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Ring, Sinéad (2015) *Sexual Offence Complainants and Credibility: Why Virginity Testing is Pointless. R v L [2015] EWCA Crim 741.* Journal of Criminal Law, 79 (6). pp. 385-394. ISSN 0022-0183.

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Sexual Offence Complainants and Credibility: Why Virginity Testing is Pointless: ***R v Lawson*** **[2015] EWCA Crim 741.**
(2015) Journal of Criminal Law 385

KEYWORDS: rape; previous sexual experience; reference from the Criminal Cases Review Commission; sexual assault.

FACTS

On a reference from the Criminal Cases Review Commission (CCRC) the appellant appealed his convictions for three counts of indecent assault and one charge of rape.

The complainant came to England from Nigeria at the age of 15. She lived with her half-sister and her husband (the appellant) in South London. Within a year of living with them she made allegations of sexual assault and rape against the appellant to a counsellor at her school.

The prosecution case was that the young woman had been subjected to progressively serious indecent assaults, leading ultimately to rape. The defence was denial: she was lying, perhaps out of a desire to be re-housed.

In the first trial the appellant was convicted of three counts of sexual assault. The jury could not agree on verdicts on six other counts of sexual assault and one charge of rape. In January 2008 the appellant was convicted on a retrial of the rape offence. In both trials the examining doctor's witness statement indicated that the complainant's hymen was disrupted in three places. The doctor could not say when the complainant had first had sexual intercourse, beyond that it had been more than 72 hours previously.

At the retrial on the rape charge the prosecution asserted that the evidence of hymenal penetration had resulted from the rape by the appellant. This was consistent with the complainant's statement that she had told the appellant that he had taken her virginity, that he had apologised and said he had not known that she was a virgin. Her evidence was that she bled for three days afterwards.

In November 2011 the CCRC referred the case to the Court of Appeal based on fresh evidence: a previously undisclosed note made by an assistant social worker who had accompanied the complainant to a medical examination. The note stated that the complainant had reported at that meeting that she had been raped as a child. That appeal was dismissed ([2012] EWCA Crim 1961), the Court holding that the note was likely to be inaccurate because the statement of the examining doctor did not mention any assertion of childhood rape, and that statement was likely to be a more accurate record of the information provided by the complainant and was superfluous to the evidence already available in the ABE interview.

This appeal was a second reference by the CCRC on the basis that new evidence had been disclosed: original notes of two examining doctors which supported the social worker's note to the effect that the complainant had reported having been raped as a child. This evidence confirmed the accuracy of the social worker's note and indicated that the complainant reported an incident which at least suggested that she had been penetrated vaginally at the age of five. The examining doctor stated that the hymenal

injuries observed on examination could have been caused by the earlier incident and could not medically be attributed to one incident rather than another. The CCRC argued that the fresh evidence rendered the medical evidence relating to the damage to the woman's hymen neutral and was capable of undermining the credibility of her account, and gave rise to a real possibility that the convictions would not be upheld.

The Crown accepted that a jury might conclude that the complainant was raped at the age of five and this would account for the damage to the hymen. It accepted that this evidence might affect the woman's credibility in relation to the rape charge since her denial when asked that she had ever had intercourse "might appear to be an attempt to bolster the significance of the medical evidence" (para 34).

The Crown argued than the fresh evidence had a more limited impact on the sexual assault convictions than on the rape conviction, since the jury was satisfied of guilt of sexual assault in the first trial. The jury was alive to the weaknesses in the complainant's evidence and yet despite these weakness they were convinced by her evidence on the three specimen counts of relatively minor indecent assault. Therefore the evidence that she was raped at the age of five did not detract significantly from her evidence regarding the sexual assault. Similarly, if the jury were to find the complainant to have lied, there was no motive to tell such lies to bolster any evidence of sexual assault

THE DECISION

The Court admitted the fresh evidence of the examining doctors. The fresh evidence had the ability to undermine the integrity of the woman's assertion that she was a virgin, in terms of there being no possible previous hymenal injury, and therefore the context in which the medical evidence was placed before the jury at the re-trial by the prosecution and so directed by the judge (para 50). The Court was satisfied that the impact of the fresh evidence was sufficient to throw doubt on the safety of the conviction for rape and quashed it.

