he confirmed that on each occasion he saw X for sex, she was a confident sexual partner and gradually began to take control, often changing positions. On Friday 27 May 2011, Mr Hughes was on call in his capacity as an engineer. During the early hours of 28 May 2011, he was woken by a telephone call from X asking if he was able to pick her up. He agreed to collect her and drove to the nightclub. She was very drunk; Mr Hughes had not previously seen her in such a state. He described X as instigating all the sexual activity between them that night. They had vaginal and oral sex in different positions; this included his having sex with her from behind when she was on all fours. She demanded he 'go harder, go harder,' whilst he was having sexual intercourse with her and repeated this on a couple of occasions.

36. Mr Hughes did not know the appellant personally and does not know Tristin Owens. He was encouraged to make his first statement about his relationship with X following a telephone call from a man called Jordan Davies.

37. From there, he made contact with his cousin, Lloyd Hobson, who is friendly with the appellant. His telephone number was passed to Brabners Solicitors and he answered their questions and signed and returned a statement. The reason his first statement contained so little detail is because Mr Ripley did not ask him more; he simply answered the questions he was asked. Following the appellant's conviction, he was contacted by Liberton Investigations but proposed meetings were never convenient. In his evidence before us he said much the same.

38. Having heard the evidence and submissions we reserved judgment. During the course of the Easter vacation we received some important information from the CCRC in relation to publicity. We are very grateful to them for informing us so promptly. It had come to their attention that, contrary to the parties' stance before us at the hearing, there had been considerable publicity on the internet including the graphic detail of what the appellant told the jury. We invited further submissions from the parties. We received no application to put this material to the witnesses.

Second appeal

39. This appeal is based on the proposition that the evidence of Tristin Owens, his mother and Steven Hughes adds significant support to the contention that the appellant was telling the truth about the fact that X was capable of consenting and did consent. Mr Vaughan QC (who now represents the appellant) relied upon what he described as the 'striking detail' of the accounts from Mr Owens and Mr Hughes as compared with the appellant's description. They all describe a woman who in May and June 2011, having been out drinking, engaged in sexual intercourse in a particular way; she was not only an enthusiastic participant, she directed her sexual partners to have sexual intercourse with her in particular positions including the 'doggie position' and used a distinctive expression demanding intercourse with her harder. Their accounts bear sufficiently close resemblance to the appellant's account as to make the evidence 'so similar' that it cannot be reasonably explained as a coincidence.

40. If the court was persuaded to receive the evidence we were invited to find that had it been given at trial it might reasonably have affected the decision of the jury to convict: *R v Pendleton* [2002] 1 Cr. App. R. 34 HL. It should therefore have a significant impact on the members of this court.

41. Counsel considered each of the criteria in section 23 of the Criminal Appeal Act 1968 in turn.

Admissibility

42. Mr Vaughan accepted that the evidence upon which he wishes to rely relates to X's sexual behaviour and therefore the court would have to give permission under section 41 of the YJCEA for any questions to be asked or evidence adduced from Mr Owens and Mr Hughes on this issue.

43. Section 41provides:

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

44. Parliament intended these provisions to counter what have been described as the twin myths, namely that 'unchaste women are more likely to consent to intercourse and in any event are less worthy of belief'.

45. The House of Lords considered the meaning of section 41 and its compatibility with the ECHR in *R v A (No. 2) [2002] 1 A.C.45 [2001] 2 Cr. App. R. 21, H.L.* Their Lordships recognised the importance of providing complainants in sexual offences with protection from unnecessary and intrusive questioning about their private lives, but also that section 41, if interpreted too strictly, has the potential to interfere with the fairness of a trial by forcing judges to exclude relevant and admissible evidence. Mr Vaughan placed reliance on three passages in particular from the speeches:

(i) Lord Slynn at paragraph 13:

> "Section 41(3) (c) raises a different issue. Although if read literally or even perhaps purposively this provision is very restrictive, I think disproportionately restrictive, it is less

> precise than section 41(3)(b). The section must be read and given effect in a way "which is compatible with the Convention rights" in so far as it is possible to do so. It seems to me that your Lordships cannot say that it is not possible to read section 41(3) (c) together with Article 6 of the Convention rights in a way which will result in a fair hearing. In my view section 41(3)(c) is to be read as permitting the admission of evidence or questioning which relates to a relevant issue in the case and which the trial judge considers is necessary to make the trial a fair one."

