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Limitations on Adducing Evidence of the Complainant's Sexual History: Lawful Shield or Constitutional Breach – Section 27 of the New Sexual Offences Act of Jamaica (2009)

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ABSTRACT:

This paper submits that section 27 of the Sexual Offences Act of 2009 breaches the rights of the accused by creating a general prohibition on third party sexual history evidence and then solely permitting evidence that can pass through only four narrowly defined gateways. It therefore has a seriously delimiting effect on the accused' due process rights and cannot pass constitutional scrutiny. Furthermore, despite its aims, it has not offered sufficient protection to the complainant as mainly evidenced by its failure to restrict sexual history evidence between the complainant and defendant as well as limiting the application of the section only to offences under the **SOA**.

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PART I

INTRODUCTION

The Sexual Offences Act[1] (hereinafter **SOA)** is the primary statute governing the creation and punishment of sexual offences and the regulating of offenders. The Act has reformed the law relating to rape, incest and other sexual offences. It has introduced a number of new offences and is characterized by stiffer penalties.[2] The intent of Parliament is stated in the long title of the **SOA**;

"AN ACT to Repeal the Incest (Punishment) Act and certain provisions of the Offences Against the Person Act; to make new provision for the prosecution of rape and other sexual offences; to provide for the establishment of a Sex Offender Registry; and for connected matters."

Arguably, one of the achievements of the act is the provision housed under section 27; for which the marginal note reads the "**Restriction on Evidence at Trial for Rape**". The Section repeals the common law provision regarding the relevance and admissibility of evidence of previous sexual history of the complainants in relation to third parties. The need for change has come about due to the slow acceptance and dawning realization of lawmakers of the need to protect complainants from what the Canadians refer to as the twin myths.[3] The twin myths are, "*that unchaste women were more likely to consent to intercourse and, in any event, were less worthy of belief*." They flow(ed) from a woman's previous sexual experience before the committal of the offence. As noted by Lord Steyn in **R v A**, "such generalized, stereotyped and unfounded prejudices ought to have no place in our legal system."[4]

Jamaica is not unique in this regard, as over the last number of decades varying jurisdictions have adopted similar provisions[5] often loosely referred to as 'rape shield laws'.[6] The contention surrounding this type of legislation, however lies not in the question of the need for such legislation but rather what is the legislative model that best protects the interest of the complainant and the fairness of the trial process but at the same time encroaches the least on the accused's right to defend himself.

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[1] Act of 2009, (enacted 20th October 2009) came into effect (except for Part VII Sex Offender Register and Sex Offender Registry) on June 30th, 2011.

[2] Though creating a great disparity between sentences recorded at the RM level as opposed to the High Court level for the same offence which is expected to face constitutional challenge.

[3] Seaboyer (1991) 83 D.L.R. (4th) 193, per McLachlin J at page …expounded what the myths are. This case, out of Canada, has played a pivotal role in the development of our legislation.

[4] R v A (No.2) [2002] 1 A.C. 45 at [27]

[5] Jamaica is one of many to include, Canada, USA, Australia, South Wales; UK, Barbados, Guyana, Belize etc… There is even a Caricom model legislation for countries to incorporate such a section.

[6] The term is a misnomer for at least two reasons, first it does not shield against rape, but rather seek to restrict questioning/evidence of the complainant's prior sexual history and secondly the rule is applicable to all sexual offences under the SOA and not just rape.

In determining which model to adopt it is clear that Jamaica had a number of models under consideration. There is clear reference both to the UK and the Canadian provisions. While section 27 appears broadly to be patterned off the Canadian legislation before Seaboyer, it also appears that it bore in mind the decision of the Canadian Supreme Court and enacted a further section that allows for a category of evidence that the pre- Seaboyer legislation had not made provision for. The wording of it is modeled somewhat off the UK provision.[7] The sub-section also gives the judge greater discretion in determining whether evidence is admissible under its gateway.[8] In so legislating Jamaica's aim it must be presumed was to capture the best of both worlds; a regulatory regime which proscribed a certain line of reasoning while at the same time allowing the accused to vault his defence by advancing relevant evidence. Having the benefit of the criticisms launched at legislation before it, it should have put Jamaica in an advantageous position to formulate a model which prohibits an illegitimate line of reasoning, whilst permitting the introduction of relevant evidence from which appropriate inferences may be drawn.

The issues that arise for contemplation then are; is section 27 wide enough, has it achieved its aims; or has the constitutional right of the accused to a fair trial been infringed (bearing in mind the test for breach?) and has the complainant's sexual history been properly shielded? This paper aims to consider all the above. In order to do this, it will firstly examine the position at common law, it will then dissect the legislation into discrete sections (to include consideration of the scope of its ambit). The paper will then go on to consider the constitutional implications of section 27. The issues will be advanced against a comparative analysis with other jurisdictions particularly those of the Canada and the UK as well as the Caribbean. Finally the paper will make suggestions as to a perhaps more efficacious model based on the idiosyncrasies of the Jamaican situation.

PART II

THE POSITION AT COMMON LAW

[7] This category however was not the only one that was deemed missing under Seaboyer. And as evidenced by a letter of December 8th, 2006 written by Shirley Miller Q.C. and addressed to then Minister of Justice and Attorney General Hon A.J. Nicholson, Q.C., the specific categories were brought to the attention of Parliament.

[8] Note that the English section S 41 , had imposed a judicial straitjacket on judges as well as preclude the evidence of previous relationship between the Accused and complainant. R v A (No.2) is credited for loosening up this category. According to Rook and Ward, pg. 814 "..far more cases than ever before are being prosecuted where there has been a previous sexual relationship between the complainant and the accused. To reconstruct the parties in the eyes of the jury as strangers or people, who had never enjoyed consensual intimacy together have in many cases arbitrarily excluded key matters from the jury's consideration and, worse still, would positively have misled juries".

"***Even in the very recent past, defensive strategies, playing upon generalized, stereotyped and unfounded prejudices were habitually employed***." Lord Steyn, **R v A** [9]

McColgan[10] puts it thus, "***knowledge of [the] complainant's sexual history seriously interferes with jurors' ability rationally to consider the issue of the defendant's guilt …..because of the persistence of double standards concerning women and sex***."

There are two limbs on which it was potentially permissible at common law to lead evidence as to the history of the complainant in cases of sexual violation. The first limb was as to her credibility; a woman who had premarital or extra-marital sex was considered as one who was potentially unreliable and untruthful as a witness. The second limb concerned her character as it impacted on the issue of consent; '*if the complainant was a prostitute or of notoriously immoral character*.' However, where the complainant's character could not be so described, evidence of prior sexual activity unless it was with the accused himself was generally held to be inadmissible. However the common law permitted questioning of the complainant without proof of relevance to a specific issue in the trial. Studies have shown throughout other jurisdictions and this certainly holds for Jamaica, that despite these two limbs much, unnecessary, irrelevant and unfounded cross examination of the complainant regarding her previous sexual history persisted. Though these were at times aimed at her credibility, many times it was '*underpinned by the line of reasoning that a woman's sexual experience was indicative of a general willingness to consent*.'[11]

Studies carried out particularly that of the Heilbron Committee out of the UK, charged with reviewing the law of rape on the heels of the decision in **DPP v Morgan**[12], concluded that much had changed in society that was yet to influence the practice and procedure in this area of the law. It found that women in contemporary society engaged freely in sexual relationships that did not make them more likely to consent or to lie. They concluded that "*there exists in our view, a gap between the assumptions underlying the law, and those public views and attitudes which exist today which ought to influence today's law*."[13]

During the debates in the House of Representatives, The Honourable Clive Mullings (Minister of Mining and Energy as he then was)not only acknowledged, but called up on other members of the House who are attorneys to also acknowledge[14] the practice of cross-examining the complainant by exploiting the twin myths. Regarding section 27 the Minister concluded *"I bless a signal achievement in seeking to put to bed...this crime of assertion by Counsel*."

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[9] R v A (No.2) [2002] 1 A.C. 45 at [27]

[10] A. McColgan "Common Law and the Relevance of Prior Sexual History Evidence" (1996) 16 OJLS, 275 at p 303.
[11] Rook and Ward, *"Rook and Ward on Sexual Offences, Law &Practice* 4th Edition, Sweet and Maxwell p815 at para 19.08.(hereinafter Rook and Ward)
[12] Citation for DPP v Morgan [1976] AC 182.
[13] Cmnd 6352 (1975) para. 131.
[14] Namely the speaker of the House as he then was The Hon.Delroy Chuck, Member of Parliament from St. Ann (presumably Ernest Smith), and member of Parliament from Central Kingston (presumably Ronnie Thwaites), none of whom demurred.

Therefore, in essence, the aim of this type of legislation to a great extent is to provide for a balancing exercise between rehashing of a woman's sexual past that can lead to much embarrassment and hurt and the need to allow an accused to deploy his case as he is best able which includes bringing all the evidence the jury needs to hear to determine his innocence or guilt.

PART III

THE LEGISLATION[15]

SECTION 27 (1) RESTRICTION OF EVIDENCE ON TRIAL FOR A SEXUAL OFFENCE UNDER THE SOA

Except with leave of the Judge:

I. No evidence shall be adduced relating to the sexual behavior of the complainant with a person other than the accused
II. No question shall be asked during cross-examination of the complainant relating to the sexual behavior of the complainant with a person other than the accused

SECTION 27 (2) HOW TO GET THE LEAVE OF THE JUDGE

I. An application must be made by the accused or on the accused's behalf to the Judge
II. The application must be in writing
III. The application must be made in the absence of the jury
IV. A copy of the application must be served on the Crown (complainant)

SECTION 27(3) CIRCUMSTANCES IN WHICH THE JUDGE WILL GRANT LEAVE

The Judge shall grant leave where the evidence or the question for which leave is sought is, or relates to evidence that:

SECTION 27(3) (a)

I. **(goes to identity)** Specific instances of the complainant's sexual behaviour which tend to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge;
II. **(goes to consent)** Of other sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge and relates to the consent which the accused alleges that the accused believed was given by the complainant; or

[15] I have 'rearranged' the legislation here for ease of reference. However the extract from the statute is appended to the paper at the back.

III. **(evidence in rebuttal)** Which rebuts evidence of the complainant's sexual behavior or absence thereof that was previously adduced by the prosecution; or

SECTION 27(3) (b)

I. (**evidence of similar behaviour**) The Judge is satisfied that the exclusion of the evidence or question in respect of which leave is sought would be unfair to the accused because of the extent to which the evidence
II. Relates to behavior on the part of the complainant which was similar to the alleged behavior on the occasion of, or in relation to, events immediately preceding or following the alleged offence **AND**
III. Is relevant to issues arising in the proceedings.