The Court rejected the argument that the fresh evidence was also pertinent to the conviction for the indecent assault. It distinguished *R v F* [2008] EWCA Crim 2859 in which there was a history of indecent assaults or possible rape that were all intertwined.

COMMENT.

This case features a number of very interesting dimensions, including the prosecution's failure to disclose the examining doctors' notes, and the lack of investigation into what exactly the woman and the examining doctor understood by the term 'rape'. Indeed the Court commented on the deleterious effects of not exploring the meaning of the term with the woman and the examining doctor (paras). However, due to considerations of space, this comment focuses on the role of the medical evidence, specifically how it related to the arguments about the woman's credibility.

The focus of the appeal was on whether the complainant's statements in relation to the incident were credible, given the inconsistencies between her account at the (re)trial in which she denied ever having been raped, and the account to the examining

doctors and assistant social worker at the time, when she stated she was raped at the age of five. However the importance attached to these inconsistencies was misplaced.

The prosecution's decision in the re-trial to focus on the medical evidence is at the root of the success of this appeal. One can only speculate as to why this strategy was adopted (certainly the Court of Appeal was 'surprised' at this stance: para 54). Perhaps it was due to the jury's failure to agree a verdict on the rape charge in the first trial. Whatever the reason, the decision to focus on the evidence of a hymenal disruption meant that the appellant could tie the complainant's credibility to the issue of virginity. This is clear in the Court's holding that the newly disclosed notes had the ability to undermine the integrity of the woman's assertion that she was a virgin, ***in terms of there being no possible previous hymenal injury*** (para 50). This linking of credibility to a particularly narrow definition of virginity (hymenal disruption) is concerning for a number of reasons:

1. This case should be read in light of reforms to the law of evidence regarding the so-called rape shield. The relevance of previous sexual experience has been shown to be often based on outdated stereotypes about women, including the twin myths that a woman's previous sexual activity makes her more likely to consent to sexual intercourse and less worthy of belief, when compared with other women. This myth has been strongly deprecated by the House of Lords (*R v A (No 2)* [2001] UKHL 25 at para 27). What would have been the value of questioning the complainant about the previous statements regarding the incident when she was five years old? Surely any trial judge would have refused questioning on this matter given that it would clearly be related to woman's credibility, a line of questioning specifically prohibited under the YJCEA 1999 (s41(4). The assertion that the evidence would have been admissible because of the fact of the inconsistency between the two accounts (of being a virgin and not being a virgin) is problematic because it is very close to simply using evidence of the complainant's previous sexual experience in order to undermine her credibility. Furthermore, the grounds for saying that the complainant was inconsistent were weak: as the Court pointed out, there was no investigation at any point as to what the woman's understanding of the term 'rape' was. The Court also noted that the woman's denials that she had ever been raped could very well have been accurate given the changes to the definition of rape in the *Sexual Offences Act 2003*. To further complicate matters, the examining doctor explained that she used the term 'sexual abuse' in her witness statement in accordance with the definition of the Department of Health, Home Office, Education and Employment 1999 "Working Together to Safeguard Children" to mean "physical contact, including penetrative (e.g. rape, buggery or oral sex), or non penetrative acts." This was not appreciated by the either trial advocate; the Court of Appeal described this "anodyne descriptive phrase" as unsatisfactory in the circumstances of the criminal investigation and capable of misunderstanding (para 47). The confusion around what rape meant to the complainant or the examining doctor means that a finding of possible inconsistency and therefore possibly damaged credibility, is a self-fulfilling prophecy, despite the impossibility of knowing whether the woman's statements were in fact inconsistent.

2. It is difficult to understand where the force of the argument regarding inconsistency really lies, given in the re-trial on the rape charge defence counsel asked the woman (following leave granted pursuant to s41(3)(a) *Youth Justice and Criminal Evidence Act 1999)* about a reference in her interview to an incident involving her landlord when she was a teenager. Counsel argued that the damage to the complainant's hymen was possibly due to her having been raped. The woman said she had been 'almost raped' by him. The trial judge directed the jury that the medical evidence regarding hymenal disruption could only assist them if they accepted the woman's evidence that she had been a virgin at the time of the alleged rape. Surely this evidence alone would have lead to the jury to consider the possibility of (a) her hymen having already been broken and (b) whether this possibility had any bearing on the value, if any, of the medical evidence.

