CAN THE LAW ON SEXUAL CONSENT AND RELATED RULES OF EVIDENCE PROVIDE ADEQUATE PROTECTION TO VULNERABLE VICTIMS AND DEFENDANTS WHO ARE SUBJECT TO FALSE ALLEGATIONS? IF SO, DO JURIES JEOPARDIZE THIS?

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Abstract:

Sexual consent is a sociolegal principle that is designed to protect personal autonomy. This article will evaluate and challenge the legal concept of sexual consent and whether the current law is sufficiently designed so that it is capable to protect both vulnerable victims and defendant simultaneously in rape and sexual assault trials. A common theme throughout will be rape myths and how these can negatively affect jurors and as a result, raise the question, should jurors sit on rape and sexual assault trials?

Keywords: Consent, rape, rape myths, sexual assault, jurors

Introduction:

The Office for National Statistics estimated than between March 2016 and March 2017 a total of 648,000 people aged between 16 and 59 were subject to some type of sexual assault.[2] Despite being such a prevalent crime in modern society only 3.8 per cent of reported sexual offences resulted in a charge or summons to court.[3] Consent being at the center of the offences. If it can be proven that consent existed between the parties beyond reasonable doubt, then no offence is committed in law. The statistics suggest that there is a major issue with how consent is either established, disproved, or interpreted by jurors. One explanation for this is that the law is overly complex to jurors and as a result prevents them applying the law of consent to the case facts with the appropriate degree of certainty necessary for a

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[2] Office for National Statistics, 'Sexual Offences in England And Wales: year ending March 2017', 8 February 2018
[3] Lizzie Dearden, 'Only 1.7% of reported rapes prosecuted in England and Wales, new figures show' *Independent* (25 April 2019)

guilty verdict.

This article will assess whether the legal mechanism of sexual consent is able to operate in such a way that it has the ability to protect vulnerable people from being sexually taken advantage of but simultaneously protect the defendant from malicious claims. Although the law on sexual consent itself is predominantly balanced, it will be discussed whether the tactics used by barristers, such as disclosing previous sexual history during trials threatens this notion. Running parallel with this discussion is whether juries should be used in such cases, whether they should receive training to help them make better legal decisions[4] or whether the issues should be decided by a judge. It will also be examined whether stereotypes and personal preconceptions by jurors are harmful to the mechanics of sexual consent.

1.1 Rape & Sexual Assault

This article will focus on consent in relation to the offences contained within ss.1-4 Sexual Offences Act 2003. These sections define the law on rape[5] and various types of sexual assault[6], all of which have the common element of 'consent' and 'reasonable belief' in consent. Consent acts as a statutory defence and is therefore the issue in many rape and sexual assault cases as it determines whether or not an offence has been committed. As the concept of 'consent' is so central to these offences it raises the question, what is legal consent? Does it give sufficient protection to vulnerable victims? And, how can one define 'reasonable belief in consent'?

1.2 Defining Consent

Prior to 2003, the Sexual Offences Act 1956 provided no definition for 'consent'. Jurors were told that consent should be given its ordinary meaning, and that there is a difference between 'consent' and 'submission'.[7] This posed a number of issues for jurors as each had a slightly different perception of the meaning and ultimately, they would be left with little guidance to make such an important decision. The introduction

[4] Jonathan Koehler, 'Train Our Jurors', Northwestern University School of Law Public Law and Legal Theory Series, No. 11-21
[5] s.1(1)(a-c) Sexual Offences Act 2003
[6] ss.2-4 Sexual Offences Act 2003
[7] 'Rape And Sexual Offences - Chapter 3: Consent | The Crown Prosecution Service' (*Cps.gov.uk*, 2020) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-3-consent> accessed 27 February 2020.

of the Sexual Offences Act 2003 fundamentally changed the law as section 74 introduced a statutory definition. It defines consent as '[a] person consents if he agrees by choice and has the freedom and capacity to make that choice'. The Crown Prosecution Service (CPS) guidance to prosecutors suggest that a two-stage test exists within the statutory definition.[8]

Agrees by choice

The first stage of the test is whether the person who gives the consent was in a position to agree to sexual activity by choice. This provides the first element of protection to vulnerable victims as it requires the consenter to affirm the sexual act by their own choice, not anyone else's. In respect of vulnerable victims, it ensures that they are not coerced, bullied or physically forced[9] into sexual activity as this would not satisfy the 'choice' element of the test. The courts have considered this point and have made it very clear that when considering choice, it is vital that it is considered in the context of the case.[10] This therefore allows jurors to consider if the complainant's agreement to consent was given by their own choice. If the jury believe that the complainant did consent by choice they will then be tasked with the next stage of the test.

Freedom and Capacity

The second stage of the test is that the consenter must have the 'freedom and capacity to make that choice' – capacity being the key element. The Sexual Offences Act 2003 does not define 'capacity', but the common law suggests that a complainant will not have capacity where their knowledge and understanding are so limited that they are not in a position to decide whether or not to agree.[11] This is once again a question for the jury. This stage of the test provides that the consenter must have the sufficient mental ability to consent to any sexual act otherwise the consent will be void. The most common way in which 'capacity' becomes an issue for the courts is where the consenter is sufficiently intoxicated that they cannot consent.[12]

[8] Ibid
[9] s.75(2)(a-b) Sexual Offences Act 2003
[10] *R v C* [2012] EWCA Crim 2034
[11] Howard (1965) 50 Cr App R 56
[12] *R v Bree* [2007] 2 All ER 676