SECTION 27(4)

In order to grant leave the Judge must be satisfied that the probative value of the evidence is significant **AND** likely to outweigh any risk of prejudice to the proper administration of justice if it is admitted.

PART IV

SCOPE OF SECTION 27

Section 27 lays down a general prohibition against adducing evidence tending to show previous sexual acts of the complainant. However the effect of the general prohibition is curtailed by the creation of exceptions to this rule.[16] The section places third party sexual history evidence within a regulatory framework, whereby all such evidence requires the leave of the judge before it can be adduced. It further fetters the discretion of the trial judge by imposing dual restraints on the exercise of the judge's discretion. Therefore the judge must exclude evidence even where it falls within one of the required exceptions if it does not also pass the test in section 27(4). Section 27 further provides for a procedure involving a written application by the defence to the Judge for permission to adduce or elicit this evidence. The paper will treat with each subsection and its scope separately.

Under sub-section 27 (3) there is a three stage process; (1)The defence must apply in writing; (2)the defence must prove that the evidence/or question relates to evidence falling under any of the four

[16] The exceptions are four in number rebuttal evidence, evidence going to identity, evidence relating to consent to sexual activity on the same occasion as the trial incident and evidence of similar behaviour of the complainant that it would not be fair to exclude.

gateways. However an open gateway though necessary is not a sufficient condition for the evidence to be admitted.(3) The defence must go further and satisfy the judge that the probative value of the evidence sought to be admitted or the question to be allowed also satisfy the two pronged test under section 27(4); that the probative value of the evidence sought to be admitted or allowed is both significant and likely to outweigh any risk of prejudice to the proper administration of justice if it is allowed. Hence leave must be refused unless the defence further satisfies these two criteria.

Section 27 (1)

It provides;

"In any proceedings in respect of rape or other sexual offence under this Act, no evidence shall be adduced and no question asked shall be asked in cross-examination relating to the sexual behavior of the complainant with a person other than the accused, unless leave of the Judge is obtained on application made by or on behalf of the accused."[17]

The first point of some importance is that the section applies to *all sexual offences under the SOA*, not being restricted to rape offences; though in the marginal note it states 'restriction of evidence at trial for rape." It is however only applicable to Sexual offences under this act. Which means that all offences committed before the SOA came into force, offences that remain under the OAPA (the male on male offences), offences at common law etc. are all excluded from the protection offered here. The exception of offences under the OAPA is particularly troubling since practically it means males are being offered less protection than females.[18] The untenable situation which is created is that if an offence for a sexual violation under the SOA is being tried jointly with a common law or OAPA offence the complainant would be protected for the SOA offence but not the other. In essence the scope of the provision is broad in the range of the offences it covers under the SOA but narrow in terms of its applicability to sexual offences under other types of legislation.[19] Another salient point to note is that section 27 not only takes aim at the 'attempt to adduce evidence' it also prohibits 'questions in cross-examination' which has the similar aim of going into the complainant's sexual history. Hence both the attempts to adduce as well as to elicit evidence are impugned under this section.

The finding in **Darrach**[20], relying on **Crosby** that the legislation also applies to non-consensual as well as consensual sexual activity is equally applicable in the Jamaican context. The Court stated '*that evidence of non-consensual sexual acts can equally defeat the purposes of the [legislation by distorting the trial process when it is used to evoke stereotypes such as that women who have been assaulted must have*

[17] The Jamaican provision departs from its UK counterpart (Section 41 of the Youth Justice and Criminal Evidence Act 1991) by not regulating evidence of the complainant's sexual history with the accused.
[18] A female who has been buggered would be in the same peril as a male.
[19] In determining whether section 27 does apply to pre- SOA offences (and even offences under other statutes), two cases from the UK that addressed somewhat similar issues should be instructive; Warner; Birmingham crown Court , June 5, 2007 and **Cartwright** [2007] EWCA Crim 2581.
[20] **Darrach** [2000] 25 S.C.R 443

deserved it and that they are unreliable witnesses, as well as by deterring people from reporting assault by humiliating them in court.' [21] If the application to elicit or adduce the evidence is granted, the accused may put it to whatever use he pleases. This is because the '*type of use to which evidence of sexual activity may be put is not controlled by the legislation. It could for instance be used to cross-examine the complainant, in chief by the accused (should he choose to testify himself), or by another witness*.'[22]

Section 27(1) prohibits only evidence or question concerning the sexual behaviour of the complainant '*with a person other than the accused'*. Sexual behaviour with the defendant does not fall within the scope of the legislation. The legislation therefore supports the presumption that prior sexual relations with the accused whatever the proximity between it and the alleged offence may prima facie, be relevant to the issues before the court.

Sexual Behaviour – is not defined under the Act, which depending on the view one takes may very well be a good thing. In **Mukadi**[23] a case involving an appeal against rape, the question to be determined was whether the complainant's act in getting into the car of another man before the alleged offence was committed, was sexual behaviour, Sir Edwin Jowitt stated, "*in many cases it will be very easy to say what is or is not sexual behavior, but there are obviously borderline cases in which the sexuality of what happens may not be so apparent. It would not be possible to try to define sexual behavior further. Indeed, it probably would be foolish to do so. It is really a matter of impression and common sense*." In this regard, the facts of **Lloyd**[24] bears examination (where the crown tendered evidence of the complainant's diary which read "*James abused me (sexual) in cake shop*" and the defence then attempted to put another entry from the same diary which read "*I had ten inch cock in my mouth today, hmm*" to demonstrate the lack of genuineness of the entry relied on by the crown as opposed to the sexual behavior of the complainant). The trial judge refused leave as he said it related to sexual behavior. The Court of Appeal, held that it should have been allowed, because while it may have depicted sexual behavior, that was not the purpose of the cross-examination on it.

Whilst a truly false complaint is not 'sexual behaviour' if there is no sexual activity, it is of paramount importance to distinguish between such complaints and allegedly false complaints[25] relating to a complainant's previous sexual history." A case which illustrates the width of the definition of sexual behaviour is that of **R v S**.[26] *"A complainant's false assertion that she was a virgin at the time of the*

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[21] **Darrach** [2000] 25 S.C.R 443, para 33. ***R v. Crosby***, [1995] 2 S.C.R. 912, at para. 17

[22] **Darrach** para.59

[23] [2003] EWCA Crim 3765, Crim L.R. [2004] 373. Note the point made by the court of the need to see if evidence which does not fall under one gateway may nonetheless pass through the other.

[24] [2005] EWCA Crim 111. "The cross examination would have been carried out to show that the complainant's account as to how the entry came to be in her diary was untrue. The trial judge had failed to focus on the real issue of relevance, the genuineness of the diary entry." (from Rook and Ward p825)

[25] There is an issue as to whether false complaints are a part of a complainant's sexual behaviour.' Where the complainant has admitted the falsity, it appears not to be, but if complainant denies it then arguably such evidence of sexual behaviour may well be required to show that the complaint was false.' Neil Kibble, The Sexual History provisions: Charting a Course between Inflexible legislative rules and wholly untrammelled judicial discretion? [2000] Crim. L.R. 274 at p277.

[26] [2003] All.ER (D) 408 (Feb)

alleged allegation, when earlier that day she had sexual intercourse with someone other than the accused, relates to her "sexual behavior." [27]

SEXUAL BEHAVIOUR WITH THE DEFENDANT

Section 27 only illegitimises the delving into third party sexual history of the complainant; the words "...with a person other than the defendant" makes that clear. It therefore does not take the same exclusionary approach to a complainant's sexual experience with the accused as to her experience with other men. There are mixed views as to this approach.[28] The old English section 2 had not regulated this aspect of the evidence.[29] The Jamaican legislation adopts this approach. In **R v A**[30] Lord Steyn, although disapproving of the legislative breadth of section 41 in this regard, "*also took the view that the wholly unregulated questioning about sexual experience between the complainant and the defendant, even if remote in time and context, was a serious mischief that needed to be corrected*."[31] Mclachlin J, who delivered the majority judgment in Seaboyer, made known her discomfort with this broad latitude given to the accused. The learned judge averred "I *question whether evidence of other sexual conduct with the accused should automatically be admissible in all cases, sometimes the value of such evidence might be little or none*."

Neil Kibble observes that the literature was concerned almost exclusively with the problems surrounding previous sexual history with third parties and that little systematic attention had been paid to the question of the relevance and admissibility of prior sexual history with the accused."[32]

It is submitted that leaving sexual history evidence with the defence unregulated allows the defence to cross-examine the complainant on previous sexual activity with the accused for the purpose of supporting an inference that the complainant more likely consented on the occasion charged because she previously had sexual activity with the accused. It also permits the defence to cross-examine to support an argument that because the complainant previously had sexual activity with the accused, she

[27] Rook and Ward , 825.

[28] Cf Professor Di Birch Re-thinking Sexual History Evidence: Proposals for Fairer Trials [2002] Crim.L.R. 531; Untangling Sexual History Evidence- A Rejoinder to Professor Temkin [2003] Crim.L.R. 370, an ardent critic of sc 41 which she viewed as flawed for having brought the previous sexual relationship of the parties under similar regulatory mechanism.

[29] Sc 41 The Sexual Offences Act of 2003 now regulates evidence of previous sexual relationship between the Accused and the complainant.

[30] (No.2) [2002] 1 A.C. 45 at [28]

[31] Para 28 of R v A (No.2), Rook and Ward p825. "*Evidence of previous sex with the accused also has its dangers. It may lead the jury to accept that consensual sex once means that any future sex was with the woman's consent. That is far from being necessarily true and the question must always be whether there was consent to sex with this accused on this occasion and in these circumstances*." Lord Slynn of Hadley, para 4. R v A (No.2).

[32]Cf. In the Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases, (University of Wales, Aberyystwyth, Feb 2001This is a footnote at page 818 of Rook and Ward. Cf . In 1975, the Heilbronn Committee 'did not recommend any curtailment of evidence of a previous sexual relationship between the complainant and the defendant himself'. 'Evidence of previous relationship with the accused was not regulated because the common law of relevance was regarded as providing an adequate filter, when combined with the trial judge's duty to curtail oppressive and inappropriate questioning as to the detail of the relevant matters."[32].

is less worthy of belief. It does not logically follow that because a complainant consented to sex on a previous occasion, it is more likely she consented on the occasion charged. Inferring she more likely consented "stacks the deck" against a complainant who is sexually assault by someone with whom she previously had sex. Women are entitled to sexual autonomy and saying "yes" once does not amount to saying "yes" any time in the future. The inference that women are less worthy of belief because they have engaged in consensual sex is an unfortunately prevalent and irrational stereotype that still appears to be open to the defence in Jamaica.

