Neutral Citation no. [2008] NICA 19 | *Ref:* **HIG7123**

Judgment: approved by the Court for handing down | *Delivered:* **14/3/08**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

D S

Before: Kerr LCJ, Higgins LJ and Girvan LJ

HIGGINS LJ

[1] On 20 June 2006 at Craigavon Crown Court, after a trial before His Honour Judge Markey QC and a jury, the appellant was convicted of three charges of rape and seven charges of indecent assault in which his daughter R was the complainant (Counts 1 – 10 in the Bill of Indictment). They included one specific count of rape and two specimen counts of rape and two specific counts of indecent assault and five specimen counts of indecent assault. He appeals against each of those convictions.

[2] The appellant was also convicted of indecent assault on another daughter L (Count 14) but there is no appeal in respect of that conviction. He was acquitted of a further three charges – Count 11 (making a threat to kill R), Counts 12 and 13 (rape of R). The jury either failed to reach a verdict or acquitted the appellant on thirteen other counts alleging rape or indecent assault on L and another daughter C. The offences were alleged to have occurred on various dates between 1988 and 2001, although the offences of which he was convicted involving R occurred between 1988 and 1991 and the single count involving L between May 1991 and March 1992. He was sentenced to a total of twelve years' imprisonment on counts 1 to 10 and a further 18 months' imprisonment consecutively on Count 14.

[3] R was born on 10 July 1976 and at the time of the events alleged in Counts 1 to 10 she was between the ages of twelve and fifteen. On 24 May 1991, prior to being taken into care, R made an eight page statement to police

(the first statement) in which she alleged that she had been abused by her uncle G and her brother P. R was then aged 14 years and 10 months. Towards the end of this statement she said – "the only people to have sex with me is (sic) P and G". On 18 April 2001 she made a further statement (the second statement) in which she stated that her father abused her from the age of twelve until she was seventeen years of age and that this involved full penetrative sexual intercourse. She referred to the disclosure she made in the first statement and stated that she "never told anyone about my dad because I was scared. He was violent and would have beaten me up".

[4] On 9 November 2001 R made a further statement (the third statement) in which she stated that her father had sexual intercourse with her on a regular basis. She also stated that he had sexual intercourse with her after she had been taken into care in 1991. Counts 12 and 13 related to this period after she was taken into care. The appellant was acquitted of these charges. On 20 August 2002 she made a final statement (the fourth statement) in which she repeated her allegations that she had been abused by her uncle G and her brother P. In this statement she said that when she made her statement in 1991 she was too frightened to make a complaint about her father. She then stated that she now wished to "tell everything that happened to me while I was at home living with my mum and dad…..". In this statement she alleged she had been abused by three cousins, a great uncle, and the boyfriend of a lodger. She alleged that one of her cousins had sexual intercourse with her on a regular basis from when she was eleven or twelve years of age and another cousin on one occasion when she was close to fifteen years of age.

[5] The statements of 18 April 2001 and 9 November 2001 contained the allegations on which the appellant was returned for trial and were included in the preliminary inquiry papers. The other two statements, dated 24 May 1991 and 20 August 2002, were disclosed to the defence prior to the commencement of the trial.

[6] The appellant's case, as set out in his defence statement, was that he did not rape or indecently assault any of his three daughters who made allegations against him. He did not give evidence at the trial, but it was put to R in cross-examination that she had not been abused in any manner by her father. There was no forensic evidence to support her allegations. Therefore the counts in the indictment relating to R rested on her testimony alone.

[7] The single ground of appeal is in the following terms: –

> "The trial judge erred in refusing leave for the defence to cross-examine R about the circumstances of the making of her statement of 20 August 2002. Had the members of the jury been able to hear her cross-examined about this they would have had a complete

> picture of her background and behaviour and they would have been better placed to assess her credibility. The failure of the learned trial judge to ensure that the jury had a complete picture renders the convictions in respect of R unsafe."

