

In the Crown Court for the Division of Antrim

R v N T D

Ruling by Judge Smyth QC delivered on 5th December 2007.

Part IV of the Criminal Evidence (NI) Order 1999

Application for leave to ask questions and call evidence about a complainant's sexual behaviour.

1. This is an application to the court on behalf of the accused seeking leave under Articles 28-30 of the Criminal Evidence (NI) Order 1999 to ask questions and call evidence about a Complainant's sexual behaviour.

(a) **The relevant law is:**

PART IV

PROTECTION OF COMPLAINANTS IN PROCEEDINGS FOR SEXUAL OFFENCES

Restriction on evidence or questions about complainant's sexual history

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).

Interpretation and application of Article 28

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

Procedure on applications under Article 28

30. - (1) An application for leave shall be heard in private and in the absence of the complainant.

In this Article "leave" means leave under Article 28.

(2) Where such an application has been determined, the court must state in open court (but in the absence of the jury, if there is one) -

(a) its reasons for giving or refusing leave, and

(b) if it gives leave, the extent to which evidence may be adduced or questions asked in pursuance of the leave,

and, if it is a magistrates' court, must cause those matters to be entered in the Order Book.

(3) Rules of court may make provision -

(a) requiring applications for leave to specify, in relation to each item of evidence or question to which they relate, particulars of the grounds on which it is asserted that leave should be given by virtue of paragraph (3) or (5) of Article 28;

(b) enabling the court to request a party to the proceedings to provide the court with information which it considers would assist it in determining an application for leave;

(c) for the manner in which confidential or sensitive information is to be treated in connection with such an application, and in particular as to its being disclosed to, or withheld from, parties to the proceedings.

(b) **The facts and Ruling:**

1. The application was heard on the 4th December 2007 in court sitting in private and in the absence of the complainant. An indication was given by the Court on the Ruling and this is a considered synopsis of that Ruling for the guidance of Counsel.
2. I state, briefly, the facts that I regard as relevant to this application. I start with the issues that the jury will have to ultimately decide in the trial. These are that, after listening to all the relevant evidence, whether there exists in their mind a reasonable possibility either that the complainant consented to being penetrated per anus at the time of penetration or whether the accused genuinely believed that she was consenting at the relevant time. If either exists, the accused must be acquitted.
3. The allegation centres on what occurred in the accused's bedroom on the 4th June 2006 after Sunday lunch. Both the accused and the complainant are cousins, the accused was 16 and the complainant was also 16. In very brief form, it is the complainant's case that she was in the accused's bedroom and that they had looked at each others' mobile phones that she had fallen asleep on the accused's bed and woke when she was being anally penetrated. She left the house and met friends to whom she complained. Clearly, if she was asleep she could not have consented.
4. The accused was interviewed by the police at some length and made the case at different stages in his interviews that he had anally penetrated his cousin but did so with her consent. He said

this happened after video clips that had passed between the complainant's mobile and his mobile, and which were of a pornographic nature, were viewed by them both. More particularly, one of the clips depicted anal intercourse. Two forensic experts, Adam Omerod and Kitty Banks, examined both mobile phones, that of the complainant and that of the accused.

5. The relevant items fall into three categories: those items which are saved to the complainant's phone on 15th May 2006, those saved on that phone on 4th June 2006 and those which were sent from the complainant's mobile phone by "Bluetooth" to the accused's mobile on 4th June 2006. The clips on the complainant's mobile on 15th May 2006 included moving images of anal intercourse. These had no connection with accused's mobile and had not been deleted but were downloaded and retained.
6. I was not invited to look at the clips and had their nature and contents described to me but, from the title and description given to me, they clearly are graphic.
7. Mr Kane sought leave to both ask questions about the video clips, their content and their history and provenance and also to show them to the jury in the absence of the complainant. This was opposed by Mr Hunter on the grounds that they came under the ambit of the Order and should not be admitted. He also objected to these being shown to the court and jury in the absence of the complainant if they were to be admitted.
8. In addition to the application concerning video clips application was also made in reference to a number of entries made by the complainant on her "BEBO" website. These I do not recite in full but they included entries as follows: online identities which included the words: Fuck me I'm a Prod and text written by the complainant that included explicit sexual references, some of which could properly be described as lurid. Finally, pictures had been posted on the site which depicted cheek kissing, clothed but physically suggestive postures and a picture of the complainant taken on the lavatory, clothed but with a crude caption. These references were, in the main, subsequent in time to the alleged offence.
9. Two further matters were the subject of the application. The first was to admit in evidence an assertion that the accused and his cousin had, on one previous occasion, been sexually intimate. This

