

JERSEY / JUDGMENT

The Attorney General v Duarte Nuno Araujo Drumont Correia

COURT

Royal Court

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Hearing (Criminal) - Application by the defendant for leave to introduce certain text message evidence.

[2015]JRC061A

Royal Court

(Samedi)

26 March 2015

Before : Sir Michael Birt, Commissioner, sitting alone
The Attorney General
-v-
Duarte Nuno Araujo Drumont Correia
R. J. MacRae Esq., Crown Advocate.
Advocate C. M. Fogarty for the Defendant.

JUDGMENT

THE commissioner: 1. This is an application by the defendant, who faces a charge of attempted rape, for leave to introduce in evidence certain text messages between the complainant and her boyfriend with a view to then using them for the purpose of cross examining the complainant on matters relating to her previous sexual history. It requires the Court to consider the principles upon which such evidence and/or cross-examination should be permitted. 2. The application was partially heard on 10th February, 2015. Following that hearing, Advocate Fogarty submitted a narrower, more focused application which was heard on 17th February, 2015. On 18th February, 2015, I announced my decision, which was to refuse leave. What follows constitutes my reasons for that decision.

Background

3. The defendant faces a charge of attempted rape with an alternative count of indecent assault. 4. The prosecution case is that at about 11:20pm on 4th August, 2014, the complainant, a 26 year old woman, was walking back from a friend's house to her boyfriend's house. She walked along Don Road and into a gravel car park lying between Don Road and Chapel Lane. She was on the phone to the friend whom she had just left when the defendant appeared beside her. She rang off and then stumbled. The defendant pulled her up and then tried to kiss her. Within moments she found herself up against a wall in Chapel Lane against which she was being pressed by the defendant. He pulled down her shorts leaving her clothing just below the cheeks of her buttocks. She then felt the defendant's erect penis up against her buttocks and thought he was trying to get it into her vagina. He was unsuccessful but she felt it between the cheeks of her buttocks. At this time a witness was walking his two dogs in Chapel Lane when he noticed some movement in a driveway. He saw the defendant, with his back to him, up against the victim with his hands on the wall. He asked what was going on and the defendant replied "nothing". The complainant then broke away and ran off with her head in her hands. Shortly afterwards she was seen by the witnesses sister outside the sister's home. The complainant was on the phone telling her boyfriend that someone had just tried to rape her. She was in a very distressed state. In the meantime the defendant ran off and was chased by the witness. He was arrested not long afterwards. In short, the prosecution case is that this was an attempted rape of a woman by a stranger within moments of coming across her. 5. The defence case is very different. In one of the police interviews, the defendant explained that he had seen the complainant "wobbling" all over the pavement because she was drunk. Shortly afterwards, she indicated that she wanted a cigarette. He gave her one but she dropped it on the floor along with her phone. She then grabbed him by the hand and took him over to the car park (which was opposite his home address). Whilst in the car park she again dropped her mobile phone and when she bent down to pick it up, he held her by the waist so she did not fall over. As she picked it up, she grabbed his penis and squeezed it. She then pulled him by the hand towards the end of the car park where there are some bins. She grabbed him around the waist and started kissing him forcefully. He kissed her back. Following a period of kissing, she took him by the hand and led him into Chapel Lane. She faced the wall. She grabbed his hand and placed it down her shorts and pants where he rubbed the outer part of her vagina as he thought this was what she wanted. She then took hold of his penis and squeezed it before pulling down her own shorts and pants to expose her bottom. He then pulled her shorts down a little more before pulling down his own trousers and pants so that his erect penis was exposed. There was no conversation but it was clear that she wanted to have sex with him. He then inserted his erect penis before thrusting for approximately three minutes and then withdrawing before ejaculating. He was not sure if he inserted his penis into her vagina, her anus or simply between the cheeks of her buttocks. A man then walked passed and asked "are you ok" to which he replied "I am fine". He then said that the complainant pulled up her shorts and pants and walked off without saying anything. He thought the man

