



Common Rape Myths and the Scottish Legal System

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Introduction

When beginning a discourse on rape culture and myths, it could be argued that the societal attitudes toward these behaviours are fixed by the way in which the legal system of that society conducts the following processes: investigation; prosecution; and the subsequent punishment of these crimes.¹ Scotland, as a common law jurisdiction, has been slow to change its jurisprudence regarding rape and sexual offences: a factor which has affected the entrenchment of commonly held misconceptions surrounding such crimes. The enactment of the Sexual Offences (Scotland) Act 2009 (hereafter known as the ‘2009 Act’) was a key milestone in the development of Scotland’s jurisprudence in this area, as it broadened the definition of rape and consolidated the previous common law offences into comprehensive legislation.² Additionally, in 2017, the Scottish Government passed legislation providing new jury directions which were specific to rape cases in an attempt to rebalance attitudes amongst jurors surrounding rape myths.³

There are questions however about whether this legislation is actively dispelling rape myths within Scottish society. In particular, there are many different myths about the laws surrounding rape, which have been highlighted by several activist groups, notably Rape Crisis Scotland.⁴ The continued existence of these myths can have negative effects on the

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¹ For example, see the effect of Police scepticism creating false allegations within rape cases- Gerry Chambers and Ann Millar, *Investigating Sexual Assault* (Scottish Office: Central Research Unit, 1983), 86-87.

² For a general discussion of the topic, leading up to the change in law, see: Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Scot Law Com No 209 2007).

³ Criminal Procedure (Scotland) Act 1995, ss. 288DA-288DB. [Inserted by the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s.6] (‘CP(S)A’).

⁴ For an example of this organisation’s campaigns, see: Rape Crisis Scotland, ‘I Just Froze’ (Web Page, *Rape Crisis Scotland*, 2018) <<https://www.rapecrisisscotland.org.uk/i-just-froze/>> Accessed 4 April 2018.

attitudes of the jurors who are selected for these cases or those who investigate and prosecute those crimes. Thus, these myths can lead to injustices for victims of rape.

This paper shall address three of the common rape myths listed by both Rape Crisis Scotland and Rape Crisis England and Wales.⁵ First- that false accusations of rape are common. Second- that an element of force or physical violence is required in every genuine case of rape. Third- that true victims of rape would have immediately reported the crime to the police; any delays otherwise suggest the claim is false. This essay shall assess whether the legislation has challenged these myths, determining to what extent public perception has, and would be, influenced by these developments in legislation.

Myth 1: False accusations of rape are common

The first rape myth that shall be addressed is that false accusations of rape are common. In 2014, figures gathered by the Scottish Government show that 23% of those asked ‘agreed strongly’ or ‘agreed’ that women often lie about being raped.⁶ While this is a minority opinion, there are many factors as to why this opinion still exists and may potentially spread further. These contributing factors include media outlets using headline-grabbing cases⁷ and certain misogynistic societal groups regularly propagating rape myths on internet forums.⁸ These attitudes can affect individuals’ approaches to investigating and prosecuting cases of rape, as rape is a crime particularly susceptible to stereotypes and attitudes.⁹ The spreading of the false accusation myth would have repercussions on the legal system, and those who

⁵ See both: Rape Crisis Scotland, ‘Myths and Facts’ (information leaflet, pdf version, *Rape Crisis Scotland* 2017) <<https://www.rapecrisisscotland.org.uk/resources/RCS-SVinScot-leaflet.pdf>> Accessed 4 April 2018; and Rape Crisis England and Wales, ‘Myths about rape’ (Web Page, *Rape Crisis England and Wales*, 2018) <<https://rapecrisis.org.uk/mythsvsrealities.php>> Accessed 4 April 2018.

⁶ Susan Reid and others, ‘Scottish Social Attitudes Survey: Attitudes to violence against women in Scotland’ (*Scottish Government*, 25 November 2014) <<http://www.gov.scot/Publications/2015/11/5577>> Accessed 28 April 2018.

