



‘Real Rape’ Stereotypes and the Relevance of a Previous Relationship in (Mock) Jury Deliberations

Victimisation studies have, for some time, indicated that women are most likely to experience sexual assault at the hands of husbands, partners or men with whom they have previously had some degree of intimacy or acquaintanceship (Ministry of Justice, 2013, Myhill & Allen, 2002). Despite this, contemporary commentators have commonly maintained – and lamented the fact that – penal and popular understandings of what ‘real rape’ looks like continue to be dominated by the imagery of a sudden, surprise attack by an unknown assailant. To the extent that rapes committed by men known to the complainant deviate from this ‘real rape’ stereotype, it has been argued that they are less likely to be accepted as genuine and / or serious violations (Temkin & Krahe, 2008). In previous work, we have urged caution lest relying too much on the ‘real rape’ stereotype disguises the complexities at play in framing jurors’ responses to rape cases involving acquaintances (Ellison & Munro, 2010). We have argued that jurors are not necessarily disinclined to accept that rape can, and often does, happen

amongst acquaintances or intimates, and nor do they typically perceive of acquaintance rapes *per se* as less serious than stranger rapes. And yet, despite this, we have supported the concern that conviction in acquaintance rape cases remains peculiarly problematic. Jurors do often find it difficult to convict in these cases, but it is not because they are committed to an empirically unfounded and outdated conception of what ‘real rape’ looks like so much as because these types of cases are perceived as inherently ‘less clear-cut’. They invoke an array of expectations regarding ‘appropriate’ forms of socio-sexual behaviour, conventions of sexual (mis) communication, and presumptions regarding the will and capacity of victims to physically resist an attack.

This ESRC funded study (RES-000-22-4277) sought to shed further light on juror decision-making in acquaintance rape cases.

Summary of Key Findings

- The prevalence and seriousness of rape by known assailants (including current and former sexual partners) was generally acknowledged by jurors
- Prior intimacy / acquaintance was nonetheless seen to give rise to a heightened risk of miscommunication in sexual encounters, which made acquaintance rapes ‘less clear cut’ and ‘more difficult to prove’ than stranger rapes in the eyes of many jurors
- Many jurors additionally exhibited a strong expectation that a genuine victim of rape would engage in vigorous physical resistance against her attacker, and that, as a result, there would be corroborative evidence of injury. For a majority of jurors, the idea that fear or shock may inhibit physical resistance by a rape victim was only plausible in the context of a surprise attack by an unknown assailant

Method

Since the Contempt of Court Act 1981 prohibits research into the content of ‘real’ jury deliberations, a simulation was undertaken. 4 different mini rape trials were scripted and re-enacted by professional actors and barristers in front of an audience of mock jurors. The scenario involved a complainant and defendant who had been in an eight month relationship, which ended approximately two months before the alleged offence took place. The defendant called at the complainant’s home (which they previously shared) to collect some possessions. He and the complainant enjoyed a glass of wine and some coffee as they chatted. A few hours later, as the defendant made to leave, the two kissed. It was the Crown’s case that the defendant then tried to initiate sexual intercourse with the complainant, touching her on the breast and thigh, and that the complainant made it clear that she did not consent to this by telling the defendant to stop and pushing away his hands. The Crown alleged that the defendant ignored these protestations and went on to rape the complainant. When the defendant was questioned by the police, he admitted that he had had sexual intercourse with the complainant, but maintained that all contact was consensual, and this was the approach taken by the defence. A forensic examiner testified that the complainant had suffered bruises and scratches of a sort that were consistent with the application of considerable force, but that – as was not uncommon - she had sustained no internal bruising. He advised that while intercourse had occurred between the parties, the evidence available following his examination of the complainant was neither consistent nor inconsistent with rape.

Each trial reconstruction lasted approximately 75 minutes and was observed simultaneously by between 38 and 42 participants from the local community (recruited by a market research company). Having observed the simulation, jurors were streamed into five different juries to reach a unanimous, or failing that, majority, verdict. These deliberations, which lasted up to 90 minutes, were recorded and subsequently transcribed, coded and analysed.