PROCEEDINGS TO WHICH SECTION 27 RELATE

Though the marginal note refers only to trial proceedings, sub-section 27(1) makes it clear that section 27 speaks to '*any proceedings*'. This therefore means it applies to preliminary enquiries, bail applications sentencing and even appeals. To provide protection only at the trial stage, would be wholly inadequate and make a mockery of the aim of section 27 protection. The practical effect of such a situation would be that an accused could be freed at the preliminary enquiry by relying on evidence that he could not rely on at trial. Similarly, he could raise aspects of the complainant's sexual history to 'sweeten' his bail application though he will not be able to do so at the trial. On the other hand the complainant is exposed to the embarrassment and humiliation that can arise from leading this sort of evidence or asking questions thereon at an early stage on the proceedings, and is only offered protection after she has perhaps chosen to become uncooperative due to the publication of her sexual history. For the legislation to truly offer the membrane of protection intended, surely it must apply to these other proceedings also.[33]

THE LEAVE APPLICATION

Evidence of the complainant's previous sexual history or questions relating thereto can only be asked pursuant to a successful application made by the accused or on behalf of the accused. The application cannot be oral, it must be reduced in writing, and where it is a jury proceeding, it has to be made in the absence of the jury. The defence must also serve a copy of the application on the complainant/crown.[34] Section 27(3) is not dissimilar in this regard with provisions from other jurisdictions. However it doesn't go far enough in adumbrating the application process and leaves a number of important matters up to, it is assumed judicial interpretation and judicially adopted homogenous procedure. Firstly, it leaves unsaid whether Judges should make clear on the records their reasons and the result of the application process to include the extent to which the application is granted. It is preferable that this is done because it aids in the scrutiny of the decision making process and the creating/building of proper jurisprudential practice in this regard.[35] Secondly it does not state in what context the application should proceed, is it by virtue of submissions, a voire dire and if so is the complainant a compellable

[33] See section 42(3) of the 1999 act that spells out the ambit of section 41 of the Sexual Offences Act of the UK.

[34] The legislation says the complainant, but for all intents and purposes and certainly for absence of confusion regarding service, it is the Crown that should be served. I am not sure why the legislation felt it necessary to say complainant.

[35] See for example section 28 of the SOA of Barbados, 276(2) of Canada,

witness? [36] It is submitted that a voire dire where the complainant is not compellable is the best procedure.[37] Nonetheless, it is submitted that it is desirable that the defence in the application state exactly the purpose for which it intends to adduce evidence or ask the question, and where applicable, the evidence it intends to call in proof thereof. The defence should also state which gateway(s) they are trying to get in through. It would seem also to serve the interests of the efficient administration of justice if the defence serves the Crown as early as possible with the application so as to enable it to consult with the complainant and determine its position regarding the application.[38] No form has been created for the defence to use but it is suggested that in keeping with best practices, that by virtue of the Court's rules or otherwise that such a form be devised.

This paper submits that if an application procedure is not established and then rigorously followed then it will undermine the efficacy of section 27.[39] One of the practical effects of the section 27 and in particular the requirement of a leave application is that it may have the effect of prolonging sexual assault trials especially where the court may have to embark on a voire dire to determine the admissibility of evidence based on the defence application. Nevertheless, the fact that section 27 incorporates a leave application process supports the fact that it is designed to encourage careful consideration of the probative value of this type of evidence for admission.

THE PROSECUTION AND SECTION 27 OF THE SOA

Section 27 does not regulate the prosecution's leading of evidence of previous sexual history or asking questions thereto. There may well be instances where the prosecution needs to lead this evidence in proof of their case. It may be necessary as explanatory/essential background as in the case where the parties were married or living together, where it necessary to explain medical evidence. There may also be instances where the Crown leading evidence of the previous sexual history of the complainant underscores the allegations of the non-consensual nature of the sexual activity alleged against the defendant. In ***Soroya*,**[40] the Court of Appeal of addressed the question of the application of the law to the defendant but not to the complainant. In **Soroya**, the defendant complained that '*the process is tilted against the accused in favour of the complainant', 'it is incompatible with art 6 of the ECHR*', *'it constituted a breach of the appellant's right to a fair trial' , 'it infringed the principle of equality of arms'.* The Court of Appeal rejected all the arguments and held that s 78, provided sufficient safeguards against any unfair application. It further held that the Crown had properly adduced the evidence '*that in order to try to avoid being raped she had made an untruthful claim that she was a virgin. It was an integral*

[36] See sections 32 and 33 of the SOA of Barbados.
[37] See . **Darrach v R** [2000] 25 SCR 443
[38] This right is implicit in the provision. **Darrach v R** [2000] 25 SCR 443, para 55 " *If the defence is going to raise the complainant's prior sexual activity , it cannot do so in such a way as to surprise the complainant. The right to make full answer defence does not include the right to defend by ambush*." In Canada section by virtue of 276(1)(4)(b) a 7 day period is established with discretion for lesser period if justice requires.
[39] In **McKendrick** [2004] EWCA Crim 1393, the Court of Appeal of the UK underlined the need for rigorous compliance with the rules. Section 43(3) of the 1999 Act makes provisions that rules of Court should be made to enhance the application of section 41 and pt. 36 of the Criminal Procedure Rules 2010 contains the rules.
[40] [2006] EWCA 1884.

part of the incident and was important evidence bearing upon consent. It explained how the complainant had reacted, and what she had said, to avoid the dreadful incident unfolding."

PART V

THE FOUR GATEWAYS UNDER SECTION 27 OF THE SOA

Upon an application by or on behalf of the accused, the accused must do two things;

He must firstly establish the gateway through which the application is being made; that is under section 3(a) or 3(b). He must then further establish that the probative value of the evidence sought to be allowed is significant **AND** likely to outweigh any risk of prejudice to the proper administration of justice. Therefore even if there is sufficient evidence to unlock any of the gateways, the judge must be further satisfied that the two pronged test laid down in 27 (4) has also been fulfilled. Once the criteria have been met then the Court has no further discretion and must admit the evidence.[41]

THE FIRST GATEWAY – Section 27(3) (a) (i)

Specific instances of sexual behavior tending to establish identity – The type of evidence sought to be adduced appears clear on its face. The accused is alleging that yes some act occurred which involved the complainant but he was not the person involved, it was somebody else. If the Crown advances evidence of injuries sustained by the complainant in support of its case the defence under this gateway may advance specific instances of sexual behavior of the complainant to show with whom she may have received those injuries. If the doctor concludes that a child has been penetrated by an object the size of a penis, then evidence as to other sexual behavior tending to explain this becomes relevant. Similarly evidence of sexual liaison with a third party other than the accused may also be tendered in evidence through this gateway, where the Crown is alleging that the complainant contracted a sexual disease by virtue of the alleged offence. Note that legislation speaks to *'specific instances'* hence the accused is not expected to be granted leave to belch generalizations at the complainant.

THE SECOND GATEWAY – Section 27(3) (a) (ii)

Same time sexual activity as it relates to consent – The passage of this gateway is narrowed in the sense that it allows access only in cases in relation to evidence of sexual activity that took place on the same occasion as the subject matter of the charge **AND** it must relate to the issue of consent which the accused is asserting he believed was given by the complainant. Therefore the accused can only access this gateway where he is admitting that indeed a sexual act occurred and based on other sexual acts of the complainant on the same occasion, relating to the alleged act, he believed her to be consenting.[42]

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[41] Cf **R v F** [2005] 2 Cr.App. R. 13.

[42] There is much debate concerning the extent to which sexual history evidence should be allowed to support mistaken belief of consent. Canada section 273.2 provides that the defence is not available where the defendant

The case of **Mukadi**[43] addressed this issue. There are three important factors to note with regard to this gateway; Firstly, the evidence must relate to other sexual activity that is different from the act that is before the court; it suggests that though the legislators did not use the term 'specific acts' that in this context, it cannot be otherwise than specific. Secondly, the sexual activity must have taken place on the 'same occasion' as the alleged act; the question as to what qualifies as 'same occasion' may pose some difficulty. Though there is no adumbrated time limitation, the time limit is inherent in the phrase and may be overly restrictive in this formulaic setting.

Though it does allow for acts that take place both before and after the alleged act, the use of 'same occasion' suggests a very close proximity to the alleged act so as to be seen as 'one' action. In the ***State of Missouri v Kevin Murray***[44] the court had to consider what was '*reasonably contemporaneous'*, a phrase arguably wider than '*same occasion'*. In the UK the test is *"whether the act took place at or about the same time'*. This appears indistinguishable from the Jamaican 'same occasion'. In **R v A**,[45] 'it was submitted on behalf of the appellant that SC 41(3) (b) should be construed as applying to sexual behavior "sufficiently close in time to be relevant to the issue of consent'). Rose LJ was not able to construe ' *at or about the same time'* as applicable to events which occurred months, weeks, or even days before the events said to give rise to the rape. A similar conclusion was reached by the House of Lords in **R v A (No.2)**. Lord Slynn averred that initially he thought the term capable of a wider meaning but after giving sufficient consideration he '*felt that, even if read with article 6 of the ECHR, they must be given a narrow meaning and would not allow evidence of sexual behavior to be adduced other than in cases where the acts relied on were really contemporaneous.'*

It is left to be seen what can be garnered from other jurisdictions and how the Jamaican courts will seek to interpret what is meant by *'same occasion'*. The learned authors Rook and Ward, aver that '*relevance could not be decided by use of a clock and calendar. An unyielding time limit is artificial when considering the relevance of circumstances. The subsection should be given the widest possible construction to give effect to Convention rights."*[46]

THE THIRD GATEWAY – Section 27(3) (a) (iii)

Rebuttal evidence - This section addresses the ability of the defence to treat with evidence of sexual behaviour which rebuts presence/absence of sexual behavior as previously adduced by prosecution. This ground makes it clear that the prosecution is allowed to adduce evidence or ask questions that the

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belief arose from the defendant's self-induced intoxication, recklessness or willful blindness, failure to take reasonable steps to ascertain whether the complainant was consenting'. See Kibble, ibid p289.

[43] Rook and Ward, page 841, see the decision in **Mukadi** as being out of kilter with the approach adopted by the majority Court of Appeal decisions on sc41. However they note that Both Professors Birch and Temkin and their colleagues see the decision as wholly correct.

[44] 842 S.W. Reporter (2d) 122; '*the court held that the defendant's right to due process and a fair trial required that evidence of prior consensual intercourse three and a half months and six and a half months before be admitted.'*

[45] [2001] EWCA Crim 4; [2001] Crim L.R. 381. See Rook and Ward.