⁷ Examples of headline grabbing titles include: Gemma Mullen, ‘FAKE RAPE SUICIDE Forklift driver, 38, killed himself after being falsely accused of rape... despite texts ‘proving sex was consensual’ (*The Sun*, 19 March 2018) <<https://www.thesun.co.uk/news/5837985/forklift-driver-took-own-life-false-rape-accusation/>> Accessed 9 September 2018; Paul Jeeves, ‘Jail hell over Police rape blunder: Businessman latest victim of justice scandal’ (*Sunday Express*, 24 May 2018) <<https://www.express.co.uk/news/uk/964309/police-falsely-accuse-man-of-rape-robert-Adlington>> Accessed 9 September 2018.

⁸ For instance, see discussions about the ‘Incel’ community: Zack Beauchamp, ‘Incel, the misogynist ideology that inspired the deadly Toronto attack, explained’ (*Vox*, 25 April 2018) <<https://www.vox.com/world/2018/4/25/17277496/incel-toronto-attack-alek-minassian/>> Accessed 5 September 2018; David French, ‘The Sexless Life When Sex is God’ (*National Review*, 4 May 2018) <<https://www.nationalreview.com/2018/05/sex-is-god-for-incel-sexless/>> Accessed 5 May 2018.

⁹ Sokratis Dinos and others, ‘A systematic review of juries’ assessment of rape victims: Do rape myths impact on juror decision-making’ (2015) 43(1) *International Journal of Law, Crime and Justice* 36.

operate within it, making it more likely that women would not have their accusations believed¹⁰ or, if believed by the police, their cases may flounder at the evidentiary stage.¹¹ Having a case flounder at this stage can then leave the impression that the allegation was false.

In 2010-11, a year after the introduction of the 2009 Act, the number of recorded rapes in Scotland was 1,131;¹² 80 of those recorded were proceeded against,¹³ however the number of those convicted was a paltry 36¹⁴. These figures show that one year after the introduction of the 2009 Act, large numbers of reported rapes were not proceeded against and very few led to successful convictions.

It is worth noting that in 2010-11, not much time had passed to allow for the 2009 Act to influence the legal system and thus the attitudes of wider Scottish society. It could be expected that as time passed, later years' statistics would demonstrate an improvement in statistics, given how the 2009 Act intended to clarify the definition of rape. However, any increases turned out to be very minor. In 2016-17, 7 years after the introduction of the 2009 Act the number of recorded rapes was 1,878;¹⁵ 251 of these cases were proceeded against¹⁶ but unfortunately the number of those convicted was a meagre 98.¹⁷ Yet again, these figures show a very small number of reported rapes were proceeded against and, again, fewer led to convictions.

Despite a rise in the number of cases being pursued and prosecuted, the increase itself is very minor. In terms of percentages, in 2010-11 it can be calculated that only 7% of cases were proceeded against and only 3% gained a successful conviction compared to in 2016-17 where

¹⁰ Liz Kelly, 'The (In)credible Words of Women: False Allegations in European Rape Research' (2010) 16(12) *Violence Against Women* 1345.

¹¹ For a general detailed analysis of Scottish crime statistics on rape, and how cases progressed, see: Joe Lovett and Liz Kelly 'Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe' (CWASU, 2009) 86-94 (available at <kunksapsbanken.nck.uu.se/nckkb/nck/publik/fil/visa/197/different>).

¹² National Statistics, 'Statistical Bulletin – Recorded Crime in Scotland, 2010-11' (*Scottish Government*, 5 September 2011) <www.gov.scot/Publications/2011/09/02120241/27> Accessed 19 March 2018, 17.

¹³ National Statistics, 'Statistical Bulletin, Crime and Justice Series: Criminal Proceedings in Scotland, 2010-2011' (*Scottish Government*, 13 December 2011) <<http://www.gov.scot/Publications/2011/12/12131605/5>> Accessed 17 March 2018, 12 (at 5.2.3).

¹⁴ *ibid*, 13 (at 5.3.5).

¹⁵ National Statistics, 'Statistical Bulletin – Recorded Crime in Scotland, 2016-2017' (*Scottish Government*, 26 September 2017) <<https://beta.gov.scot/publications/recorded-crime-scotland-2016-17/pages/22/>> Accessed 17 March 2018, 77.

¹⁶ National Statistics, 'Criminal proceedings in Scotland, 2016-2017' (*Scottish Government*, 27 February 2018) <<http://www.gov.scot/Publications/2018/02/7427/22>> Accessed 17 March 2018, 53.