Voluntary intoxication can prevent the complainant from having sufficient capacity to consent. The leading case law in relation to this is *R v Bree,*[13] where the Court of Appeal were asked to consider whether the Complainant was so intoxicated that she did not have the capacity to consent or whether she in fact remained capable to consent to sexual intercourse. Sir Igor Judge P held that on the proper construction of section 74 of the Sexual Offences Act 2003 'if, through drink … the complainant had temporarily lost her capacity … she [would] not [be] consenting … that would be rape'.[14] The law ensures that the consenter is in a position where they can make the decision if they want to consent. However, it is important to note that just because the complainant is drunk does not mean that they lack capacity to consent. In *R v Hysa,*[15] Hallett LJ expressed that it is for the jury to examine whether there is sufficient evidence as to whether the complainant had capacity - drunkenness is not an automatic block to capacity to consent. This is supplemented by the position of *R v Cooper*, that drunken consent is still consent.[16]

The rules on capacity ultimately prevent those in vulnerable positions from being taken advantage of. These constructs are the foundations of the law of consent and without which the law would not be in a position to protect vulnerable people from such offences.

Reasonable Belief

One of the defences to rape and sexual assault is that the defendant had a reasonable belief that the complainant consented. The Sexual Offences Act 2003 made it a necessity that the belief was reasonable: '[w]hether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents'.[17] This is a question of fact and therefore the jury will have to consider this question. If the complainant does not in fact consent but the jury concludes that the defendant reasonably believed that they consented, then there is a defence in law and the defendant will be found not guilty.

[13] *R v Bree* (Ibid n15)
[14] *R v Cooper* [2009] UKHL 42, para 24
[15] [2007] EWCA Crim 2056
[16] Ibid n17
[17] ss.1(2), 2(2), 3(2), 4(2) Sexual Offences Act 2003

1.3 Evidential Presumptions

Establishing consent or lack of is a difficult factual task as the jury must all agree. However, there are circumstances where the absence of consent and reasonable belief can be proven as a point of law. These are called evidential presumptions and the circumstances are contained under section 75(2) Sexual Offences Act 2003, which are: (a) violence, or a fear of violence, against the complainant; (b) violence, or a fear of violence, against a third party; (c) circumstances where the complainant is unlawfully detained; (d) where the complainant is 'asleep or otherwise unconscious'; (e) physical disabilities affecting communication; and (f) where the defendant has administered a substance to the complainant without their consent.[18] Overall, if there was a sexual act,[19] one of the circumstances listed above existed[20] and the defendant knew that the circumstance existed,[21] then the courts will presume that there is an absence of consent and reasonable belief in consent unless there is sufficient evidence to rebut the presumption.[22] This section is fundamental when assessing consent in circumstances where the complainant is often vulnerable and put in a situation whether they are forced to submit or are unaware that a sexual act is being performed on them. Once again, this provision ensures that those who are vulnerable or find themselves in vulnerable situations are protected in law. It can be argued that s.75 is one of the key protection mechanisms that the law provides.

In addition to these rebuttable presumptions, section 76 Sexual Offences Act 2003 contains conclusive presumptions, i.e. they cannot be rebutted by evidence. If this section is satisfied, a judge will direct a jury to convict on the basis of lack of consent and reasonable belief. Such circumstances are where consent was obtained by deception23 and/or consent was obtained by impersonation.24 In order for a section 76 presumption to be triggered it must be proven that the deception or impersonation induced the consent. This once again allows the prosecution 'to prove as a point of law the absence of consent and reasonable belief therein, thus relieving the jury of completing such task'.25

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[18] Jonathan Veasey-Pugh, Cornwall Street Barristers Briefing Note, 'When consent is not consent. Interpreting section 76, Sexual Offences Act 2003*',* December 2016
[19] s.75(1)(a) Sexual Offences Act 2003
[20] s.75(1)(b) Sexual Offences Act 2003
[21] s.75(1)(c) Sexual Offences Act 2003
[22] s.75(1) Sexual Offences Act 2003
[23] Section 76(2)(a) Sexual Offences Act 2003
[24] Section 76(2)(b) Sexual Offences Act 2003
[25] Bethany Simpson, 'Why had the Concept of Consent Proven So Difficult to Clarify?', (April 2016) JCL 80

Turning to the main issue within section 76, deception. The test for deception is whether 'the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act'.[26] The consideration in *R v Jheeta*[27] was whether the defendant had specifically deceived the complainant regarding the nature or purpose of the sexual intercourse. The Court of Appeal held that the deception was to the general circumstances and were not specific enough to trigger the presumption. Deception was also considered *inter alia* in the case of *Assange v Swedish Judicial Authority*[28] where the prosecution submitted that a section 76 presumption should be triggered. They argued that by not wearing a condom, Mr Assange had in fact deceived the complainant as to the nature and purpose of the sexual act. The Court of Appeal held that the deception within section 76 was limited to the 'act' – vaginal, anal or oral intercourse, not the act of not wearing a condom. As a result, this issue did not relate to evidential presumptions and instead the issue related solely with the definition of consent provided by the Act.

Overall, it would seem that the addition of the evidential presumptions contained within the Sexual Offences Act 2003 are a major pillar in the protection of vulnerable people. The aims of both section 75 and 76 are to remove the difficult factual questions that a jury will have to decide. It seeks to simplify this complex area of the law with the overall goal of protecting those who are vulnerable or are put in impossible situations.