was going to fight him so he ran off in the opposite direction but was chased by the man shouting “police” on his mobile phone. He said he was frightened of being arrested because he had sex in public. In short, the defence case is the entire incident took place at the instigation of the complainant, who wanted to have sex with a complete stranger within moments of meeting him on the road. It was therefore consensual. The evidence sought to be admitted 6. It follows that a key issue at trial will be that of consent. 7. At the first hearing on 10th February, 2015, Advocate Fogarty sought to have admitted in evidence some 109 pages of text messages between the complainant and her boyfriend going back to March 2014. At the adjourned hearing on 17th February, she made a much more restricted application. There were now two pages of texts from March 2014 (“the March texts”) and 10 pages of texts between 28th June and 3rd July, 2014, (“the June texts”) that she sought to have admitted. 8. The March texts appear to have taken place in the context of an argument between the complainant and her boyfriend over her being unfaithful to him. Advocate Fogarty relies in particular on a text at 15:34 on 21st March from the boyfriend to the complainant, the relevant part of which reads:- “I was just angry when I heard that u been sleepin wif people same day u met them. at least have a bit of self-respect and don’t do tha. Too small a place. all these pissheads/junkies speak about this kind of thing u know. I wouldn’t do that unless it was AIDS u gave me I would need to if u still gonna sleep around ya know...” 9. The complainant replied:- “What so u’ve never had a one night stand no?...” There are two further texts in which the boyfriend alleges that she has committed one night stands and that she has slept with three named people, although she does not respond to that allegation either by admitting it or denying it.

10. The context to the June texts is that the complainant appears to have had a one night stand with her half-brother. She asserts that she was so drunk that she cannot remember a thing about it. She says she would never do anything so stupid if she was sober and that she was not in a fit state to consent to anything.
11. Advocate Fogarty drew particular attention to the following text although she wished to have them all admitted. After various exchanges about what had happened, the boyfriend sends a text on 29th June at 19:36 saying:- “u can’t make excuse about a being so out of it that’s unacceptable excuse. u still would have known a * the time it waent with your boyfriend ay! I can’t understand tho. if u were so out of it as u say it must have been rape don’t ya think?”
12. She replies:- “If he would have been sober then yes I’d think that”.
13. After various further exchanges he sends a further text two days later on 1st July at 17:36:- “U think i’m no! hurting that the woman I loved could let that happen. It was rape or u knew it was happening s! the time either one which is it.”
14. She replies at 17:38:- “I already told u I dnt remember so far as I’m aware it didn’t happen”.

15. This is followed by a number of further texts in which, inter alia, he accuses her of liking “cocks up u” at 22:30 and then saying in another text at 22:22:- “U expect me to fuck u again after knowin God knows how many people been there before and after me again”.
16. She replies at 9:30 the next day that he is “bang out of line” with what he is saying. Relevance of the complainant’s previous sexual history
17. In the absence of authority in Jersey, I have been referred to the position in England and Wales, Canada and other jurisdictions. This has not been for the purpose of arguing that the Court may by analogy introduce provisions in Jersey which are found in statutes elsewhere. What is said is that one can gain assistance as to what is truly relevant to the issue of consent in rape cases and that this will assist the Court in establishing the principles at customary law for deciding when the previous sexual history of a complainant is admissible.
18. In times past complainants in rape cases were regularly cross-examined on their sexual history with other men. Such evidence was thought to be relevant both as to their credibility (on the basis that sexual intercourse with other men made it less likely that a woman was telling the truth) and to the issue of consent (on the basis that if she has had sexual intercourse with other men, she is more likely to have consented on the occasion in question).
19. In England and Wales, Parliament first sought to address this topic in section 2 of the Sexual Offences (Amendment) Act
1976. That section provided that, in a trial for a rape offence, no evidence could be adduced and no question asked of the complainant about her sexual experience with anyone other than the defendant except with the leave of the judge. The section provided that a judge should only give leave for this to occur if he was satisfied that to refuse to allow the evidence to be adduced or the questions to be asked would be unfair to the defendant.
20. It was felt that section 2 had not achieved its object of preventing oppressive questioning of complainants about their sexual history and in due course Parliament enacted sections 41-43 of the Youth Justice and Criminal Evidence Act 1999 (“the 1999 Act”). In very broad terms, this prohibited the giving of evidence and cross-examination about any sexual behaviour of the complainant except with the leave of the court and leave could only be given where (a) consent was an issue and where the sexual behaviour of the complainant was 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” (section 41(3)(b), and (b) where the sexual behaviour of the complainant to which the question or evidence related was alleged to have been “in any respect, so similar” to the sexual behaviour which is shown by evidence to have taken place as part of the event which is the subject matter of the charge or to any other sexual behaviour of the complainant which took place at or about the same time as that offence “that the similarity cannot reasonably be explained as a coincidence” (section 41(3)(c)). Such questions are not allowed if their purpose is to establish material to impugn the credibility of the complainant as a witness. Leave may also be given if the evidence of the

complainant's sexual behaviour goes no further than to rebut prosecution evidence.