[46] Rook and Ward, page 830-32

defence is not allowed. As such the prosecution may choose to ask questions to establish certain facts This subsection, like all the others, is subject to 27(4), so that the evidence must be significant and likely to outweigh any risk of prejudice to the proper administration of justice. This section supports that the crown can lead evidence to establish the 'idiosyncrasies' of the complainant where it is pertinent to the issues. For example, where consent is in issue, the prosecution may lead evidence to show the lack of previous sexual experience by the complainant, her attitudes and beliefs as they concern intercourse before marriage.[47] The prosecution may also adduce evidence of the background and characteristics of the complainant to the effect that she was quiet, well brought up and got along well with her siblings[48] as well as that she had been a virgin before the act in question.[49]

'*Evidence adduced by the prosecution*' was interpreted in ***Hamadi***[50] to be limited to evidence led by the prosecution during chief of its witnesses and by cross-examination of other witnesses. It does not extend to evidence adduced in cross from prosecution witnesses by the defence.[51] However the Court went further and stated that in the interest of a fair trial, if evidence was adduced from prosecution witnesses in cross-examination which was given gratuitously and was potentially damaging to the defence's case, then the defence ought to be allowed to call evidence in rebuttal.

Furthermore, this gate way is peculiar in the sense that unlike the others, it can only opened by the prosecution and the defence, may choose to enter through if it meets the criteria for admission. The facts of the following case are instructive. In ***R v F***[52] the complainant alleged that she had become pregnant by virtue of the rape. It was therefore permissible to bring evidence of her medical records to show that she had told her doctor she believed herself to be pregnant by virtue of a mishap with a condom during sex with her partner.

THE FOURTH GATEWAY – Section 27(3) (b)

Similar behaviour evidence -Section 27(3) (b) goes beyond the three exceptions in 27(3) (a) and allows evidence of 'pattern of behavior or 'habit' of the complainant of a specific type to be adduced. It addresses any other evidence of sexual behaviour whose exclusion would be unfair to the accused because of its similarity, proximity(or not) and relevance to issues before the courts. The provision is only triggered if the defence firstly satisfies the judge that (a) its exclusion would be unfair to the accused; (b) it is evidence of similar behaviour, and (c) it is relevant to issues arising in the proceeding.[53]

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[47] Rook and Ward page 855. They note that though this may bolster the credibility of the complainant, it was nonetheless permissible at common law and the statute had not changed that.

[48] **Tobin** [2003] Crim. L.R. 408.

[49] **Singh (Gulab)** [2003] EWCA Crim 485.

[50] [2008] Crim L.R. 635

[51] A somewhat similar section in the UK has been criticized for being "*narrower than similar provisions in the other jurisdictions which allow the defence to rebut inferences that may reasonably be drawn from the way in which the prosecution case is presented or from the circumstances of the case*." Neil Kibble, ibid, p 278.

[52] [2008] EWCA Crim 2859

[53] It is not certain why necessary being that relevance is the first test for evidence. Therefore if it is not relevant it would fall at the first hurdle. This test of relevance is different from 'issue to be proved by prosecution/defence'

For certain it too must meet the test of significance and weigh on the prejudicial/probative scale established by section 27(4).

The fourth gateway appears to be a compression of section 41 (3) of the UK's provisions without specifying consent as the sole issue as appears in the UK provision. Instead it leaves the section wide enough to permit any such evidence '*relevant to issues arising in the proceedings.'*[54] It is uncertain the value of such a broad interpretation as it is hard to imagine an occasion where the accused could relevantly rely on a pattern of behaviour or conduct by the complainant where the issue is not consent. [55]Nevertheless the legislation does not lose anything by this extension and is instead able to meet the unlikely situation should it occur.

The type of evidence that can be adduced or question asked is divided into two time frames though indistinguishable otherwise; either time is immaterial, or immediately before or after the alleged act. Given the width of the first, it is obvious the second becomes of lesser import since one can always get in through the generous width of the first. For example in **R v T**[56] the appellant sought to adduce evidence that he and the complainant had had intercourse in the same triangular frame three weeks prior to the rape. The trial judge did not allow the evidence under section 41(3)©(ii) because it was not sufficiently contemporaneous. The Court of Appeal struck down the conviction on the basis that the judge should have allowed it under section 41(3)© (i), that did not have that temporal constraint.

The history of how this provision came to be included in the UK's legislation, is important to recall here so as to give contextual background to Jamaica's section 27(3) (b). Rook and Ward puts it thus *"This provision was introduced in response to the "Romeo and Juliet" scenario recounted by Baroness Mallalieu during a House of Lords debate. The complainant alleged she had been raped by a man who had climbed up onto her balcony into her bedroom. Both before and after the alleged rape she had asked men to re-enact the Romeo and Juliet balcony scene before having sexual intercourse with her."*[57]

In relation to issue of consent Lord Clyde in **R v A** (No.2)[58] noted;

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which is the UK section 43 test. So if that is what the legislators intended to adopt, the provision has it passed the mark and becomes too wide.

[54] The Jamaican provision appears wider than the UK provision in two senses, (1) it is not limited solely to the issue of consent and (2) the question of 'similarity' seems to be more in keeping with the **DPP v P** [1991. 2 A.C. 447] definition as opposed to the more restrictive **DPP v Boardman**[1975 A.C. 421.

[55] One supposes it could also address the situation where the accused is alleging that though nothing happened, hence consent does not arise, the complainant has a modus of luring men into a situation where she can then accuse them of sexual violation.

[56] [2004] EWCA Crim 1220

[57] Rook and Ward p 842.

[58] [2002] 1 A.C. 45 at [133]. This statement it is submitted is to viewed not in the light that the complainant must have been consenting to this particular accused because she always does in similar situations, but rather in determining who is speaking the truth as to what occurred on the occasion in question, this repeat of pattern of behaviour may lend a lie to the complaint's claim that she did not consent to the act with the this particular accused.

"*The context and the purpose of the evidence is not so much to show from past events that history has been repeated, as to indicate a state of mind on the part of the complainant towards the defendant which is highly relevant to her state of mind on the occasion in question*."

This type of evidence has to be carefully analysed for probity as it teeters very near to the common law view, which the legislation is seeking to proscribe that similar conduct on a prior occasion means consent on the occasion under scrutiny. The arguably spurious basis on which this provision was included in the UK legislation and subsequently followed in others, does not warrant it being given the prominence it has in section 27(3) in comparison to the exclusion of others with greater pertinence.

We will here examine the section in detail.

Evidence that relates to behaviour on the part of the complainant similar to behaviour on the occasion of the incident, or is in relation to events immediately preceding or following the events. Evidence using gateway 27(3) (b) must fulfill two criteria established under the section. The second criterion at 27(3)(b)(ii) of being 'relevant to issues arising in the proceedings' is wide enough as it only restates the basic common law test for relevance. However it is the first test in section 27(3)(b)(i) which speaks to evidence of sexual behavior that is 'similar' to the alleged behavior on the occasion of the alleged offence that creates the true restriction. 27(3)(b)(i) speaks to evidence of sexual behavior that is similar to the alleged behavior in relation to; behaviour of the complainant that occurred at any time in the life of the complainant before the alleged offence, or occurred as part of events immediately preceding or following the alleged offence. Any evidence that is admitted through gateway 27(3)(b) **MUST** fulfill the similarity requirement.

(a) The section does not state that the behaviour implicated must be sexual behaviour or sexual in nature. Hence the legislation here is cast wider than its British counterpart. However it is difficult to see how non-sexual behaviour would pass the test of relevancy and then be adduced under this section.[59]

(b) The issue of what constitutes 'similar *behaviour'* will likely prove to be a contentious issue to determine.[60] The Jamaican provision does not qualify what is meant by 'similar *behaviour'.* The UK provision states that the similarity must be *"so similar that the similarity cannot reasonably be explained as a coincidence."*[61] The test for similar fact evidence in ***DPP v Boardman*** as laid down by the House of Lords is that similar fact evidence requires a strong degree of probative force.[62] The test in

[59] Section 27 employs three terms, arguably interchangeably; sexual behaviour, sexual activity and behaviour.
[60] See the strong dissenting judgment in **Seaboyer and Gayme** of L'Heureux-Dube and Gonthier JJ where they strongly criticize the admission 'pattern/similar fact ' and 'habit' evidence as being almost invariably irrelevant.
[61] Cf Lord Hutton in **R v A (No.2**) stressed that some weight must be given to the fact that 'similar' in the subsection is qualified by the word 'so' which he thought was intended to emphasize that mere similarity was not sufficient. See p 843 of Rook and Ward.
[62] However it did not go as far as 'striking similarity' where the 'similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence"

DPP v P on the other hand is that *'evidence of similar fact was admissible if its probative force was so great that it was just to admit it*." It would appear in the Jamaican context that an even more stringent test is being advocated. Because while section 27(3)(b)(i) only uses the word 'similar' and thus unqualified, section 27(4) tells us that such evidence only passes the threshold of admissibility if its probative value is significant and it is likely to outweigh any risk to the proper administration of justice.[63] It is not clear, unlike the UK provision, what measure the judge is to use in determining what is similar and what is not. It therefore means the margin of judgment opened to the decision maker is quite wide (as is a characteristic of section 27). Though the section 27(3)(b) does not utilise the descriptions 'so similar' and 'the similarity cannot reasonably be explained as a coincidence' the section 27(4) two pronged test should arguably import these factors as a consideration.

The similarity can be "in any respect".[64] Hence anything in the behaviour of the complainant, ranging from the type of person the act occurs with, where it occurs, what time, particular words or act used before during or after the alleged act, among others, would all need to be scrutinized.

There are two cases from the UK which did not meet the test in their statute. The first is ***Hamadi*;**[65] the similarities listed by the defendant in relation to the previous sexual behaviour of the complainant were; complainant was the initiator, the activities occurred in 'public' places, they took place in winter and occurred during an ongoing relationship with her boyfriend. The Court of Appeal held that the activities did not fall outside the scope of coincidences.

In the second case, ***Harris***[66] the complainant's account was that she had been raped by a strange man she had invited to her flat on her way home from drinking. The appellant stated that all the acts had been consensual. He attempted to tender in evidence her medical records which showed details of her as stating on more than one occasions that she was in the habit of having sex with strange men. The trial judge refused the application. The Court of Appeal upheld the conviction on the basis that that it was within reason for the trial judge to reject it on the basis that *'that allow such cross-examination would have been tantamount to saying that the complainant was a person who engaged in casual sex in the past and therefore would have been likely to do so on the occasion she was with the appellant*."[67]

The fact that the complainant worked as a prostitute may be able to pass through this gate way if the accused's allegation is that she picked him up in this manner.[68]

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[63] Cf. The questions raised as to the validity of the prejudicial/probative test. This concerns the fact that the judge's own idiosyncrasies will be brought to bear in making this determination. K.Kinports "Evidence Engendered" [1991] University of Illinois L.R. 431, p434 and J.McInnes and C.Boyle 'Judging Sexual Assault Law Against a Standard of Equality" (1995) 29 University of British Colombia Law Review 341 p365.

[64] Rook and Ward p 843.