1.4 Conditional Consent

The existence of a lie is however unlikely to meet the threshold to trigger a section 76 presumption as it does not relate specifically to the nature or purpose.[29] A condition imposed on consent will affect the nature of the sexual act and therefore if it is violated then will consent be vitiated? It could be argued that the term 'nature and purpose' is vague. For example, does it relate to a situation where 'a woman who tells her sexual partner that she takes the contraception pill, but in fact is not, for the

[26] Ibid n26
[27] [2007] EWCA Crim 1699
[28] [2011] EWCH 2849 (Admin)
[29] Section 76(2)(a) (Ibid n26)

purpose of conceiving a child'?[30] In *Assange*[31] the issue of conditional consent was raised alongside deception. Sir Anthony May P stated at paragraph 86:

'having sexual intercourse without a condom in circumstances where [the Complainant] had made clear [they] would only have sexual intercourse if he used a condom would therefore amount to an offence'.[32]

It would seem that the sensible position for the law to take is that it is not necessary to know every detail about a sexual partner, but they should know everything that is important for them to make a decision.[33] However, there is still a close crossover between deception and conditional consent. Such an issue is to be determined on a case by case basis.

The provision of conditional consent is a very powerful one as it ensures that the consenter has full autonomy in relation to deciding the terms of the sexual act to which the other party must comply with otherwise the consent will be vitiated.

2.1 Does the law offer protection to falsely accused defendants?

It is clear that the law at every possible stage offers protection to vulnerable people from being taken advantage of, for the purpose of sexual acts. However, does this level of protection mean that the law is biased against defendants, especially in respect of when false allegations are made? The discussion below will evaluate the ways in which defendants can be protected from false claims of rape and what restrictions they have on their defence tactics.

2.2 False Allegations

'False allegation' provokes numerous definitions. However, it would seem that at its most basic it can be defined as 'the description of an event that the complainant knows never actually occurred'.[34] The issue of false allegations in respect of rape and

[30] Dr Amanda Clough, 'Conditional Consent and Purposeful Deception', (2018), <http://nrl.northumbria.ac.uk/41430/1/Conditional%20Consent%20and%20Purposeful%20Deception.pdf> accessed 15 February 2020
[31] [2011] EWCH 2849 (Admin)
[32] Ibid
[33] David Archard, 'Sexual Consent', Westview Press (1998), pp. 189
[34] Philip Rumney, 'False Allegations of Rape', Cambridge Law Journal, March 2006, 65(1), pp 128-158

other sexual offences have been a major influence in the development of the law and how it should be enforced.[35] Such allegations require significant consideration as they are 'very easy to fabricate, but extremely difficult to refute' and the judge should give careful and clear directions to the jury that it is dangerous to convict based on uncorroborated evidence.[36]

The number of false allegations is a contentious issue amongst academics and legal professionals. Various studies have taken place to determine this figure, some suggest 1.5 per cent of all sexual assault complaints made to the police were false, while other studies suggested a far higher figure of 90 per cent[37]. Between January 2011 and May 2012, 159 cases of false rape allegations were referred to the Crown Prosecution Service for a charging decision.[38] It is because of the uncertainty regarding the regularity of false allegations that the law must be in a position to be able to protect innocent defendants from being wrongly convicted.

2.3 Reasonable Belief Defence

As discussed above, the law provides the defence of reasonable belief. This provision could be argued as the main shield defendants have to protect themselves from a false allegation. In rape cases, it is very often the case that there are only two witnesses, the Complainant and Defendant – one person's story directly contradicting the other. Allegations of this nature are 'very easy to fabricate, but extremely difficult to refute'[39] and therefore the question to ask is how can a defendant use the reasonable belief in consent defence in circumstances where they are innocent?

The fact that 'all the circumstances'[40] should be considered by the jury means defence barristers are easily able to establish reasonable belief in consent.[41] This is based on the idea that reasonable belief can be 'inferred from the complainant's

[35] Ibid
[36] *R v Henry & Manning* (1968) 53 Cr. App. R 150
[37] Rumney (Ibid n37)
[38] Joint Report to the Director of Public Prosecutions, *Charging perverting the course of justice and wasting police time in case involving allegedly false rape and domestic violence allegations,* March 2013
[39] J Jordan, *The Word of a Woman?: Police, Rape and Belief*, (Palgrave Macmillan, first edn, 2004) p. 32
[40] Sexual Offences Act (Ibid n20)
[41] Anna Carline and Clare Gunby, ''How An Ordinary Jury Makes Sense Of It Is A Mystery': Barristers' Perspectives On Rape, Consent And The Sexual Offences Act 2003' (2011) 32 Liverpool Law Review.

flirting, the complainant accompanying the defendant to a bedroom or inviting him to hers, or evidence of attraction'.[42] As a result of the jury being able to consider such circumstantial evidence it can help to ascertain if there was reasonable belief in consent at the time of the sexual act. This protects defendants from having consensual intercourse at the time but then the complainant removing that consent after the act took place. There is also an argument here, which will be developed later, that previous sexual history of the complainant may also have some bearing on whether the defendant reasonably believed that they were consenting to the act; should such evidence be disclosed to the jury?

2.4 Burden & Standard of Proof

The burden of proof revolves around the sacrosanct idea that a defendant is innocent until proven guilty.[43] The onus is on the prosecution to prove that the offence took place. They must convince a jury or bench that the defendant is guilty 'beyond reasonable doubt',[44] or put simply, can they be sure?[45] This is the first form of protection any defendant has against false allegations, not just in rape and sexual assault cases.

Does this offer sufficient protection?