[8] On 1 June 2006, just before R was due to give evidence, Mr Sefton, who appeared with Mr Lindsay on behalf of the appellant, applied to the learned trial judge for leave under the Criminal Evidence (Northern Ireland) Order 1999 (the 1999 Order) , to cross-examine the appellant's three daughters on various matters. These included leave to cross-examine R about the statements made by her on 24 May 1991 and 20 August 2002 and the detail of the complaints made by her about sexual abuse, allegedly perpetrated against her by a number of persons. In particular, it is now clear, he wished to cross-examine her about her failure to complain about her father when making the first statement and about the fact that in the fourth statement she alleged serious sexual abuse by a number of others at the same time as, she later claimed, she was being abused by her father.

[9] The learned trial judge ruled that counsel would be permitted to cross-examine R on the contents of the statement dated 24 May 1991 but not on the statement dated 20 August 2002. Thus the jury became aware of the contents of the first statement and the fact that R had claimed in that statement that the only persons to have had sex with her were her uncle G and her brother P. The jury did not become aware that in the statement dated 20 August 2002 she alleged that, at the same time as she was being abused by her father, she was also being abused by other persons.

[10] Part IV of the 1999 Order is entitled - 'Protection of Complainants in Proceedings for Sexual Offences' and comprises Article 28 to 30. Article 28 is entitled – 'Restriction on evidence or questions about complainant's sexual history' and it provides –

> "28. - (1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court-
>
> (a) no evidence may be adduced, and
>
> (b) no question may be asked in cross-examination,
>
> by or on behalf of any accused at the trial about any sexual behaviour of the complainant.
>
> (2) The court may give leave in relation to any evidence or question only on an application made by

or on behalf of an accused, and may not give such leave unless it is satisfied-

(a) that paragraph (3) or (5) applies, and

(b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3) This paragraph applies if the evidence or question relates to a relevant issue in the case and either-

(a) that issue is not an issue of consent; or

(b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or

(c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar-

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complaint which (according to such evidence) took place at or about the same time as that event,

that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of paragraph (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This paragraph applies if the evidence or question-

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of paragraphs (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those paragraphs is capable of applying in relation to the evidence or question to the extent that it does not so relate).

(7) Where this Article applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is or are charged with a sexual offence-

(a) it shall cease to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but

(b) it shall not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.

(8) Nothing in this Article authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this Article."

[11] Article 29 is entitled 'Interpretation and Application of Article 28' and provides: –

"29. - (1) In Article 28-

(a) "relevant issue in the case" means any issue falling to be proved by the prosecution or defence in the trial of the accused;

(b) "issue of consent" means any issue whether the complainant in fact consented to the conduct constituting the offence with which the accused is charged (and accordingly does not include any issue as to the belief of the accused that the complainant so consented);

(c) "sexual behaviour" means any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in Article 28(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused; and

(d) subject to any order made under paragraph (2), "sexual offence" shall be construed in accordance with Article 3.

(2) The Secretary of State may by order make such provision as he considers appropriate for adding or removing, for the purposes of Article 28, any offence to or from the offences which are sexual offences for the purposes of this Order by virtue of Article 3.

(3) Article 28 applies in relation to the following proceedings as it applies to a trial, namely-

(a) proceedings before a magistrates' court conducting a preliminary investigation or preliminary inquiry into an offence,

(b) the hearing of an application under paragraph 4(1) of Schedule 1 to the Children's Evidence (Northern Ireland) Order 1995 (application to dismiss charge following notice of transfer of case to Crown Court),

(c) any hearing held, between conviction and sentencing, for the purpose of determining matters relevant to the court's decision as to how the accused is to be dealt with, and

(d) the hearing of an appeal,

> and references (in Article 28 or this Article) to a person charged with an offence accordingly include a person convicted of an offence."

[12] Article 28 therefore restricts the type of questions that may be asked and the evidence that may be adduced during the trial of a person charged with a sexual offence. The restriction applies to any question or evidence about any sexual behaviour of the complainant. The court may grant leave to ask a question or adduce evidence about any sexual behaviour of the complainant but only if it is satisfied that paragraph (3) or (5) applies and a refusal of leave might have the result of rendering a conclusion of the jury (or the court), on any relevant issue, unsafe. Paragraph (5) applies where it is necessary on behalf of the accused to explain or rebut evidence given by the prosecution about any sexual behaviour of the complainant. It was not suggested that paragraph (5) applied in this case. Paragraph (3) applies if the evidence or question relates to a relevant issue and that issue is either not an issue of consent or if it is an issue of consent certain specified conditions have been fulfilled. In either case paragraph (4) applies.

