

## Chapter 9: Examination and Cross Examination.

### Question One

'The intention underlying the provisions [ss41-43 Youth Justice and Criminal Evidence Act 1999] is ...to counter what in the Canadian jurisprudence has been described as the twin myths that unchaste women are more likely to consent to intercourse and in any event are less worthy of belief'. (Keane A and McKeown P (2016) *The Modern Law of Evidence* 11<sup>th</sup> edn p219).

Critically evaluate whether the law in this area has successfully addressed these twin myths.

### Answer guidance

This question lends itself to an answer in the form of an argument, giving examples to suggest the law has addressed the myths and arguments to suggest it has not. You should first outline the 'myths', namely that a promiscuous woman is more likely to have consented and less likely to be credible. Give the reason why reform of the law was felt necessary, refer to the exercise of judicial discretion under s2 of the Sexual Offences Amendment Act 1976. Note also the statistics on the poor conviction rate in rape cases. In relation to the credibility of the complainant comment on the illogicality of associating sexual history with the likelihood of telling the truth. Outline the provisions of ss41-43 Youth Justice and Criminal Evidence Act 1999 explaining the high test under s41(2)(b) and the protection afforded complainants under s41(4) in relation to credibility. The answer should set out analytically on the one hand case-law which suggests that the myths have been addressed successfully and sexual history excluded, as in *R v Sunny Islam* [2012] EWCA 3106. On the other hand in *R v A (No2)* [2002] 1AC 45 the House of Lords considered that as a matter of common sense the prior sexual behaviour of the complainant with the suspect passed the test of relevance. Similarly in *R v Martin* [2004] 2 Cr App R 354 the defence should have been allowed to question the complainant although one purpose of the questioning was to undermine her credibility. There is significant academic debate on these issues for example Dennis (2006) 'Sexual History: Evaluating Section 41' *Crim LR* 869.

## Question Two

Felix, a tennis coach, is charged with sexually assaulting Harry who is eighteen years old. The incident was supposed to have taken place at the school tennis club where Betty, Felix's wife, was also present. A week after the alleged incident, when asked by his teacher why he had not submitted his homework, Harry burst into tears and told her what Felix had allegedly done. The teacher telephoned the police. When first arrested Felix denied the offence. Betty gave evidence to Felix's solicitor, before talking to Felix, about a row between Felix and Harry she claimed to have heard at the time of the alleged assault. She claimed Harry had loudly protested about being criticised over his tennis playing. The prosecution have discovered that Harry had been expelled from a summer tennis camp a year earlier because he had made false allegations about sexual propositions made to him by other students. At the trial Felix wants to adduce evidence of Harry's expulsion from the tennis camp. His defence is that Harry had made up the allegation because he was angry about the criticism of his tennis playing. Betty testifies in Felix's defence about the row she claims she heard but the prosecution claim that she had recently invented that claim.

Advise Felix on evidence

## Answer guidance

Take each issue in turn and apply the relevant law. They involve procedural matters in relation to questions that can be asked in examination or cross-examination. Apply s125 (7) Criminal Justice Act 2003 to the report of the incident to the teacher. The denial on accusation may be admitted under the common law principle illustrated in *R v Storey* (1968) 52 Cr App R 334. Consider the allegation of invention concerning the account of the row (which is relevant to the defence) in relation to the common law as in *R v Oyesiku* (1971) 56 Cr App r 240 and also in relation to s120(2) Criminal Justice Act 2003. The issue in the trial is not one of consent and answers must be careful to consider only the relevant sections of the Youth Justice and Criminal Evidence Act (YJCEA) 1999. These are s34, s41(1), (2), (3)(a) and (4). Note that questions about previous false allegations made by a complainant are not 'sexual behaviour', see *R v Davarifar* (2009) EWCA Crim 2294 but that in *R v T* [2005] 1 WLR 632 it was held that the defence should seek a ruling from the judge on s41 in such a case. A non-defendant witness is covered by s100 Criminal Justice Act 2003 in relation to bad character. Special Measures Directions may apply under s17 YJCEA.