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Albion Chambers CRIME TEAM NEWSLETTER

Hearsay or anonymous

– but not anonymous hearsay

On 12 December 2008, the issue of whether the evidence of an anonymous witness can be read as hearsay was determined by the Court of Appeal (sitting as a five judge court, the Lord Chief Justice presiding). The case arose from an interlocutory appeal by the Crown, against a preliminary ruling by Royce J, sitting at Bristol Crown Court in October 2008, prior to the proposed re-trial of three men from Easton, for murder.

In the early hours of 16 September 2006, a Jamaican 'Passa Passa' night was held at Club UK in Stokes Croft, Bristol. The premises were packed full of party-goers, but the atmosphere was shattered by the sound of gunfire. One man was hit by one bullet; he was helped to the lobby by his friend, but he died there. His friend fled, and although he was traced and interviewed, he refused to testify at the trial of the four men later charged with the murder.

The police found it difficult to persuade witnesses to assist them, but after diligent enquiries they obtained important statements from seven witnesses who had been present in the club, in two separate groups. All were promised anonymity, in the legitimate hope that the Court would grant it, subject to careful consideration.

The common law as it then stood had been clearly expressed in the leading case of *R v Davis; R v Ellis; Court of Appeal (Crim Div) [2006] EWCA Crim 1155*. The Court of Appeal was acutely aware of the extent of the problem of persuading witnesses to testify in such cases. It was observed that:

'it is not an exaggeration to point out that, whether they are aware of it or not, these gun carrying criminals are challenging the rule of law itself. One common feature of both these cases, and many others like them, is the absence of any or any significant attempt at concealment. People are gunned down in busy crowded areas. Although the offences are witnessed, those who use their guns expect to escape justice. They anticipate that the guns which have been used to kill will also serve to silence, blind and deafen witnesses. Without witnesses, justices cannot be done.'

The President of the QBD had given a powerful and authoritative judgment, upholding the right of a trial judge to permit a witness to testify under a pseudonym, from behind a screen, with voice modulation, and with other related special measures. It was decided that *'The Court undoubtedly possesses an inherent jurisdiction at common law to control its own proceedings, if necessary by adapting and developing its existing processes…'*

The trial judge faced with such an application was to make a 'case-specific decision' in which the court should:

'examine the application for witness anonymity with scrupulous care, to ensure that it is necessary and that the witness is indeed in genuine and justified fear of serious consequences if his true identity became known to the defendant or the defendant's associates. It is in any event elementary that the court should be alert to potential or actual disadvantages faced by the defendant in consequence of any anonymity ruling, and ensure that necessary and appropriate precautions are taken to ensure that the trial itself will be fair.'

The judgment had included the following observations upon the disadvantages of anonymity for the defendant:

'We gratefully adopt as illustrative of common law principle, as well as Strasbourg jurisprudence, the analysis in Kostovski v Netherlands (1989) 12 EHRR 434:

'If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. A testimony or other dec1aration inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious'.

These disadvantages are immediately ameliorated provided the defendant retains, as he normally does, the ability of his counsel to pursue a substantial degree of cross-examination of the witnesses before the jury.'

In the light of that authority, it was not altogether surprising that in July 2007, at a hearing in advance of the trial of the four defendants (*W, P, V* and *R*) the trial judge Royce J. should grant the Crown's application for anonymity to the seven eye-witnesses.

However, at the start of the trial itself in September 2007, the four most important of the seven anonymous witnesses declined to attend to testify. The Prosecution applied to read their statements as hearsay under the provisions of CJA 2003 s.116(2)(e) because the witnesses were unavailable through fear, and in the alternative under s.114. They relied, inter alia, upon these words by the President in *R v Davis, R v Ellis*:

'As we emphasise, these are issues for judicial decision in case specific situations, after allowing for the disclosure process, any PII decisions, and the ability to cross-examine together with the deployment of material helpful to the defendant in the

course of cross-examination, or even when cross-examination may not be possible. For example, the judge may be satisfied that a wholly independent, understandably terrified witness, a stranger to the defendant, and with no possible motive to implicate him, may have made a note of a crucial car number plate at the scene of the crime. If satisfied that this witness is indeed independent, but unfit to give live evidence, ***the judge may admit his or her evidence, anonymously, and in statement form.'***

This was powerful dicta to suggest that anonymous evidence might be read as hearsay. There was only one reported case of apparent value to the Crown, that of R v Williams decided in 1999.