would be both to permit a question of the complainant to that effect and also to permit the accused to say this in evidence. The second matter concerned an application based on an assertion by the accused that the complainant had told him she had done something similar, namely anal intercourse, once before with a friend. The application seeks leave to ask questions of the complainant as to whether this was said or occurred and to permit the accused to give evidence about it.

10. I find that the video clips and what happened, allegedly, by way of viewing them jointly before the incident of anal penetration constituted “sexual behaviour” as defined in Article 29, in view of their content and the context in which they were allegedly viewed. I, however, grant leave under Article 28 (3) (b) to introduce the following in evidence: items 6, 7, 10, 11, 25, 36, 12 13, 19, 24, 30, 33 and 34. Questions can therefore be asked about the acquisition of these, their history and their transfer. I do so because I view these as coming within the scope of the exception contained in Article 28 (3) (b) namely that this sexual behaviour was alleged to have taken place “at about the same time” as the event alleged. I also am satisfied that a refusal of leave might render unsafe a conclusion by the jury under Article 28 (2).
11. This should be done in cross-examination of the complainant rather than in her absence since she should have an adequate opportunity to respond to this at the appropriate time and also in view of the approach taken by Mr Hunter.
12. I do not regard any of the entries in the BEBO site, made prior to the alleged incident, as being “sexual behaviour” despite the wide meaning given to that term. Having regard to the overall context in which these terms were used I hold that they are outside the scope of Article 28 of the Order. I however do not see these, or any subsequent photographs posted on the complainant’s site, as being relevant to the issues the jury have to decide and I so hold.
13. Whether a matter constitutes sexual behaviour has to be decided in the context in which it is set and in the light of the circumstances of the case. Although the two cases cited by Mr Kane illustrate the wide interpretation that can be given to sexual behaviour as defined in Article 29 (c) where sexual behaviour is defined as to include any “sexual experience” I find that, in the context of this case, pictures in suggestive poses and text of the kind mentioned fall

short of constituting “behaviour” or “experience” of a sexual nature.

14. There is one exception. This was an entry made on 7th June 2006 referring to the previous weekend. “hey ya had a gd weeken was pretty drunk tho lol!!! Who u goin way these days pet?? Hows your exams wb huni xxxxx”. Since this related to the weekend containing the relevant date of the offence and because of its content and proximity in time I find this to be relevant and permit it to be the subject of questions in cross-examination by Mr Kane. I find it to be capable of being a comment made by the complainant about the weekend just passed and possibly relevant to consistency and to credibility. Since it is not sexual behaviour the provisions of the Order do not apply. It therefore does not fall within the ambit of Article 28 (2).
15. Since the matter of previous intimacy related to behaviour between the accused and the complainant and since, if it happened, I regard it as relevant to the issue of consent I hold that it falls within the ambit of Article 28 but, in the light of R v A, (2000) 3AER 1, I held this admissible. In R v A at page 18, per Lord Steyn:

“The effect of the decision today is that under s41(3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under s3 of the 1998 Act, 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.”
16. I give leave to ask questions about this and to give evidence about this allegation.
17. In relation to the suggestion made that the complainant had told the accused she had engaged in similar behaviour with another person I rule that that falls with the ambit of Article 28 but refuse leave. Another application under Article 28 (3) (c) can be made at an appropriate stage during the trial after the evidence in chief of the complainant has been given when I will decide whether the tests under Article 28 (2) (b) and (c) have been met.

18. I was also asked for general guidance about the possible inference that Mr Kane felt the jury might draw from the complainant's age that she was a sexually inexperienced child. Mr Hunter indicated that he would not be making this case. I believe that this inference is unlikely for two reasons. First, it is not going to be part of the presentation of the Crown case. Second, the nature of this case makes it highly unlikely that a jury would so conclude. If there is any possibility in my mind of this occurring I can address it in my closing charge.