[65] [2009] EWCA 3048

[66] [2009] EWCA 434

[67] Rook and Ward page 845;

[68] Professor Di Birch, A Better Deal for Vulnerable Witnesses? [2000] Crim.L.R. 223 at 248-9.

IS RELEVANT TO ISSUES ARISING IN THE PROCEEDINGS

The second criterion that evidence wishing to be admitted through this gate way must fulfill is that 'it is relevant to issues arising in the proceedings'. Under the UK provision, the similar section speaks 'a 'relevant issue in the case'. This phrase is however defined in the act under section 42(1)(a). A relevant issue in the case means "any issue falling to be proved by the prosecution or defence in the trial of the accused." The arguably connotes a much narrower definition than of the literal words and have been the subject of much contention in the United Kingdom.[69] The phrase as it has been argued only addresses issues that in law either side has a legal burden to prove. For example a complainant's motive to fabricate is not an issue that has to be resolved at trial.

Jamaica fares better in this regard. It is submitted that in the absence of a definition the scope of the Jamaican provision is wider. Relevance here is triggered by the issues that arise during the case are to be decided on case by case basis. Furthermore in the absence of a definition, we would therefore have to rely on the common law test of relevance.

PART VI

SECTION 27 (4) – THE TWO PRONGED RESTRICTION ON ADMISSIBILITY UNDER SECTION 27

27(4)(b) EVIDENCE MUST BE SIGNIFICANT AND LIKELY TO OUTWEIGH ANY RISK OF PREJUDICE TO THE PROPER ADMINISTRATION OF JUSTICE

Even where the evidence is relevant and becomes admissible through any of the four gateways, it cannot be admitted unless it can also fulfill this two pronged criteria. It is submitted that the requirement for significance has raised the threshold for admissibility. The Canadian corresponding provision at Section 276(2)(c) allows a judge to admit evidence of "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice"

The Supreme Court of Canada in **Darrach**[70] addressed this aspect in the following way.

It found that "*the evidence is not to be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt" and (C.A.), at p. 29, where s. 276(2)(c) was interpreted to mean that "it was not necessary for the appellant to demonstrate 'strong and compelling reasons for the admission of the evidence."*

[69] See Rook and Ward pp831-838., Darnell [2002] EWCA Crim 176,Makrecovas, ibid, **R v RT,R v MH** [2003]EWCA Crim 1877.
[70] **Darrach**, ibid para 41.

Professor McCormick, in *McCormick's Handbook of the Law of Evidence (2nd ed. 1972*), put this principle, sometimes referred to as the concept of "legal relevancy", as follows at pp. 438-40:[71]

"Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value, and is prima facie admissible. But relevance is not always enough. There may remain the question, is its value worth what it costs? There are several counterbalancing factors which may move the court to exclude relevant evidence if they outweigh its probative value. In order of their importance, they are these. First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues. Third, the likelihood that the evidence offered and the counter proof will consume an undue amount of time. Fourthly, the danger of unfair surprise to the opponent who, having no reasonable ground to anticipate this development of the proof, he would be unprepared to meet it. Often, of course, several of these dangers such as distraction and time consumption, or prejudice and surprise, emerge from a particular offer of evidence. This balancing of intangibles -- probative values against probative dangers -- is so much a matter where wise judges in particular situations may differ that a leeway of discretion is generally recognized."

Seaboyer noted that the practice in the Commonwealth has always been that this test is applied to Crown evidence in keeping with the practice of ensuring that the accused is not impeded in vaulting his defence. However the test is statutorily being introduced here and as such "it follows from this that the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law."[72]

Unlike Canada's s. 276(3), 27(3)(ii) or 27(4)provides little guidance to the judges. Experience in other jurisdictions have shown that when judges were allowed to determine the admissibility of prior sexual conduct evidence applying tests like "is the evidence relevant to issues arising in the proceedings" unaided they tend to exercise their discretion in ways that allowed the complainant to be put on trial during cross-examination. It is therefore submitted that the legislation has given judges a free hand by using terms like "unfair", "significant" and phrases like "relevant to issues arising in the proceedings" without interpretive guidance.

PART VII

EVIDENCE THAT MAY BE EXCLUDED BY SECTION 27

a) THE COMPLAINANT WAS BIASED AGAINST THE ACCUSED OR HAD A MOTIVE TO FABRICATE THE EVIDENCE

It does not appear that the Jamaican legislation makes provisions for this type of evidence. I say this because when compared to both the UK[73] and the Canadian[74] provision there is no gateway in the

[71] **Seaboyer**, page 45. **Sweitzer v The Queen**, [1982] 1 S.C.R. 949 at p953.
[72] **Seaboyer** 47-48.
[73] Permissible through section 41(3)(a). See appendix to paper for legislation. Although there is suggestion that a specific gateway be created. See Rook and Ward, p7871.

Jamaican legislation that allows this sort of evidence. Though section 27(3) (b) provide an alternate gateway to the three under 27(3)(a), evidence of motive or bias is allowed only if there is some similarity to the present behaviour. Hence in a case where the police found the alleged victim and the accused naked outside a car in a vacant lot, at trial the accused would not be prevented by 27(3) from being allowed to call evidence to show that the alleged victim had been found in similar situations on two prior occasions that resulted in her arrest for prostitution.[75] However when considering the restrictions place on the adducing/eliciting of this evidence peculiar to the section itself, it doesn't stand to reason that in every case, the evidence on which the defence would seek to rely will possess similarity to the allegations before the court.

In ***Mokrecovas***[76] the defence made an application to adduce evidence that the complainant's had a motive for telling a lie on him on the basis that she had slept at his brother's house the night before without her parent's permission, had sex with him (the brother) twice before the alleged rape on the same day and had come home in such a drunken state she had to immediately go to bed. The trial judge had refused permission for the questions to be asked and the Court of Appeal agreed. It was felt that the issue as to whether sexual intercourse occurred between the brother and the complainant did not take the matter of whether she had a motive for lying any further.

Lord Woolf, CJ put it this way

"We also bear in mind that if [counsel for the appellant] is right, the language of section 43(1)(a) could be used to drive a coach and horses through the desirable policy reflected in section 41(4) of the Act. It would elicit material by the backdoor to impugn the credibility of the complainant as a witness."

On this issue in **Mokrecovas**, the learned authors Rook and Ward had this to say,

"*The Court of Appeal in Mokrecovas did not rule that evidence of motive to fabricate could never provide a proper foundation for admissibility, or that such evidence would always fall foul of s41(4). Courts are frequently confronted with suggestions from stepfathers or mothers' partners that children have been motivated to fabricate allegations of sexual abuse against them because of disciplining for sexual promiscuity). There may be cases where, as in Mokrevocas, the defence can properly be put and evaluated without any need to refer to sexual behavior. However there may be others where to eliminate all reference to sexual behavior would unfairly deprive the defence allegation of all credibility. Extracting a story from its historical context may have fatal consequences for that story and a profound effect on the fairness of the trial. De-contextualisation may prevent a proper consideration of the defence case.*

[74] There is no specific gateway. The general structure of legislation makes it permissible. See appendix to paper for legislation

[75] **Commonwealth v Joyce** 415 N.E. 2d 181, 186 (Mass.1981). (cited in Jason M. Price "Sex Lies and Rape Shield Statute: The Constitutionality of Interpreting Rape Shield Statutes to Exclude Evidence Relating to the Victim's Motive to Fabricate," Western New England Law Review Vol 18:54 p556 at p 557). (The Supreme Judicial Court of Massachusetts stated that "the right to cross-examine a complainant in a rape case to show a false accusation, may be the last refuge of an innocent defendant" at p 186.)

[76] [2006] ECWA 1543

The jury may find a complainant's spiteful motive to fabricate difficult to accept if they do not know of the sexual context." In essence a sanitized version may not be sufficient in advancing the defence of the accused that the alleged victim is a motivated liar.

Under section 27(in the absence of a similarity) the defendant would not be able to introduce evidence to show that the victim accused the defendant, her stepfather, of sexual assault to stop him from telling the victim's mother about her sexual activity with a third person."[77]

Examples from out of the USA are also instructive. In ***State v. Jalo***[78], a father accused of sexual acts with his young daughter sought to present evidence that the source of the accusation was his earlier discovery of the fact that the girl and her brother were engaged in intimate relations. The defence contended that when the father stopped the relationship, the daughter, out of animus toward him, accused him of the act. The father sought to lead this evidence in support of his defence that the charges were a concoction motivated by animus. The respondent submitted that the damage caused by its exclusion would not be great, because all that would be forbidden would be evidence of the sexual activities of the children, and the father could still testify that his daughter was angry with him. But surely the father's chance of convincing the jury of the validity of his defence would be greatly diminished if he were reduced to saying, in effect, "My daughter was angry with me, but I can't say why or produce any corroborating evidence." As noted above, to deny a defendant the building block of his defence is often to deny him the defence itself."[79]

Notwithstanding its clear relevance, this evidence would also be excluded by s. 27. Other categories of evidence that may be barred by section 27 include, prior false allegations, In the case of young complainants where there may be a tendency to believe their story on the ground that the detail of their account must have come from the alleged encounter, it may be relevant to show other activity which provides an explanation for the knowledge.[80]

Of course it is accepted that evidence introduced for this purpose must be rigorously scrutinized to ascertain its probative value because 'it is necessary to accomplish the goals of rape shield statues [and] sometimes the defendant can establish the victim's motive to lie without reference to the sexual history evidence and sometimes the sexual history evidence is not probative on the issue of the victim's motive to lie."[81] However the extent of the exclusion is untenable. Parliament can better legislate to protect the complainant whilst safeguarding the rights of the accused.

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[77] **Lewis v State**, 591 So. 2d 922 (Fla. 1991) 'The Court stated that rape shield statutes 'must give way to the defendant's constitutional rights.' As cited in Sex Lies and Rape shield statute at pg. 558

[78] 557 P.2d 1359 (Or. Ct. App. 1976)

[79] Jason M. Price "Sex Lies and Rape Shield Statute: The Constitutionality of Interpreting Rape Shield Statutes to Exclude Evidence Relating to the Victim's Motive to Fabricate," Western New England Law Review Vol 18:54 p556

[80] **Seaboyer** page 51. See a range of cases quoted there to include **R v LeGallant** (1985), 47 C.R. (3d) 170 (B.C.S.C.) at pp. 175-76

[81] Sex, Lies and Rape Shield Statutes at page 561.