21. No distinction is drawn in the 1999 Act between questions about a complainant's sexual behaviour with other men and her sexual behaviour with the defendant. This gave rise to problems which culminated in the case of *R v A*

[2002] 1 A.C. 45. In that case the defendant wished to cross-examine the complainant about the previous sexual relationship between them and to lead evidence about it. The case was therefore not concerned with asking questions about a complainant's sexual behaviour with other men. The House of Lords held that section 41 went too far in restricting evidence and questioning about a complainant's previous sexual behaviour with the accused and could lead to an unfair trial. It held that the section should be read down under the Human Rights Act 1998 so as to permit questioning about the sexual history between a complainant and an accused when not to do so would lead to an unfair trial.

22. Although the case was not concerned with questions or evidence about a complainant's sexual history with other men, the members of the House of Lords nevertheless had some useful observations to make about the relevance in this day and age of such questioning or evidence. I would quote the following passages. (i) Lord Steyn said this at [27] and [30]:- "27 ... Nevertheless, it has to be acknowledged that in the criminal courts of our country, as in others, outmoded beliefs about women and sexual matters lingered on. In recent Canadian jurisprudence they have been described as the discredited twin myths, viz "that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief"; *R -v- Seaboyer* (1991) 83 DLR(4th) 193, 258, 278C per McLachlin J. Such generalised, stereotyped and unfounded prejudices ought to have no place in our legal system. But even in the very recent past such defensive strategies were habitually employed. It resulted in an absurdly low conviction rate in rape cases. It also inflicted unacceptable humiliation on complainants in rape cases. 30 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....". [emphasis added] (ii) Lord Clyde said as follows at [123] – [125]:- "123 The question whether a complainant has consented to intercourse with the defendant is often a critical issue in a trial for rape. So the question what evidence is or is not relevant to the matter of the giving or withholding of consent becomes of particular importance. From at least the nineteenth century the belief seems to have been held that if the complainant had had sexual intercourse with some other man or men than the defendant she would be more likely to have consented to intercourse with the defendant. It seems also to have been believed that such a complainant would be less worthy of belief than a woman of unblemished chastity. These ideas have been labelled as myths in Canadian jurisprudence. In *R -v Seaboyer* McLachlin J (p 630) considered that they had no place in a rational and just system of law. 124 Ideas which may have seemed sound in the nineteenth century should be discarded in the face of the very different society in which we

now live. The respect which is due to women in society requires that a proper recognition should be given to their independence of mind and the autonomy which they undoubtedly should enjoy. General beliefs about the propensity of unchaste women to consent to intercourse or to be unworthy of credit which may have held sway in an age when the position of women in society bears little comparison with what it is today should now be seen as heresies and discarded as outmoded. Any general idea that because a woman has consented once she is likely to have consented on the occasion in dispute should be relegated to history. Evidence of a general reputation in relation to sexual matters is properly excluded under Section 41(6). The only matters to which evidence or questioning may be permitted are specific instances of alleged sexual behaviour. 125 But there is one vital distinction which much be recognised among the generalities which are sometimes adopted in this context, and that is the distinction between a history of intercourse with the defendant and a history of intercourse with other men. To an extent that distinction has been recognised in the past. ... but the distinction should be recognised as going further. It may readily be accepted that some evidence at least relating to sexual behaviour with the defendant outside the particular event which is the subject of the trial may be relevant as casting light on the question of the complainant's consent. But I do not consider that evidence of her behaviour with other men should now be accepted as relevant for that purpose...". [emphasis added] (iii) Finally, Lord Hutton had this to say at [142] and [147] – [149]:- “142 In a criminal trial there are two principal objectives of the law. One is that a defendant should not be convicted of the crime with which he is charged when he has not committed it. The other is that a defendant who is guilty of the crime with which he is charged should be convicted. But where the crime charged is that of rape, the law must have a third objective which is also of great importance; it is to ensure that the woman who complains that she has been raped is treated with dignity in court and is given protection against cross-examination and evidence which invades her privacy unnecessarily and which subjects her to humiliating questioning and accusations which are irrelevant to the charge against the defendant. The need to protect a witness against unfair questioning applies, of course, to all trials but it is of special importance in a trial for rape. Linked to the third objective is the further consideration that allegations relating to the sexual history of the complainant may distort the course of the trial and divert the jury from the issue which they have to determine. 147 The intention of section 41 is to counter what has been described as the two myths. One is that because a woman has had sexual intercourse in the past she is more likely to have consented to intercourse on the occasion in question. The other is that by reason of her sexual behaviour in the past she is less worthy of belief as a witness. 148 As regards the first myth it is important to recognise that the present case is one where the defendant wishes to make the case that the complainant had previously had consensual intercourse with him – he does not wish to make the case that the complainant had previously had consensual intercourse with other men and that therefore it was likely that she had consented to have sexual intercourse with him. This is an important distinction, and I propose to confine my observations to a case such as the present one where a defendant seeks to give evidence of the complainant having had previous consensual intercourse with

