

EDITORIAL

Rape, Consent and Intoxication: A Legal Practitioner's Perspective

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A common theme of rape trials between two adults is the issue of consent. The prosecution will seek to prove that there was no consent given by the complainant at the time of the alleged offence. The defence will seek to show that there was or might have been consent at the material time. Consent in itself is a fairly straightforward concept and is defined in English Law Section 74 Sexual Offences Act 2003 as 'where a person agrees by choice and has the freedom and capacity to make that choice'. If the tribunal of fact (the jury) are sure there was no consent, they will convict the defendant, and if less than sure, they will acquit. The issue of intoxication significantly complicates this issue from both a prosecution/defence perspective and for the jury in reaching a true verdict on the specific facts of the case. It is important, therefore, that both sides should be aware of the inherent problems that are generated when issues of intoxication bear on the issue of consent.

Academic studies have shown that if the female complainant is portrayed as drunk, she is perceived as less credible and the defendant is seen as less likely to be criminally culpable compared with a sober victim (Stormo *et al.*, 1997; Wenger and Bornstein, 2006). This is significant because drink features prominently in cases of rape (see Crown Prosecutions Service Inspectorate Report 2007—'Without consent – a report on the joint review of the investigation and prosecution of rape cases'). Perceiving her allegation as more likely to be false because she was drunk can have serious implications both at the investigation stage (police perception of the complainant) and at the trial stage (by the jury). In mock jury trials which have explored the impact of social attitudes towards intoxication on the outcome of rape trials, it was found that participants were strongly influenced by myths not grounded in fact—for example, some tended to believe that so long as a person was conscious they were capable of expressing resistance to unwanted sexual contact and that a non-consenting person would struggle even when intoxicated (see Finch and Munro 2005).

Of course, this is only half the problem. To secure a rape conviction, the prosecution must prove not only that the complainant was not consenting (first hurdle) but importantly that the defendant does not reasonably believe that the complainant consented (second hurdle). Section 1(2) Sexual Offences Act 2003 specifically states that whether a belief is reasonable is to be determined having regard to all the circumstances. This will invariably involve issues of intoxication and the defendant's interpretation of 'sexual signals'. This can be problematic particularly if such sexual signals were given consciously or unconsciously by the complainant, not given at all, or where the defendant is under the delusion that they were given

when in objective reality they were not given. This complex inter-relationship between two parties becomes infinitely more subtle and difficult to interpret (from a jury perspective) once alcohol and intoxication are factored into the analysis. This poses subtle problems for the prosecution and the defence practitioner, as to how best to present their respective cases to the jury.

The law recognizes the evidential problems of this area. In England, the lead case is *R v Bree (2007) 2 Cr.App R 13*. In that case, Sir Igor Judge pointed out that after the voluntary consumption of alcohol by autonomous adults, the critical question was whether the evidence proved that the defendant had sexual intercourse with the complainant without her consent. If the complainant consented, her consent could not be revoked. The phrase 'drunken consent is still consent' was said to lack delicacy in the context of sexual intercourse but, properly understood, provided a useful shorthand accurately encapsulating the legal position. It also acts as a reminder that a drunken intention to commit rape is still rape.

He went on to state that it 'would be unrealistic to endeavour to create some kind of grid system which would enable the answer to questions of capacity/consent to be related to some prescribed level of alcohol consumption. Experience shows that different individuals have a greater or lesser capacity to cope with alcohol than others and indeed the ability of a single individual to do so may vary from day to day. The practical reality is that there are some areas of human behaviour which are inapt for detailed legislative structures. In this context provisions intended to protect women from sexual assaults might be conflated into a system which would provide patronising interference with the rights of autonomous adults to make personal decisions for themselves. The problems do not arise from the legal principles. They lie with infinite circumstances of human behaviour and the consequent difficulties of proving this very serious offence'.

It is clear from the above that issues of intoxication when they regularly arise in rape trials have profound consequences for all parties with very different roles in the justice system. From the defence perspective, it seems reasonable to be allowed to explore with the complainant her state of mind at the time of the sexual act especially if she claims that her level of intoxication should have been plain to the defendant and was such that she did not have the capacity to consent. The amount of alcohol the complainant had consumed, perhaps shown in a police blood sample taken some hours after the alleged incident would be less relevant than evidence of how intoxicated she had appeared leading up to and at the time. As reports from hospital

emergency departments show (Apple *et al.*, 2013; Tönisson *et al.*, 2013), there can be wide discrepancy between apparent level of intoxication and blood alcohol level. Fettering the defence's exploration of the complainant's state of mind at that time would cause unfairness and be a source of multiple appeals. On the other hand, from a prosecution perspective, it seems equally reasonable that there be more use made of expert evidence concerning rape myths. As has been stated by a leading academic in this area 'there is a still room for further law reforms in the area of sexual offences to assist in the task of dismantling the stereotypes of rape which involve derogatory beliefs about rape victims and their credibility and serve to cloud the issues in rape cases. The rules on corroboration and third party disclosure should be strengthened and evidence of good character of the complainant should become admissible' (Temkin and Krahe, 2008, 174/175).

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