3. Indeed, close examination of the options open to the complainant in talking about her sexual history expose the limiting effects of law on the complexity of her experience. There was no room for her to say: "Although my hymen had been ruptured through forced intercourse at the age of five, or through sexual contact with a man when I was a younger teenager, I considered myself to be a virgin, and to never have had sexual intercourse. I did not consider myself as having lost my virginity until that point. I did bleed for three days, and that may be because my hymen was torn or it be because the rape was so violent. I don't know." Neither could she say: "I don't remember the details of what happened to me at the age of five. Most people do not remember what happened to them at such an young age. I was so upset by the experience I did my best to forget it. I don't know if my hymen was ruptured, but I still considered myself a virgin." Given the prosecution's decision to focus on the importance of medical evidence regarding the hymenal disruption, there was no room for these kinds of statements. Defence counsel would have quickly deemed them contradictory and inconsistent. This is especially problematic when one considers that the case revolved around the antiquated and deeply gendered concept of "losing one's virginity' in the context of a five year old being subjected to sex by an adult man.

4. The focus on the hymen meant that the woman's credibility was bound up with medical validation. This mobilised the 'real rape' stereotype, part of which is the idea that 'real rapes' typically cause physical damage (See Kelly et al, *A gap or a chasm? attrition in reported rape cases* (Home Office Research Study 293: London, 2005). This stereotype is contradicted by the fact that sexual violence is usually carried out through implied force and threat and therefore does not leave injuries on a woman's body (See White, C. and McLean, "Adolescent Complainants of sexual assault: injury patterns in virgin and non-virgin groups." 2006 13 *Journal of Forensic Medicine* 172). The search for external medical evidence to legitimate the woman's story recalls the dark days of the mandatory corroboration warning in sexual offences trials (see *R v Baskerville* [1916] 2 KB 65). The social workers' note that the woman said she had previously been abused/raped at the age of five could only ever become important in the context of a case that focused on credibility as being linked to virginity. Otherwise, the fact of the

inconsistencies in accounts of her sexual past would not have been significant.

5. Finally, this case raises fundamental questions about the relevance of medical evidence pertaining to the hymen. As leading forensic experts have recently stated, "*the status of the hymen has no correlation with previous penetration or sexual contact; it does not enable a determination of whether penetration of the hymen or vagina by a penis or any other object has occurred. An individual with an undamaged hymen may or may not have experienced penetrative sexual contact. There similarly may be no trace of hymenal lesion following sexual assault."* (Independent Forensic Expert Group, Statement on virginity testing" (2015) *Journal of Forensic and Legal Medicine* 33 121 at 123.) Thus, given that there is no medical diagnostic value in the presence or absence of the hymen, this begs the question why the Crown focused on this part of the evidence at all. From a broader systemic perspective, the case prompts serious questions about whether a focus on hymenal disruption is appropriate given that it may open up lines of investigation that are intrusive and distorting of the trial's search for the truth. Given that attrition continues to plague rape and sexual assault prosecutions (see Stanko et al, "Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales" (2015) 12(3) *European Journal of Criminology* 324) this is an issue that deserves considered reflection by practitioners and academics.

In conclusion, the success of this appeal lies in the Crown's focus on the outdated concept of virginity at the re-trial. Defence arguments about the probative value of the alleged inconsistencies between the complainant's various naming of her previous sexual history (as rape or not) would have been defeated by a judicial direction.
If the trial judge had directed the jury that, if they accepted that the complainant had experienced some unwanted sexual contact prior to the alleged rape in question, the medical evidence regarding the hymenal disruption should be regarded as neutral. Indeed the trial judge in the first trial had given such a direction. This case points up the dilemma facing prosecution counsel in many rape cases where there is medical evidence. It serves as a timely reminder that the option of 'strengthening' complainant testimony by reference to medical evidence relating to the hymen, should be treated with great caution, because it may prove counter-productive.