¹⁷ *ibid*, 54.

only 13% were ever proceeded against, only 5% were ever successfully convicted. It can be calculated that these statistics show that there was only a small rise of 2% in convictions, and a 6% increase in cases proceeded against; both statistics show only small rises which are very unsatisfactory. This demonstrates that while the definition of rape was given added certainty and clarification under the 2009 Act, this legal development has only made small progress in pursuing more cases of rape and securing the conviction of accused rapists.

There is no doubt more reform is needed to investigate and convict more rapists, since it appears that broadening the definition of ‘rape’, and public awareness campaigns, has been insufficient so far. Solutions to this issue have been offered by various sources – for example, some pressure groups have suggested removing the corroboration rule in rape cases as the nature of the crime is one which may not have corroboratory evidence.¹⁸

It is essential to note that these low prosecution and conviction rates are arguably one of the reasons that the false accusation myth persists to this day, as it appears many allegations are actually false, which is not true.¹⁹ Although the removal of the corroboration rule may be a divisive issue²⁰ it is evident that with an acquittal rate of 59% (compared to crimes of robbery with an acquittal rate of 15% or crimes of homicide with an acquittal rate of 17%)²¹ there is a clear need for further reform when prosecuting crimes of rape, and thus dispelling this myth.

Myth 2: If there are no signs of force, then doubt is cast on the validity of the complaint

The second myth that shall be addressed in this essay is that if there are no signs of force or physical injury, doubt is cast on the validity of the complaint. In Scotland’s criminal justice system, the root of the myth ‘where there are no signs of force or physical injury, no rape occurred’ can be traced back to the jurisprudence of institutional writers²² and judgements

¹⁸ Rape Crisis Scotland, ‘News’ (*Rape Crisis Scotland*, 27 February 2018) <<https://www.rapecrisisscotland.org.uk/news/news/conviction-rate-for-rape-and-attempted-rape-falls-to-lowest-level-since-2008091>> Accessed 5 September 2018.

¹⁹ See, Lovett and Kelly (n.11), 93 (Table 5.32) - while only looking at 100 cases, this report showed that while many cases were dropped, only 2 were deemed false allegations by the police (2%).

²⁰ For information on the discussion of the corroboration rule, see Lord Carloway and others, ‘Reforming Scots Criminal law and Practice: The Carloway Report’ (Consultation Paper, Scottish Government, 3 July 2012) <<https://www.gov.scot/Publications/2012/07/4794>> Accessed 7 September 2018.

²¹ National Statistics 2016-17 Criminal Proceedings (n.16), 15.

²² David Hume, *Commentaries on the Law of Scotland, Respecting Crimes*, (2 Volumes, 4th edn, originally published in 1844 (1986 Reprint by Clark Constable)), Vol 1, 302.

such as in *H.M. Advocate v. Sweeney*,²³ where a conviction for rape could be met with capital punishment and the courts took a markedly narrow definition of the crime. Until 2001, the common law belief was that to constitute the crime of rape, there needed to be an element of ‘force’. In 2001, after *Lord Advocate’s Reference (No.1)*²⁴ the need for the use of ‘force’ was since dropped from the definition of rape. Despite this change in the common law (a change which was met with some derision²⁵) and the subsequent enactment of the 2009 Act, the myth that a victim will fight back or will be forced to comply still lingers. Since 2017, judges have been given guidance on how to direct juries in a case where the defence counsel have used a lack of physical injury as evidence that the alleged offence did not happen.²⁶ This guidance provides that force is not always needed to ‘overcome the will’ of the complainer and that a lack of physical injury does not necessarily indicate the complaint is false.²⁷ Rape Crisis Scotland’s campaign ‘I just froze’²⁸ also seeks to inform the Scottish public that there is not only one way that a victim of rape can behave. This campaign included videos detailing how differently victims of rape can react in the event of a serious sexual assault, such as fighting back or submitting to the attack.

There is a question about how effective jury directions are when it comes to jury decisions in rape cases. In an English study, it was found that rape myths were regularly used by defence lawyers in order to undermine victims of alleged rape.²⁹ Often judges and prosecutors would actively resist these rape myths,³⁰ though the study noted that defence lawyers would still rely on these myths, which could operate to undermine the efforts of the judges and prosecution to support rape victims.³¹ Other studies have found that jury directions had a positive impact on the dispelling of rape myths, which thus led to more successful convictions.³² It could be reasonably submitted that if legal actors did not deliberately refer to rape myths in court, jury

²³ 1858 3 Irvine 109.