So it was that Royce J permitted the applications for the statements of the four crucial witnesses to be read at trial; this was anonymous hearsay evidence permitted at trial for perhaps the first time in such circumstances. He also allowed the statements of four other anonymous witnesses to be read as hearsay, but this was less controversial evidence that related to events elsewhere, some hours before the shooting, in what the Crown alleged was an incident relevant to the motives of one defendant in particular, in seeking out the victim at Club UK.

In the course of argument attention was brought to these provisions of CJA 2003:

s.116 (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if:

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,

(b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and

(c) any of the five conditions mentioned in subsection (2) is satisfied.

It was submitted that the defence needed to know the identity of the witness in order for the provisions of CJA 2003, s. 124 to have any value to the defence, i.e. to permit the possibility of their introducing into evidence material of relevance going to the credibility of the witness, whose statement is to be read as hearsay. The trial judge decided that the provision required only that he, as the judge at trial, needed to be satisfied of the identity of the witness.

The case proceeded to trial, and the first defendant was acquitted by the jury. The jury could not agree verdicts in relation to the other three defendants, and a re-trial was ordered for the autumn of 2008. In February 2008 the trial judge held a Preparatory Hearing under the provisions of the Criminal Procedure and Investigations Act 1996, in order to consider the Crown's (identical) applications in respect of their anonymous witnesses for the re-trial. He made the same rulings, but the defence were now enabled to appeal the orders in advance of the re-trial, under section 35(1) of the CPIA 1996. Appeals were duly lodged, and a hearing date awaited.

Meanwhile, on 18 June 2008 the House of Lords reversed the decision of the Court of Appeal in R v Davis [2008] EWCA Crim 1418. It was held that the trial of Davis had been unfair. Lord Bingham criticised the Court of Appeal for failing to 'acknowledge that the right to be confronted by one's accusers is a right recognised by the common law for centuries, and it is not enough if counsel sees the accusers if they are unknown to and unseen by the defendant'. Lord Rodger said the courts had not the power to amend their own process so as to permit anonymity: 'it is not open to this House in its judicial capacity to make such a far-reaching inroad into the common law rights of a defendant as would be involved in endorsing the procedure adopted in the present case. In effect, the ability of counsel for the appellant to cross-examine the decisive witnesses against him was gravely compromised.' For the reasons given by Lord Mance, it was held that the trial of Davis did not meet the standard required by article 6 of the European Convention. The view of the House was that 'Parliament is the proper body both to decide whether such a change is now required, and, if so, to devise an appropriate system which still ensures a fair trial.'

Parliament did act, and acted fast. The Criminal Evidence (Witness Anonymity) Act 2008 came into law by the end of July. It abolished the common law; it created an entirely new statutory scheme for the grant of anonymity to witnesses in criminal proceedings. It is important to note that parliamentary debate was very limited; the 'sunset clause' at s.14 provides that the law will 'expire' from 31 December 2009; the legislation will be monitored, assessed and reviewed by Parliament before long.

In September the trial judge for P, V and R called for the case to be listed before him in September, in order to review his earlier orders. In relation to the three witnesses still willing to testify, he granted anonymity. The Crown again applied for the statements of all the other (unwilling) witnesses to be read as hearsay. It was agreed in argument that the new statutory scheme was directed solely at the grant of anonymity to witnesses who would testify if the order was granted. The Act says nothing at all about witnesses who are unavailable for any reason or the notion of anonymous evidence being admitted as hearsay. Section 4(5) specifies as Condition C that the Court must be satisfied that:

'it is necessary to make the order in the interests of justice by reason of the fact that it appears to the court that:

(a) it is important that the witness should testify, and

(b) the witness would not testify if the order were not made.'

It was submitted for the Crown that the terms of the Criminal Evidence (Witness Anonymity) Act 2008 had to be read in a particular way, namely as restricted only to apply to those witnesses who met the definition in s.12, namely 'any person called, or proposed to be called, to give evidence at the trial or hearing in question'. Thus, it was contended, the abolition of the common law was applicable only to such witnesses; the law was unchanged by the new Act in respect of a witness who was unavailable for any reason, such as fear. The Crown submitted that an application could be made for the evidence to be read as hearsay under CJA 2003, notwithstanding that the identity of the witnesses was to be withheld.

