Different functions of rape myth use in court: findings from a trial observation study

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Abstract

This study examines rape myth use in eight English rape trials and assesses attempts by trial participants to combat it. Trial notes, based on observations, were analyzed using thematic analysis. Rape myths were used in three identifiable ways: to distance the case from the "real rape" stereotype, to discredit the complainant, and to emphasize the aspects of the case that were consistent with rape myths. Prosecution challenges to the myths were few, and judges rarely countered the rape myths. This study provides new insights by demonstrating the ways that rape myths are utilized to manipulate jurors' interpretations of the evidence.

Introduction

Rape myths are widely held but false beliefs about rape, the nature of it, and the circumstances surrounding it. They have been described as "prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists" (Burt, 1980, p. 217). It has been widely recognized that false assumptions about rape and sexual assault are dangerous in the legal context as they have the potential to influence decision-making (Ellison & Munro, 2009a; Judicial Studies Board [JSB], 2010; Temkin & Krahé, 2008). Although Reece (2013) has recently criticized this view, her argument has been robustly challenged (Conaghan & Russell, 2014). The purpose of the research on which this article is based was to find out whether the use of rape mythology could still be found in modern rape trials and, if so, to examine the nature of its use and attempts made by trial participants to combat it.

The academic study of rape myths has a long history (e.g., Burt, 1980), but a recent definition emphasizes both the content and function of these myths: "descriptive or prescriptive beliefs about sexual aggression (i.e., about its scope, causes, context, and consequences) that serve to deny, downplay or justify sexually aggressive behavior that men commit against women" (Gerger, Kley, Bohner, & Siebler, 2007, p. 423). Examples include beliefs that the only genuine rape is violent rape by a complete stranger, that complaints of rape are generally false, and that true victims report to the police immediately. Of course, some rapes are committed by strangers and do involve violence, some reports of rape are false, and some victims do report to the police immediately. However, myths involve generalizations about all rapes and therein lies the problem. To those who believe in them, few allegations will ever qualify as real rape.

In England, the use of rape myths in court was identified in two key observational studies (Adler, 1987; Lees, 1996). These studies found that defense barristers[1] drew on a

wide range of rape myths. They were used to undermine the credibility of the complainant, to blame her for the assault, and to make her appear unworthy of the protection of the law. Subsequently, legislative changes were introduced, which were designed to afford complainants more protection from questioning about their sexual history (s.41 Youth Justice and Criminal Evidence Act 1999 (henceforth s.41) and "bad character" (s.100 Criminal Justice Act [CJA], 2003). The definitions of rape and consent were also revised (Sexual Offences Act [SOA], 2003). S.41 requires that a written application be made to the judge before evidence can be admitted about the complainant's past sexual history. This must specify precisely the aspects of the complainant's sexual history it is sought to explore and the grounds for doing so. The judge may approve the application only in a very restricted set of circumstances set out in the legislation (see Kelly, Temkin & Griffiths, 2006 for further details). Kelly et al. (2006) examined the operation of s.41, and concluded that sexual history evidence was still being introduced frequently without the necessary application to the judge, while other rape myths not subject to the restrictions of s.41 were being increasingly mobilized. Reference to rape myth usage by both barristers and judges is also made by Smith and Skinner (2012) who conducted a more recent observational study.

Research has repeatedly shown that rape myths can be influential in the perception of consent and rape (Frese, Moya, & Megías, 2004; Gray, 2015), as they provide a schema that shapes expectations of what is or is not considered to be rape (Bohner, Eyssel, Pina, Siebler, & Viki, 2009). Although jurors have the opportunity to engage in careful, systematic processing of the evidence presented (Chaiken, 1980), this is not sufficient to ensure that their verdict is accurate or unbiased. Factors such as lack of knowledge about rape and the relative ease of relying on pre-existing beliefs about rape are likely to encourage quicker and less effortful heuristic processing (Chaiken, 1980; Temkin & Krahé, 2008). Moreover, regardless of the depth of processing employed, jurors may selectively process the evidence in line with their pre-existing beliefs about rape (Chaiken, Giner-Sorolla, & Chen, 1996). Thus, when defense counsel (DC) employ rape myths, they are reinforcing the beliefs of those who believe in those myths, while also potentially raising doubt in the minds of those who generally do not.

