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"How an Ordinary Jury Makes Sense of it is a Mystery": Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003

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Abstract The *Sexual Offences Act 2003* introduced significant reforms to the offence of rape, amid concerns regarding the low reporting and conviction rates for rape. One of the key aims of the Act was to improve the law relating to consent, in order to assist a jury in their decision making process. In addition, disquiet had been expressed with regards to the subjective nature of the mens rea of rape. Consequently, the 2003 Act reformulated the law so as to introduce an objective test. This article discusses the findings of a qualitative research project undertaken with 14 Barristers in the North West of England, in order to investigate counsels' opinions regarding the 2003 reforms. Drawing upon data collected from semi-structured interviews, the article examines barristers' perspectives with regards to the definition of consent, the 'consent presumptions', and the reformulated mens rea. In conclusion, it will be argued that while the barristers were not overly optimistic about the reforms introduced by the 2003 Act, they were also opposed to further reform to the substantive law and increased jury directions. Barristers argued that the law relating to rape should remain as simple as possible.

Keywords Rape · Consent · Mens rea · Sexual Offences Act 2003 · Barristers' perspectives · Justice

Introduction

The *Sexual Offences Act 2003* dramatically altered the legal landscape relating to sexual offences generally and the offence of rape specifically. The then Labour Government expressed concern that the law was not only out of date, but also potentially fostered unfairness, with attention being drawn to the dramatic decrease

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in rape conviction rates: from 25% in 1985 to 7% in 2000.[1] In *Protecting the Public* it was surmised that this decrease correlated with an increase in the reporting of "acquaintance rapes".[2] In comparison to "stranger rape" cases, the complainant's lack of consent in an acquaintance rape is overwhelmingly the key issue and New Labour were keen to introduce "greater clarity in the law as it relates to consent" in order to assist the jury.[3] To this end, the Act introduced a statutory definition of consent (section 74) and also a range of conclusive and evidential presumptions relating to the absence of consent and the defendant's belief in consent (sections 75 and 76). In addition the mens rea of rape was reformulated, so as to require a reasonable belief in consent (section 1(2)). Throughout the reform process it was suggested that these reforms would encourage victims to report offences and also increase the conviction rate.[4]

Despite such amendments, concerns regarding the conviction rate for rape remain. The extent to which the conviction rate continues to dominate the rape debate has, however, been criticised by the *Stern Review,* in which it was noted that the frequently cited 6% is somewhat misleading.[5] Similar to the findings of a Ministry of Justice research project,[6] the *Stern Review* noted that the conviction rate stood at 58% with variance in estimates being due to the manner in which the rate is calculated.[7] While the 6% statistic relates to those cases which are reported to the police and end in a conviction, 58% is based solely on cases which proceed to trial. Hence, provided a rape case reaches the trial stage, a conviction is no less unlikely than it is for any other serious offence. This, nevertheless, still represents an 18% decrease in rape convictions since 1979.[8] Furthermore, a very small percentage of rape cases proceed to trial and a major factor in the decision making process as to whether cases should be taken forward, is whether a conviction is likely. Thus, the 58% statistic may be seen to obscure somewhat the unique biases that relate to rape cases as they progress through the criminal justice system. On this basis, it can be argued that the 2003 reforms have not thus far achieved their stated aim of significantly impacting on the rape conviction rate.

Academics have also criticised the reforms noting that not only do terms such as "freedom and choice" "raise philosophical issues of such complexity as to be ill-suited to the needs of criminal justice",[9] but also that the phrasing of the mens rea permits a degree of contextualisation which reduces the objectivity of the test.[10] Doubts have also been raised regarding the range of circumstances covered by the

[1] Home Office (2002, p. 9).

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] The Government Equalities Office (2010, pp. 9–10).

[6] Thomas (2010).

[7] The Government Equalities Office (2010, pp. 9–10).

[8] Temkin (2002, p. 28).

[9] Temkin and Ashworth (2004, p. 336).