him. 149 The Supreme Court of Canada in R –v- Seaboyer ... and R –v- Darrach ... has given powerful and learned judgments demonstrating that the two myths have no place in modern law, but the judgments were given in cases where the defences which the defendants wished to advance related to the alleged sexual conduct of the complainants with other men and the judgments are primarily directed to this situation. ...”

23. In my judgment, the statements made by the members of the House of Lords in R v A give authoritative support to the proposition that evidence of the complainant having previously had sexual intercourse with other men is only rarely relevant to the issue of whether she has consented with the defendant.
24. That was also the view of the Supreme Court of Canada in the case of R v Seaboyer [1991] 2 SCR 577, referred to by some of the judges in R v A. That case raised the question of whether sections 276 and 277 of the Criminal Code 1985 were compatible with the Canadian Charter of Rights and Freedoms (“the Charter”), which conferred the right upon an accused to a fair trial. Section 276 provided that no evidence could be adduced on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused except in three situations, namely to rebut evidence adduced by the prosecution, to prove the identity of the person who committed the alleged offence or where the sexual activity took place on the same occasion as that which formed the subject matter of the charge where that evidence related to consent. Section 277 provided that evidence of sexual reputation, whether general or specific, was not admissible in relation to the credibility of the complainant.
25. The Supreme Court held that section 277 did not infringe the Charter because it did not adversely affect the fairness of any trial. McLachlin J said this in relation to section 277 at 612:- “Section 277 excludes evidence of sexual reputation for the purpose of challenging or supporting the credibility of the plaintiff. The idea that a complainant’s credibility might be affected by whether she has had other sexual experience is today universally discredited. There is no logical or practical link between a woman’s sexual reputation and whether she is a truthful witness. It follows that the evidence excluded by s.277 can serve no legitimate purpose in the trial. Section 277, by limiting the exclusion to a purpose which is clearly illegitimate, does not touch evidence which may be tendered for valid purposes, and hence does not infringe the right to a fair trial.”
26. Turning to section 276, the Court held that the blanket exclusion (subject only to the three exceptions) could exclude evidence which was relevant to the defence and the probative value of which was not substantially outweighed by the potential prejudice to the trial process. It was therefore contrary to the Charter. The Court went on to say that this did not mean that, section 276 having been struck down, one reverted to the old position. The common law had to develop and to do so by taking account of changing perceptions of what was or was not relevant. McLachlin J summarised the Court’s conclusion at 598:- “My conclusion is that one of the sections in issue, s.276 offends the Charter. While its purpose – the abolition of outmoded, sexist-based use of sexual conduct evidence – is laudable, its

effect goes beyond what is required or justified by that purpose. At the same time, striking down s.276 does not imply reversion to the old common law rules, which permitted evidence of the complainant's sexual conduct even though it might have no probative value to the issues on the case and, on the contrary, might mislead the jury. Instead, relying on the basic principles that actuate our law of evidence, the courts must seek a middle way that offers the maximum protection to the complainant compatible with the maintenance of the accused's fundamental right to a fair trial."

27. The Court elaborated on this aspect at 630 where, having posed the question as to whether the striking down of s.276 revived the old common law rules, McLachlin J said this:- "The answer to this question is no. The rules in question are common law rules. Like other common law rules of evidence, they must be adapted to conform to current reality. As all counsel on these appeals accepted, the reality in 1991 is that evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant's credibility or consent. Although they still may inform the thinking of many, the twin myths which s.276 sought to eradicate are just that – myths – and have no place in a rational and just system of law. It follows that the old rules which permitted evidence of sexual conduct and condoned invalid inferences from it solely for these purposes have no place in our law."
28. The Court went on to consider what those common law rules should be. It began at 631 by referring to a work in relation to the law of the United States by Professor H Galvin "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade (1986), 17 Minn. L.Rev. 763 where at 903-4 she proposed the following as appropriate principles:- "Sexual conduct of victim of rape. In a prosecution for rape, evidence that the victim has engaged in consensual sexual conduct with persons other than the accused is not admissible to support the inference that a person who has previously engaged in consensual sexual conduct is for that reason more likely to consent to the sexual conduct with respect to which rape is alleged. Evidence of consensual sexual conduct on the part of the victim may, however be admissible for other purposes.
 - (1) By way of illustration only, and not by way of limitation, the following are examples of evidence admissible under this section:
 - (a) Evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape alleged by the prosecution;
 - (b) Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the victim;
 - (c) Evidence of a pattern of sexual conduct so distinctive and so closely resembling the accused's version of the alleged encounter with the victim as to tend to prove that the victim consented to the act charged or behaved in such a manner as to lead the accused reasonably to believe that the victim consented;