(ii) Lord Steyn at paras 45 and 46:

> "In my view section 3 requires the court to subordinate the niceties of the language of section 41(3) (c), and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and common sense criteria of time and circumstances. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material."

(iii)

> "The effect of the decision today is that under section 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under section 3 of the Human Rights Act 1998, and due regard always being paid to the importance of seeking to protect X from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 of the convention. If this test is satisfied the evidence should not be excluded."

46. The sexual behaviour at issue in *A (No.2)* was sexual behaviour between the complainant and the accused; the admissibility of sexual behaviour between a complainant and third parties was not an issue for their Lordships determination. They noted that the section itself does not distinguish between sexual behaviour with others and sexual behaviour with the accused and their speeches suggest they contemplated evidence of the latter being admissible only in very restricted circumstances. At paragraph 30 Lord Steyn observed: "Although not an issue before the House, my view is that the 1999 Act deals sensibly and fairly with questioning and evidence about the complainant's sexual experience with other men. Such matters are almost always irrelevant to the issue whether the complainant consented to sexual intercourse on the occasion alleged in the indictment or to her credibility."

47. This approach appears to have been adopted by the Court of Appeal Criminal Division in R *v Hamadi (Zeeyad) [2007] EWCA Crim 3048* (see paragraph 18). Neither party sought to rely upon the judgment in *Andre White [2004] EWCA Crim*

946 which, it was said, may suggest there is a different legal test for the two situations. In *White,* the court rejected a defence submission that *A (No. 2)* is authority for a "wider reading of section 41 by force of section 3 of the Human Rights Act in a case where sexual acts of the complainant with men other than the appellant are sought to be adduced than is justified by the application of conventional canons of construction". On the facts, the court held that general evidence of the complainant's activities as a prostitute (as opposed to evidence of a specific sexual encounter) was irrelevant and inadmissible under section 41. Evidence of that kind did not go "in any legitimate sense to the issue of consent" (see paragraphs 35 to 37).

48. In our judgment it is not necessary to determine whether what has been called the 'ECHR gloss' on section 41 applies to the kind of evidence of sexual behaviour with third parties the defence wish to adduce before us. The parties agree that in principle, on the ordinary canons of construction, the section applies. The evidence in question may be admissible if, and only if, the defence can overcome the high hurdle of relevance and similarity.

49. Before turning to Mr Vaughan's principal submission we need to dispose of an argument advanced by the Crown as the effect of section 41. Ms Laws QC for the Crown interpreted section 41 to mean that even if a judge ruled questions about X's sexual conduct with Mr Owens and Mr Hughes admissible, the defence would be bound by her answers; they would be unable to call evidence about her sexual conduct because the evidence would go to her 'credit' and to what she called a 'collateral issue'. To our mind, this line of argument betrayed a misunderstanding of the section. If the proposed questioning of the witness or the evidence the defence wish to adduce goes solely or mainly to the issue of the credibility of the complainant, it would be prohibited by subsection (4); the judge would not give leave. We emphasise the words solely or mainly. To an extent any challenging of a complainant's evidence involves an attack upon her credibility. To obtain leave under this section the defence must satisfy the judge that the provisions of one or more of the other subsections apply and that, if leave is refused, any subsequent conviction would be unsafe. Thus, it is only if the proposed questioning and evidence of specific instances of sexual behaviour relate to a relevant issue and either do not go to the issue of consent under subsection (3) (a) or do go to the issue of consent and the requirements of subsection (3) (b), (c) (i) or (c) (ii) are fulfilled that a judge may give leave. If the judge gives leave the section makes clear provision for the asking of questions and the calling of evidence. The defence could not possibly be 'bound' by the complainant's answers.

50. It was upon section 41 (3)(c)(i) that Mr Vaughan focussed his submissions almost entirely, albeit the CCRC suggested the evidence might also go to the issue of the appellant's reasonable belief and therefore come within the terms of section 41 (3) (a) as not being an issue of consent. He sought to persuade us that Tristin Owens' and Steven Hughes' accounts of X's sexual behaviour with them are so similar to the appellant's account of X's sexual behaviour during the alleged rape that the similarity cannot be reasonably explained as a coincidence and might support a defence of actual consent.