[10] Ibid. p. 342.

consent presumptions, the manner in which sections 74–76 potentially generates a moral hierarchy,[11] and the level of evidence needed to rebut a section 75 presumption.[12]

This article contributes to the debate in this area by drawing upon the findings of a research project which aimed to: generate insights into the impact of the 2003 reforms, highlight where the law is still failing, and reflect on how improvements could be made. The authors rationalised that the most effective way of analysing the impact of the reforms was to speak with those who work with the law on a daily basis. To date, little work has been carried out with barristers and that which has was conducted prior to the enforcement of the 2003 Act.[13]

The follow section of the article will discuss the methodology adopted. The article will then proceed to analyse the opinion of counsel with regards to: the definition of consent, the consent presumptions contained in sections 75 and 76, and finally the mens rea of rape. In conclusion it will be noted that whilst barristers were not overly optimistic about the law reforms introduced by the *Sexual Offences Act 2003,* they were decisively not in favour of further law reforms or jury directions. In contrast, in their consideration of how to engender justice for rape complainants, they focused on the procedural aspects of the trial. This article complements and furthers previously published research which focused specifically on barristers' perspectives regarding rape, voluntary intoxication, and the Sexual Offences Act 2003.[14]

Methodology

Fourteen barristers (10 men and four women) were interviewed, a divide which was roughly representative of the gender make up of those criminal barristers practising in the study district. Participants were recruited from five chambers and the Crown Prosecution Service via liaison with a local circuit judge who had extensive experience of residing over sexual offence trials. The number of years of experience across the study sample ranged from seven to 34, with a mean of 19.4 years. The majority of barristers could be classified as highly experienced, five were grade four prosecutors and two sat as recorders. All barristers had been in practice prior to the 2003 Act and had knowledge or direct experience of trying rape under the pre 2003 law, enabling them to draw comparisons, highlight improvements, and articulate possible failings with the new legislation. Twelve barristers had experience of prosecuting and defending rape cases whilst barrister eight and 14 only had experience of defending, due to their more junior status. While the study sample cannot be viewed as representative of the entire barrister population involved in rape cases, it does draw together a broad range of experience, enabling important issues and insights to be gained in relation to rape and the 2003 reforms.

[11] Temkin and Ashworth (2004).

[12] Finch and Munro (2004).

[13] Kelly, Temkin and Griffiths (2006); Temkin (2000); Temkin and Krahe (2008).

[14] Gunby, Carline and Beynon (2010).

The semi-structured interviews lasted a minimum of 1 hour and up to an hour and 45 min. Schedule questions addressed how the relevant 2003 provisions were perceived by practitioners, worked in practice, and their overall impact in relation to improving the law of rape. The interview schedule was devised following a review of the relevant literature and the final version of the schedule was sent to the liaison judge for comment and feedback before the first interview took place. The barrister transcripts were independently scrutinised by the two investigators in order to identify broad themes, these were coded using NVivo, and were discussed and agreed by the investigators to ensure there was consistency in their allocation.[15] This article focuses specifically on the themes developed in relation to the amendments made by the 2003 Act to consent and mens rea.

Section 74 and Consent: A Clear and Unambiguous Definition?

Prior to 2003 consent was governed by the common law. The key judgment, *R v Olugboja,*[16] did not, however, provide a definition of consent, but rather stipulated that the term should be given its ordinary meaning.[17] Lord Justice Dunn further noted that a distinction existed between a mere submission and real consent and opined the jury was to arrive at a decision by "applying their good sense, experience and knowledge of human nature and modern behaviour."[18] This decision was, however, criticised as being unduly vague and as giving too much discretion to juries which consequently risked "very different conclusions being drawn on similar facts in different cases."[19] Hence, section 74 aimed to assist the jury in their decision making process by providing a clear and unambiguous definition of consent.[20] As consent is pivotal to the offence of rape, a clear understanding of what consent involves is undoubtedly necessary. Consequently, section 74 states: "A person consents if he agrees by choice and has the freedom and capacity to make that choice."

Notionally, study barristers were in favour of a statutory consent definition with one barrister commenting, in line with Governmental rhetoric, that the definition was "as clear and comprehensible as any legal direction" (barrister 6). However, many others were less confident about the wording and impact of section 74. Several barristers commented that while the definition was perfectly explicable from a lawyer's perspective, they doubted the extent to which it was comprehensible to jury members. For example, barrister one stated: "How an ordinary jury makes sense of it is a mystery", a perception which concurs with findings of other empirical studies.[21] It transpired throughout the interviews that the statutory

[15] For a more detailed discussion of the methodology, please see Gunby, Carline and Beynon (2010).

[16] *R v Olugboja* [1982] 1 QB 320.

[17] Ibid.

[18] Ibid. p. 332.

[19] Home Office (2000, p. 10); see also Elliott and de Than (2007, p. 237).

[20] Home Office (2002, p. 16).