The trial judge rejected those arguments. He ruled that there was no means by which the Court could now grant anonymity to a witness if the test set out in Condition C of the Act was not met. He refused the Crown's application for anonymity for the unavailable witnesses. He did not proceed to hear an application for hearsay in detail, because the Crown refused to identify its witnesses.

The Crown lodged an interlocutory appeal against the ruling by Royce J. The case was joined with a number of other appeals relating to the issue of witness anonymity. The judgment is reported as R v Mayers & Ors, [2008] EWCA Crim 1418. The Court of Appeal used the opportunity to explain and comment upon the terms of the Criminal Evidence (Witness Anonymity) Act 2008; it will be useful reading for any practitioner who faces an anonymity application.

The court held that the trial judge was right. 'Dealing with it in general terms, any witness who gives oral testimony at trial, whether anonymously, or screened, is there to be cross-examined, and the jury is provided with some opportunity to see the evidence tested, and to form their own view of the veracity and demeanour of the witness. However, as we have indicated earlier in this judgment, if the evidence of

the anonymous witness is read, the judge and jury are deprived of an important aspect of the trial which should normally inform their assessment of any contentious witness.'

The Court considered the authority of R v Williams, CA Crim Div [1999] EWCA Crim 751 but noted that the case was decided under the provisions of CJA 1988. In that statute, there was no requirement that 'the person who made the statement (the relevant person) is identified to the court's satisfaction' as now provided by s.116 (1) (b) CJA 2003.

In oral argument, the Court accepted that unless they knew the identity of the witness, the defence would be powerless to employ the provisions of s.124. The Crown submitted that disclosure of the name to the judge alone sufficed; but the Court ruled that 'In our judgment, the language of the Act is quite clear and it requires disclosure of the witness's name, not just confidentially or secretly to the judge, but to the defence. In our judgment, therefore, section 116 of the Criminal Justice Act 2003 cannot be applied to anonymous statements.'

The Crown was driven to rely upon the potential application of s.114, drafted in wider terms, but the Court of Appeal concluded that such usage of the statute was not permitted; any such development of the law must be for Parliament to determine.

Whether Parliament does so develop the law, remains to be seen. This is an emotive and controversial area of the law. The observations made by the Court of Appeal in R v Davis; R v Ellis in 2006 are still powerful, and still relevant.

Mlichael Fitton QC

Cross admissability and the bad character provisions of the Criminal Justice Act

Section 112(2) of the Criminal Justice Act 2003 provides that where a defendant faces multiple charges on the same indictment the bad character provisions apply in the same way as if each were charged in separate proceedings. Thus cross admissibility between charges in the same proceedings is only possible when the evidence on a particular charge can be admitted through one of the usual gateways. However, until recently the basis upon which such evidence was admitted and the way in which it could be used by a jury was unclear. That has been remedied by the Court of Appeal in *R v Freeman; R v Crawford [2008] EWCA Crim 1863*.

Freeman had been convicted of three counts of indecent assault and two counts of sexual assault of a child. The complaints were made by two young girls, B and L, who alleged that the appellant had touched their legs/body and vaginal areas. Freeman appealed on the grounds that the judge had given an insufficient direction to the jury regarding the admissibility of each, and had wrongly referred to it as 'bad character'.

Crawford was convicted of two counts of robbery, similar in that they both involved the wrestling of a handbag from the respective complainants' hands by a man of a similar description and subsequently identified by the complainants. The Crown made a 'standard' bad character application to adduce three convictions for street robbery and also applied to use the evidence from each of the offences in question in relation to the other, both of which applications were permitted by the trial judge.

In the judgment the Court of Appeal provided to the answers practitioners had been waiting for namely; (a) how evidence relating to multiple counts on the indictment is properly defined and admitted; and (b) how exactly a jury may use such evidence once admitted.

In doing so the court reviewed the various authorities. The first was *R v Chopra [2006] EWCA Crim 2133* (which concerned a dentist charged with indecently touching three complainants) the Court of Appeal observed that the 2003 Criminal Justice Act had effected a sea change in abolishing the common law rules of admissibility of bad character and held that the evidence of the three complainants was admissible under Section 101(d) as being relevant to an important matter in issue. It was said that the critical question for the judge was whether or not evidence of one complainant was relevant as going to establish a propensity to commit offences of the kind charged.