- (d) Evidence of prior sexual conduct, known to the accused at the time of the act charged, tending to prove that the accused reasonably believed that the victim was consenting to the act charged;
 - (e) Evidence tending to rebut proof introduced by the prosecution regarding the victim's sexual conduct;
 - (f) Evidence that the victim has made false allegations of rape."
29. The Supreme Court held that, subject to certain modifications, this would reflect a proper approach to the admissibility of evidence about previous sexual conduct and set out guidelines in the judgment at 634 – 636 as follows:- "I would summarize the applicable principles as follows:- 1 On a trial for a sexual offence, evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct:
- (a) more likely to have consented to the sexual conduct at issue in the trial;
 - (b) less worthy of belief as a witness. 2 Evidence of consensual sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant where it possesses probative value on an issue in the trial and where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence. By way of illustration only, and not by way of limitation, the following are examples of admissible evidence:
- (a) Evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape alleged by the prosecution;
 - (b) Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the complainant;
 - (c) Evidence of prior sexual conduct, known to the accused at the time of the act charged, tending to prove that the accused believed that the complainant was consenting to the act charged (without laying down absolute rules, normally one would expect some proximity in time between the conduct that is alleged to have given rise to an honest belief and the conduct charged);
 - (d) Evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence, bearing in mind that such evidence cannot be used illegitimately merely to show that the complainant consented or is an unreliable witness;
 - (e) Evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct."

30. The Court went on to hold that, procedurally, the Court must establish on a voir dire that the proposed use of the evidence of other sexual conduct is legitimate as falling within the guidelines. The Court summarised the judge's task at such a hearing at 634:- "In my view the trial judge under this new regime shoulders a dual responsibility. First, the judge must assess with a high degree of sensitivity whether the evidence proffered by the defence meets the test of demonstrating a degree of relevance which outweighs the damages and disadvantages presented by the admission of such evidence. The examples presented earlier suggest that while cases where such evidence will carry sufficient probative value will exist, they will be exceptional. The trial judge must ensure that evidence is tendered for a legitimate purpose, and that it logically supports a defence. The fishing expeditions which unfortunately did occur in the past should not be permitted. The trial judge's discretion must be exercised to ensure that neither the in camera procedure nor the trial become forums for demeaning and abusive conduct by defence counsel."
31. By analogy with the procedure laid down by the Supreme Court of Canada, the English courts have stated that, before evidence can be admitted on the basis that it falls within an exception allowed by section 41 of the 1999 Act, there must be a proper evidential basis for asserting that this is the case; see *R v Abdelrahman (Samir)* [2005] EWCA Crim 1367.
32. Following the decision in *Seaboyer*, the Canadian Parliament amended the legislation. The replacement section 276 was challenged in *R v Darrach* [2000] 2 SCR 443. In that case the Supreme Court upheld the new provision as not endangering the right to a fair trial. In passing the Court said this at paragraphs 32-33:- "32. The accused objects to the exclusionary rule itself in s.276(1) on the grounds that it is a "blanket exclusion" that prevents him from adducing evidence necessary to make full answer and defence, as guaranteed by ss.7 and 11(b) of the Charter. He is mistaken in his characterisation of the rule. Far from being a "blanket exclusion", s.276(1) only prohibits the use of evidence of past sexual activity when it is offered to support two specific, illegitimate inferences. These are known as the "twin myths", namely that a complainant is more likely to have consented or that she is less worthy of belief "by reason of the sexual nature of [the] activity" she once engaged in.
33. This section gives effect to McLachlin J.'s finding in *Seaboyer* that the "twin myths" are simply not relevant at trial. They are not probative of consent or credibility and can severely distort the trial process. ..."
33. Advocate MacRae also referred me to legislation introduced in Scotland (sections 274 – 275 of the Criminal Procedure (Scotland) Act 1995) and in Guernsey (sections 42 – 43 of the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law 2013), both of which introduce measures to restrict the ability of the defendant to ask questions or introduce evidence about the previous sexual history of a complainant. Jersey law on the subject