[21] Thomas (2010); Home Office (2006); Finch and Munro (2006).

definition was perceived to be more helpful to practitioners, as opposed to jurors, and was considered by some to be perfectly explicable from a lawyer's point of view (barristers four and five). Others commented that the main benefit of section 74 related to preventing judicial "ad libbing and anecdotal comparisons" (barrister 11) and ensuring consistency in jury directions, which subsequently reduced the likelihood of unnecessary appeals due to poor directions. However, barristers commented that while the definition may engender consistency in jury directions this did not necessarily translate into consistency in jury decision making. Several barristers held the belief that, despite the existence of the statutory definition, juries frequently relied upon their own personal definitions and understandings of consent to sexual activity to draw conclusions in rape cases. For example, barrister eight stated: "I think there's probably a common shared perception of what consent is and what it isn't." Barrister five similarly contended that while the jury will listen to the legal directions and definitions in a rape case, they will still draw upon their own common sense version of what consent is and decide a case accordingly. Barrister four also noted that the definition was of little use in a case in which the complainant and the accused give "completely different versions about what happened in the privacy of a room somewhere." A technical definition of consent was felt to be of little assistance in those cases in which the complainant's contention that she did not consent is refuted by the defence, a factor which tends to be pivotal in most "acquaintance rape" cases. As stated by barrister four, in such cases: "legal definitions from a juror's point of view [do not] help at all." While this opinion may appear unsurprising, due to a statutory definition not helping to address the pivotal issue of the lack of independent evidence in rape cases, it is important to recall that the need to develop a definition of consent was premised, partially, on the increased reporting of acquaintance rape cases.[22] It therefore seems problematic that in such cases the statutory definition is considered minimally useful.[23]

Accordingly, some barristers felt the definition had little impact on juries and this led certain participants to dispute its necessity. For example, barrister 12 stated "I think people know what you mean by consent. I don't think the government need to define it for you." Barrister 14 further opined that the definition had simply served to further confuse a jury, and also suggested that any lack of jury understanding may conceivably lead to acquittals. Similarly, barrister one stated: "…quite often, I do think that a juror, in a case on balance, may say well I just don't understand this and I'm not going to convict a man or a woman of this because I don't understand."

Reformulating Consent?

The opinions discussed above suggest that while a statutory definition of consent was generally perceived to be a positive move, this was more in relation to avoiding

[22] Home Office (2002, p. 9).

[23] For a discussion of barristers' perspectives on the issue of voluntary intoxication and capacity to consent, see Gunby, Carline and Beynon (2010); see also Finch and Munro (2005).

appeals as opposed to assisting in a jury's decision making process. While some expressed concerns regarding the precise wording of section 74, there was, nevertheless, a general reluctance to suggest an alternative definition. For example, barrister 11 stated "I'm not sure I'd like to be the one to redraft it" and barrister 10 adopted the following analogy: "…none of us can describe an elephant but we know what it is when it is in the room." These comments substantiate academic concerns regarding the difficulties of basing an offence around a complex concept such as consent.[24] Consent is deemed to be knowable, but yet as escaping precise definition. Given the difficulties with consent, barristers were asked whether they could imagine reformulating the offence of rape in a manner which did not so heavily rely on consent, similar to that discussed by Tadros.[25] Invariably, the answer to this question was no. While consent was deemed difficult to define, reconceptualising rape in a manner which moved away from focusing upon the complainant's lack of consent was considered illogical, for example, barrister 13 asserted "But I mean that's what rape is, isn't it?" and similarly barrister four queried "Um well, what are you left with?" Consent, or its absence, was perceived to be the offence's "central theme" (barrister two), and to remove it from the definition was considered by some to be "very, very dangerous" (barrister 10), and necessitate a "big shift" in consciousness (barrister eight). Generally, the structure of the rape offence was generally considered to be "utterly fair", and any reconceptualisation was considered to problematically "water down" the "terrible crime of rape" which would only, paradoxically, result in fewer convictions (barrister one). Hence, for barristers, consent appears to retain its "moral magic".[26]

Presumptions Relating to Consent: Sections 75 and 76

Sections 75 and 76 introduced a range of evidential and conclusive presumptions regarding the absence of consent and the defendant's belief in consent. During the reform process it was stated that the introduction of such presumptions would assist the jury with the "fundamental question" of whether the complainant did consent to the sexual intercourse and "send a clear signal to the public about the circumstances in which sexual activity is likely to be wrong."[27] However, the impact of the presumptions was found to be significantly less than anticipated and, in line with the Home Office Stocktake,[28] counsel interviewed had very little experience of cases in which a presumption had been applied.