In *Wallace [2007] EWCA Crim 1760* a case arising from convictions for three offences of robbery and one of armed robbery the court held, relying upon Chopra, that the evidence of each qualified as 'bad character' and that as no 'bad character' application had been made by the prosecution the evidence had been wrongly admitted. However, In Wallace the evidence in relation to each count was entirely circumstantial. Despite that the crown's case was that the robberies showed common features, and as Scott Baker LJ put it *'The problem…arises because the four robberies, although charged individually, cannot be considered in four separate and self contained compartments. The evidence is circumstantial – the jury has to look at the whole picture when it is considering each case'.*

Reading the judgment it is clear that the court had some reservations about treating *'indirect relevant circumstantial evidence'* as 'bad character' evidence and felt that the statutory draftsmen had not had such evidence in mind when drafting the 'bad character' provisions. Nonetheless, the court ruled that such evidence came within the provisions, and that; *'In our view the important matter in issue was… whether the circumstantial evidence linking him to the robberies, when viewed as a whole, pointed to his participation in and guilt of each offence'.* The court noted, however, that the simplest course in such cases would be for the parties to agree the admission of the evidence under s101(1)(a), in which case no reference to bad character would be required and the case could be summed up simply as one that depended upon circumstantial evidence. The court also observed that, had the appellant been charged with conspiracy to rob, the difficulty would have been avoided as the evidence would have fallen within the exception in Section 98(a), as being evidence to do with the facts of the offence charged.

Finally, the case of *R v DM [2008] EWCA Crim 1544* which concerned an interlocutory appeal following the trial judge's ruling that in respect of the trial for robbery Leeds, the evidence relating to the alleged participation by the appellant in another robbery in Banff, Scotland should be admitted to prove his guilt of the indicted robbery. The difficulty in respect of that was that the appellant had already been tried in Scotland for the alleged Banff robbery and the jury had returned a verdict of 'not-proven' and the only marked similarities between the two offences were that both were committed by a man wearing a balaclava, carrying a sawn-off shotgun and admissions from the appellant admitted that he had been in both locations at the relevant times.

Further, the trial judge admitted the evidence not in order to establish propensity (the first ground advanced by the prosecution), but to strengthen the other evidence in respect of the Leeds offence, relying upon the assertion made by the

Crown that it was unlikely that different persons had committed the two robberies.

Unsurprisingly, the Court of Appeal took the opportunity to emphasise the difference between evidence as to propensity and evidence tending to establish 'the unlikelihood of coincidence'. In the latter case the jury is asked to 'recognise that the evidence in relation to a particular offence on an indictment may appear stronger and more compelling when all the evidence, including evidence relating to other offences is looked at as a whole'. The court said that such evidence may 'loosely be described as 'similar fact evidence", but was wary of attaching that label to it for obvious reasons. However, Moses LJ stated that *'The evidence of the robbery in Banff and the presence of the applicant… is evidence of bad character pursuant to Section 98 and is relevant to an important matter in issue between the defence and the prosecution, namely whether he was the robber in Leeds'*. But concluded that to admit the evidence would have involved the sort of satellite litigation which a trial judge would wish to avoid. That, together with the Scottish verdict of 'not-proven', led the court to say that admission of the evidence would have had such an adverse effect on the fairness of the proceedings that it ought not to be admitted.

Following their review of the authorities the Court dismissed both appeals. In doing so Latham LJ admitted to their being some confusion as to the admission of bad character evidence under S101(d), as exemplified in *Chopra*. Whilst Section 103 provides that the important matters in issue *include* propensity, he said *'when it is submitted that evidence in relation to one count is admissible in relation to another, it may not always be helpful to concentrate on the concept of propensity when the nature of the evidence is such that, in itself, it is capable of being probative in relation to another count, in the sense that it makes it more likely either that the offence was committed… or that this defendant committed the offence'.* In other words, the important matter in issue to which the evidence on goes may be either (a) the defence is mistake or fabrication or (b) identity of the perpetrator is disputed. Thus *Chopra* and *Freeman* (sex cases) fall into the earlier category whilst the cases of *Wallace, DM* and *Crawford* (all robberies) fall into the latter category.

Helpfully, the court also clarified the use to which the jury may put such evidence once admitted. They approved the approach taken in *R v DM* when addressing the difference between cross admissibility of evidence on multiple counts and bad character evidence showing a propensity; *'A true propensity case requires the prosecution to prove the defendant's guilt of another offence (which may or may not be the subject of another conviction). Once the jury is satisfied that a defendant is guilty of that other offence (or disreputable conduct), it may deploy that conclusion as tending to show that he is more likely to have committed the offence on the indictment. But that is not the position either in Wallace, or in Chopra, in which the jury was required to look at all the evidence and then reach a conclusion in relation to each particular offence'*.

