

## Ch 7: Cross-examination

### Cross-examination

#### Liability to cross-examination

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Regard can also be had to whether other material will be before the jury which enables them to assess the witness's credibility, whether the witness's evidence can be assessed by them in the context of other evidence *not* related to credibility, and the directions that may be given about the limitations of the witness's evidence: see *R v RT* [2020] EWCA Crim 155. See also the Crown Court Compendium (December 2020), Part 1, 10-5, para 7.

#### The permitted form of questioning in cross-examination

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Judges may also call an end to cross-examination where a witness is repeatedly ill-tempered, the line of cross-examination has been substantially completed, the witness remains resolute in his evidence and further cross-examination is unlikely to yield concessions: *R v Simon* [2018] EWCA Crim 3086.

While the judge may intervene during a cross-examination under his powers in relation to children and vulnerable witnesses, or to clarify any matter he does not understand or thinks the jury might not understand, it is certainly not his function to cross-examine witnesses or the accused: *R v Binoku* [2021] EWCA Crim 48 at [53]; see also *R v Inns* [2019] 1 Cr App R 61 (5), CA. Principles which apply to interventions by the judge were considered in **Chapter 6** in the context of examination-in-chief and it is submitted that these principles apply equally to cross-examination. A working summary of the principles was endorsed and adopted in *R v Mustafa*, [2020] EWCA Crim 1723 at [7] – [8], a case where the judge had intervened so excessively during both examination-in-chief and cross-examination that the accused's trial was unfair. In addition to the principles mentioned in **Chapter 6**, the summary set out principles which apply when considering whether interventions require a conviction to be quashed:

... 4. Interventions which lead to a quashing of a conviction are:

- (a) those which invite the jury to disbelieve the evidence for the defence, which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury
- (b) those which have made it really impossible for the defence advocate to do his or her duty in properly

representing the defence.

- (c) those which have had the effect of preventing the defendant... from doing himself justice and telling the story in his own way.
  - (d) those which compel the conclusion that the defendant has not been fairly tried by an impartial judge.
5. Not every departure from good practice renders a trial unfair. There will come a point, however, where the departure from good practice is so great or so persistent or so prejudicial or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty.
6. Ultimately, the question is one of degree. Rarely will the impropriety be so extreme as to require a conviction, however safe in other respects, to be quashed for want of a fairly conducted trial process.
7. It is the overall fairness of a trial, taken as a whole, that is crucial.

Interventions carry the risk of depriving the judge of the advantage of calm and dispassionate observation and lengthy interrogation may hamper his ability properly to evaluate and weigh the evidence as to impair his judgment and render the trial unfair:

*Southwark London Borough Council v Kofi-Adu* [2006] HLR 33, CA.

See also *R v Beresford* [2020] EWCA Crim 1674 where the conviction was quashed. Cf *R v Binoku* [2021] EWCA Crim 48 at [54].

For an example of a civil trial rendered unfair by the judge's interventions, see *Serafin v Malkiewicz* [2020] UKSC 23: the interventions amounted to '...a barrage of hostility towards the claimant's case...'

## **Complainants in proceedings for sexual offences**

### **The rationale**

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It is submitted that the word 'complainant' in s 41 refers to a complainant in the indictment and does not cover a complainant in a previous trial as was suggested by the judge in *R v Philo-Steele* [2020] EWCA Crim 1016. See [56] and [60].

### **The restriction**

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Questions about sexual identity are often suggestive of sexual behaviour and may well come within the definition, depending on their nature and scope. See *Rook and Ward on Sexual Offences, the Law and Practice* (5<sup>th</sup> edition, London, 2019), para 26-146. See also *R v T* [2021] EWCA Crim 318. Cf *R v Bater-James* [2020] EWCA Crim 790.

### **False statements or failure to complain**

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*R v Gabbai* [2020] 4 WLR, 65, CA, is an example of case where there was evidence suggestive of a conclusion of falsity: the complainant had in the past engaged in high-risk behaviour, been ambiguous about consent, misdescribed prior complaints and referred to herself as an attention seeker and a liar.

In *R v Fichardo* [2020] EWCA Crim 667 at [30], it was said *obiter* that where evidence of a false complaint has been admitted under s 100(1), but the complainant denies having made it, then the accused bears the legal burden of proving on the balance of probabilities that the complaint was both *made* and *false*. For critical analysis, see 'Case note: *R v Fichardo*' [2020] Crim LR 1164, CA.

### **When the restriction may be lifted**

#### **Section 41(3)(a)—an issue other than consent**

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In *R v Gabbai* [2020] 4 WLR 65, CA at [61] it was said that in most cases the issues of belief in consent and actual consent will be indistinguishable; although in this 'difficult and demanding' case the two issues were capable of being separated.

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As to (iv) in the text at **p 235**, a complainant's account would need to include details that are more than unexceptional, i.e. details that someone of the complainant's age could not be expected to know. See *R v Philo -Steele* [2020] EWCA Crim 1016 at [41] – [49]: details provided by a seven-year-old boy about the removal of his underwear and touching were of a kind that he could be expected to know (see [45]).

**Section 41(3)(b)—behaviour at or about the same time**

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See also *R v Gabbai* [2020] 4 WLR 65, CA [2020] Crim LR, 8, 755 at [63]: a background of sexual behaviour displayed similarities, but was neither part of the event charged (s 41(3)(c)(i)), nor similar to any other behaviour 'at or about the same time of the event' (s 41(3)(c)(ii)).

**Section 41(4)—where the purpose is to impugn credibility**

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In respect of *R v Sunny Islam* [2012] EWCA Crim 3106, Cf *R v Gabbai* [2020] 4 WLR 65, CA, where in respect of the issue of reasonable belief in consent the main purpose was not to impugn the complainant's credibility, but to establish that she put herself in risky situations and could be ambiguous about consent.

**Evidence of physical or mental disability affecting reliability**

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See also *R v J* [2020] 4 WLR 26 at [68]: statements made by a counsellor purporting to tell the jury that a witness was reliable were not only inadmissible statements of opinion, but completely contrary to the principle in *R v Robinson* [1994] 3 All ER 346, CA. See also **Ch 20**.

**General note:** the Criminal Procedure Rules 2015 SI 2015/1490 have been replaced by the Criminal Procedure Rules 2020, SI 2020/759

Adrian Keane and Paul McKeown, The Modern Law of Evidence, 13<sup>th</sup> Edition

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