Rape myths have a notable effect on mock jury discussions of rape cases (Ellison & Munro, 2009a). They can also obstruct attempts to educate mock jurors as to the reality of rape (Ellison & Munro, 2009b). Research has shown that those who believe in rape myths are more likely to find the defendant not guilty, to believe that the complainant consented, and to place at least some of the blame for the events upon the complainant (e.g., Frese et al., 2004; Gray, 2006; Hammond, Berry, & Rodriguez, 2011).

The Crown Prosecution Service (CPS)[2] has identified a number of common rape myths and, while it recognizes that the defense has a duty to challenge the victim's account, it states that prosecutors "will robustly challenge such attitudes in the courtroom" (CPS, 2012, p. 15). It also asserts that prosecutors will object to inappropriate defense cross-examination regarding the complainant's sexual history and to "allegations about the character or demeanour of the victim which are irrelevant to the issues in the case" (CPS, 2012, p. 34). Efforts to improve the prosecution of rape in this way are by no means new as specialist training for rape prosecutors was introduced in 2007 (CPS, 2012). However, publications such as the *Joint CPS and Police Action Plan on Rape* (2014), which emphasizes that the focus for investigators and prosecutors should be the behavior of the defendant rather than that of the complainant, and the report by Angiolini (2015) suggest that this training has not been adequately implemented. Based on the analysis of CPS case files, Angiolini (2015) observed that rape

myths were on occasion influential in CPS decision-making, and that there was little evidence of the prosecution discussing strategies to combat these myths.

In addition to possible challenges from the prosecution, judges in England and Wales are now able to give directions to the jury regarding the danger of relying on stereotyped beliefs about rape (JSB, 2010), although they are not obliged to do so. Given greater understanding about the malign effects of rape myths and the attempts made to see that they are disputed in court, it might have been expected that their usage would be declining. The purpose of this study was, therefore, to observe a small sample of rape trials to identify whether rape mythology figured in them and, if it did, to obtain a deeper understanding of the way in which rape stereotypes were deployed and challenged.

Method

Design

The study employed an observational design together with qualitative semi-structured interviews with some of the barristers appearing in the observed cases. This article focuses on the trial observations, with the main analysis of the interviews to be reported elsewhere. Official recordings are made of trials conducted in the courts of England and Wales but these are not routinely transcribed. Transcription costs are very high and researchers are not allowed to use recording equipment in court. Trial observation and manual note-taking was therefore selected as the means to record detailed information about the trials.

Table 1. Complainant/Defendant Relationship and Verdict, by Trial.

	T1	T2	T3	T4	T5	T6	T7	T8
Relationship	Stranger	Previous relationship	Married	Previous relationship	Acquainted[a]	Previous relationship	Acquainted[a]	Acquainted[a]
Verdict	Guilty	Trial abandoned. Retrial ordered	Guilty	Not guilty	No verdict: Jury disagreement	Not guilty	Guilty	Not guilty

Note. T = trial.

[a]Considered as acquaintances, but the complainant met the defendant for the first time on the occasion of the rape itself.

Trial Observations

The study involved observation of eight single perpetrator rape trials including one attempted rape, at the end of 2010. The trials took place in several different Crown Courts[3] in London and the southeast of England. Each week throughout the data collection period, telephone calls were made to all the courts in the study area to establish whether any single perpetrator rape trials were listed for the following week, and to obtain any preliminary information about the nature of the case. For most weeks, there was only one relevant trial scheduled, but if there was more than one, then the case scheduled to last for no more than 5 days was selected.

The study sample consisted of alleged rapes by one stranger, three acquaintances, one husband, and three previous partners. The term *stranger* has been used where there has been no previous interaction of any sort between complainant and defendant. *Acquaintance* has been used where there has been some limited interaction before the alleged rape. The relationship between the complainant and defendant and the verdict for the eight trials are shown in Table 1.