²⁴ 2002 SLT 466.

²⁵ James Chalmers, ‘How (not) to reform the law of rape’ (2002) 6(3) *Edinburgh Law Review* 388.

²⁶ CP(S)A (n.3), s.288DB (1-7).

²⁷ *ibid*, s.288DB(2) and s.288DB(5).

²⁸ Rape Crisis Scotland, ‘I Just Froze’ (Web Page, *Rape Crisis Scotland*, 2018) <<https://www.rapecrisisscotland.org.uk/i-just-froze/>> Accessed 4 April 2018.

²⁹ Olivia Smith and Tina Skinner, ‘How Rape Myths are Used and Challenged in Rape and Sexual Assaults Trials’ (2017) 26(4) *Social & Legal Studies* 441, 449 and 452-453.

³⁰ *ibid*, 453-454.

³¹ *ibid*, 454-458. The study also notes at 455 that the prosecution should also not rely on rape myths to support their arguments, as this too relies on misconceptions and perpetuates rape myths.

³² Emma Henderson and Kirsty Duncanson ‘A Little Judicial Direction: Can the use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials’ (2016) 39(2) *University of New South Wales Law Journal* 750.

directions could make great progress in dispelling rape myths,³³ which includes the myth that all rapes have force or physical injury.

Since the new jury directions in Scotland were only introduced in 2017, it is not yet possible to view statistics which determine their impact on conviction rates. However, based upon the evidence above, it is reasonable to suggest that jury directions could have an impact on dispelling rape myths,³⁴ such as the myth of requiring force or physical injury.

Myth 3: If there is a delay in notifying the police, doubt is cast on the validity of the complaint

The final myth that shall be addressed in this essay is that if there is a delay in notifying the police of the alleged offence, doubt is cast on the validity of the complaint. The implication being that in these cases every individual who has been the victim of rape or sexual assault will have similar reactions, notably that victims will immediately go to the police. It is thought that a person will scream and shout, lash out at their attacker and immediately notify the police. However, similar to the discussions in the previous section above, this is very rarely the case and victims do not always react in the same way.³⁵ In cases where the victim has been raped, the trauma of being sexually assaulted can invoke many feelings, most of which are not conducive to the victim fighting back or even reporting the crime.³⁶

Recent movements such as #metoo and #timesup have shown that many people have been raped or sexually assaulted and then not disclosed this to police, due to their relationship with their attacker.³⁷ Notably, in the case of Harvey Weinstein where he used his status as a film producer to sexually assault women hoping to be employed in his productions.³⁸ In the other

³³ See also, Louise Ellison and Vanessa E. Munro, 'Reacting to Rape: Exploring Mock Jurors Assessments of Complainant Credibility' (2009) 49(2) British Journal of Criminology 202, particularly 213-214 (who suggest that because many jurors take their misconceptions into the jury room, reforms in this area are required).

³⁴ See, Isla Callander, 'Jury Directions in Rape Trials in Scotland' 20(1) Edinburgh Law Review 76, particularly page 81.

³⁵ For a discussion on how victims of crime react in general rape cases, see, Patricia A. Resick, 'The Trauma of Rape and the Criminal Justice System' (1984) 9(1) The Justice System Journal 52.

³⁶ Avigail Moor, 'Rape: A Trauma of Paralysing Dehumanisation' (2012) 22(10) Journal of Aggression, Maltreatment and Trauma 1051.

³⁷ For example, see the prominent cases of: Harvey Weinstein, Bill Cosby, Kevin Spacey, Max Clifford, Rolf Harris.