Although both the burden and standard of proof offer protection to defendants, it is important to gauge whether or not, in practice it can prevent innocent defendants being found guilty. Jim W. McElhaney advances the point that the burden may actually be counterproductive to defence cases in criminal trials.[46] In respect of the defence tactic of offering no evidence, McElhaney suggests that the defendant is metaphorically saying 'you can't prove it' and 'that feeling may color [sic] your view of the rest of the case. The words are not exactly an admission, but they have a strangely guilty ring'.[47] He also develops the opinion that when the jury are informed of the heavy burden protecting the defendant, and that they are innocent until proven guilty, there is a real risk that the jury will take the opinion that 'the defendant is guilty,

[42] Wendy Larcombe *et al*, ''I Think It's Rape and I Think He Would Be Found Not Guilty'' (2016) 25 Social & Legal Studies.
[43] Articles 6 Human Rights Act
[44] *R v Davies* (1913) 29 Times LR 350
[45] *Woolmington v DPP* [1935] UKHL 1
[46] Jim McElhaney, 'The Burden of Reasonable Doubt: When a Standard Designed to Protect Defendants Actually Hurts Them', ABA Journal, 1 October 2011
[47] McElhaney (Ibid n49)

but the prosecution hasn't proved it well enough'.[48] The law gives defendants the benefit of the doubt[49] but by telling the jury this implies that they are in need of protection and suggests that they might well be guilty. In conclusion, McElhaney suggests that the defendant will have a stronger case if they actively emphasise their own case rather than being too defensive.[50]

It could be argued that defendants who are falsely accused of sexual offences are put in a difficult position in respect of whether to give evidence. Should they choose to exercise their right not to give evidence and rely on the burden and standard of proof, it is possible that the jury may make adverse inferences regarding this, which could be considered as unfair against the defence due to the judge also making a direction regarding the silence of the defendant.[51] The principals of the burden and standard of proof, when relied on too heavily, may not be able to protect defendants in the way it was designed to do and therefore falsely accused defendants must take to the witness box to ensure that they can protect themselves from being wrongly convicted.

Does this offer too much protection?

The conviction rates for rape and sexual assault are surprisingly low when compared to other offences.[52] This has caused a large amount of hostility amongst the media, with some journalists saying that 'rape might as well be legal'.[53] This suggests that there is something fundamentally wrong with the way in which guilt is proved in relation to these offences. Many academics have argued that the burden and standard of proof is a major contributory factor to the low conviction rates as they offer defendants too much protection; there is less than a 1 per cent chance of them being convicted.[54]

Rape and sexual assault are physically indistinguishable from consensual sexual

[48] Ibid
[49] Zoran Dimitrievski *et al*, 'Doubt in favour of the defendant, Guilty beyond reasonable doubt', pp 9, <https://www.osce.org/mission-to-skopje/345461?download=true> accessed 20 March 2020
[50] McElhaney (Ibid n49)
[51] s.35 Criminal Justice and Public Order Act 1994
[52] Lizzie Dearden, 'Only 1.7% of reported rapes prosecuted in England and Wales, new figures show' *Independent* (25 April 2019)
[53] Julie Bindel, 'Why is rape so easy to get away with?', *The Guardian*, (1 February 2007)
[54] Ibid

acts, which means that a verdict can pivot on testament alone.[55] It is an inevitable outcome that when two people tell convincing but completely contradictory versions of events, they will cast reasonable doubt upon each other and where reasonable doubt exists, a not guilty verdict must be given. It can also be argued that actually achieving such a high standard of proof is made even harder by the existence of rape myths and stereotypes.[56] This will form a significant part of the discussion below.

Miranda Fricker is a feminist theorist and developed a concept called 'testimonial injustice'. This idea suggests that testimonies given by women are 'unjustifiably and often unintentionally downgrade[d]'[57] by judges and juries. As a result of this downgrading, Fricker advances the idea that a female complainant's evidence will not always be able to satisfy the high standard and therefore raised the question 'what justifies the reasonable doubt standard in the first place[?]'[58] When agreeing with Sir William Blackstone's rationale behind the reasonable doubt standard, Wareham and Vos suggest that when the standard is so high, they are indeed protecting defendants from harm, such as 'stigma, broken relationships, loss of income'[59] all a direct result from being wrongly convicted. However, Fricker argues that this neglects the harm of a false acquittal – returning a verdict of not guilty when the defendant is in fact guilty. When considering if such a high standard is justified, it could be suggested that we should not just consider the harm done to one wrongly convicted defendant, but also the harm done by ten wrongly acquitted defendants.[60] In their commentary, Wareham and Vos argue that Blackstone's belief that it is better for ten guilty men to be released than for one innocent man to be found guilty is 'untenable'[61] and that we should consider a much lower standard of proof in relation to sexual offences.

2.5 Defence Tactics

A questionable tactic used by defence barristers is to disclose the complainant's previous sexual history to the jury at trial in the hope to discredit them. Prior to 1975,

[55] Christopher Wareham and James Vos, 'Why rape cases should not be subject to reasonable doubt', <https://aeon.co/ideas/why-rape-cases-should-not-be-subject-to-reasonable-doubt> accessed 20 March 2020
[56] Ibid
[57] Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing*, (1st edn, Oxford University Press, 2007)
[58] Wareham and Vos (Ibid n58)
[59] Fricker (Ibid n60)
[60] Wareham and Vos (Ibid n58)
[61] Fricker (Ibid n60)

only a common law restriction existed in relation to the admission of sexual history. This restriction was incredibly broad, and only required that any such admission must be relevant to fact in issue. The Heilbron Committee issued a report[62] stating that the sexual history of a complainant has no bearing on whether or not they would lie when giving evidence and is rarely going to be relevant to an issue before the jury.[63] As a result, section 2 of the Sexual Offences (Amendment) Act 1976 imposed more stringent restrictions on the admission of such evidence – only to be used when the judge believes that it would be unfair to the defendant to not allow such evidence to be adduced. After significant criticism,[64] the introduction of section 41(1) of the Youth Justice and Criminal Evidence Act 1999 prohibits evidence or questions about the complainant's sexual behaviour without leave from the court. The court may only give leave if the evidence or questions relates to an issue in the case.[65] If the issue relates to that of consent, then the judge may allow such questions if they either relate to behaviour at or around the same time of the alleged offence or, the behaviour of the complainant is so similar that it cannot be considered a coincidence.[66]

Despite having these restrictions, many still consider that they are wholly unfair and biased towards an acquittal. Harriet Harman and Dame Vera Baird QC, both former Labour Solicitor Generals are 'leading calls for reform … [as] they say that [section 41] is deterring women from reporting attacks'.[67] Research conducted by Baird suggested that the use of section 41 is being used far too often as out of 30 rape trials over an 18-month period, the complainant's sexual history was used in 11 of those trials – equivalent to 37 per cent.[68] In 2017, after considerable campaigning, Liz Savile Roberts MP introduced the Sexual Offences (Amendments) Bill 2016-17, which restricted the asking of questions regarding appearance and sexual history irrespective of the alleged behaviour of the complainant, unless it would be manifestly unjust.[69] This received significant backing, however never received royal assent as the 2017 general election was called before it could progress to that stage.