51. Both parties agreed that what will amount to being "so similar" such that it cannot reasonably be explained as a coincidence will depend upon the given facts and will vary from case to case. The speech of Lord Clyde in *A (No 2)* provides some helpful guidance at paragraph 135:

> "It is only a similarity that is required, not an identity. …. Further the similarity must be such as cannot reasonably be explained as a coincidence. To my mind that does not necessitate that the similarity has to be in some rare or bizarre conduct. So long as the particular factor goes beyond the realm of what could reasonably be explained as a coincidence, it should suffice. Something about the sexual behaviour of the complainant on each of the occasions, such as something said or done by him or her which is not so unremarkable as to be reasonably explained as a coincidence has to be found."

52. We were taken to *R v T (Abdul) (2004) 2 Cr App R 32* in which this court found that the section 41 criteria were satisfied on its facts. In that case it had been alleged that the appellant had raped his long-term partner inside a climbing frame in a children's play area in a park. He applied under section 41(3) to cross-examine the complainant about an incident which had occurred three to four weeks earlier where the complainant consented to sexual intercourse with the appellant inside the same climbing frame. He argued that there were similarities that could not reasonably be explained as coincidence, namely: the fact the parties enjoyed consensual oral sex on both occasions, the location of the sexual intercourse was the same (inside the climbing frame), the same position had been adopted, that is to say that the complainant and the appellant were standing up and the sexual intercourse took place from behind.

53. In its judgment the court observed at paragraph 15: "

> "It is now accepted that the evidence relating to the previous sexual intercourse within the climbing frame was similar within the wording of section 41(3) (c) (i). As it would seem to us, it is clearly arguable that the adoption of the same respective positions on that occasion as on the occasion the subject of the trial would also be similar within section 41(3)(c)(i). Indeed it is arguable that the consenting oral sex should be admissible, if not because it is similar, at least, in order to avoid there being an unfair trial."

54. Mr Vaughan urged upon us that the court in *Abdul T* had followed the guidance in *A (No. 2)* and had not applied an overly restrictive test but the broader test of relevance.

55. Ms Laws did not disagree but placed considerably more emphasis on the fact there here the defence wish to put evidence before the court of X's sexual behaviour with other men. She parted company from Mr Vaughan on the question of whether the sexual behaviour described by Mr Owens and Mr Hughes was relevant on the facts of this case and whether it is sufficiently similar to that described by the appellant that it cannot reasonably be explained as a coincidence.

56. Her primary stance was to assert that even if the 'fresh evidence' is credible it reveals simply that a sexually active woman enjoys sexual activity with other men in a way that is far from unusual. She described the words 'fuck me harder' as common-place words used to indicate enthusiastic consent that can be reasonably explained by coincidence.

57. Her secondary stance was that the 'fresh evidence' is not credible and is not sufficiently consistent with the appellant's account. She took us through what she asserts are a number of aspects of the appellant's account to establish its inherent unreliability and a number of inconsistencies between what he has said, what his co-accused has said and what Mr Owens and Mr Hughes have said.

58. In so doing Mr Vaughan accused her of isolating each of the aspects of sexual behaviour relied upon and ignoring the cumulative effect. He argued the words ("Fuck me harder "and "Go harder") alone are sufficiently similar to satisfy the test of similarity but taken with the other behaviour alleged, the impact is compelling and therefore reaches the higher hurdle of relevance. The evidence, if accepted, suggests that, in the relevant period, when engaged in consensual sexual intercourse, X was far from a passive participant. She instigated sexual activity, directed her sexual partners to have sex with her in certain positions and in a certain way (for example vaginal intercourse from behind when she was "on all fours") and in the course of having sex used an expression demanding her partner to have intercourse with her harder.