PART VIII

CONSTITUTIONAL ISSUE REGARDING THE EFFECT OF SECTION 27 ON THE ACCUSED' S RIGHT TO LIBERTY AND A FAIR TRIAL

THE ISSUE OF BALANCING RIGHTS

During the debates leading to the creation of section 41 of the UK Act, Lord Bingham noted "*no one has rights coterminous with those of the defendant because it is he alone who is at risk of being punished by the state.*"[82] Lord Williams on the other hand, argued that the complainant also had a legitimate interest in the criminal trial and that further the public had an interest in securing the conviction of the guilty and likewise the acquittal of the innocent. This not dissimilar to the argument put forward in the profound dissenting judgment of the minority in the **Seaboyer** case. Later in **Darrach,**[83] the first constitutional challenge to the post- **Seaboyer** legislation, Gonthier J, delivering the unanimous verdict of the Supreme Court of Canada, rejected the appellant's argument that his Charter rights were breached and averred, "*recognizing interests other than the accused does not in itself infringe the constitution*."

In commenting on the situation in Europe, Kibble states "*the notion of balancing or reconciling conflicting rights does not sit comfortably with the traditional conception of attaching exclusive emphasis to the rights of the accused, yet balancing it is clearly required by the European Convention on Human Rights*." Furthermore in the case of ***Doorson v Netherlands,***[84] the European Court held "*principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.*" In **Baegen v Netherlands**[85] the Commission found that "*In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the victim's private life.*" In **Steven Grant v R** , the Privy Council underlined " *that the rights of the individual must be safeguarded, but the interests of the community and the victims of crime must also be respected*." [86] No less of a consideration informs section 27. The provisions of section 27 are itself an example of the balancing of the rights of the complainant against that of the accused. This point resonates more when one bears in mind the underlying purpose of the provisions and the bases of the restrictions placed on adducing or eliciting section 27 evidence; particularly the right to bear in mind 'what the fair administration of justice require'. Fairness cannot be judged without including the rights of the complainants. A defendant's constitutional rights may be restricted by other interests as long as those restrictions are neither

[82] Lord Bingham speaking during the Second Reading , December 15, 1998, col. 1270 http://www.parliament.the-stationery-o...s98/text/81215-08.htm/81215-08_ignore0.
[83] [2000] 25 S.C.R. 443, para 16.
[84] **Doorson v Netherlands** (1996) 22 EHRR 330, at para70.
[85] Baegen v Netherlands Report of the European Commission of Human Rights Application No. 16696/90 October 20, 1994.
[86] PCA No 30 0f 2005, para 17(3). The Privy council was examining the constitutionality of section 31(D) of the Evidence (Amendment) Act .

arbitrary nor disproportionate to the purposes they are intended to serve.[87] Thus the pertinent question is whether the method of securing the benefit gained by achieving the aim of restriction of the evidence is arbitrary and disproportionate when compared to the detrimental effect on the accused' right to adduce or elicit evidence of the complainant's sexual history.[88]

JAMAICA'S CONSTITUTIONAL PROVISIONS

The 1962 Constitution of Jamaica was amended to provide for a New Charter of Fundamental Rights and Freedoms.[89]

Section 13(1)(b) All persons in Jamaica are entitled to preserve for themselves …the fundamental rights and freedoms to which they are entitled…

13(1)© All persons are under a responsibility to respect and uphold the rights of others recognized in this chapter….

13(2) subject to sections 18 and 49, and to subsections 9 and 12 and save as may be 'demonstrably justified in a free and democratic society- (13)(2)(a) this Chapter guarantees the rights and freedoms set out in this subsection and sections 14, 15, 16 and 17 and

13(2)(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights."

13 (3) The rights and freedoms referred to in subsection (2) are as follows;

13(2)(a) the right to …liberty and security of the person and the right not to be deprived thereof….

13(3)(g) the right to equality before the law, 13(3)(j) the right of everyone to (ii) respect for protection of private and family life and privacy of the home;

13 (3)(p) the right to freedom of person as provided in section 14; 13(3)(r) the right to due process as provided in section 16[90] ; 16 (1) the right to a fair hearing; 16(6)(d) be entitled to examine or have examined, at his trial, witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

[87] See Donald Phipps v R , paras 111-

[88] Sex, Lies and Rape Shield Statute', W.N.E.L.R Vol 18:54, p …at p 556. "The *Courts in the United States have held that 'the policy interests behind rape shield statutes cannot justify restricting the defendant's right to examine the victims motive to fabricate. In fact , United States Courts of appeal have held that the defendant may introduce relevant sexual history evidence to examine a victim's motive to fabricate."*

[89] The Charter received it assent 7th of April and took effect on the 8th of April, 2011, almost two months before the SOA. It repealed Chapter III of the Constitution.

[90] 3(4) This Chapter applies to all Law and binds the legislature , the executive and all public authorities

THE COMPETING RIGHTS /AIMS BEING CONSIDERED ALONGSIDE THE RIGHTS OF THE ACCUSED[91]

Apart from the Constitution which enshrines the rights of all citizens, Jamaica has acceded to a number of international instruments concerning the need to end violence of all forms against women and children and to heighten the protection offered to these groups.[92] Three bases/purposes were posited for the similar legislation in **Seaboyer**: (1) the avoidance of non-probative and misleading evidence, (2) the encouraging of reporting and (3) the protection of the security and privacy of the witnesses.[93] These purposes will be examined against the accused enshrined constitutional right to due process; the rights to a fair trial, right to cross examine witness called against him as well as the right to liberty of his person.

LEGITIMATE PRIVACY INTERESTS OF THE VICTIM

The new Charter rights of Jamaica provides in section 13(3)(g) the right to equality before the law, and 13(3)(j) the right of everyone to (ii) respect for protection of private and family life and privacy of the home; An examination of the complainant's sexual history is an examination into acts that she had all rights to engage in and that are usually deeply private. Any revelation of which results in embarrassment, and a loss of self- esteem. It can leave the victim feeling as if she has done something wrong and her sexual behaviour now becomes public knowledge. The statute therefore protects a very important privacy right. It stands to reason that where the complainant's right to privacy are publicized without justification it can be argued on the part of the complainant that there is a failure to protect him/her under the law in keeping with the provisions of the constitution.

ENCOURAGING WOMEN TO REPORT CRIMES

In addition to privacy interests, one of the purposes of the legislation is to increase the policing of crimes of sexual violation by encouraging women to report these crimes. It is well known that the magnitude of sexual assault is quite high however underreported. It is widely believed that one of the reasons women do not report these crimes is because of the view that the trial process revictimises the victim, putting her on trial also. Since the prospect of pursuing the route of a trial to obtain justice is so unattractive, there is no desire to report the violation.

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[91] See **Seaboyer** pp. 53-54 for a succinct explication of these issues.

[92] See the United Nations Convention on the Elimination of All forms of Discrimination against Women (CEDAW), UN Declaration on the Elimination of Violence against Women, United Nations Convention on the Rights of the Child, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, Convention of Belém do Pará.

[93] **Seaboyer**, pages 39-40

THE AVOIDANCE OF NON-PROBATIVE AND MISLEADING EVIDENCE

The basic rule of evidence is that the party seeking to introduce evidence must be prepared to satisfy the court that it is relevant and admissible.[94] 'An accused has never had the right to adduce irrelevant or misleading evidence.' Furthermore society has a vested interest in seeing that accused persons are brought to justice, the guilty convicted and the innocent acquitted. This can only be done if the laws that govern the judicial process are fair to all the parties involved. Parliament, in the interest of society must create legislation balancing the all the competing rights.

THE RIGHTS OF THE ACCUSED THAT REQUIRE PROTECTION

Under the constitution the accused is guaranteed the right to liberty as well as his due process rights. The constitution guarantees the accused;

13(2)(a) the right to …liberty and security of the person and the right not to be deprived thereof….

13 (3)(p) the right to freedom of person as provided in section 14; 13(3)(r) the right to due process as provided in section 16[95] ; 16 (1) the right to a fair hearing; 16(6)(d) be entitled to examine or have examined, at his trial, witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

There can be little debate that section 27 impacts on all of these rights.

PART IX

THE DISCUSSION

Mootoo v Attorney-General of Trinidad and Tobago[96] is authority for the principle that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional, and the burden on a party seeking to prove invalidity is a heavy one. [97] However the principle is rebuttable.

The test for the presumption of constitutionality was also addressed by the Court in Mootoo. "Their Lordships were content to apply the test laid down by this Board in *Attorney-General v Antigua Times*

[94] **Darrach v R** [2000] 25 S.C.R. 443.
[95] 3(4) This Chapter applies to all Law and binds the legislature , the executive and all public authorities
[96] [1979] 1 WLR 1334, 1338-1339.

[97] [1979] 1 WLR 1334, 1338-1339.

Ltd ((1975) 21 WIR 560, [1975] 3 All ER 81, [1976] AC 16, [1975] 3 WLR 232, PC) ((1976) 21 WIR at p 574) in these terms:

> 'Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the statutory provisions in question are, to use the words of Louisy J "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power".'

In **Donald Phipps v R**[98] the Court in considering the constitutionality of the Interception of Communications Act (ICA) underlined that in rebutting the presumption of validity the test would be whether the impugned provision was a measure reasonably justified in our democratic society.

The Court of Appeal in **Phipps** also relied on **Hinds et al v R and DPP v Jackson** (1975) 24 WIR 326, 340,

In which Lord Diplock (relying on the old test in section 22 of chapter 3 of the Constitution) said:

"*In considering the constitutionality of the provisions of s 13 (1) of the Act, a court should start with the presumption that the circumstances existing in Jamaica are such that hearings in camera are reasonably required in the interests of "public safety, public order or the protection of the private lives of person concerned in the proceedings." The presumption is rebuttable. Parliament cannot evade a constitutional restriction by a colourable device: Ladore v Bennett ([1939] AC 468) ([1939] AC at p 482). But in order to rebut the presumption their Lordships would have to be satisfied that no reasonable member of the Parliament who understood correctly the meaning of the relevant provisions of the Constitution could have supposed that hearings in camera were reasonably required for the protection of any of the interests referred to; or in other words, that Parliament in so declaring was either acting in bad faith or had misinterpreted the provisions of sc 20(4) of the Constitution under which it purported to act*."[99]

From the following authorities it is submitted that the following principles can be adduced; Parliamentary enactments are presumed to be valid; the presumption is rebuttable; the burden to do so is heavy; to rebut the presumption it must be demonstrated that the impugned legislation was not required in the interests of a democratic society; that is in accordance with the new chapter III '***demonstrably justified in a free and democratic society***'. The following analysis will demonstrate that that section 27 is not in accordance with Chapter III.

The case of **Seaboyer**, which led to the legislative changes in the UK is very pertinent to the discussion at this juncture and it is therefore instructive to examine it in some depth.

[98] Cited Donald Phipps v Regina [2010] JMCA Crim 48, para 212

[99] Cited Donald Phipps v Regina [2010] JMCA Crim 48, para 210

THE FACTS OF SEABOYER

Seaboyer[100] was charged with sexual assault of a woman with whom he had been drinking in a bar. The judge at the preliminary inquiry refused to allow the accused to cross-examine the complainant on her sexual conduct on other occasions. The appellant contended that he should have been permitted to cross-examine as to other acts of sexual intercourse which may have caused bruises and other aspects of the complainant's condition which the Crown had put in evidence. Such evidence might arguably be relevant to consent since it might provide other explanations for the physical evidence tendered by the Crown in support of the use of force against the complainant. He brought an action that ss. 276 and 277 of the Criminal code were unconstitutional.