Overwhelmingly, barristers expressed no misgivings with regards to section 76. This may seem surprising due to the fact the section introduced conclusive presumptions regarding the absence of consent. Under section 76, if the prosecution establish beyond a reasonable doubt that the defendant deceived the complainant in

[24] Tadros (2004).

[25] Ibid.

[26] Hurd (1996).

[27] Home Office (2002, p. 16).

[28] Home Office (2006).

a relevant manner, the jury will be directed to convict and he will not be permitted to argue that, despite the deception, consent was present. Due to the conclusive nature of the presumption, the section only applies in very limited circumstances: when a complainant is deceived as to the nature or the purpose of the act or the defendant impersonated a person known personally to the complainant. Furthermore, the Court of Appeal in *R v Jheeta*[29] confirmed that the phrase "nature or purpose" is limited to the physical nature of the sexual act, hence maintaining the distinction between fraud as to the fact and a fraud as to the inducement, which operated prior to 2003.[30] The Court in *Jheeta* was clear to indicate that "[n]o conclusive presumptions arise merely because the complainant was deceived in some way or other by disingenuous blandishments or of common or garden lies by the defendant."[31] Barristers were keen to express their support for the restrictive nature of section 76, with there being no support to extend the section any further. Barrister two, for example, stated: "to expand them any further, I think, removes both the judicial and the jury's sort of right to consider the evidence properly." Opinion was, however, rather more fraught with regards to section 75.

As initially proposed, section 75 would have placed a persuasive burden upon the defendant to prove the presence of and/or a reasonable belief in consent, if the prosecution established the existence of certain circumstances. However, due to disquiet during the reform process that such an approach could potentially contravene the presumption of innocence,[32] the section now only places an evidential burden upon the defendant. The relevant circumstances include the use or threats of violence against the complainant or a third party, and cases in which a complainant was asleep, unconscious, unlawfully detained or involuntarily intoxicated (see section 75(2) (a–f)).[33] Under section 75 a judge will determine whether a presumption arises and also determine whether the defendant has raised sufficient evidence to rebut the presumption.[34] If it is not rebutted, the jury should be directed to convict, provided they find that the prosecution have proved that the relevant circumstance existed and the defendant was aware of its existence.[35] If rebutted, the burden falls back on the prosecution to prove beyond a reasonable doubt the absence of consent on the basis of section 74.[36] The current study, however, suggests that there exists significant confusion with regards to the operation of section 75 and a general reluctance to engage with the presumptions.

Barristers overwhelmingly felt that section 75, simply "state[d] the obvious" (barrister three) and considered that jurors would be intelligent enough to realise that if someone was detained, asleep or threatened with violence, they would be

[29] [2007] EWCA Crim 1699.

[30] See for example *R v Linekar* [1994] EWCA Crim 2.

[31] [2007] EWCA Crim 1699 para. 24.

[32] Temkin and Ashworth (2004, pp. 333–334).

[33] See Gunby, Carline and Beynon (2010) for an analysis of counsels' opinion regarding intoxication and section 75.

[34] Card (2003); Home Office (2004); *R v Zhang* [2007] EWCA Crim 2018.

[35] Home Office (2004); *R v Zhang* [2007] EWCA Crim 2018.

[36] Home Office (2004); *R v White* [2010] EWCA Crim 1929.

unlikely to have consented to the intercourse. For example, barrister four argued, "I don't think people are that daft really, you know, that they have to be given a definitive list … did they really need it pointing out to them?" Considering the extent to which empirical research consistently indicates that a significant number of people hold problematic and stereotypical victim blaming attitudes,[37] the contention that the presumptions are unnecessary can be challenged. Furthermore, the presumptions may be critiqued on the basis that they encompass a rather narrowly conceived set of circumstances, circumstances which arguably maintain and perpetuate notions of "real rape".[38] This is due to section's focus on the presence of violence and a concern with sexual intercourse in circumstances in which a defendant takes advantage of a woman who is placed in a submissive position. In addition, they are in some respects regressive; for example, prior to 2003 if a complainant was, at the relevant time, asleep or unconscious, her lack of consent was considered to be conclusive.[39] Now, however, a defendant is able to argue that despite being asleep or unconscious, the complainant nevertheless consented.