However, Latham LJ said that it was too restrictive for the jury to be told that it must first determine whether it is satisfied on the evidence in relation to count A of the defendant's guilt before it can move on to using the evidence in relation to count A in consideration of count B; *'Whilst the jury must be reminded that it has to reach a verdict on each count separately, it is entitled, in determining guilt in respect of any count, to have regard to the evidence in regard to any other count, or any other bad character evidence, if that evidence is admissible and relevant'*. Therefore such evidence is cross-admissible on each count, prior to the jury being sure on the basis of that same evidence of the defendant's guilt on the count to which it relates.

The effect of this important ruling is that the admissibility of 'similar fact' evidence survives the enactment of the 2003 Act. If there are similarities in the evidence, that inevitably renders the evidence admissible under Section 101(d). However, this does not mean that the common law principles of similar fact are simply imported wholesale into the statutory framework. Hughes LJ, during the course of his judgment in Chopra, made it clear that not all evidence of other misbehaviour will by any means be admissible, and that there has to be a sufficient connection between the facts of the several allegations. Nevertheless, 'the answer to the question whether the evidence does [go to proving a 'propensity' as the court then referred to it]… is not necessarily the same as it would have been before the common law rules of admissibility were abolished by Section 99. The test is now the simple test of relevance'. Which means that although, as more generally, the prosecution is significantly advantaged by the scope and terms of the 'bad character' provisions, defence advocates may successfully argue against admissibility if the exact nature of each allegation sought to be adduced is examined.

Anna Midgley

Too many cooks...

It is very easy to look to and rely upon experts believing they are the panacea for all ills. With the country in the grip of a recession people are turning, perhaps for the first time, to the financial pages trusting the advice and opinions of economists, bankers and commentators over their own common sense or intuition.

When it is a matter with which we may not be overly familiar, turning to the experts is a natural and prudent measure. But when an area of expertise falls potentially within the knowledge and understanding of its intended audience, an over reliance upon expert advice could have unintended and sometimes harmful results. Indeed, it has long been established that expert evidence should only be admitted if it concerns matters beyond the normal competence of the court. Why then is there a move for expert evidence to be given in rape cases to explain matters such as why a complaint was not made immediately, why a victim may not have expressed distress or acted in the way 'expected' of her or him by society, or why an abused victim should return time and time again to her abuser.

These are matters that criminal practitioners prosecuting and defending sexual or domestic violence cases come across on a daily basis. But the issues they throw up are clearly not confined to those practising in law, nor are they concepts that a jury would find difficult to understand.

Despite that fact, a recent consultation paper published by the Office for Criminal Justice Reform recommended that experts be allowed to provide information to assist jurors in understanding exactly the types of issues highlighted above. That recommendation was quickly adopted by the Government eager to halt the decline in rape convictions which announced that they would look for a fair way to present such information to juries other than through evidence presented by the prosecution or the defence.

But admitting evidence from an expert on something that is well within the competence of the court is not only wrong in principle but is likely to lengthen a trial quite considerably.

That the conviction rate for offences of rape is low is something that is not in doubt. In 1979 the annual number of convictions for rape as a percentage of the number of offences reported was 32%. In the year 2004/2005 that figure had fallen to just 5.3%, rising in the current year to 6%. Those working within the criminal justice system are all too aware of the low ▸

level of convictions but also know that there are many reasons for such a low figure. Not least is the fact that rape, or any sexual offence, is one where there is normally no independent evidence; they are cases which hinge upon the victim's word against that of the defendant and evidence gathering has, until recently, been poor.

Another reason is 'rape myths'. These are unfounded beliefs which inform people's views of both the victims of rape but also the circumstances in which the offence is committed. These myths include attitudes to drinking, perceived promiscuity, personal safety, whether a woman has said no to a man clearly enough and whether changing her mind constituted a withdrawal of consent. To put those myths into context 26% of those surveyed considered that a woman who wore revealing or sexy clothing was partially or totally responsible for being raped and more than one in five held the same view if the woman had had many sexual partners.

