When is evidence of a previous false accusation by a witness admissible?

It is not unusual in cases of sexual assault for the disclosure process to reveal material recording that the complainant has made allegations of sexual assault in the past which have not resulted in a prosecution, still less a conviction.
The issue that will usually then arise in such cases is what, if any, use can be made of such material by the defence?
The line usually taken by the defence is that this is evidence – not proof, but evidence – that the complainant is not reliable, and the jury should hear it. In other words it goes to the witness's credibility.
The recent case of R v Butler [2015] EWCA Crim 854 arguably has nothing new to say on the matter, but is nonetheless a useful authority on the disclosure of such material and the use to which it could be put.
The facts of the case were quite straightforward. The appellant met the complainant and invited her for a drink. They ended up at his flat and sexual intercourse took place. She said he locked her in the flat while he went to get a pizza delivered. Later that night she was able to leave the flat and reported the rape. The defendant said they had had consensual sexual intercourse. There was other evidence undermining the defendant's account.

The appeal was a reference to the Court of Appeal. Utilising their statutory powers to check for undisclosed material which might be relevant to the credibility of the complainant, AB, the CCRC discovered material that related to previous complaints of sexual assault. They found that the CPS file noted limited details of AB's previous sexual allegations against members of her family in these terms:

> "Been raped in the past by 'Geordie' mum's boyfriend (now ex-boyfriend) [name redacted]. Aged 9-14 at the time.
>
> Been raped in the past by uncle [name redacted] aged 14.
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> Been raped by father [name redacted]. Rape reported to police aged about 8.
>
> Indecent assault by grandfather [name redacted] ... None reported to police."

There followed a reference in the note to social workers, the fact that the children were taken into care and that a doctor "tried to put her in a mental hospital".

The prosecution had decided at the time of the trial not to disclose any of this on the basis that the material did not undermine the case for the prosecution, it being a "consent case". In any event, the CCRC took the view that had the available material been provided to the appellant's legal team at the time, it would not have made a difference on the basis that the disclosures were not capable of making a significant impact on AB's credibility.

However, inquiries by the CCRC revealed a far more detailed picture. It was summarised by the CCRC as follows.

> "i. Prior to trial in 1998, the complainant had made a substantial number of sexual allegations against different men. Some of those allegations she

> subsequently formally retracted. Other allegations were found to be untrue, or were found to be unsubstantiated;
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> ii. Prior to trial in 1998, there were a number of findings by Police and Social Services that the complainant had problems distinguishing between fact and fantasy. It is clear from the relevant records that a number of her sexual allegations were not believed by professionals who dealt with the complainant;
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> iii. Subsequent to trial in 1998, the complainant has approached the police with further sexual allegations, in particular in 2008 and 2010. None of those allegations has been proceeded with, and at least some of the allegations have not been believed by the police."

The Court of Appeal dealt in detail with the substance of the allegations which reveal a not unfamiliar litany of claims and counterclaims of sexual activity involving family members and non-family members with denials and retractions.

The Court noted first of all that none of the evidence that people had not believed AB in the past would have been admissible. The opinion of one person as to the veracity of a witness is never admissible.

What was described by the Court of Appeal as the "high water mark" of the material relevant to AB's credibility was a claim of rape that was later retracted by AB, admitting that the sex had in fact been consensual.

It is important firstly to note that the court considered that any cross-examination of these matters [that is retracted allegations] would not have fallen foul of s. 2 of the Sexual Offences (Amendment) Act 1976 [the precursor to the Youth Justice and Criminal Evidence Act 1999, ss.41–43 – restriction on evidence or questions about a complainant's sexual history]. The point being advanced was related to AB's credibility, not her sexual history.
Secondly however, as was made clear in *R v R.D.* [2009] EWCA Crim 2137 (at para. 16), following *R v T* and *R v H* [2002] 1 WLR 632, [2002] 1 Cr App R 254, before the evidence of the previous allegation could be adduced as evidence of unreliability there would have to be:

> "... a 'proper evidential basis' for asserting that the previous complaint had been made and had been false. In the absence of such a basis the questions would become ones about previous sexual behaviour: see *E* [2004] EWCA Crim 1313, [2005] Crim LR 229."

Such 'proper evidential basis' would, for example, be an admission by the complainant that a previous allegation had been false. One example of this is R v V (S B) [2006] EWCA Crim 1901 where the defendant wished to call the complainant's sister to say the complainant had told her she had made up a complaint. The Court in R v Butler appears to consider that mere evidence of retraction might be enough, although then the reason for retraction would become relevant.

Thirdly, evidence of a previous false complaint would be 'bad character' evidence and would have to satisfy the test of s.100 Criminal Justice Act 2003 before it could be admitted. In R v V the Court held that making a false allegation did amount to relevant bad character under s.100. This principle is of course not limited to accusations of sexual misconduct, bit to any false accusation.

On the specific facts of this case the Court of Appeal appear to have concluded that notwithstanding the retraction there was insufficient evidence that the complaint had been deliberately fabricated; this may however be *obiter dicta* and one should view with a degree of caution the impression that the Court was ruling unequivocally that cross-examination could not have taken place.
The Court was considering the safety of the conviction and the effect of any possible non-disclosure on the trial process. The Court took the view that given the defendant's previous two convictions for rape prior to the trial in 1998 it was highly unlikely that the defendant would have wanted to deploy any potential bad character evidence in any event, as that would have put his own bad character in evidence.

Notwithstanding the clear impression earlier on in the judgement that the Court took the view that the evidence of deliberate fabrication was lacking, at the end of the judgment under the heading "Conclusion" they say: -
"Further, in the unusual circumstances of the case, ***it is far from clear*** *[emphasis added] that the allegation of rape, immediately altered to unlawful sexual intercourse would justify cross examination as to credit* ***but, even if it did****, [emphasis added] because of the appellant's appalling record for sexual offending (with the consequences on his credibility), the general tactic adopted by the defence in relation to what they did know, would, in our judgment, have prevailed and rightly so."*

This is hardly a firm statement of principle. The decision to dismiss this appeal was based upon the facts of this particular case and as the court pointed out;
"*Each case is fact sensitive and has to be considered in the light of what was known at the time and all the circumstances. Suffice to say that we do not believe that the material now disclosed by the records search reasonably would have altered the strategy adopted by the defence team*."

All one can say with certainty is that; -

- if there is evidence that a complainant has admitted that they have previously made a false complaint of sexual assault, the Youth Justice and Criminal Evidence Act 1999, ss.41–43 are not engaged as such evidence is not evidence of sexual activity.
- evidence [not proof] of a previous false allegation is evidence of bad character that would usually satisfy the test of admissibility in s.100 Criminal Justice Act 2003.
- evidence of falsity falling short of an admission by the complainant of fabrication will be admissible or not depending upon its probative value.

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