Criminal Code, s. 276 provided that:

276. (1) In proceedings in respect of an offence under section 271, 272 or 273, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless

*(a) (**rebuttal evidence**[101])- It is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;*

*(b) (**identity evidence**) It is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or*

*(c) (**consent evidence**) It is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant.*

(2) No evidence is admissible under paragraph (1)(c) unless (a) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to adduce the evidence together with particulars of the evidence sought to be adduced; and (b) a copy of the notice has been filed with the clerk of the court.

(3) No evidence is admissible under subsection (1) unless the judge, provincial court judge or justice, after holding a hearing in which the jury and the members of the public are excluded and in which the complainant is not a compellable witness, is satisfied that the requirements of this section are met.

Criminal Code, s. 277 of the Code provided that:

277. In proceedings in respect of an offence under section 271, 272 or 273, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

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[100] The case of **Gayme** arose at the same time as Seaboyer and was considered along with it. It involved an allegation that the 18 year old accused assaulted the 15 year old on the school premises. The accused relied on honest belief in consent and sought to adduce evidence at the PE on prior and subsequent conduct of the complainant. The appeals in both cases were dismissed but the court had gone on to consider the constitutionality of the legislation.

[101] The 3 titles in 'bold' in brackets have been inserted by the writer to highlight the similarities to section 27 of the Jamaican provision.

After passing through the various hierarchies of courts, the Supreme Court of Canada upon consideration of the constitutional validity point held that section 276 was not constitutionally valid. The Court pronounced that in relation to section 277 there was no breach because;

"Section 277 excludes evidence of sexual reputation for the purpose of challenging or supporting the credibility of the plaintiff. The idea that a complainant's credibility might be affected by whether she had other sexual experience is today universally discredited. There is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness. Section 277 excludes evidence which may be tendered for valid purposes. It accordingly does not infringe the right to a fair trial."

However in relation to section 276 they held that;

*"Section 276 has the potential to exclude evidence which is relevant to the defence and whose probative value is not substantially outweighed by the potential prejudices to the trial process. It constitutes a blanket exclusion, subject to three exceptions -- rebuttal evidence, evidence going to identity, and evidence relating to consent to sexual activity on the same occasion as the trial incident. The value of the excluded evidence will not always be trifling when compared with its potential to mislead the jury. Two fundamental flaws marks section 276. **First**, the different purposes for which evidence may be tendered are not distinguished. The legislation misdefines the evil to be addressed as evidence of sexual activity, when in fact the evil to be addressed is the narrower evil of the misuse of evidence of sexual activity for irrelevant and misleading purposes--the inference that the complainant consented to the act or that she is an unreliable witness. The result of this misdefinition of the problem is a blanket prohibition of evidence of sexual activity, regardless of whether the evidence is tendered for an illegitimate purpose or for a valid one. **Secondly**, a "pigeon-hole approach" is adopted which is incapable of dealing adequately with the fundamental evidentiary problem, that of determining whether or not the evidence is truly relevant, and not merely irrelevant and misleading. This amounts, in effect, to predicting relevancy on the basis of a series of categories.*

Section 276 has the potential to exclude otherwise admissible evidence which may be highly relevant to the defence. Such evidence is excluded absolutely, without any means of evaluating whether in the circumstances of the case the integrity of the trial process would be better served by receiving it than by excluding it[102]. Given the primacy in our system of justice of the principle that the innocent should not be convicted, the right to present one's case should not be curtailed absent an assurance that the curtailment is clearly justified by even stronger contrary considerations."

CONSIDERATION OF SECTION 27 IN LIGHT OF SEABOYER

On the basis of the foregoing analysis, it is submitted that section 27, like 276 does breach sections 13(2)(a) and 16(1) and 16(6)(d) of the Constitution.

[102] Emphasis is the writer's.

The next question therefore must be whether it is saved by section 13(2) of the constitution. *"Is it demonstrably justified in a free and democratic society?*" Courts in other jurisdictions have found it necessary to curtail legislation with a similar effect to section 27.

Furthermore, does the exclusion detract from the fairness of the trial? **Seaboyer** puts it thus "'whether the potential for deprivation flowing from section 276 is in accordance with principles of fundamental justice. The principles of fundamental justice are the fundamental tenets of our legal system."[103] The analysis in **Seaboyer** using the principles of fundamental justice are indistinguishable from the considerations that section 13(2) of the Constitution would require in considering what is demonstrably justified in a free and democratic society. Sections 13(2) (a) which enshrine the right to liberty as well as the due process rights under consideration are quite apposite examples of principles of fundamental justice.

The principles of fundamental justice incorporate varying and competing interests ranging from the rights of the accused to broader societal concerns. Therefore, sections 13(2)(a) and (16)(1) and 16 (d)must be analyzed in light of the relevant competing concerns.[104]

Mclachlin J puts it thus,

"One way of putting this question is to ask whether the challenged legislation infringes the Charter guarantee in purpose or effect: R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295. Purpose, on this test, must be defined generously in terms of the ultimate aim of the legislation. Effect refers to the actual consequences of the legislation. Where the Charter guarantee relates to individual rights, as does s. 7, the inquiry as to effect will necessarily concern not only the overall effect of the measure as it operates in the justice system, but will extend to consideration of its impact on the individuals whose rights the Charter protects, typically the person charged with an offence."

The first issue as identified in **Seaboyer** is to decide whether the legislation addresses a pressing and substantial objective.[105] It must be agreed that it does as indicated by the three considerations in relation to the victim and society listed above.

The second criterion is that the infringement of the rights must be proportionate to the pressing objective. This criterion must be further examined under three discrete headings[106];

- The **first** is (a) whether there exist a rationale connection between the legislative measure and the objective- this must be

[103] Canada are R v Beare [1988] 2 S.C.R. 387 and Re B.C. Motor Vehicles Act, [1985] 2 S.C.R. 486.
[104] See page 36 of **Seaboyer and Gayme**
[105] See page 64 of **Seaboyer**, **R v Oakes** [1986] 1 S.C.R. 103
[106] Defreitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1A.C. 69., Lord Clyde adopted a precise and concrete analysis of the criteria for determining proportionality. In determining whether a limitation is arbitrary or excessive a court should ask itself; "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right(ii) the measures designed to meet the legislative objective are rationally connected to it, and (iii) the means used to impair the right to freedom or no more than is necessary to accomplish the objective."

answered in the affirmative as section 27 does reduce significantly the adducing/eliciting of *'unhelpful and potentially misleading evidence of the complainant's prior sexual conduct/behaviour.' 'The legislation is designed both to exclude irrelevant evidence and permit only that relevant information that is more prejudicial to the administration of justice than it is probative.'*[107]

- The **second** factor (b) under the heading of proportionality is whether the legislation impairs the right as little as possible. Even when the civil principle of the need to give the legislature room to manouevre is applied in this context, the degree of impairment is still too great. The same criticism leveled at Canada's old 276[108] can be leveled at SOA 27. **In that Parliament, by virtue of the exceptions created, recognized that justice required admission of this type of evidence despite its prejudicial effect. However Parliament, has also excluded evidence, which has no greater prejudicial effect than that which has been permitted but which seriously impinges on the accused's right to defend himself.**
- The **third** factor (c) the balance between the importance of the objective and the injurious effect of the legislation. The objectives of the legislation – to eradicate the erroneous inferences drawn from the previous sexual conduct of complainant, to increase reporting of sexual assault, to reduce the assault on the complainant's right to privacy, to need to make the trial process fairer- is not properly balanced against the right of the accused to defend himself. [109]

It is submitted that section 27 not only prohibits the use of evidence of prior sexual activity that supports illegitimate inferences regarding complainant's propensity to lie (credibility) or to consent, it also prohibits evidence that has a legitimate basis. Evidence of sexual activity may be admissible to substantiate other inferences. Evidence to show that the charges were a concoction motivated by animus resulting from the conduct in relation to other sexual acts, bias, or evidence of prior false allegations, although clearly relevant, would be excluded by section 27.

It is clear that the extent of the legislation is not 'demonstrably justified in a free and democratic society.' The ineluctable conclusion therefore is that section 27 like the old 276 of Canada*, "overshoots the mark and renders inadmissible evidence which may be essential to the presentation of [a] legitimate defence and hence to a fair trial. In exchange for the elimination of the possibility that the judge and jury may draw illegitimate inferences from the evidence, it exacts as a price the real risk that an innocent person may be convicted. The price is too great in relation to the benefit secured, and cannot be tolerated in a society that does not countenance in any form the conviction of the innocent."*[110]

PART X

[107] **Darrach** [2000] 25 S.C.R.443, para 43
[108] **Seaboyer** p 64
[109] **Seaboyer** page 65.
[110] **Seaboyer** page 65.

SUGGESTIONS TO IMPROVE THE JAMAICAN MODEL

The legislation must 'be carefully crafted to comport with the principles of fundamental justice'. Borrowing from McLachlin J, *"[Parliament] must seek a middle way that offers the maximum protection to the complainant compatible with the maintenance of the accused's fundamental right to a fair trial."*[111] In attempting to craft an ideal model, along with the criticisms already stated, it may well prove useful to bear the following factors in mind.

1. If Jamaica keeps the 'gateways' model, there may very well be a need to legislate for a residual discretionary power vested in the trial judge to admit evidence that falls outside the specific gateways. A list of stated criteria could then be added to aid the judge in the exercise of this discretion as reflected in the Canadian legislation.

As posited by McLachlin J, it would ensure that evidence is not excluded "*without any means of evaluating whether in the circumstances of the case the integrity of the trial process would be better served by receiving it than by excluding It."* Hence in those instances, not contemplated by the categories listed in section 27, but where an unforeseen need arises to admit evidence of sexual behaviour, which would not be 'merely misleading but truly relevant and helpful' then the judge is able to do so.[112] The legislation would therefore escape the criticism of 'pigeon-holing' or 'predicting relevancy on the basis of a series of categories'.[113] In **Seaboyer**, it was noted that many of the models now present do include a measure of judicial discretion to deal with unforeseen circumstances.[114]

2. The legislators could also add further exceptions to the gateway model to make provision for the admissibility of other categories of evidence.[115]
3. Adopt the Canadian twin myths model as amended by the New South Wales Law Reform Commission.[116]
4. Restrict evidence of past sexual history between the complainant and accused using proximity as a barometer.
5. Broaden the application of the provision to other Acts as well as the common law.
6. Consider whether the embargo on sexual history should also apply to the prosecution.[117]

[111] Page 30 **Seaboyer** et al.
[112] See page 54-55 of **Seaboyer**.
[113] See page 55-56 of **Seaboyer**. See also Sopinka J, comments regarding the difficulty in determining relevance beforehand **R v Morin** [1988] 2 S.C.R. 345 at pp. 370-71.
[114] See page 61 which lists such models as those in England, Australia and many states of the United States.
[115] See the Guyana or UK model in the appendix.
[116] This is an alternative that Neil Kibble suggested for the UK after in depth research. See page 871 of Rook and ward.
[117] See mention of the Barbados model in the appendix. This model goes as far as proscribing the adducing of evidence of lack of sexual experience.