However, those beliefs and others such as the fact that 30% believed that a woman was partially or totally responsible for being raped if she was drunk is not something that is going to be challenged by the calling of expert evidence. Ingrained views about the way women in particular should act, is something that is deep rooted and affected by many factors such as background and education. If there are three people with similar views on a jury it is not surprising that in the majority of rape cases, which rather than as is believed are the result of a stranger rape but in fact consist of one or more of the factors labelled as rape myths, it is almost impossible to secure a conviction.

But that doesn't mean the answer is to call on the experts. Many of us have reminded the jury that they posses special talents such as common sense, experience drawn from their daily lives and knowledge built up from their interaction with people outside of the court room. Why is it that they can be trusted to use those skills to determine whether an 89 year old man, previously found to be unfit to plead, committed the act of raping his daughters repeatedly over a number of years but cannot be left to analyse why the affect of such abuse meant that they didn't make a complaint for 25 years? It is nonsensical yet the Government's recommendation is that such evidence is not to be left to prosecution or defence advocates to comment upon. But a victim, properly assisted through the process of making a statement and a statement that doesn't just contain the bare bones of the complaint but one that sets out in detail the background and the effects that the rape or abuse has had upon her or him and then allowed to give that evidence in court, is clearly the most powerful evidence of its kind.

Because it is not envisaged that the expert would give an opinion as to how the offence or abuse has affected that particular victim and hence to explain his or her specific response or lack of response but that it should be a description of the effects of trauma upon such victims in general. But if such evidence were to be relied upon by the prosecution, in order for the defendant to receive a fair trial the defence would have to be entitled to call their own expert to rebut such evidence or at least to put it into context in relation to the specific witness the jury are being asked to consider. That would create an additional area of evidence that the jury would be bound to consider, perhaps swayed by the fact that the evidence has been given by experts when in fact they are more than capable of assessing the evidence on the point given by the witness and assisted by speeches on the point from both counsel.

What the Government nor any amount of expert evidence cannot escape from is the fact that the offence of rape, and sexual offences in general, are offences in which the credibility of the complainant and defendant are in issue in a way that is almost unique to those offences. If there is a burglary and the complainant names the defendant as being responsible, the defence may advance wrongful identification, innocent explanation for incriminating evidence or allege that the complainant has a motive for wrongly naming him. But there will ordinarily be no challenge to the fact that the offence of burglary has been committed; the issue will be by whom. In a case of rape committed by a partner in the course of a relationship, the fact that he admits to intercourse but states that it was consensual means that even the fact of the offence itself is in issue. Therefore, the cross examination of both the complainant and the defendant becomes crucial. Part of that cross examination in respect of the complainant will necessarily involve probing matters such as her contacting the defendant after the incident, not making a complaint for a number of days or the lack of injury or distress. That is a vital part of the trial process but it doesn't mean that the trial process becomes unfairly weighted against the victim or that a conviction is any less likely. Indeed, the way those particular questions are answered by the victim and the way the defendant copes with what may be thrown up as a consequence, will undoubtedly assist a jury in determining the issue they have to decide. But that is something they are more than capable of undertaking without the need for expert evidence on the point.

The proposal is that expert evidence would seek to explain exactly those areas which are crucial for anyone to explore whilst attempting to defend someone accused of rape and to demonstrate that *such apparently problematic features of a person's evidence are common and should not necessarily lead to the conclusion that the witness is lying or unreliable.* Yet in the absence of evidence specifically tailored to the case the jury have to decide, the value of such evidence must be worthless, especially if it is accepted that the defence are rightly not to be fettered in their cross examination of the victim on exactly those points.

We trust juries to decide the fate of those accused of every type of offence from murder to theft, because we trust their sense of the collective pool that makes up a jury. Why should that be any different in rape cases?

For victims to be given the justice they deserve they need to be given their own voice to explain what happened to them and why. For a defendant to receive a fair trial he needs to be able to challenge that account unfettered, except perhaps by the limits of s.41, by the threat that that line of questioning will be undermined by non-specific evidence that only confuses a jury. Care when prosecuting, both to ensure that the victim is able to give any evidence to the court that will assist her case but also to challenge any rape myths in a closing speech, will achieve far more than any expert evidence ever could. Mounting a balanced cross examination that challenges the victim's account while not alienating a jury has always been the difficult path trodden by those who defend those charged with rape. If those competing interests are balanced there is no need for expert evidence. The conviction rate is low for a reason, but that reason is the human element of the offence of rape – exactly why the human element of the jury is best placed to interpret and unravel it.

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