34. I repeat what I said at the beginning of this judgment, namely that it is not permissible for a Court simply to look at statutory provisions in other jurisdictions and transpose those into Jersey law by way of purported development of the common (or in our terminology ‘customary’) law. But it is permissible, as the Supreme Court of Canada has said, to develop the customary law to take account of modern understanding.
35. A defendant has an absolute right to a fair trial. That means that, subject only to any discretion to disallow the admission of evidence whose probative value is substantially outweighed by its prejudicial effect, a defendant has the right to adduce relevant evidence to his defence including evidence which goes to the building blocks of his defence. The question is what is relevant?
36. In the past, it was thought that evidence of a previous sexual history with other men was relevant as tending to show that the complainant was less worthy of belief and also would be more likely to consent to sex on the occasion in question. What the extracts from the judgments in *R v A* and *Seaboyer* show convincingly is that this is no longer the case. It is now realised that these are twin myths. The fact that a woman has a sexual history does not mean that she is more likely to be a liar; and the fact that she has had consensual sex with other men on previous occasions does not tend to show that she consented on this occasion. In other words, the evidence is simply not relevant to these two issues. If it is not relevant, it is of course not admissible.
37. The prosecution have requested that I should seek to give guidance for the future as to the circumstances in which a complainant may be asked or evidence may be given about her previous sexual history. I am content to do so but I must enter three notes of caution:- (i) Judicial guidance is just that. Words in a judgment are not to be treated as if in a statute and a court can only focus on the issues as presented to it in the particular case before it. Ultimately, a defendant has an absolute entitlement to a fair trial. If the judge concludes, on the facts of any particular case, that rigid application of these guidelines would lead to the exclusion of relevant evidence, he should of course feel free to depart from them. However, in coming to a decision a judge should always bear in mind the existence of the “twin myths” previously referred to. (ii) This guidance is concerned only with the sexual history of a complainant other than with the defendant. I have not considered the circumstances in which evidence of previous sexual history with a defendant may be relevant and, as *R v A* shows, the position may be very different there. (iii) I have formulated the guidance by reference to a prosecution for rape, but the principles would in my view be equally applicable to other sexual offences such as attempted rape, indecent assault etc. (iv) Anything I say in this judgment is of course subject to correction by the Court of Appeal.
38. As will be seen, I have drawn substantially on the discussion in *Seaboyer*, partly from the formulation by Professor Galvin already referred to and partly from the formulation by the Supreme Court. That is because, with great respect to the Supreme Court, I find Professor Galvin’s formulation preferable in certain respects. For example, the Supreme Court guidance seeks to cover sexual history with a defendant as well as with other men. The

guidance is also, in my respectful opinion, too restrictive on whether previous sexual conduct of a distinctive and similar nature to that which is the subject of the charge ('similar act evidence' to use the Supreme Court's terminology) can be relevant to the issue of consent.

39. Doing the best I can, I would summarise the correct approach as follows:- (i) In a prosecution for rape, evidence that the complainant has engaged in consensual sexual conduct with persons other than the defendant is not admissible to support the inference that a person who has previously engaged in consensual sexual conduct is for that reason less worthy of belief as a witness i.e. that it affects her credibility. (ii) Such evidence is similarly not admissible to support the inference that a person who has previously engaged in consensual sexual conduct with other persons is for that reason alone more likely to have consented to the sexual conduct at issue in the trial. (iii) Evidence of consensual conduct on the part of the complainant with persons other than the accused may, however, be admissible for other purposes. (iv) By way of illustration only, and not by way of limitation, the following are examples of admissible evidence:-
- (a) Evidence of specific instances of sexual conduct tending to prove that a person other than the defendant caused the physical consequences of the rape alleged by the prosecution;
 - (b) Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the complainant;
 - (c) Evidence of prior sexual conduct, known to the defendant at the time of the act charged, tending to prove that the defendant believed that the complainant was consenting to the act charged;
 - (d) Evidence of a pattern of sexual conduct so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that the complainant consented to the act charged or behaved in such a manner as to lead the defendant to believe that the complainant consented;
 - (e) Evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct; (f) Evidence that the complainant has made a false allegation of rape.
40. Where evidence is not admissible in accordance with the preceding paragraph, questions concerning such matters may not be asked of the complainant.
41. Where the Defence wish to ask questions of a complainant or introduce evidence relating to her previous sexual conduct, they must apply for leave to do so and the judge should not give leave unless satisfied that it is necessary for the purposes of a fair trial. It is not necessary under our procedure to have a voir dire to the extent envisaged in *Seaboyer* but the judge must be satisfied that there is a proper evidential basis to support the grounds upon which the defence wish to ask questions or introduce evidence about previous sexual conduct with other persons. This is to prevent questions being put or evidence adduced in order to elicit evidence about the complainant's past sexual behaviour as such under the guise of some