59. Both Ms Laws and Mr Vaughan considered in detail how Mr Owens' and Mr Hughes' new accounts came to light and how they developed in writing. Ms Laws suggests the delay in the witnesses coming forward with the new detail bears all the hallmarks of witnesses being fed information by people close to the appellant so as to make statements that would support another appeal. Mr Vaughan uses the same factors to argue that, had the witnesses been a party to a conspiracy to pervert the course of justice, they would have provided the new detail at a much earlier stage. He reminded the court the witnesses are of previous good character and apart from relatively distant connections with the appellant's circle of family and friends and Mr Owens' mistaken belief X had invented an allegation of rape to extract money from the appellant, there is no reason to conclude either is lying.

60. Although we were not invited to receive it formally as fresh evidence, we were also invited to note that the CCRC took a statement from X dated 27 July 2015. In it she accepted that she and Tristin Owens had sex in 2011. She stated that it was two months before 30 May 2011, not two weeks after. She also denied that she used the words attributed to her by Tristin Owens and maintained that she would not have used such words during sex. Yet, when X was asked about these words at trial, she said that she could not remember whether she said them or not; she did not assert that those were words she would never say. She has not been asked about intercourse with Mr Hughes.

61. Finally, Mr Vaughan invited us to conclude that there is a reasonable explanation for the evidence not being available at trial. Mr Vaughan has complied with the duties of fresh counsel under *McCook [2014] EWCA Crim 734*, as he was obliged to do. He has done his best to confirm with the appellant's trial lawyers the factual accuracy of what he has asserted. Mr Ripley and Kylie Wardle's statements confirm that the witness Mr Owens was not known to the defence at the time of the trial. It is not a case of a tactical decision having been taken not to call him. His sexual relationship with X was known by the time of the first appeal but this aspect of his evidence was not. The reason for that seems to be simply that he was not asked about it.

62. On that basis he argued we should adopt the same course as was adopted in the case of *R v Khan [2010] EWCA Crim 1946.* The Court stated, "neither the appellant nor

the police, it would seem, were aware before the trial that Mr Cooper (the fresh evidence witness at the appeal) might be in a position to give evidence and so there is a reasonable explanation for the failure to call him as a witness."

63. As for Mr Hughes, his involvement with X was known at trial but the trial lawyers were focussed on a different issue and they never appreciated that he might be able to help on the issue of X's sexual behaviour. His original statement lacks almost any detail on the type of behaviour exhibited by X. The only detail contained in his statement is the fact that X gave him oral sex the first time they had sex.

64. Ms Laws took a different view; she maintained there is no reasonable explanation for the evidence not being put before the jury. In any event the court should not encourage this kind of post-trial investigation into the sexual behaviour of a complainant which has the potential for undermining the clear intent of Parliament in enacting section 41 and doing its best to abolish the 'twin myths'.

Conclusions

65. This case has been referred to us by the CCRC and not by the single judge. In normal circumstances the full court (rather than the single judge) will decide whether or not to give leave to adduce fresh evidence (see *Cross [2014] EWCA Crim 96*). When the CCRC refers a case, this court must deal with it as if it was an appeal. It is common ground, therefore, that the full court should determine whether or not to allow fresh evidence to be called and should apply the criteria in section 23 of the Criminal Appeal Act 1968 in the usual way.

Whether the evidence is capable of belief

66. For the purpose of deciding whether or not the evidence is capable of belief, we consider we must put to one side the material that has emerged as to extent to which the detail of the appellant's account has been made public. This material only emerged after the hearing had concluded, there has been no application to adduce it, the witnesses have not been asked about it and we have heard no submissions upon it.

67. Nevertheless, we have borne very much in mind the fact that there may be material available to the Crown that has the potential to undermine the witnesses' credibility at a hearing where their evidence can be thoroughly and rigorously tested in a way that was not possible before us. The Crown has a number of potentially valid points to make. There is the possibility that the witnesses may be more partial than they cared to admit and there is the obvious point that their current accounts did not come to light until the appellant had exhausted the appeals process. Having said that, Ms Laws' cross examination before us did nothing to undermine their integrity and their credibility. Ms Laws could only assert their partiality by reference to their indirect or direct connections to the appellant. She relied on the fact that some of those closely connected to the appellant and known to the witnesses have changed their accounts; she suggests in an attempt to assist the appellant. However, there is nothing of any significance she could put to the witnesses themselves to show that they have changed their accounts and been prepared to lie to assist the appellant. On the material we have seen, that would be too much of a leap.