The Ministry of Justice in conjunction with the Attorney General's Office published a

[62] Report of the Advisory Group on the Law of Rape, Cmnd 6352, December 1975
[63] HC, The Youth Justice and Criminal Evidence Bill [HL], Research Paper 99/40, 14 April 1999
[64] HC, Deb, 15 April 1999, Column 429
[65]s.41(3) Youth Justice and Criminal Evidence Act 1999
[66] s.41(3)(b-c) Youth Justice and Criminal Evidence Act 1999
[67] Owen Bowcott, 'UK Rape Complainants 'Face Unfair Questions About Sexual History', *The Guardian*, 2020
[68] Ibid
[69] Sexual Offences (Amendment) Bill 2016-17, Bill 137

report in 2017 directly addressing the points raised by Harman and Baird. The report[70] wholly disagrees with the claims made by campaigners and cites figures collated by the CPS to suggest that 'section 41 is working as intended'.[71] The CPS analysed 309 cases of rape which finished in 2016 to ascertain the regularity that section 41 was being used. The report found that '[i]n the overwhelming majority of cases (92 per cent) no evidence of the complainant's sexual history was permitted to be introduced by the defence'.[72] It also highlighted that in only 13 per cent of cases did the defence make a successful section 41 application. These statistics are directly contradicting those published by Baird who has criticised the government's report by saying that 'review does not reflect the situation in courtrooms across the country'.[73]

Ched Evans

The case of Ched Evans has re-ignited the debate regarding cross-examination of the complainant's sexual history after he was acquitted of rape at re-trial. The basic facts of the case are that Ched Evans and Clayton McDonald had sexual intercourse with a 19-year-old woman in a hotel room. The next morning the woman woke alone and had no memory of what had happened the night before. Evans and McDonald were charged with rape on the basis that the complainant was incapable of consenting.[74] In April 2012 Evans was found guilty of rape and was sentenced to five years imprisonment, whilst McDonald was acquitted. Evans, the appellant, was refused leave to appeal twice before his case was approved by reference from the Criminal Case Review Commission (CCRC) on the basis of fresh evidence, that of two new witnesses, S and O. Each of these witnesses said that they had had sexual intercourse with the Complainant around the same time of the alleged offence. Both the accounts S and O gave were very similar to Evan's, in respect of how the complainant had engaged in sex. The Court of Appeal, on hearing this new evidence formed the opinion that this fell within one of the statutory provisions and such evidence was therefore admissible and should have been put before the jury at trial.[75] At re-trial in 2016, upon hearing the evidence of S and O the jury returned a verdict of not guilty of rape.

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[70] Ministry of Justice and Attorney General's Office *'Limiting the use of complainants sexual history in sex cases Section 41 of the Youth Justice and Criminal Evidence Act 1999: the law on the admissibility of sexual history evidence in practice'*, December 2017
[71] Ibid
[72] Ibid
[73] Ibid
[74] *R v Evans* [2016] EWCA Crim 452
[75] Ibid

The case of *R v Harrison*[76] is similar to that of Evans in respect of raising the question, when should s.41 apply? In *Harrison* the Complainant had consensual sexual intercourse with the Defendant's friend, shortly after coming home from a night out, in his living room. The Defendant was also staying at the property and was asleep in the living room where the Complainant and his friend had just had intercourse. It was alleged that following this intercourse, whilst the Complainant was asleep, he allegedly, digitally penetrated her vagina without her consent. The defence sought at trial to cross-examine the Complainant on her intercourse with the Defendant's friend, as they argued it showed the honest belief of the Defendant. The Court of Appeal firmly rejected this argument. Lord Justice Hughes, in his verdict commented that '[t]he evidence in question was precisely the kind of evidence which s.41 was designed to exclude.[77] This case is an active example of the judiciary fairly assessing the merits of a s.41 application and blocking it when it does not fall within the statutory exceptions.

Nonetheless, the case of Evans saw huge criticisms by women's right campaigners. However, within the legal profession the consensus is very much the same, that the Court of Appeal were in fact correct in their application of s.41 in the case. Clare Walsh, a criminal barrister suggests that 'the public's fear that the case of Ched Evans has set a dangerous precedent is unfounded'[78] and that the 'courts continue to exercise care in applying the principles set out in section 41'[79]. It would seem that there will always be a difference of opinion in respect of disclosure of sexual history. However, so long as the law approaches the issue with fairness and respect, s.41 is, and should remain a protective tool for defendants facing rape and sexual assault charges.

3.1 Juries – do they jeopardize the balance of the law?

At this point it is fair to conclude that the law is balanced and fair to both parties involved in rape and sexual assault trails. The more important issue is whether juries jeopardize this balance?

[76] [2006] EWCA Crim 1543
[77] Ibid n79
[78] Clare Walsh, 'The impact of the Ched Evans case on the law surrounding a Complainant's sexual history', Broadway House Chambers, May 2017 <https://broadwayhouse.co.uk/publication/test/> Accessed 26 March 2020
[79] Ibid

Trial by jury is a mechanism enshrined in English legal history and plays an ever-important role in modern criminal trials. However, many journalists, Members of Parliament and academics argue that juries have no role in sexual offence cases.[80] This then raises the question, juries – do they work?