Another key objective of this study was to explore the impact, if any, upon jurors of the complainant’s use of special measures when compared to giving evidence ‘live and in the flesh’ in the courtroom. As a result, the way in which the complainant delivered her testimony varied across the four trial reconstructions while the substantive content of the basic trial scenario remained constant throughout. In the first trial, the complainant gave evidence by means of a live TV link; in the second, in the courtroom from behind an opaque partition; in the third trial, a video recording of the complainant’s pre-trial interview with the police replaced her examination-in-chief, and cross-examination was conducted via a live TV link; and in the fourth trial, the complainant testified from the witness box in court, without the use of special measures. Findings related to the use of special measures are reported elsewhere (Ellison & Munro, forthcoming).

Outline of Key Findings

Perceptions of Prevalence / Seriousness of Acquaintance Rape

Across the deliberations there was evidence that the majority of our participants were receptive, in principle, to the idea that a woman could be raped by a man that she had previously had a sexual relationship with. Indeed, comments from jurors indicated an appreciation of the empirical reality that most rapes are committed, not by strangers, but by someone that is known to the complainant. In Jury B, for example, one juror observed, when peers made reference to the existence of a previous relationship between the trial parties, that “a lot of rapes are where people know them aren’t they and they’ve had a relationship.” In addition, and in contrast to the findings of some previous studies (Shotland & Goodstein, 1992, Simonson & Mezyddlo Subich, 1999), there was no clear indication that our jurors considered rape by an acquaintance to be any less serious *per se* than rape by a stranger. Indeed, there was evidence of a reasonably widely held appreciation amongst jurors of the extent and ways in which being assaulted by a person known

to the victim may be more traumatic and more likely to generate negative psychic effects.

Despite this, however, a recurrent theme throughout the deliberations was that it would be more difficult to secure a rape conviction in this type of scenario, on account of the ambiguity which jurors felt was introduced by the fact of acquaintanceship, particularly where it involved a previously intimate relationship. A number of our participants observed that rape involving an ex-partner or known assailant was “more delicate” (Jury K), “a lot harder” (Jury B) and more of a “grey area” (Jury B) than rape involving a violent stranger. As one juror put it, “it’s different isn’t it...if you go into the street and just grab somebody into a hedge and have sex with them, rape them, that’s clear isn’t it, you’ve raped them” (Jury K).

‘Messy’ Nature of Sexual Communication

At the heart of the ambiguities and complexities that jurors felt often pervaded this acquaintance rape scenario was the existence of a series of expectations and conventions regarding intimate heterosexual engagement, and the scope for sexual (mis) communication which these permitted. Women were positioned as having primary responsibility for acting as sexual gatekeepers, communicating willingness or refusal clearly, whilst bearing in mind the predisposition of ‘red-blooded’ men to ‘push their luck’ as sexual initiators. It was also generally accepted that this would take place, not through explicit negotiation, but through a variety of indirect verbal and non-verbal cues or ‘signals’, which participants widely recognised as being open to misinterpretation.

This understanding of the communicative conventions for sexual access provoked a preoccupation within many of the juries with the ways in which the complainant, through her conduct on the night in question, might have ‘signalled’ – wittingly or otherwise – a sexual interest to the defendant, which, even if mistaken, would have reasonably been understood by him to token consent. A number of jurors observed that the complainant had ‘egged on’ or encouraged

the defendant by, for example, allowing him into her home, offering him a glass of wine, engaging him in a friendly conversation over the course of a few hours, kissing him, and generally creating a comfortable ambiance. These discussions often assumed a markedly critical tone, with jurors – male and female – frequently censuring the complainant for giving out “mixed messages” (Jury A) or, as one male juror put it, “being a prick-tease” (Jury P).

