

Juries and sexual history evidence pervert the cause of justice in rape trials.

Justice does not prevail when it comes to rape in the United Kingdom's Criminal Justice system. In the UK 1.5% of rape cases recorded by the police lead to a charge, meaning a person is 15 times more likely to be offered a place at Cambridge University than see their rapist charged.¹ To change these disturbing statistics, two major reforms ought to be enacted: the abolition of juries in rape trials, and an amendment to the Youth Justice & Criminal Evidence Act 1999 preventing sexual history evidence from being used to prove consent.²

Sections 41-43 of the Youth Justice & Criminal Evidence Act (YJCEA) 1999 sets out the law that sexual history evidence may not be admitted without leave of the court. This is reprehensibly too broad, with judges permitting sexual history in 2/3 of rape trials, due to the evidence falling under eight large categories defined by the Act.³ Most notably, the issue of consent. Consent is the continuous positive communication, given afresh, at every step of the way during a sexual activity, agreed between specific people, with the freedom and/or capacity to decide. Sexual history with third parties has absolutely nothing to do with consent in relation to the accused. In fact, the use of 'third party evidence' undermines Article 6 of the European Convention of Human Rights (ECHR), the right to a fair trial.⁴ Subjecting complainants to the distress and humiliation caused by a traumatising cross-examination is completely irrelevant to their case, and can only be described as 'judicial rape'.⁵ Alternatively, restrictions over sexual history as evidence could be interpreted as having the potential to undermine the defendant's right to a fair trial. However, there is a large limitation to this argument, in that sexual history can in no way prove consent, as consent has to be given both afresh, and explicitly to the defendant. The broad nature of the YJCEA facilitates judicial rape, and has resulted in an abundance of clear violations of the ECHR.

¹ O.Bowcott and C. Barr, Article, The Guardian, "Just 1.5% of all rape cases lead to charge or summons, data finds". <https://www.theguardian.com/law/2019/jul/26/rape-cases-charge-summons-prosecutions-victims-england-wales>

² Rape and Sexual Offences - Chapter 10: The Sexual History of Complainants, Section 41 YJCEA 1999. <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-10-sexual-history-complainants-section-41-yjcea>

³ C.McGlynn, Rape Trials and Sexual History Evidence, section entitled "How common is sexual history evidence?". <https://claremcglynn.files.wordpress.com/2017/09/sexualhistoryevidence-briefing-mcglynn-august-2017.pdf>

⁴ Equality and Human Rights Commission, Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6: Right to a fair trial, (pages 9-10). https://www.echr.coe.int/documents/convention_eng.pdf

⁵ Sexual Offences (Amendment) Act 1976 - Chapter 82, section 2, subsection 3. Definition of complainant. <https://www.legislation.gov.uk/ukpga/1976/82/enacted>

Toxic rape mythology and systemic victim blaming are immense social problems which have been demonstrated and amplified in the courtroom through juries. Few cases prove this issue further than when defence attorney Elizabeth O’Connel told a jury of eight men and four women to “look at the way she (17 year-old complainant) was dressed. She was wearing a thong with a lace front”, in order to validate consent.⁶ The jurors found the thong did symbolise consent, and therefore, the 27 year-old defendant not guilty of rape. Juries undoubtedly bring issues of bias into the courtroom, the idea of being judged by your peers means you are also subject to being judged by societal values at the time. In the instance of rape, this is unjust. Specialist police officers handle sexual violence cases, therefore the same specialism should be present in the courtroom. This would be entirely possible with the appointment of a trained, specialist judge, alongside a panel of assessors with expertise in the field of sexual violence, thereby eliminating the prejudiced nature of a jury and allowing for biased-free trials where social attitudes do not infringe on criminal justice.

Despite jury bias, responsibility for unjust rape trials arguably lies less so with the jury, and more with the criminal justice system. Bias is facilitated within the jury as a direct consequence of the legislation utilised by the system. Over the last 20 years, police reports of rape have increased by over 500%, yet conviction rates have remained the same.⁷ Demonstrating there is truth within the previous statement, that juries are potentially a lesser issue than the use of sexual history evidence. *R v Evans* saw footballer Ched Evans’ rape conviction quashed when third party sexual history was used as evidence against the complainant.⁸ The use of this evidence turned the jury’s attention away from Evans, instead focusing on the complainant's lifestyle and character. The impact of *R v Evans* has been felt by thousands of complainants since, as the case opened the floodgates to flip who is on trial, and enable victims to be questioned as if they were the defendant. But unlike the defence, victims are being questioned on personal evidence that is distinctly unrelated to the case.