Procedure

Detailed contemporaneous notes, using a form of shorthand, were taken by the third author throughout seven of the trials, and then typed up during trial breaks and at the end of the day. In Trial 1, the second and third authors conducted the observation and separately took notes. The notes were subsequently compared and the adequacy of this method of trial recording was confirmed. Although not quite a verbatim transcript, the notes provide a very full account of the trials, with direct quotes noted where particularly relevant. In one trial, the judge refused to allow note-taking in the courtroom. Notes were therefore made during the frequent trial breaks and these were supplemented with notes taken by prosecuting counsel (PC) in the case. The third author had approached PC to request an interview with her for the study. Aware of the judge's embargo, PC offered the third author her notes. As these were extremely detailed including verbatim quotes, they proved to be a useful addition to the existing material.

Analytic Approach

Inductive thematic analysis was conducted in accordance with the procedures suggested by Braun and Clarke (2006). As the analysis focuses on observed practice in the courts, the analysis was carried out at the semantic level, taking a realist perspective. That is, no attempt was made in this analysis to include latent conceptualizations of rape myths nor to explore a social constructionist interpretation of the data.

The first stage of the analysis entailed identifying whether rape myths were used in the trials, and if so which myths were present. Identifying rape myth usage is not unproblematic. DC has a duty to represent the defendant and to put forward his case as strongly as possible, which can frequently entail a robust cross-examination of the complainant. A conservative approach toward the identification of myth use was adopted, allowing the most leeway to counsel and only classifying myth use as occurring when counsel expressly made generalizations about rape, rape victims, or rape defendants, which were false or where such false generalizations were clearly implicit in the argument.

Having identified the myths in use, analysis was then carried out to explore whether there were conceptually discrete ways in which they were deployed. The myths were grouped into initial conceptual themes, which were reviewed and checked back to the original trial notes to ensure accuracy. From this iterative analytic process, there emerged two overarching themes, reflecting on one hand the way rape myths were deployed by DC and, on the other, how the myths were challenged. These two overarching themes divided themselves into subthemes. Thus, the deployment of rape myths by DC is subdivided into three subthemes, namely, the use of the real rape stereotype, the use of myths purely to discredit the complainant, and the use of myths that relate specifically to the facts of the case. Challenges to rape myths are subdivided into two subthemes, namely, prosecution challenges and judicial interventions and directions.

Analysis

Defense Use of Rape Myths

The study found that myth use was frequent. Across the course of the eight trials, the defense had recourse to a remarkably wide range of myths as is illustrated in Table 2. All have been previously identified in the literature of rape mythology (e.g., Payne, Lonsway, & Fitzgerald, 1999; Temkin & Krahé, 2008). The myths were used in subtly different, if overlapping, ways and, as mentioned above, three themes were identified. In Theme 1, DC draws on the stereotype of what happens before, during, and after a "real rape," highlighting the elements of it that are missing in the case in question, with the aim of casting doubt on the prosecution's allegations. In Theme 2, rape myths are used to discredit the complainant, focusing on her character and background. In Theme 3, rape myths relating to the specific facts of the case are mobilized.

Theme 1: The "real rape" stereotype as the standard. The classic stereotype of a genuine rape is a violent sexual attack by a stranger (Temkin & Krahé, 2008), where the victim does all she can to resist, incurring injury and/or torn clothes in the process, and immediately reporting the matter to the police. In Theme 1, DC invokes this stereotype and then attempts to distance the case in hand from it by pointing to the relationship between the parties, however tenuous, and emphasizing the absence of injuries,

Table 2. A "Map" of Defense Myths and Judicial Directions, by Trial.