To this extent, the approach taken by our jurors can be seen to correspond to the findings of previous studies which have indicated that third party observers will scrutinise the conduct of the complainant as much as, if not more than, the defendant, in order to identify ways in which she may be seen to have contributed to, or even invited, the subsequent sexual assault (Ellison & Munro, 2009a, Grubb & Harrower, 2009). At the same time, however, the fact of the parties’ previous intimate relationship in the present study also interacted with jurors’ perceptions regarding the inevitably ‘messy’ nature of sexual communication in striking and rather distinctive ways. There was a general view, for example, that this shared sexual history created an even greater risk of miscommunication, in a context in which it was often presumed that emotions might well still be both conflicted and intense.

In this context, the fact that the complainant had consensually kissed the defendant assumed great significance, for example, since it was often suggested that, when together, sex between the parties would have started with consensual kissing, rendering it more likely – and more reasonable – that the defendant would interpret the kiss on this occasion as a ‘green light’ to further intimacy. To this extent, whilst the fact that their relationship had broken down ensured that jurors rarely went so far as to suggest that the complainant’s previous sexual consent gave rise to a ‘sexual precedent’ that entitled the defendant to presume consent on this occasion, some jurors did suggest that it may be easier, or “a more natural progression” (Jury B), to have sex with a previous partner. Indeed, some jurors went so far as to suggest that, in light of their

previous intimacy and the fact that the relationship breakdown had been amicable, it would be difficult for the parties to avoid falling into the familiar pattern of having sex.

Resistance, Force and Previous Relationship History

In line with the findings of previous research (Ellison & Munro, 2009b & 2009c), jurors in the present study also exhibited a strong and, in many cases, unshakeable expectation that a genuine victim of rape would engage in vigorous physical resistance against her attacker, and that, as a result, there would be corroborative evidence of injury on the body of either the complainant or defendant, or both. The complainant testified that she pushed at the defendant's chest and attempted to grab his arm whilst verbally protesting in an effort to stop the assault, but the majority of our jurors were adamant that if she had 'really' wanted to protect herself, she would have "put up more of a fight" (Jury B), slapping, punching, scratching, kicking or biting the assailant. Female jurors were particularly vocal and trenchant, insisting that their own instinctive reaction 'as a woman' would have been to lash out aggressively at the defendant in order to inflict "some kind of damage" (Jury I); and expressing a confidence that they would have been able to do so even in situations in which the assailant was significantly stronger than themselves.

Although such views were challenged by some jurors who contended that a woman could freeze during a sexual attack out of fear or shock and may, indeed, be more likely to do so when her attacker was a former partner whom she had both loved and trusted, for the vast majority of participants, this type of 'freezing' response was only considered plausible in the context of a surprise attack by an unknown assailant. The underlying logic here was evidently that a stranger rape carried a risk of serious additional violence that would leave a woman "like jelly" (Jury F), "petrified" (Jury I), "completely terrified" (Juries H and R), or "in absolute and utter fear" (Jury E), not knowing whether her life was under threat. By contrast, it was presumed that in an acquaintance rape scenario - and particularly in

the type of situation with which the jurors had been presented, in which there had been a previous relationship between the parties - a woman would not expect further physical violence. As a result, it was felt that she would be likely to be less frightened, "not so traumatised" (Jury E), more inclined to "fight tooth and nail" (Jury F) and "more comfortable that she can fight him off" (Jury R). For most jurors, the only apparent exception to this arose in situations where there was a history of domestic abuse at the hands of the defendant, in which case it was felt that a frightened 'freezing' response might have been more credible. In carving out this exception, however, jurors betrayed a number of additionally problematic assumptions, including that a propensity for violence is predictable, that women who have been subjected to domestic abuse will always report this to the authorities, who will always pursue that complaint through formal channels, and that such allegations will always be admissible as evidence in any subsequent rape trial.