Paul Mendelle QC is a practicing criminal barrister at 25 Bedford Row and is a strong advocate in favour of jury trials. In 2010, he put his argument forward in the Guardian[81] and listed three key reasons why jury trials are so important in our legal system. First, Mendelle makes the simple, yet most effective point, '[juries] make the right decisions on the evidence and come to the right verdicts'.[82] This gives rise to the argument that if they did not work then they would not be used all around the world, in hundreds of jurisdictions. Expanding on this point, Mendelle cites a Ministry of Justice report[83] that examined whether or not juries were fair with particular emphasis on rape trials. The report also examined whether juries discriminated against particular races and whether or not there were particular courts where 'the police are unlikely to get a conviction'.[84] The report concluded that on the whole, juries are effective, fair and efficient at their task and that 'must be the first requirement of jury trial[s]'.[85]

The second point Mendelle raises is that twelve people judging guilt 'reduces the chance that a mistake of fact will be made'.[86] In an attempt to advance this point, Mendelle suggests that juries are not the cause of miscarriages of justice. It is often errors 'by police, by experts, by witnesses or by lawyers'[87] that cause these miscarriages and that if a jury are given flawed evidence, then they will return a flawed verdict. A subsidiary argument to this is that a jury consisting of twelve people are able to bring their life knowledge and experience – this is imperative in trial of a sexual nature. A group of twelve are far less likely to make a unanimous error of fact, whereas a single judge, who is equally infallible does not have the safety net of eleven other people deciding guilt.

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[80] Julie Bindel, 'Juries Have No Place In Rape Trials. They Simply Can't Be Trusted' (*the Guardian*, 2020)
[81] Paul Mendelle QC, 'Why juries work best' *(the Guardian, 2010)*
[82] Ibid
[83] Cheryl Thomas, 'Are juries Fair?' Ministry of Justice Research Series 1/10, February 2010
[84] Alan Travis, 'The verdict on juries: fair, effective and efficient', *(the Guardian February 2010)*
[85] Mendelle (Ibid n84)
[86] Mendelle (Ibid n84)
[87] Ibid

The last substantial point Mendelle raises is that the trial by jury 'exposes the criminal justice system to … scrutiny'.[88] He argues that it is vital that the system 'reflects the values and standards of the general public'.[89] Further to this, it could be argued that it would be dangerous to block members of the public from being involved in the decision making of criminal trials. If this was the case, it would be a fair assumption that society would lose faith in the system and therefore begin to question the validity of the decisions the courts make. In his conclusion, Mendelle highlights that 'for all our sakes, [juries] must be allowed to carry on doing [their job]'.[90] Before this article can agree with the proposition made by Mendelle it must be sure that jurors are not adversely influenced by myths, tactics or procedural rules.

3.2 Rape Myths

Lonsway and Fitzgerald define rape myths as 'attitudes and beliefs that are generally false, but are widely and persistently held, and that serve to deny and justify male sexual aggression against women'.[91] They are a way of explaining 'events, like rape and [sexual] abuse in ways that fit into our preconceived ideas about the world'.[92] The majority of these myths or false ideas come from stereotypes and prejudices, which can be particularly dangerous if they exist in the minds of a juror.

Many academics have attempted to discover the origins of rape myths. However, most have concluded that there are multiple historic, socio-legal and ethical beliefs than have helped develop the concept of rape myths. Heather Littleton PhD argues that one of the main attributing factors to the prominence of rape myths is society's attitude towards sex and how this is different depending on gender. Littleton suggests that men who have non-committal sexual relationships are viewed as 'enhancing [their] reputation and social status and as proof of their sexual prowess and masculinity'.[93] Whereas, women who do the same are given the negative labels of

[88] Ibid
[89] Ibid
[90] Ibid
[91] Kimberly Lonsway and Louise Fitzgerald, 'Rape Myths', Psychology of Women Quarterly, 1994, pp. 133-164
[92] Rape and Sexual Offences - Chapter 21: Societal Myths' (*Cps.gov.uk*, 2020) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-21-societal-myths> accessed 2 April 2020.
[93] Heather Littleton, 'Rape Myths and Beyond: A Commentary on Edwards and Colleagues (2011), Sex Roles, Vol. 65, Issue 11-12, Dec 2011, pp. 792-797

'slut or as easy'.[94] The argument is then made that women who have such labels are 'targets for aggressive sexual advances by men and as having fewer rights to refuse these advances'.[95] These ideas sadly help to gives rise to the common myth, which is directly addressed in the CPS guidance, that 'prostitutes cannot be raped',[96] which is wholly incorrect. Finally, Littleton discusses the idea that the negative stigma of having one of these labels is so severe that women will actively supress their sexual desires and therefore 'some individuals who force women to engage in sex [believe they] are responding to women's unexpressed sexual desire'.[97] This gives rise to one of the other main rape myths which operate in our society, women like rough/forceful sex and therefore 'if she didn't scream, fight or get injured, it wasn't rape.[98]

There is a non-exhaustive list of rape myths contained within the CPS guidance;[99] some myths are however far more prevalent in modern society. Sadly, the recurring theme when it comes to rape is to blame the victim. It could be relating to the dress, actions such as flirting earlier in the night or not resisting hard enough to advances – it is their fault for being raped. A survey conducted by End Violence Against Women Coalition showed that 33 per cent of a pool of nearly 4,000 respondents believed that rape requires physical force[100] and therefore if a victim silently endures the assault then, in their minds it is not rape.