Barristers were also concerned that section 75 merely served to over complicate a trial. The perceived complex nature of the presumptions appears to have engendered an environment in which their application was avoided. For example, barrister three commented: "…judges find them very, very complicated. And really, making consent too complicated is sometimes not a good idea." The general tendency was to keep the trial as simple as possible and to not overload the jury "with either too many counts or too much law" (barrister one). Considering it is, strictly speaking, the judge who decides whether a presumption has been triggered, this judicial reticence undoubtedly reduces the chances of a presumption coming into play. Problematically, such an approach arguably disadvantages complainants as they are not permitted to rely on the protection offered by section 75. For example, barrister 14 talked about a case in which section 75 was not triggered despite the existence of evidence that violence had been used against the complainant. They stated that the "judge circumvented the presumption", and further alluded to the fact that this decision was approved by all involved in the case. They stated: "I was fortunate enough to be prosecuted by a very, very senior and experienced barrister, who decided to just take the best points of his case, rather than throw everything." Thus, judicial reticence to trigger the presumption was not challenged by the prosecuting counsel. In addition, it was contended that the use of a section 75 presumption implied that the Crown's case was weak and that little confidence was held in obtaining a conviction on the basis of the complainant's testimony alone. For example, barrister eight commented: "…there's a saying at the bar that if you're worried about the law, your case is in trouble." Here a reliance on a presumption was seen to indicate that the prosecution were dependent upon a burden being placed on the defendant in order to win the case. This potentially reinforces certain myths about "good rape victims" and "real rapes".[40] "Good

[37] Opinion Matters (2010); Temkin and Krahe (2008).

[38] Estrich (1988).

[39] See *Larter v Castleton* [1995] Crim LR 75.

[40] Estrich (1988).

victims" do not need the law's assistance to achieve a conviction; her evidence alone will suffice in convincing the jury as to the guilt of the accused.

The reluctance to engage with the presumptions was linked to a perception that judges were "worried about trespassing into the jury's domain" (barrister two). Despite these concerns, and in line with academic conjecture,[41] there was a general agreement that the evidential burden placed upon the accused under section 75 was relatively easily discharged. Furthermore, it was in relation to the issue of rebutting a presumption that confusion amongst counsel became apparent. Numerous barristers inferred that it was the jury, as opposed to the judge, who would decide whether a presumption had been rebutted. For example, barrister 10 stated: "there is often evidence, even if it's from the defendant himself, and the jury will latch on to that", and similarly barrister 12 noted: "…it really does very much come down to who the jury believe." This may go some way to explain the perspective that section 75 is considered to complicate a trial and confuse a jury. Given the level of experience of the barristers interviewed, one must assume this confusion is due to unclear drafting and a lack of information regarding how the legal provision should work in practice. Indeed the case of *R v White*[42] illustrates that this confusion is not limited to counsel. The appellant's conviction for sexual assault by penetration was quashed by the Court of Appeal as the trial judge had directed the jury that they should decide whether the defendant had rebutted presumption section 75(2)(c). His Honour stated: "In simple terms, that means that if you are satisfied that she was asleep, the law places an evidential burden on the defendant to satisfy you, on the balance on probabilities, that he had a reasonable belief the complainant was consenting".[43] Such a direction was considered to be both unnecessary and "baffling",[44] and the Court of Appeal reiterated that it was the judge, and not the jury, who decides whether or not a presumption has been rebutted.[45] Clearly, reform or training on the operation of the presumptions is necessary.

Only one barrister suggested extending the section to include "scenarios where the person knows very well that they have a sexually transmitted disease and then goes and sleeps with another individual who doesn't know that, [and] has no way of knowing it" (barrister 12). This is an interesting and arguably radical suggestion considering the law thus far has been reluctant to permit a deception, whether implied or explicit, regarding sexually transmitted infections to vitiate consent to sexual intercourse and consequently label the activity rape. In contrast, if a deceived individual becomes infected, the offence of causing grievous bodily harm under section 20 *Offences Against Person Act 1861* is deemed appropriate.[46] Indeed, the Court of Appeal supported this distinction in *R v B*[47] and held that an implied deception regarding the defendant's HIV status was not relevant to the issue of

[41] Finch and Munro (2004).

[42] [2010] EWCA Crim 1929.

[43] Ibid. para 8.

[44] Ibid.

[45] Ibid. para 10.

[46] *R v Dica* [2004] EWCA Crim 1103.