The parties' previous relationship also assumed significance as jurors advanced possible explanations to account for the injuries that she had sustained to her chest, wrist and upper thigh. While notably not raised by the defence at trial, a significant number of jurors specifically raised the possibility that the complainant and defendant may have in the past routinely enjoyed "rough" (Jury E), "raunchy" (Jury B) conduct, or "getting quite violent during sex" (Jury C). And while such conjecture was occasionally challenged by peers who pointed out that the defence had introduced no evidence along these lines when, if they had been able to show evidence of this proclivity, it would have provided a "strong defence" (Jury M), on the whole, jurors displayed a striking willingness to construct a range of unsupported hypotheses regarding the parties' prior sexual relationship.

Some jurors suggested that the injuries might have been sustained as a result of the peculiarly passionate nature of this sexual encounter, arising as it did against a context in which the relationship had ended and the parties were 'reigniting an old flame'. Jurors hypothesised that the bruises had

occurred because “it was more passionate because they weren’t together” (Jury A) or because “they’re rampant” on account of having split up and then starting to kiss (Jury E). In a context in which the information given by both trial parties about their relationship breakdown depicted an entirely amicable, measured and mutual split, it is unclear from where the jurors derived these particular hypotheses, other than perhaps from a series of (media-informed) scripts about the intensity and urgency of heterosexual ‘re-union sex’.

Summary

Taken together, these findings provide valuable insights that supplement, and in some cases challenge, received wisdom from previous research regarding jurors’ beliefs about acquaintance rape (for further, more detailed discussion, see Ellison & Munro, 2013). Contrary to the concerns raised in much preceding social science literature, this study suggests that jurors may not be so blinded by the ‘real rape’ prototype as to be unwilling to accept in principle that rapes can be committed by non-strangers, and are no less serious for it. And yet, during the course of deliberations it became clear that many jurors struggled to be sufficiently certain of the defendant’s guilt in a context in which it was generally accepted that scope for sexual miscommunication was pervasive and that the complainant’s failure to physically struggle ensured that, even if she had not consented, the defendant might reasonably have believed that she did. These factors played a key role in ensuring that the vast majority of our juries (16 out of 20) ultimately returned not guilty verdicts. As a result, we would insist that, while educating jurors on the empirical realities of acquaintance versus stranger rapes, and on the ways in which rape by a known perpetrator can be just as serious and traumatic as rape by an unknown assailant, is important, it alone will not overcome the obstacles that render jurors reluctant to convict. Instead, a thorough interrogation of prevailing expectations regarding socio-(hetero) sexual behaviour and communication is required, alongside renewed efforts to disavow jurors of the assumption that a victim’s ‘normal’ response to rape

is to fight back aggressively, receiving and causing injury.

Methodological Note

The methods used in this research offer an improvement upon those used in many previous mock studies. The researchers took advice on the scripting throughout from barristers, prosecutors and other experts familiar with the realities of rape trials. In addition, the real-time re-enactment represents a significantly more detailed and engaging stimulus than the vignettes or video extracts that are often used in simulation research. That said, there are a number of limitations, which have to be borne in mind. For one thing, the participants knew that they were taking part in an experimental study and that, therefore, their decision-making would have no consequences for a real defendant. In addition, the trial reconstruction was obviously streamlined in terms of its duration and the levels of evidence that were presented. The periods of delay and disruption that typify criminal court proceedings were absent, jury size was reduced to an average of eight members, and the time for jury deliberation was limited to 90 minutes. These factors do mean that it would be inappropriate to make uncritical or automatic extrapolations to the real jury room, but equally, it is important not to over-state the significance of these limitations, particularly bearing in mind the present inability to conduct research into deliberations with ‘real’ jurors in England and Wales. There was ample evidence in the present study of jurors taking their role seriously despite its mock nature, commenting on the consequences of their verdict for the parties involved and remarking at the close of deliberations on the stress the process had caused them. Research on the relevance of jury size is contested, and there are some indications that ‘real’ jurors may not have needed much longer to deliberate. Moreover, the alternative methods that have been used to study juries, including the use of shadow groups, suffer from similar shortcomings in terms of lack of deliberative verisimilitude without offering the advantage of being able to isolate and manipulate variables for internal cross-comparison.

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