A common myth in our society is that 'women cry rape when they regret having sex or want revenge.[101] It is disastrous to our justice system that rape myths exist in our society. However, this myth in particular poses significant damage to both our system and the perception of women. This myth has been briefly discussed above and it highlighted the imbalance between the prevalence of this myth and the actual occurrence of revenge allegations. The validity of this myth was examined by DPP and the CPS and the statistic showed that only 0.62 per cent of prosecutions for rape resulted in prosecutions for false allegations.[102] It could be argued that this myth is more dangerous than others as it personally attacks women and labels them as liars

[94] Ibid
[95] Ibid
[96] Rape and Sexual Offences (Ibid n95)
[97] Littleton (Ibid n96)
[98] Rape and Sexual Offences (Ibid n95)
[99] Ibid
[100] End Violence Against Women, 'Attitudes to Sexual Consent, December 2018, <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/1-Attitudes-to-sexual-consent-Research-findings-FINAL.pdf>
[101] Rape and Sexual Offences (Ibid n95)
[102] Ibid

and dishonest; not to be trusted.[103] As with all myths, if it is brought into the jury room by an individual or group there is a serious possibility that once again a jury would not be able to come to a unanimous decision or worse, give an incorrect verdict.

As expected, the obvious outcome of this discussion is that rape myths, pose a significant risk to the fairness of our justice system. It is vital to now examine how juries interact with such myths and whether or not they are adversely affecting the verdicts in rape and sexual assault trials.

3.3 Do Rape Myths Affect Jurors?

'[T]rial by jury in criminal cases is neither perfect nor infallible'.[104] It is accepted that in some cases juries arrive at the wrong verdicts, hence the existence of the appellate courts. In their defence, when juries arrive at the wrong conclusion it is predominantly through no fault of their own,[105] an argument raised by Paul Mendelle QC. However, this may not be the case if rape myths actively change opinions, when there is no such evidence to support such a myth, then jurors are solely to blame. Multiple studies have been conducted that attempt to analyse to what extent, if at all, rape myths affect the decision making of jurors. These studies have all be conducted in mock trial situations as questioning and recording data from a real jury is prohibited under the Contempt of Court Act 1981.

Ellison & Munro[106]

Louise Ellison is a Senior Lecturer in Law at the University of Leeds, specialising in Evidence Law in criminal contexts, whilst Vanessa Munro is a Professor of Socio-legal Studies at the University of Nottingham. Their study consists of a series of nine fictitious rape trials before a total of 219 participants who assumed the role of the jury in their specific cases and were asked to deliberate on a verdict. Across nine trials the:

[103] Julie Bindle, 'Why Are Some So Keen to Believe Women Lie About Rape?' *The Spectator* (2020) <https://www.spectator.co.uk/article/why-are-some-so-keen-to-believe-women-lie-about-rape-> accessed 10 April 2020.
[104] *R v Connor and Another* [2004] UKHL 2
[105] Mendelle (Ibid n84)
[106]

> 'core facts and role-players remained constant … substantive variables were introduced depending upon the complainant's level of physical resistance, the delay between the incident and the complainant's report to the police, and the apparent emotional demeanor (sic) of the complainant whilst giving her testimony'.[107]

The vast majority of the results of their study are positive, as they show that the jurors had an awareness of rape myths but did not always believe in them. For example, most of those in the study agreed 'that most rapes are committed, not by strangers, but by someone known to the victim',[108] contrary to the myth that rape only happens in an alleyway by a stranger.[109] Nevertheless, some of the jurors brought into the jury room preconceptions about how the victim would act in certain situations. Generally, the jurors agreed to the notion that the victim of a stranger rape assault would 'freeze' and remain 'paralyzed'.[110] Yet in circumstances where the parties were known to each other, the study suggests that the jurors were more inclined to believe the victim would do 'her utmost to avoid an assault by issuing strong verbal protests and fighting back'.[111] One of the points raised by a number of jurors was the idea 'that … male sexual desire … become[s] difficult to control once ignited' with one of the jurors specifically stating 'a woman can stop right up to the last second . . . a man cannot, he's just got to keep going, he's like a train, he's just got to keep going'.[112] This troubling idea was then put to each of the participants in the form of a question, to which 58 per cent believed that it is not rape when a man's sex drive gets out of control and he carries on. This notion poses significant issues within itself and suggests that juries can and do, form incorrect ideas either from rape myths or from purely incorrect ideas.

Willmott[113]

Dr Dominic Willmott is a Senior Lecturer in Forensic Psychology at Manchester Metropolitan University and specialises in jury decision making in rape trials. Willmott conducted a study containing mock rape trials and assessed whether or not rape

[107] Ibid
[108] Ibid
[109] Rape and Sexual Offences (n95)
[110] Ellison and Munro (Ibid n109)
[111] Ibid
[112] Ellison and Munro (Ibid n109)
[113] Ella Rhodes, 'There is a problem with juries acting on myths rather than evidence', The British Psychology Society, Vol. 31, December 2018, pp. 16-19

myths had any bearing on the mock jury's verdict. The conclusion of his study is far more troubling than that of Ellison and Munro's as Willmott found:

> 'that rape attitudes were the strongest and most consistent predictor of the verdict decisions that juries made across the nine mock trials. In fact, across two separate studies involving almost 450 mock jurors, rape-myth acceptance was the only consistent predictor of verdict outcomes'.[114]

As a result of such startling evidence, Willmott suggests that jurors sitting on rape and sexual assault trials should be educated on rape myths in an attempt to prevent them from being influenced whilst making their decision. This suggestion has been received with significant criticisms such as the issue of cost and practicality, but it begins to raise the question, are juries fit for purpose if they are so easily influenced by rape myths?