In the eyes of Lord Bingham, a Lord Chief Justice of England and Wales strongly in favour of judicial discretion on sexual history evidence, “no rational

⁶ BBC News, “Irish outcry over teenager's underwear used in rape trial”(14th November, 2018) <https://www.bbc.co.uk/news/world-europe-46207304>

⁷ Statista, Number of police recorded rape offences in England and Wales from 2002/03 to 2020/21, <https://www.statista.com/statistics/283100/recorded-rape-offences-in-england-and-wales/>

⁸ *Evans v. R* EWCA Crim 452 (21st April 2016). <https://www.bailii.org/ew/cases/EWCA/Crim/2016/452.html>

person” believes questions about a complainant’s sexual history with people other than the accused are “irrelevant”.⁹ Sexual history used as evidence is not only irrelevant, but undermines Article 6 of the ECHR, creates jury bias, credits rape mythology and encourages victim blaming. A rational person is someone who views these implications as an inexcusable miscarriage of justice, in desperate need of resolution.

⁹ Wikipedia, Tom Bingham, Baron Bingham of Cornhill.
https://en.wikipedia.org/wiki/Tom_Bingham,_Baron_Bingham_of_Cornhill

Bibliography/ Research list:

C.McGlynn, Feminist judgment: R v A (No 2) [2001] UKHL 25. Published November 11th, 2010.
<https://www.theguardian.com/law/2010/nov/10/rape-juries-feminist-judgment>

C.McGlynn, "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence". First Published September 8, 2017.
<https://journals.sagepub.com/doi/full/10.1177/0022018317728824>

Sexual Offences (Amendment) Act 1976, Chapter 82. <https://www.legislation.gov.uk/ukpga/1976/82/enacted>

Rape and Sexual Offences - Chapter 10: The Sexual History of Complainants, Section 41 YJCEA 1999.
<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-10-sexual-history-complainants-section-41-yjcea>

Equality and Human Rights Commission, Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6: Right to a fair trial, (pages 9-10). https://www.echr.coe.int/documents/convention_eng.pdf

BBC News, "Irish outcry over teenager's underwear used in rape trial"
<https://www.bbc.co.uk/news/world-europe-46207304>

Broadway House chambers, "The impact of the Ched Evans case on the law surrounding a Complainant's sexual history. Published May 15th, 2017.
<https://broadwayhouse.co.uk/the-impact-of-the-ched-evans-case-on-the-law-surrounding-a-complainants-sexual-history/>

O.Bowcott and C. Barr, Article, The Guardian, "Just 1.5% of all rape cases lead to charge or summons, data finds". July 26th, 2019.
<https://www.theguardian.com/law/2019/jul/26/rape-cases-charge-summons-prosecutions-victims-england-wales>

C.McGlynn, "Rape Trials and Sexual History Evidence"
<https://claremcglynn.files.wordpress.com/2017/09/sexualhistoryevidence-briefing-mcglynn-august-2017.pdf>

Rape Crisis, "Statistics about sexual violence". 2017.
<https://rapecrisis.org.uk/get-informed/about-sexual-violence/statistics-sexual-violence/>

K.Bhola-Dare and J.Fletcher, "The problematic use of past sexual history as evidence in rape trials".
<https://www.starsdorset.org/blog/the-problematic-use-of-past-sexual-history-as-evidence-in-rape-trials>

Harriet Sherwood, Thong protest in Belfast raises concerns over rape trials. November 15th, 2018.
<https://www.theguardian.com/uk-news/2018/nov/15/thong-protest-in-belfast-raises-concerns-over-trials>

Statista, Number of police recorded rape offences in England and Wales from 2002/03 to 2020/21,
<https://www.statista.com/statistics/283100/recorded-rape-offences-in-england-and-wales/>

Evans v. R EWCA Crim 452. April 21st, 2016). <https://www.bailii.org/ew/cases/EWCA/Crim/2016/452.html>