	Trial 1	Trial 2	Trial 3	Trial 4	Trial 5	Trial 6	Trial 7	Trial 8
No. of myths used by defense	3	4	6	6	5	7	6	1
Lack of injury/torn clothes		✓			✓	✓[a]		
Failure to resist			✓[a]				✓	✓[a]
Absence of immediate complaint			✓[a]		✓[a]			
Rape complainants are commonly liars	✓	✓	✓	✓	✓	✓	✓	
Sexual history		✓		✓		✓	✓[a]	
Previous allegations of rape suggest fabrication	✓			✓				
Rape is an easy allegation to make (Hale's dictum)			✓			✓		
Rape by former partner/husband is not really rape		✓	✓[a]	✓		✓[a]		
Real victims of marital rape leave the marital home			✓					
Sex offenders are				✓			✓	

different from ordinary people						
Complainant's clothing may precipitate rape					✓[a]	
Kissing as consent			✓	✓		✓[a]
Post-rape behavior/demeanor in court	✓			✓[a]	✓	✓

[a]Indicates that the judge gave a direction in response to the myth.

resistance, torn clothes, and immediate reporting. The defense is therefore focusing not on what happened but rather on what did not happen and thereby suggesting that rape is unlikely to have taken place.

Statistics for England and Wales show that only 14% of serious sexual offences involve a stranger attack (Office for National Statistics [ONS], 2013). Moreover, it is a myth both that rape necessarily involves injury or torn clothing and that where force is used, this will always leave a trace by way of marks or bruising. Victims of rape may well suffer no genital or other physical injury (Bowyer & Dalton, 1997; Sugar, Fine, & Eckert, 2004). Yet these myths featured strongly in two of the eight trials (5 and 6) and were also present in Trial 2. In Trial 6, the defense referred 3 times to absence of injury. The complainant (henceforth C) was asked in cross-examination whether she had suffered injuries to her genital region or to the rest of her body. She said that she had not. In her closing speech to the jury, DC said "C said that D had used force to prise her legs apart, force to pull her shoulder down yet she had no injuries at all, no red marks." Thus, DC was relying on the false idea that any force necessarily entails injury and that without force or injury real rape has not occurred.

In addition to the requirement for injury, the "real rape" stereotype also includes the expectation that genuine victims will always employ one or more of a number of avoidance or resistance strategies. This bears no relationship to reality, and fails to account both for the fact that victims are often terrified that struggle will lead to injury or death and for the paralyzing effect of fear on the ability to shout or get away (Rape Crisis, n.d.). It also fails to account for the strength differential between most men and women.

The avoidance/resistance myth featured in three trials (3, 7, and 8). In Trial 7, C, when drunkenly making her way home, met a stranger, D, whom she allowed into her flat. There he allegedly raped her. She was questioned by DC as to why she did not ask him to leave and failed to fight back, yell, swear, or resist: "At no point did you say 'get the fuck out of here as my flatmate is in his room and he'll come and beat you up?' Did you never once yell or swear?" There were five questions to this effect. C explained that she was afraid he was going to kill her and her strategy was to go along with what he wanted. In her closing speech, DC reiterated the point: "Would a victim not at least scream or do something to show some kind of resistance? . . . She did not offer any resistance whatsoever to get rid of him."

Victims of rape rarely report to the police right away (see, on this, *R v. Valentine* 1996), and many never report to the police at all (Ministry of Justice [MJ], Home Office [HO], & the ONS, 2013). Some are reluctant to mention the matter to anybody (Stewart, Dobbin, & Gatowski, 1996). The myth that genuine rape victims will report immediately was invoked particularly in two trials (3 and 5). In Trial 3 there was some delay before C reported to

anyone that she had been repeatedly raped by her husband. DC cross-examined C and two witnesses at great length about this, implying that genuine victims report immediately. In her closing speech DC claimed that the delay suggested C was lying.

Even in an adversarial system, it is hard to justify the use of Theme 1 mythology. Cross-examination about the absence of features consistent with the stereotype of a "real rape" serves no other purpose than to mislead the jury. DC utilizes these ideas to encourage the jury to distance the events from the stereotyped image of a "real rape." However, it is of no significance that C was uninjured, that her clothing was undamaged, or that she failed to resist unless there is specific evidence that suggests that such a result would have been expected in the particular circumstances of the case.