7. The need to define relevant terms in the section as well as restrict the application with the aim of providing judges with greater assistance in arriving at determinations under the section.
8. The need for monitoring the legislation as provided for under the act as well the need for judicial training are paramount.[118]
9. The need for the creation of procedural guidelines/rules for the making, hearing, and giving the results of the application under section 27.
10. Empirical studies should be undertaken to grasp the fulcrum of the problems that will arise with the use of this section as is and these should inform the crafting of the desired model.

[118] "*The monitoring is essential to ensure that decisions to admit or exclude evidence or questioning are made after full and proper consideration of both the rights at stake and issues of relevance. Training is essential because the judicial construction of relevance is affected by stereotypical beliefs which cannot be legislated out of existence…it is impossible for any workable legislation to eliminate judicial discretion, even if that were desirable*." Neil Kibble p 292.

PART XI

APPENDIX

1) COMPARATIVE LEGISLATION FROM THE CARIBBEAN/ CANADA/ UNITED KINGDOM

THE CARICOM MODEL LEGISLATION ON SEXUAL OFFENCES[119]

Caricom explored the need for it members to address the issue of adducing /eliciting evidence of the sexual history of the complainant by creating model legislation on the issue. In its explanatory memorandum, the legislation specifically states that that in relation to sexual history evidence the aim is to provide for '*the restrictions regarding the adducing of evidence as to the sexual history of the complainant'* At section 23 it advocates a complete ban; "*In proceedings in respect of an offence under this Act, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant."* However it is seen that none of the jurisdictions (and rightly so) considered have accorded with this aspect of the model.

2) BARBADOS[120]

Barbados legislation is quite peculiar and somewhat detailed. The statute is similar to Jamaica's only in that it provides for a general exclusion of sexual history evidence subject to a number of exceptions.[121]

[119] The draft boldly asserts that "It is well recognized in almost all CARICOM States that the trial of sexual offences often turns out to be hardest on the victims and many are therefore reluctant to report the offences or to attend court to give evidence."

[120] Sexual Offences Act of Barbados CAP 154 commenced on 13th February, 1992

[121] See sections 26, 27, 33, 34

However it goes further in that it includes evidence of relations between the complaint and the accused in this ban also. Providing instead in section 26 (1)(b) that such evidence may only be admissible 'where the sexual activity is reasonably contemporaneous with the date of the alleged crime." All evidence to be introduced must have a connection in time, proximity or person. The ban is on both the prosecution and the defence led evidence. It also allows sexual history evidence where issues concerning semen, pregnancy, disease or injury are attributed to the accused who denies them. This provision is far more restrictive than the Jamaican provision in some respects however it is more permissive in the categories of evidence it allows. No specific provision is made to adduce evidence in relation to motive to fabricate or bias, however such evidence may be admitted through other gateways. For the same reasons given for the Jamaican analysis this sort of evidence appears unjustifiably limited by the restrictions contained in the legislation.

3) **TRINIDAD AND TOBAGO**[122]

Section 30 of the SOA succinctly creates a general prohibition on evidence excluding activity with the accused. However, the section continues by providing that any such evidence is admissible if on application to the court, it is thought that the evidence is necessary for the fair trial of the accused. Whilst the Trinidad and Tobago provision can be criticized for leaving an almost unfettered discretion to the trial judge, it is certainly wide enough to allow for any relevant evidence to be adduced/elicited including evidence of motive to fabricate or bias etc.

4) **The BELIZE EVIDENCE ACT**[123]

The Act for Belize contains a similar provision to that of Trinidad and Tobago, though much narrower in the range of offences it covers; it only addresses rape or attempted rape. However the adducing of evidence to prove motive or bias is not prohibited.[124]

5) SEXUAL OFFENCE Act of GUYANA (2010)[125]

The section in Guyana Act is quite detailed and is worth reproducing here in full.

EVIDENCE OF SEXUAL ACTIVITY

77. (1) Where the complainant in proceedings for an offence under this Act is under 16 years of age, no evidence shall be adduced that the complainant has engaged in any sexual activity (with the accused or with any other person) other than the sexual activity that forms the subject matter of the charge unless

[122] Sexual Offences Act Chapter 11:28 commenced the 11th of November 1986
[123] Evidence Act of Belize, Chapter 95, Revised Edition 2000, section 74
[124] The Trinidad and Tabago and Belize Acts have taken the path of the old section 2 of the Sexual Offences (Amendment) Act 1976. However statics showed the the object of the measure was not being achieved when the decision given entirely to the trial judge. See R v A (No.2) para 57, ibid.
[125] Act No 7 of 2010

the Court determines in accordance with the procedure set out in the Second Schedule, that the evidence –

(a) is of criminal sexual activity involving the complainant, and there is evidence of a conviction of a third party for this criminal sexual activity;

(b) is to be used to show that inappropriate sexual knowledge was not learnt from the accused, or that the complainant had a motive to lie; and

(c) is of facts sufficiently similar to the facts in issue to have signifi-cant relevance.

(2) Any evidence referred to in subsection (1) shall only be admitted to the extent that the Court finds that the proposed evidence is material to a fact in issue in the case and that its probative value is not outweighed by its inflammatory nature or potential prejudice to the proper administration of justice or the complainant's personal dignity and right of privacy.

78. (1) In proceedings in respect of a sexual offence, evidence as to the sexual activity or reputation of the complainant is not admissible, and the defence shall not be allowed to cross-examine on the matter.

(2) In proceedings in respect of a sexual offence, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant -

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief.

79. (1) Where the complainant in proceedings for an offence under this Act is sixteen years of age or over, no evidence shall be adduced that the complainant has engaged in sexual activity (with the accused or with any other person) other than the sexual activity that forms the subject-matter of the charge, unless the Court determines, in accordance with the procedure set out in the Second Schedule, that the evidence -

(a) is of specific instances of sexual activity; and

(b) (i) tends to rebut evidence that was previously adduced by another party to the proceedings;

(ii) where the accused denies sexual penetration, tends to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue; or

(iii) is of consensual sexual activity of the complainant with the accused where this is reasonably contemporaneous with the date of the alleged offence.

(2) Any evidence referred to in subsection (1) shall only be admitted to the extent that the Court finds that the proposed evidence is material to a fact in issue in the case and that its probative value is not outweighed by its inflammatory nature or potential prejudice to the proper administration of justice or the complainant's personal dignity and right of privacy.

80. (1) The defence shall not introduce evidence directly or ask questions in cross-examination suggesting that previous allegations of sexual offences by the complainant may have been false without the prior permission of the Court.

(2) The Court shall not give such permission unless -

(a) the defence can adduce concrete evidence that the previous allegation was in fact false; and

(b) the relevance of the evidence to the case of the accused is demonstrated to the satisfaction of the Court.

6) UK PROVISION : Youth Justice and Criminal Evidence Act 1999, sections 41-43

41 Restriction on evidence or questions about complainant's sexual history

(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 subsection (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 subsection 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 complainant 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 subsection (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 subsection 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 subsections (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 subsections is capable of applying in relation to the evidence or question to the extent that it does
not so relate).

(7) Where this section 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 section authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section.

42 Interpretation and application of section 41

(1) In section 41-

(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 section 41(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 subsection (2), “sexual offence” shall be construed in accordance with section 62.

(2) The Secretary of State may by order make such provisions as he considers appropriate for adding or removing, for the purposes of section 41, any offence to or from the offences which are sexual offences for the purposes of this Act by virtue of section 62.

(3) Section 41 applies in relation to the following proceedings as it applies to a trial, namely-

(a) proceedings before a magistrates court inquiring into an offence as examining justices,

(b) the hearing of an application under paragraph 5(1) of Schedule 6 to the Criminal Justice act 1991 (application to dismiss charge following notice of transfer of case to Crown Court),

(c) the hearing of an application under paragraph 2(1) of Schedule 3 to the Crime and Disorder Act 1998 (application to dismiss charge by person sent for trial under section 51 of that Act),

(d) 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

(e) the hearing of an appeal, and references (in section 41 or this section) to a person charged with an offence accordingly include a person convicted of an offence.

43 Procedure on applications under section 41

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

In this section 'leave' means leave under section 41.

(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 register of its proceedings.

(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 subsection (3) or (5) of section 41;
(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.

7) THE NEW CANADIAN PROVISION

THE CANDIAN CRIMINAL CODE

276. (1) In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(*a*) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(*b*) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

(*a*) is of specific instances of sexual activity;

(*b*) is relevant to an issue at trial; and

(*c*) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(*a*) the interests of justice, including the right of the accused to make a full answer and defence;

(*b*) society's interest in encouraging the reporting of sexual assault offences;

(*c*) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(*d*) the need to remove from the fact-finding process any discriminatory belief or bias;

(*e*) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(*f*) the potential prejudice to the complainant's personal dignity and right of privacy;

(*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(*h*) any other factor that the judge, provincial court judge or justice considers relevant.

276.1 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 276.2 to determine whether evidence is admissible under subsection 276(2).

(2) An application referred to in subsection (1) must be made in writing and set out

(*a*) detailed particulars of the evidence that the accused seeks to adduce, and
(*b*) the relevance of that evidence to an issue at trial,
and a copy of the application must be given to the prosecutor and to the clerk of the court.
(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.
(4) Where the judge, provincial court judge or justice is satisfied
(*a*) that the application was made in accordance with subsection (2),

(*b*) that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or such shorter interval as the judge, provincial court judge or justice may allow where the interests of justice so require, and
(*c*) that the evidence sought to be adduced is capable of being admissible under subsection 276(2),
the judge, provincial court judge or justice shall grant the application and hold a hearing under section 276.2 to determine whether the evidence is admissible under subsection 276(2).
276.2 (1) At a hearing to determine whether evidence is admissible under subsection 276(2), the jury and the public shall be excluded.
(2) The complainant is not a compellable witness at the hearing.
(3) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part thereof, is admissible under subsection 276(2) and shall provide reasons for that determination, and
(*a*) where not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;
(*b*) the reasons must state the factors referred to in subsection 276(3) that affected the determination; and
(*c*) where all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.
(4) The reasons provided under subsection (3) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.