[13] Consent was not an issue in this case. Therefore it was necessary to establish the nature of the relevant issue for the purposes of paragraph (3) and to apply paragraph (4). In order to engage paragraph (3) the question to be asked in cross-examination (or the evidence to be adduced) must relate to a specific instance or instances of sexual behaviour by the complainant – see paragraph (5). However, by virtue of paragraph (4), if it is reasonable to assume that the purpose (or the main purpose) for asking the question or adducing the evidence about sexual behaviour of the complainant is to establish or elicit material for impugning the credibility of the complainant as a witness, then it is not a relevant issue in the case and no question can be asked or evidence adduced.

[14] The court may grant leave but only on application to it (Article 28(2)). Such an application shall be heard in private and in the absence of the complainant (Article 30(1)). On determination of the application the court must state in open court the reasons for refusing or granting leave and in the latter case the extent to which evidence may be adduced or questions asked (Article 30(2)) .

[15] Crown Court Rules, added by SR 2003/471 with effect from 1 December 2003, make provision for applications under Article 28 of the 1999 Order. Rule 44H provides: -

> "44H. - (1) Subject to paragraph (10), an application under Article 28(2) of the 1999 Order for leave to adduce evidence of, or ask questions about, any sexual behaviour of a complainant shall

be made by giving to the chief clerk notice in writing and shall-

(a) be made within 28 days from the date –

(i) of the committal of the defendant; or

(ii) on which Notice of Transfer under Article 3 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 or under Article 4 of the Children's Evidence (Northern Ireland) Order 1995 was given; or

(iii) on which leave to present an indictment under section 2(2)(e) of the Grand Jury (Abolition) Act (Northern Ireland) 1969 was given; or

(iv) on which an order for retrial is made; or

(b) be accompanied by a full written explanation specifying the reasons why the application could not have been made within the specified period.

(2) An application under paragraph (1) shall contain the following –

(a) a summary of the evidence it is proposed to adduce and of the questions it is proposed to put to any witness;

(b) a full explanation of the reasons why it is considered that the evidence and questions fall within Article 28(3) or (5) of the 1999 Order;

(c) a summary of any document or other evidence to be submitted in support of such evidence and questions;

(d) where it is proposed that a witness at the trial give evidence as to the complainant's

sexual behaviour, the name and date of birth of any such witness.

(3) A copy of the application under paragraph (1) shall be served, by the applicant, on every other party to the proceedings at the same time as it is served on the chief clerk.

(4) The prosecutor shall notify the chief clerk and the other parties to the proceedings –

(a) whether or not he opposes the application, giving reasons for any such opposition, and

(b) whether or not he wishes to be represented at any hearing of the application,

and where the notice of application is received by the prosecutor more than 14 days before the date set for the trial to begin, the notification must be served by the prosecutor within 14 days of receipt.

(5) Where a copy of the application is received by a party to the proceedings other than the prosecutor more than 14 days before the date set for the trial to begin, that party may, within 14 days, make observations in writing in relation to the application to the chief clerk and shall serve a copy of such observations on every other party to the proceedings.

(6) In considering any application under this rule, the Court may request a party to the proceedings to provide the Court with such information as it may specify and which the Court considers would assist in determining the application.

(7) Where the Court makes such a request, the person required to provide the information shall do so within 14 days of the Court making the request or by such time as the Court considers appropriate in the circumstances of the case.

(8) An application under paragraph (1) shall be determined by a judge following a hearing.

(9) The date and time of the hearing shall be –

(a) determined by the chief clerk after taking into consideration –

(i) any time which a party to the proceedings has been given to respond to a request for information; and

(ii) the date fixed for any other hearing relevant to the proceedings; and

(b) notified by the chief clerk to all the parties to the proceedings.

(10) An application under Article 28(2) of the 1999 Order may be made orally to the trial judge where the application is made after the trial has begun.