3.4 Should jurors sit on rape cases?

Mark Twain described juries as 'the most ingenious and infallible agency for defeating justice that human wisdom could have devised'[115] and in light of Willmott's study it would seem that there is a strong argument here. If jurors are so easily influenced by stereotypes, prejudices and rape myths, then why are they still being allowed to judge the guilt of defendants in rape and sexual assault trials? This is a highly contentious question that draws a line in the sand amongst practitioners and journalists. Julie Bindel, co-founder of Justice for Women argues that juries should not sit on rape and sexual assault trials and instead appoint a specially trained judge who receives 'a day or two of training in sexual offences which includes dispelling myths'.[116] Joanna Hardy from Red Lion Chambers disagrees with the propositions made by Bindel. Directly addressing the issue of rape myths, Hardy argues that 'to conclude that the jury system must be abolished because citizens might be tainted by rape myths is to miss the point entirely'.[117] She argues that rape myths should be removed from society and that we should be educated about them generally at school or university, this

[114] Rhodes (Ibid n143)
[115] Simon Jenkins, 'Juries? It's time they went the way of the ducking stool' (*The Guardian*, 21 February 2013)
[116] Julie Bindle, 'Juries have no place at rape trials – victims deserve unprejudiced justice' (*the Guardian*, 12 August 2016)
[117] Joanna Hardy, 'Judging the jury: Why rape trials can still be in safe hands', The Law Society Gazette, 11 December 2018, < https://www.lawgazette.co.uk/commentary-and-opinion/judging-the-jury-why-rape-trials-can-still-be-in-safe-hands/5068627.article>

way they will not enter the jury room.

Conclusion:

The Sexual Offences Act 2003 lays out clear provisions relating to the protection of individuals and specifically vulnerable individuals. The first, and most obvious form of protection the law provides is the definition of consent itself, which is contained under s.74 of the Act. The definition ensures personal autonomy as the person giving the consent must do so by their own choice, and pressure as a point of law will vitiate the consent.[118] It also prevents those who are not in a position to give consent from being taken advantage of as they are required to have the capacity to consent. If they do not have capacity, then they are unable to consent, and any sexual act performed on them will amount to an offence. Overall, the law does offer vulnerable victims significant protection in rape and sexual assault cases.

In order for our justice system to work, it must be legally and procedurally balanced and fair. This guarantees that the rights of the complainant are not outweighed by the rights of the defendant.[119] As a result, it is very important that the law provides the defendant with 'tools' with which to fight false allegations. The first being the basic principles of criminal law, the burden and standard of proof. It provides that the defence don't have to prove anything, if they wish, the defendant does not even need to give evidence, in the eyes of the law they are innocent until proven guilty. In addition, the prosecution has to meet the high standard of proof – beyond reasonable doubt. Despite facing substantial criticism[120] this high standard has to remain to ensure that defendants do not lose their liberty and often their livelihood as a result of weak evidence. Reducing this standard would be wholly dangerous and asymmetrical within the criminal justice system. The law also provides the complete defence of 'reasonable belief'[121] in consent. Where a defendant reasonably believes that the complainant consented to the sexual act the offence will be negated, and the defendant found not guilty. Finally, turning to procedural fairness the law does allow the defence to question the complainant on sexual history, but only in very limited

[118] s.76 Sexual Offences Act 2003
[119] Article 6 Human Rights Act 1998
[120] Zoran Dimitrievski *et al*, 'Doubt in favour of the defendant, Guilty beyond reasonable doubt', pp 9, <https://www.osce.org/mission-to-skopje/345461?download=true> accessed 20 March 2020
[121] ss.1(2), 2(2), 3(2), 4(2) Sexual Offences Act 2003

circumstances.[122] The case of *Evans*[123] showed that in some cases the sexual history of the complainant is highly important and should be brought forward as evidence for the jury to examine. This is arguably one of the most criticised points of law in relation to sexual offences but *Harrison*[124] illustrates that the law does not permit this kind of evidence in every case; it could not therefore be argued that this point of law is duly unfair to complainants.

At this point, it would be wholly fair to conclude that the law on sexual consent is an asset to both the vulnerable victims and defendants who are subject to rape myths. For the reasons set out above the law can in fact offer protection to both parties without the protection of one being detrimental to the other. What now must be decided is do juries jeopardize this? Jurors are the independent officials of the criminal justice system whose ultimate task is to judge the guilt of the defendant based upon the evidence. It is vital that they act fairly and without prejudice otherwise their use in the system becomes obsolete and dangerous. Both academics and practitioners have questioned the use of juries in rape and sexual assault trials as their interaction with rape myths are concerning. Some studies suggest that jurors are fully aware of rape myths and are hesitant to believe them whilst others suggest the decisions, they make are wholly influenced by rape myths and therefore are the reason for the low conviction rate in rape and sexual assault trials.[125] The only practical alternative to jury trials is for specially trained judges to sit on rape cases and be the sole decider of guilt. This alternative suggests that judges even with training are infallible, which is a very dangerous stance to take.

Overall, the law on sexual consent is able to protect both vulnerable victims and defendants faced with false allegations. However, it would seem that the question more central to this issue is whether jurors jeopardize the fairness and balance of the law. Put simply, the answer is yes, jurors who are influenced by rape myths pose a significant threat. Therefore, the sooner a practical alternative is found and implemented the better for our justice system, that is, if such an alternative should exist.

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[122] Youth Justice Criminal Evidence Act 1999
[123] *R v Evan*s [2016] EWCA Crim 452
[124] *R v Harrison* [2006] EWCA Crim 1543
[125] Lara Hudspith**, '**How tackling 'rape myths' among jurors could help increase convictions at trial', *The Conversation*, December 2019, <https://theconversation.com/how-tackling-rape-myths-among-jurors-could-help-increase-convictions-at-trial-123797>