other ground. In considering applications by the defence, the judge is entitled to remind himself of the public interest summarised conveniently by Lord Hutton at para 142 in *R v A*, namely to ensure that the woman who complains that she has been raped is treated with dignity in court and is given protection against cross-examination and evidence which invades her privacy unnecessarily and which subjects her to humiliating questioning and accusations which are irrelevant to the charge against the defendant. Application to the facts of this case

42. Advocate Fogarty's primary submission was that the March and June texts are relevant as showing a history of the complainant acting as a sexual predator when intoxicated. That is what the Defence are alleging in this case. It is therefore, she says, relevant to the issue of consent.
43. In my judgment, that is to seek to put forward one of the two 'myths' referred to in the Canadian and English judgments that I have quoted. The fact – if it be so – that the complainant may have had a number of sexual encounters with other men when intoxicated, is not relevant to show that she consented on this occasion to have sexual intercourse with a complete stranger within moments of meeting him on the road. The sexual behaviour of the complainant on the night in question as alleged by the defence is unusual and therefore, if there were a proper evidential basis of similar conduct previously, - i.e. seduction of strangers within moments of meeting them on the street – I would have allowed such evidence to be adduced and questions to be asked as falling within paragraph 39(iv)(d) above. But the content of the texts comes nowhere near evidencing previous sexual conduct so distinctive and so closely resembling the defendant's version of the encounter as tending to prove that she consented on this occasion.
44. The Defence additionally face a difficulty in showing a proper evidential basis for seeking to show that the complainant is a sexual predator as alleged. Most of the texts consist of allegations by the boyfriend and many of them are clearly hearsay, in that he states what he has been told. Hearsay evidence is not admissible. The allegations she appears to admit are to one night stands with people she knows. For the reasons given, that is insufficient to come within the exception referred to.
45. In relation to the June texts, Advocate Fogarty has an additional argument. She points to the texts quoted at paragraphs 11 – 13 above where the boyfriend suggests that if she was so drunk that she could not remember having sex with her half-brother, it must have been rape. She submits that these texts show that the complainant was content to allege rape if it helped her out of difficulties in her relationship with the boyfriend. It is therefore relevant to the issue of whether she has falsely alleged rape on this occasion.

46. Linked with the above point, she submits that the fact that the complainant was in an unstable relationship with her boyfriend, which had been placed under strain by her unfaithfulness, is relevant as going to provide a reason why she would make a false allegation of rape on this occasion, namely to help preserve her relationship with her boyfriend.
47. I do not think that the references to rape in the texts are relevant as tending to support the defence case that this was a false allegation of rape. It is the boyfriend who brings up the possibility of the previous incident having been rape. The complainant does not really pursue the matter and it is not suggested that she did in fact ever make any complaint of rape in respect of that incident of sexual intercourse. The submission that the fact that the boyfriend had referred to the possibility of rape in relation to the previous incident somehow gave her the idea of alleging rape in this case is not sufficient to allow in the texts.
48. I do however accept that it is relevant for the Jurats to know that the complainant's relationship with her boyfriend was unstable, that they had separated on previous occasions and that he had accused her of being unfaithful to him. This is relevant to one of the building blocks of the defence, namely that the complainant had a reason to make a false allegation of rape in order to try and preserve the relationship with her boyfriend, on the basis that disclosure of consensual sex with a stranger would, having particular regard to the history of the relationship, endanger its continuation. It would therefore be a possible motive for her to lie.
49. However, I do not accept that it is relevant to the defence case on this point that she has actually been unfaithful; what is significant for the ability of the relationship to survive an incident of consensual sex is the belief of the boyfriend that she had previously been unfaithful. Nor do I accept that, in order to enable the defence properly to develop their case on this point, it would be proportionate to allow in the texts (with their wide ranging allegations of her previous sexual conduct) or to allow the defence to ask the complainant whether she had actually been unfaithful. As stated, what is material is the boyfriend's belief and to allow in the texts would not be consistent with the considerations described at para 40 above.
50. It is for these reasons that I directed that, assuming the fact was accepted by the Prosecution, the Prosecution should draft agreed admissions to the effect that the complainant's relationship with her boyfriend was unstable, they had separated on previous occasions and her boyfriend had accused her of being unfaithful. This judgment has been drafted after the conclusion of the trial and, as it happens, when the simple terms of this admission were very properly put to the complainant by Advocate Fogarty, the complainant volunteered that she had actually been unfaithful, without elaborating on the detail.
51. Finally, Advocate Fogarty submits that the texts should be admitted as necessary 'background' evidence. The principles governing the admission of such evidence were authoritatively stated by the Court of Appeal in *U v AG*