(11) The person making the application under paragraph (10) shall –

(a) give reasons why the applicant failed to make the application in accordance with paragraph (1); and

(b) provide the Court with the information set out in paragraph (2).

(12) The chief clerk shall, as soon as reasonably practicable after the hearing of an application under paragraph (1), give notice of the decision of the judge to all the parties to the proceedings."

[16] It is clear from the Rules that applications under Article 28(2) should ordinarily be made well in advance of trial and that the questions and/or evidence, the subject of the application, should be set out clearly for consideration by the court. While an application may be made orally during the trial, the rules require the reasons why the application was not made earlier to be disclosed. Crucially in an oral application the Court should be provided with all the information which would have been set out in the written application, had the application been made before trial. It appears that in this instance Rule 44H was not complied with. If the Rules had been complied with, the learned trial judge would have become aware of the precise nature of the application which was being made.

[17] The purpose of Part IV of the 1999 Order is to protect complainants in sexual offence trials from unfair and unnecessary cross-examination relating to their sexual history. It was long regarded as permissible to cross-examine complainants about such history on the basis that this might demonstrate that they were unworthy of belief or, if consent was an issue, that if they consented to sexual intercourse in the past, it was more likely that they consented on the occasion in question in the trial. In the seventeenth century Sir Matthew Hale explicitly articulated his distrust of women's testimony where the accusation involved sexual crime (1 P.C. 628 – 9), a sentiment echoed several hundred years later by the leading legal scholar Wigmore (Wigmore, 1940, para.924A) – see Home Office Report 20/06 into the application of section 41 in trials for sexual offences. Those attitudes, often referred to as the 'twin myths', greatly influenced the law and practice in this area and continued to do so until recently.

[18] Part IV of the 1999 Order, which mirrors Section 41 of the Youth and Criminal Justice Act 1999, is designed to protect complainants and to ensure that only evidential material which is sufficiently relevant is admitted in evidence. However, the accused is entitled to a fair trial, guaranteed by Article 6 of the European Convention on Human Rights. Article 28 is far-reaching and excludes much evidence that hitherto was admissible. In its strict application it may deny the accused the right to put forward a full and complete defence or an element of that defence. While Part IV creates exceptions, they are difficult to apply to the many different situations which can arise where an accused is charged with a sexual offence. Where an accused is denied the right to question the complainant or to put forward evidence in circumstances which might prevent a fair trial, the court may have to consider, under Section 3 of the Human Rights Act 1998, whether it is possible to interpret the legislation in such a manner as to guarantee the right to a fair trial.

[19] Such a question relating to Section 41(3)(c) (the equivalent of Article 28 (3)(c)), arose for consideration by the House of Lords as a preliminary issue prior to trial in *R. v A* [2002] 1 AC 45. In that case the defence sought to have admitted evidence of an alleged previous sexual relationship between the complainant and the accused. It was submitted that this evidence was relevant to the question of consent yet there was no way of bringing it within any of the four exceptions set out in Article 28. The question was whether the exclusion of such evidence would breach the right of the accused to a fair trial as guaranteed by Article 6. The House of Lords held that section 41 (the equivalent of Article 28) was not incompatible with the European Convention on Human Rights and that it was possible to interpret the section in such a manner as to protect the accused's right to a fair trial. The relevant part of the head-note states -

"Held

(1) that, although the legislature had pursued a legitimate objective in enacting section 41 of the 1999 Act, namely to protect complainants in sexual offence cases from indignity and humiliating questioning and to correct the twin assumptions that a woman who had had previous sexual intercourse was more likely to consent on the occasion in question and in any event was less credible, a prior consensual sexual relationship between a complainant and the defendant might, in the circumstances of an individual case, be relevant to the issue of consent; that, although in giving effect to the defendant's rights under article 6 account might also be taken of the interests of the complainant and of society in general, his right under article 6(1) to a fair trial, assessed by reference to the overall fairness of the proceedings, was absolute and fundamental and would be infringed if he were denied the admission of relevant evidence where its absence led to his unjust conviction (post, paras 1, 3, 5, 27, 31, 38, 55, 76, 90-91, 119, 120, 122-124, 125, 142-143, 152, 160, 161).