³⁸ Telegraph Foreign Staff, 'Harvey Weinstein timeline: Key moments in Hollywood scandal' (*The Telegraph*, 25 May 2018) < <https://www.telegraph.co.uk/news/2018/05/25/harvey-weinstein-timeline-key-moments-hollywood-scandal/> > Accessed 7 September 2018.

well-publicised celebrity cases of historical rape allegations, the attackers also used their celebrity status as a way to hold power over the victims they assaulted.³⁹

Statistics from the 2012/13 Scottish Government survey published in 2014 titled 'Sexual Victimization & Stalking' show that, of the respondents who answered, 83% of those who had experienced a serious sexual assault in their lifetime knew their assailant, whilst 54% of those said that the assailant was their partner.⁴⁰ These relationships often involve a power dynamic where the accused is in a position of trust or responsibility over the complainer. Relationship types include spousal, employment and parental. Frequently, this means the complainer feels powerless in making an allegation resulting in a delay in them going to the police.⁴¹

Similar to the previous section, during a trial for rape, and other sexual offences, it is common where there has been a delay in reporting the crime for the defence to use this as a factor in attacking the validity of the complaint.⁴² As discussed above, this was challenged by the 2017 new Jury Directions for judges. In particular, judges are guided to direct juries that delays in reporting a rape may be for 'good reasons' and is not indicative of a false allegation.⁴³ As explored in the previous section, jury directions could help dispel rape myths, especially at the trial stage. While it is of note that there has been no study into recent Scottish statistics, it is argued that the amendments to jury directions could influence the public's (and perhaps even legal professionals') opinions of rape myths.⁴⁴ This means, like in the second myth discussed, jury directions could work to influence societal attitudes, and in time dispel the myth that victims of rape must come forward immediately for their accusation to be deemed true.

³⁹ For example, see the cases of: Bill Cosby— Jen Kirby, <https://www.vox.com/2018/4/26/17272470/bill-cosby-trial-verdict-guilty-sexual-assault-andrea-constand> Accessed 7 September 2018; And Jimmy Savile— Hardeep Matharu 'Jimmy Savile raped children as young as nine' while working at BBC, leaked report unveils' (*The Independent*, 21 January 2016) <<https://www.independent.co.uk/news/uk/jimmy-savile-raped-children-as-young-as-nine-while-working-at-bbc-leaked-report-finds-a6824436.html>> Accessed 7 September 2018.

⁴⁰ Justice Analytical Services, 'Scottish Crime and Justice Survey 2012/13: Sexual Victimization & Stalking' (Scottish Government, 2014), 29 (available at <<https://www.gov.scot/Publications/2014/06/3479>>).

⁴¹ For a general discussion on the many reasons why a victim may delay in notifying police see: Debra Patterson, Megan Greeson and Rebecca Campbell, 'Understanding Rape Survivors' Decisions Not to Seek Help from Formal Social Systems' (2009) 34(2) *Health & Social Work* 127.

⁴² Smith and Skinner (n.29), 452-453.

⁴³ CP(S)A (n.3), s.288DA.

⁴⁴ Callander (n.34), 81-82.

Conclusion

Despite the Sexual Offences (Scotland) Act 2009 broadening the definition of rape, and well publicised campaigns, aiming to dispel the myth that false accusations of rape are common, there are no signs of significant progress in this area. The 2009 Act has insignificantly influenced the number of reported rapes proceeded against, with a paltry rise of 2% in successful convictions. In 2016/17 the acquittal rate for complaints of rape was 59%, evidencing that this crime is one of the hardest to prosecute in Scotland.

The second myth addressed, has great potential to be challenged by the developments in recent jury direction legislation. However, despite many studies showing that such jury directions assist with the dispelling of these myths, there is no recent data to conclude whether this will actually be effective, as the legislation is still relatively new.

For the final myth, being that a delay in notifying the police of a serious sexual assault casts doubt on the validity of a rape complaint, again new jury directions may actively work to dispel these myths. However, like above, there is currently a lack of recent data to suggest whether there actually has been any influence in dispelling this myth.

It should be noted that the perpetuation of one rape myth feeds into the perpetuation of another. A victim is worried that they will not be believed as 'false accusations of rape are common' so they 'delay in notifying police' or perhaps because they didn't 'fight back and resist' they think they will not be believed, so they again 'delay in notifying police'. This can quickly spiral out of control and the victim may never come forward, which is undoubtedly a serious injustice.

Despite the evidence discussed in this essay, only time will tell whether the continued influence of the 2009 Act as well as the 2017 amendments to jury direction legislation will influence public opinion of these myths. Thus, further study in the future will inevitably be required in this area.