- [2012] (1) JLR 349 at paras 39 – 46 in a judgment delivered by Nutting JA. At para 39 the Court quoted the well-known passage from the judgment of Purchas LJ in the case of *R v Pettman*, Court of Appeal 2nd May 1985: unreported, as follows:- “Where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence.” I note in passing that, although the above quotation from the judgment of Purchas LJ refers to the word ‘incomprehensible’, Professor Birch, in her article at 1995 Crim LR 651 quoted by the Court of Appeal at para 41 of its judgment, suggests that Purchas LJ used the word ‘incoherent’. However, I do not think that anything turns on this difference as the two words are very similar (albeit not identical) and the sense of what Purchas LJ was saying appears clearly whichever word was used.
52. The important point is that, even in relation to background evidence, the test for admissibility is relevance. Thus at para 41 of *U v AG* the Court of Appeal said:- “But in truth all that is required is that such evidence passes the threshold test for relevance ...” And at para 45, the Court of Appeal quoted from the English judgment *R v Phillips (Alun)* (2003) 2 Cr. App. R 35 at para 29 where Dyson LJ said:- “We do not propose to conduct an exhaustive analysis of all the authorities to which we were referred. To a great extent they turn on their own facts. The essential question in every case is whether the evidence passes the test of relevance. If it is relevant then it is admissible unless, in the exercise of its discretion the court decides that fairness requires it to be excluded.” Finally the Court of Appeal in *U v AG* begins para 46 by stating:- “Applying the test of relevance to the relationship between the appellant and KH and the issues in this case ...”
53. Advocate Fogarty submits that the texts are necessary background in order to show that the complainant has had a number of previous sexual relationships which have led to significant arguments with her boyfriend and that when intoxicated she becomes predatory in her sexual behaviour. She refers again to the texts from the boyfriend which refer to possible rape. She submits that if the text messages are not admitted as background evidence, the Jurats would be deprived of the context in which the alleged attempted rape took place. She submits that the nature of the relationship with the boyfriend and the complainant’s previous behaviour are relevant to the issue of whether the complainant was now making a false allegation of attempted rape.
54. It seems to me that, although placed under the label of ‘background’ evidence, these are in effect a repetition of the arguments that I have just rejected. As *U v AG* makes clear, background evidence is only admissible if it is relevant. For the reasons I have given, I do not consider that the evidence about the previous sexual conduct of the complainant is relevant to the issues in this case. In so far as the texts relate to that topic, they are therefore not admissible as necessary background evidence. As already indicated, I do accept that it is

relevant to establish the instability of the complainant's relationship with her boyfriend; and his belief that she had been unfaithful is relevant as providing a possible reason why she might make a false allegation of attempted rape. But I have held that, having regard to the important public interest of not exposing complainants to unnecessarily intrusive questioning, the correct way to deal with this is by way of admission. That ruling is equally applicable in respect of the suggestion that the texts are admissible as background evidence.

55. In my judgment, there is no question of the evidence in this case (in the absence of the texts) presenting the Jurats with an incomplete or incomprehensible picture. In so far as the texts relate to the complainant's previous sexual conduct, they are irrelevant for the reasons I have already given and are therefore not necessary background. In so far as they relate to the instability of the relationship, they can be dealt with by way of admission. I therefore do not accept Advocate Fogarty's submission that the texts should be admitted as necessary

background.

56. It was for these reasons that I declined to allow the Defence to cross-examine the complainant about her previous sexual history with other men or to adduce the texts in evidence. Authorities Sexual Offences (Amendment) Act 1976. Youth Justice and Criminal Evidence Act 1999. R v A [2002] 1 A.C. 45. Human Rights Act 1998. R v Seaboyer [1991] 2 SCR 577. Criminal Code 1985. Canadian Charter of Rights and Freedoms. Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade (1986), 17 Minn. L.Rev. 763. R v Abdelrahman (Samir) [2005] EWCA Crim 1367. R v Darrach [2000] 2 SCR 443. Criminal Procedure (Scotland) Act 1995. Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law 2013. U v AG [2012] (1) JLR 349. R v Phillips (Alun) (2003) 2 Cr. App. R 35.

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