Theme 2: Myths used purely to discredit the complainant. In Theme 2, stereotypes were used as part of a concerted attempt to discredit the complainant by focusing on her history, psychology, or character.

A common myth is that rape allegations are frequently or even generally false. However, the CPS has recently pointed out that there are many prosecutions for sexual offences but it has had occasion to prosecute very few complainants for making false allegations (CPS, 2013). Nonetheless, this myth featured in three trials (1, 2, and 3), and there was some reference to it in Trials 4, 5, 6, and 7. In pursuance of this myth, DC in Trials 3 and 6 were not above harking back to Lord Justice Hale's discredited 17th-century dictum that rape "is an accusation easily to be made and hard to be proved and harder to be defended by the party accused tho never so innocent" (Hale1PC 635). In her closing speech in Trial 6, DC said,

> Unfortunately, the experience of the courts is that false allegations of this type are made, sadly regularly made, and are made for all sorts of reasons. Allegations are quite easy to make: You only have to say it and it has to be investigated.

This theme was even taken up by the judge in the case, who reiterated that "sexual allegations are easy to make but difficult to refute." It is well established today that rape is a very difficult allegation to make and, as noted above, most rapes are not reported to the police (MJ, HO, & ONS, 2013). Contrary to the adage, as the burden of proof is on the prosecution and not on the defense, it is an allegation that is hard to prove beyond reasonable doubt. Conviction rates for rape testify to this, which show that only about 7% of rapes recorded by the police in England and Wales result in a conviction (MJ, HO, & ONS, 2013).

In Trial 1, involving attempted rape by a complete stranger, the prosecution had a very strong case as, unusually, the incident had been directly observed by two excellent independent witnesses. Arguing that the witnesses were mistaken and that C was lying about what had happened, DC successfully applied to the judge to cross-examine C about her alleged bad character (s.100 CJA). A very lengthy cross-examination ensued taking in every aspect of C's past. C, it was claimed, was a violent drunk, a woman of bad character who had made previous rape allegations and whose word about what had happened could not therefore be trusted. While DC could not be faulted for attempting to do the best for her client, this heavy-handed character assassination, which was deeply distressing for the complainant, seems in the circumstances of the case hard to justify. It proved to be of no avail as D was convicted.

In both Trials 5 and 7, C's drunkenness at the time of the alleged rape was used by DC to argue that she was lying and had consented when drunk but regretted it later. In such

circumstances, according to the leading case of *R v. Bree* (2007), her claim of rape would be invalid as consent given when drunk is still considered to be consent (see Wallerstein, 2009, for a critique). Research shows the pervasiveness of the myth that women who give their consent when drunk will often cry rape afterwards (e.g., Gunby, Carline, & Beynon, 2012). DC's assertions were therefore likely to strike a chord with the jury. In Trial 5, C was walking home at night when D, who was standing at a bus stop, started talking to her, followed her home and made his way into her house where he allegedly raped her. DC described the alleged rape as "a slightly embarrassing sexual encounter portrayed as rape." He suggested to C, "You behaved a little out of character after having a few drinks and were a bit embarrassed afterwards." But DC did not seek to explain why, if embarrassment was the motive for a false allegation of anal rape, C would have wished to go through with a police investigation and public trial.

Research has found that sexual history evidence is influential with juries (Mason, Riger, & Foley, 2004). As noted above, s.41 requires that a written application be made to the judge before evidence can be admitted about C's past sexual history. Despite this, the study found that C's sexual history with third parties was introduced in four of the trials (2, 4, 6, and 7) without any s.41 application to admit it. There was scant evidence of any judicial attempts to stop this happening or to require the editing of video-recorded police interviews containing sexual history evidence.