68. We have noted, as Ms Laws invited us to do, that neither Mr Owens nor Mr Hughes provided the detail we have heard when they first made statements. To our mind, that fact may be explained in the way Mr Vaughan suggested. The witness would have been entitled to assume that the lawyer would ask them all relevant questions and the lawyer may have been focussed on entirely different issues and not asked them for this kind of detail of their sexual encounters with X.

Whether there is a reasonable explanation for the failure to adduce the evidence at trial

69. There is undoubtedly a reasonable explanation for not calling Mr Owens at trial, his existence and potential relevance were not known. At the first appeal hearing, his evidence, limited as it was to the issue of X's memory, was said not to be relevant. The position as regards Mr Hughes is not so straightforward. It was known that he had had a sexual relationship with X; it was the details that were not known. One could argue that the appellant's lawyers should have asked for that detail but they were, no doubt, conscious of the restrictions in section 41 and, importantly, they were focused on the one issue of 'sex with a stranger' upon which they thought he could give relevant evidence. We would be prepared in those circumstances to accept the explanation for the failure to apply to adduce his evidence at trial as reasonable.

Whether the evidence would have been admissible and may afford a ground for allowing the appeal

70. This is the ultimate question. It was an unusual case. The only witnesses as to sexual activity and the only evidence as to sexual activity came from the accused. Unlike McDonald, the appellant could rely on little more than his own account of events in the bedroom to advance his defence of capacity to consent and actual consent. X could not assist; she said she remembered nothing.

71. When the appellant was first asked what happened in room 14, he described in graphic detail the sexual behaviour of a woman who, on the prosecution case, would have been incapable of behaving in that way. If the jury rejected his account of her sexual behaviour, he had no defence. Two other men have described specific instances of her behaving in a very similar fashion with them, in the days before the alleged rape and in the days that followed. On each occasion she had been drinking, she is said to have instigated certain sexual activity, directed her sexual partner into certain positions, and used specific words of encouragement.

72. We are acutely conscious of the hurdle facing any defendant in persuading a trial judge that evidence of this kind from third parties is admissible. Having said that, we are satisfied that, on these facts, the evidence of Mr Owens and Mr Hughes would have been relevant and admissible evidence at trial and is arguably sufficiently similar to come within the terms of section 41 (3) (c) (i). It may also have been relevant and admissible, as the CCRC suggested, under 41 (3)(a) on the issue of reasonable belief.

73. The flaw in Ms Laws' argument, as we see it, is that she focussed on there being nothing 'unusual' about X's alleged behaviour. The behaviour does not have to be unusual or bizarre; it has to be sufficiently similar that it cannot be explained reasonably as a coincidence.

74. We have reached this conclusion with a considerable degree of hesitation. Ms Laws was right to emphasise the importance of offering complainants in sexual offences protection from intrusive and unnecessary questioning about their sexual history, particularly with third parties. It may well be a rare case, as Lord Steyn envisaged in *A (No.2)* in which it will be appropriate to indulge in this kind of forensic examination of sexual behaviour with others. In our judgment this is potentially such a rare case. The requirements of section 41 must give way, as was held in *A (No.2)*, to the requirements of a fair trial. Relevant and admissible evidence cannot be excluded. For those reasons we have concluded that this appeal must be allowed.

Re-trial

75. In the event of our allowing the appeal the prosecution indicated that they would seek a re-trial. The only argument that Mr Vaughan could advance in support of his proposition there should not be a re-trial is the fact the appellant has served his sentence and been released on licence. The offence with which he has been charged is a serious one and much as we regret the fact that both the appellant and X must go through what is undoubtedly an ordeal for all concerned at a second trial, it is in the interests of justice for this matter to be resolved by a jury.

76. Finally, we should emphasise that in allowing the appeal we have made no criticism of X. We do not expect to see any repetition of the appalling treatment of her on the internet. In fact we do not expect to see anything on the internet in relation to this appeal until after the conclusion of the re-trial, save for the bare summary we have given for publication. Any attempt improperly to influence the verdict of the next jury will be dealt with robustly and anyone responsible punished severely. For the avoidance of doubt we repeat that X's identity must not be revealed. It is protected by law.