[47] [2006] 1 WLR 1567.

consent under section 74, nor did it fall within section 76. It is, however, noteworthy that the Court of Appeal did not exclude the possibility of such a reform, commenting that:

> That does not mean that we in any way dissent from the view of the Law Commission that there would appear to be good reasons for considering the extent to which it would be right to criminalise sexual activity by those with sexually transmissible diseases who do not disclose that to their partners. But the extent to which such activity should result in charges such as rape, as opposed to tailormade charges of deception in relation to the particular sexual activity, seems to us to be a matter which is a matter properly for public debate.[48]

Mens Rea: From an Honest Belief to Contextualised Objectivity

The mens rea of rape has been a subject of consternation over the years. The subjective test, developed by the House of Lords in *DPP v Morgan*[49] was labelled "the rapists' charter",[50] as an unreasonable but honest belief in consent could enable a defendant to avoid a rape conviction. During the reform process, concerns were expressed that this subjective test "contribute[d] in some part to the low rate of convictions for rape."[51] Thus, and in contrast to the general trend in criminal law,[52] the reformulated mens rea in section 1(c) requires the defendant's belief in consent to be reasonable, and also appears to place an element of responsibility on to the defendant to ensure the presence of consent, as juries are directed to take into account "any steps A has taken to ascertain whether B consents" (section 1(2)). Nevertheless, the definition has been critiqued on the basis that it enables a jury to take into account "all the circumstances" when evaluating whether a defendant's belief in consent was reasonable. One key concern is that this contextualisation may problematically permit a jury to take into account stereotypical and sexist views regarding appropriate female behaviour.[53]

The majority of barristers were not opposed to the adoption of an objective test. Indeed, barrister one commented that it was "one of the few coherent, simple directions." Certain barristers expressed opinions decisively in favour of the move away from the subjective test, echoing the perception that the honest belief approach problematically fostered injustice. In particular, barrister eight stated: "I think it has to be objective. I think it's just a copout to make it subjective. Some of the …defendants I represent, you couldn't make it subjective, because they would …they'd get away with anything." Likewise, the move towards examining the

[48] Ibid. para, 20.

[49] [1976] AC 182.

[50] Temkin (2002, p. 119).

[51] Home Office (2002, p. 17).

[52] *R v G* [2003] UKHL 50.

[53] Temkin and Ashworth (2004).

behaviour of the defendant and requiring him to take appropriate steps was supported by certain barristers. For example, barrister 12 stated:

> I think it requires positive actions by a defendant and it's effectively saying, well, were you really paying attention to what this other person was doing? … I think that is quite important because what it is doing is saying that sex is to do with two individuals. And you can't focus on one, the person who is making the complaint, you've got to focus on the other as well.

Only three barristers expressed strong misgivings with regards to the move away from a subjective test, with barrister seven being highly critical of the manner in which the test now requires the defendant to "show they're innocent." Moreover, this barrister proclaimed that the move towards establishing a test of reasonable belief was "unrealistic", as they perceived it to be impossible for a "third party to come along and declare whether or not your belief is reasonable", particularly if the complainant and defendant where in a relationship at the relevant time. Others, whilst not against the adoption of an objective test *per se*, nevertheless queried the inclusion of the phrase: "any steps A has taken to ascertain whether B consents" (section 1(2)). In particular it was argued that the "spontaneous" (barrister eight) and "passionate" (barrister 11) nature of sexual encounters was antithetical to section 1(2), on the basis that it appeared to require the defendant to stop and enquire whether the complainant was consenting. Barrister 11 noted: "I think that's very often what jurors have sympathies for, the man that, you know, when is he supposed to stop and say, you know, just before the act of penetration, may I please establish with you that we are still consenting?" Such perspectives, it is argued, problematically perpetuate notions of uncontrollable male sexuality and maintain women as the gatekeepers to sexual intercourse.[54] This is particularly so, given the continued expectation that women should strongly signal their lack of consent, as will be discussed below.

In addition, academic concerns regarding what might fall into "all of the circumstances" appeared to be well-founded. Barristers' reflections on how a defendant may establish that his belief was reasonable in the circumstances indicated that not only does the test lead to a re-examination of the complainant's behaviour, but also continues to permit problematic assumptions regarding female sexuality to pervade the legal arena. In line with the findings of mock jury trials,[55] arguably too much attention was given to the complainant's behaviour prior to the sexual intercourse. Indeed, actions on behalf of a complainant which were considered to support a reasonable belief in consent included "flirting", "evidence of attraction", and "being invited back to the bedroom" (barrister 10 and barrister three), with contrasts being drawn with stranger rape cases, involving, for example, one in which the complainant was "jogging around the park" (barrister seven). Moreover, there was also an expectation that a complainant should actively demonstrate a lack of consent, despite the fact that this is not strictly required by the

[54] Garvey (2005).