(2) That the temporal restriction in section 41(3)(b) could not be construed as permitting evidence or questioning other than in respect of acts which were really contemporaneous with the incident charged; but that under section 41(3)(c), construed where necessary, or (per Lord Hope of Craighead) so far as it was possible to do so, by applying the interpretative obligation under section 3, and always giving due regard to the importance of protecting the complainant from indignity and humiliating questioning, the test of admissibility was whether the evidential material was nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6; and that where that test was satisfied the evidence should not be excluded (post, paras 12-15, 40, 46, 80, 82, 110, 132, 135-136, 140, 156, 163)."

[20] Lord Steyn, who gave the leading opinion, commented generally on the task for trial judges when issues relating to section 41 arose in the context of ensuring a fair trial. At paragraph 45, page 68 he stated: –

> "It is of supreme importance that the effect of the speeches today should be clear to trial judges who have to deal with problems of the admissibility of questioning and evidence on alleged prior sexual experience between an accused and a complainant. The effect of the decision today is that under section 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under section 3 of the Human Rights Act 1998, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention. If this test is satisfied the evidence should not be excluded."

[21] Mr Sefton's application to the trial judge was made explicitly under the 1999 Order for leave to cross-examine R about a series of alleged sexual abuses from 1980 onwards. He submitted that it was important for the jury to understand what her claims were about the number of people who were abusing her (see transcript pages 31 and 32). Mr Sefton stated that if he was not entitled to cross-examine about these matters the jury would not know that, during the period of alleged sexual abuse by her father, R was alleging that she was also being sexually abused by a number of other persons.

[22] At this point the learned trial judge stated that this was cross-examination about sexual history and could not be permitted as it did not fall within the exception, although he accepted that cross-examination was permitted as to why 'when you are complaining about A, you did not complain about B'. Mr Sefton then submitted that "the issue the jury has to decide is credibility" (see transcript page 33). There the matter was left. Mr Lavery QC responded, agreeing with the comment of the trial judge quoted above, but objecting to cross-examination about the contents of the other allegations of abuse unless they could be shown to be false.

[23] At a later point in the trial, Mr Sefton returned to R's statements and the assertion in her first statement that only two persons had sexual intercourse with her whereas she was now saying her father and a number of other people had sexually assaulted her. He submitted that the jury were entitled to know that the first statement was not true and then added that "the jury are entitled to know that there are a number of other people in the same boat" (see transcript page 38). Subsequently, he commented that the jury would not be aware that R had later made a number of complaints about

other persons and would therefore have no occasion to question what her motive was in not making those complaints at the same time.

[24] Thus the substance of the submission was that the jury should be made aware that R was alleging that, at the same time as she was being abused by her father, others were similarly engaged in sexual abuse of her. The prosecution objected to the proposed use of the other statements on the basis that they would expose R to cross-examination on other sexual behaviour, which, of course, was no longer permissible following the introduction of the 1999 Order. In the event the judge ruled, inter alia, that counsel for the defence was entitled to cross-examine R on the contents of the first statement but not on the fourth statement, as this would expose her to cross-examination on other sexual behaviour.

[25] At a later stage in the trial, but before the cross-examination of R had concluded, Mr Sefton applied to cross-examine her on a magazine article to which she had contributed. During the course of this application he renewed his application to cross-examine R about the fourth statement. The learned trial judge stated that he adhered to his earlier ruling as it would lead to cross-examination about her 'generalised sexual history' and that was not permissible under Article 28 of the 1999 Order.

[26] The manner in which the issue was debated, namely in the context of the complainant's sexual history, had the effect of deflecting the court from the precise nature of parts of the application in relation to the first and fourth statements and their possible significance in relation to R's credibility. The emphasis of the submissions made in the course of the trial appears to have been on the details of the sexual abuse alleged against others contained in the fourth statement, whereas there were in fact two issues. One related to the detailed allegations of sexual abuse and the other on why, when she had complained at a particular time about some family members, she did not also complain about those others whom she later named in 2001 and 2002. Her credibility as a witness of truth was a major issue in the trial. The precise nature of the point relating to the fourth statement and her credibility, as opposed to the sexual history disclosed, was not spelt out before the learned trial judge with the clarity that applications under the 1999 Order require.

[27] Before this court Mr Sefton accepted that he had not isolated this point in his general argument before the learned trial judge. In his submissions on the appeal he concentrated on the single critical point of the discrepancy between R's assertion that no-one other than her brother P and her uncle G had sex with her (contained in her first statement) and the revelation in her fourth statement that other family members were also having sex with her at or about the same time. Counsel effectively abandoned that part of the submission that he had made to the learned trial judge that he be permitted to cross-examine about the details of the fourth statement. Instead, on the

appeal, Mr Sefton argued that he should have been permitted to cross-examine R about this discrepancy which went to her credibility as a witness and reliability as an historian.

[28] In itself such cross-examination did not involve investigation of her sexual history to establish any particular sexual propensity on her part. It was therefore submitted that the trial judge was in error in holding that it came within Article 28 and was on that account impermissible. Alternatively, it was argued that if it came within the provisions of the 1999 Order and cross-examination was not permitted, then the appellant would be denied a fair trial contrary to Article 6 of the European Convention on Human Rights. The appellant's right to a fair trial was infringed, Mr Sefton argued, where a witness whose credibility was in issue could be shown to have lied and the jury was not permitted to know this.

[29] Section 3 of the Human Rights Act 1998 requires legislation to be read and given effect to in conformity with Convention rights, where it is possible to do so. It was submitted that it was possible to read Article 28 in a manner which would permit the cross-examination sought and therefore not deprive the appellant of his right to a fair trial. In response to this argument, Mr Lavery submitted that to permit cross-examination about the fourth statement would have the effect of opening up a whole series of allegations of a sexual nature which were not before the jury. This was the kind of cross-examination which Article 28 was designed to prevent. He submitted that not permitting such cross-examination, in the context of the other evidence adduced in the trial, would not and did not deprive the appellant of the fair trial guaranteed by Article 6.

[30] Article 28 prohibits cross-examination or the adducing of evidence relating to any sexual behaviour of the complainant. Sexual behaviour is defined in Article 29 as any sexual behaviour or other sexual experience. In *Re A* Lord Clyde at paragraph 128 stated that the phrases sexual behaviour and sexual experience 'seem to be referring to matters of conduct or activity, to acts or events of a sexual character'. Undoubtedly the fourth statement contained details of activity or events of a sexual nature involving other persons. On the basis of the application made to him, the learned trial judge was correct to identify this statement as sexual history and that cross–examination about it, that is about the details of sexual events or activity, was not permitted unless it fell within the exceptions in Article 28. None was identified or relied on by the defence. However, the other aspects of the application, which had not been clearly identified to the learned trial judge, namely the fact that R made a statement in 1991 and averred that no other person other than P and G had sex with her and that she omitted to mention in 1991 and 2001 that others, apart from her father and P and G had sexually abused her, did not relate to sexual behaviour as defined, but to her inconsistent statements about who sexually abused her, not the sexual

behaviour itself. Thus refined, these aspects of Mr Sefton's application relating to the fourth statement did not fall within either Article 28(1) or 28(4). If they had, then an issue would have arisen as to Article 6. Because they do not it is unnecessary to consider that alternative issue in this appeal.

[31] In ruling that Mr Sefton could not cross-examine R about those aspects relating to her fourth statement the learned trial judge erred, although that error was understandable in view of the manner in which the application was made to him. If the application had been made in accordance with the rules, the issues would have been clearly identified. Cross-examination relating to the first statement was permitted. The jury were made aware that in that first statement R had omitted to mention her allegations against her father and that she had stated that no one other than P and G had sex with her.

[32] The credibility of R was a critical feature of the case and the jury were not satisfied of her evidence in relation to the alleged abuse by her father after she was taken into care. But they were unaware that when she made her first statement she had omitted the allegations contained in the fourth statement. In addition they were unaware that, when she said no one other than P and G had sex with her, not only had she failed to mention her father but had failed to mention a number of other persons. In those circumstances we cannot be satisfied that the verdicts on those ten counts were safe. The verdicts on those counts must be quashed and the appeal is allowed.