[55] Ellison and Munro (2009).

law.[56] For example, barrister 11 commented that defendants will frequently assert: "well there was nothing in her behaviour demonstrative or implied that led me to believe that she was not consenting." Correspondingly, a jury would also question "well how was she demonstrating it if she …didn't say no, she didn't shout, she didn't try to get him off, she just lay there, according to her own evidence. Well, how it is supposed to know from that?" As opposed to enquiring whether the defendant had taken steps to ascertain consent, the emphasis remains on the complainant to display her lack of consent.

Such perceptions resonate with Temkin's argument that certain stories are routinely told at trial, and facts and events are reconstructed in order to fall within one of a limited range of scripts.[57] Overall, it was generally considered that it was not difficult for a defendant to establish that his belief in consent was reasonable, with some barrister's commenting that "it's relatively easy" (barrister nine). The ease at which this can be achieved is, arguably, evident with reference to the case in which the complainant invited the defendant back to the bedroom. Significantly, he was invited back along "with other people, sitting on the bed, listening to music" (barrister three). It is disconcerting that such a general invitation could amount to evidence of a reasonable belief in consent. Thus, the impact of the reformulated mens rea is by no means as dramatic as it could have been. Indeed, one barrister commented that the reform had not "made a ha'peth of difference" (barrister six). Overall, it is relatively easy for defence establish a reasonable belief in consent and the complainant's behaviour remains firmly in the spotlight.

Conclusion

The research study highlights that certain provisions introduced by the 2003 Act are not being utilised in a way that was intended. Indeed, the presumptions appear to be infrequently incorporated into trials despite the possible existence of the given circumstances. This raises serious questions over whether these provisions have met their intended aims of helping to improve the prosecution of rape cases. Whilst barristers were not overly supportive of the relevant reforms introduced by the *Sexual Offences Act 2003*, they were not in favour of further reform in relation to the substance of the rape offence. It was argued that "tinkering" with legal definitions would not improve the law, nor would introducing further jury directions, a significant finding considering the detailed jury directions introduced by the recent edition of the *Crown Court Bench Book* in order to deal with "mistaken assumptions" regarding rape.[58] Any further over complication of the trial was considered to be inauspicious as it was felt that the law should be as clear and concise as possible if it is to be effectively utilised. Indeed, the point was frequently made that the increasing number of directions and definitions that judges are required to provide often appear to be designed to "push" (barrister 8) a jury down

[56] *R v H [Hysa]* [2007] EWCA Crim 2056.

[57] Temkin (2000, p. 41).

[58] Judicial Studies Board (2010).

the road to conviction. A number of barristers did not think this was helpful and actually felt that it could be detrimental to the trial process. Others lamented the ability of the legal system to deal effectively with the phenomenon of rape: "It's one of the big problems with rape, you're using a very blunt instrument like the law to try and deal with a very complicated social interaction" (barrister 12). For this barrister education and awareness at a societal level was also deemed paramount in order to allow legislation to optimally impact. Societal messages that promote the importance of acting ethically and promoting social responsibility on the part of men, as well as women, were suggested.

Several barristers were forthcoming with suggesting changes to the procedural aspects of the trial. These included: altering the physical layout of the court room, familiarisation with the court process, and fostering a feeling of participation within the process, especially for the complainant, through additional input and information about the trial process. A consideration of alternative ways complainants could give their evidence effectively, for example, allowing witnesses to use their everyday language, rather than imposing the official language of the courts to describe sexual details and actions, was mooted. It was also proposed that complainants should be told in advance that they are allowed to sit down to give their evidence and be provided with additional and more discreet ways of conveying distress to the judge, who can subsequently request breaks. Engendering justice for rape victims may consequently lie more within the process of the trial as opposed to the black letter of the law. Indeed, it is useful to note the comments of barrister 12 in articulating the current limits of legal modifications. They argued that "[w]e have an adversarial system. I think while you maintain a system like that, you're going to have… it is a combat situation. So there's only so much that you can do."

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