In Trial 2, DC applied pre-trial to cross-examine C about her sexual relationships with other parties, and after C gave her evidence in chief the judge told DC to apply in writing under s.41. The judge commented to the researcher after the trial was adjourned that the defense was doing its utmost to have C's previous sexual relationships brought out in court and he was not going to allow this to happen. Despite the judge's good intentions, before any written application was made, DC still managed to cross-examine C about a previous rape by a Black man [*sic*] with a gun, which he claimed had taken place but which C denied. The judge did not intervene at this stage but later on in the trial, he sent the jury out and reprimanded DC for the "badgering" style of his cross-examination.

In Trial 4, although a s.41 application had been made, which covered previous allegations by C of sexual abuse by her father, it did not cover C's previous relationships with other men. Nonetheless, in contravention of s.41, DC asked her about two older men she had had relationships with to show she was not averse to having sex with older men like D who was 20 years older than she was. She was also questioned about her sexual relationship with another man during her on/off relationship with D. There was no judicial intervention to prevent these lines of questioning.

In Trial 6, C alleged that she had been raped by a former partner with whom she had previously had an on/off relationship. In her video-recorded police interview, C had described the sexual nature of this relationship. The judge decided that, as the jury would see this interview, there was no need for a s.41 application which would, in any case, have been successful. However, in addition to exploring in depth C's relationship with D, DC, in blatant contravention of s.41, questioned her about her relationships with other men when she was not seeing D. Instead of cutting off this line of cross-examination, remarkably, the judge himself questioned her about this matter, reiterating to the court that she had had a relationship with someone else during one of these "off periods." Quite apart from the irrelevance and highly prejudicial nature of this questioning about sex with third parties, it should not have been permitted outside a s.41 application.

Again, in Trial 7, C had been asked in her police interview about her previous sexual experience with others. As a result, her sexual history was revealed when the video recording of the interview (see Achieving Best Evidence, MJ, 2011), was shown unedited in court. In the absence of any s.41 application, both prosecution and defense then referred to C's sexual experience. In her closing speech, DC said that C was "a much older, confident woman, worldly-wise who had had a lot of sex and knew what she wanted . . . C and D had one thing in common—their attitude to sex and one night stands." But, DC added, she was not asking the jury to judge C's "promiscuous sex life."

Another attack on the complainant's credibility came through reliance on the myth that a previous allegation of rape indicates that the complainant is lying. This occurred in two trials (1 and 4). It relies on the idea that it is highly unlikely that a person would have been raped or abused more than once. Evidence, however, shows that victims of rape or sexual assault have frequently had this experience previously (e.g., Myhill & Allen, 2002).

In Trial 4, DC applied under s.41 to cross-examine C about her previous allegations of rape and sexual abuse. The judge decided that there was no evidence that these allegations were false. He gave permission for one question only to be asked about them in relation to a panic attack that C had suffered after the alleged rape. However, DC managed to refer 5 times to these previous allegations of sexual assault. In her closing speech, she reminded the jury at some length that C had previously made three separate allegations against three separate males. While this was supposedly relevant to the panic attack, it inevitably invoked this myth. The judge made no attempt to intervene at any stage.

Section 41 was introduced to deal with highly prejudicial myths relating to C's past sexual history. In response to the study by Kelly et al. (2006), which demonstrated flaws in the operation of s.41, steps were taken to tighten procedures and to require written applications pre-trial (see MJ, Criminal Procedure Rules, Part 36). But the present small study suggests that s.41 is still not operating as it should. As legal restrictions are ignored, myths about sexual history are permitted to enter the courtroom.

It is not unusual in criminal trials for attempts to be made to discredit witnesses. Indeed, this is an accepted part of the defense role. However, as seen in Trial 1, this can involve a sustained onslaught of vilification. In Theme 2, the reliance on myths to discredit C and make her appear deserving of her fate, an unworthy woman or a liar, is, it is argued, hard to justify.

Theme 3: Invocation of myths in relation to the specific facts of the case. In this theme, the most frequently used, the actual facts of the case are used as a platform for the invocation of stereotypes. It goes without saying that counsel cannot be criticized for discussing the facts of the case, for example, that C and D were married, were former partners, or had engaged in kissing before the event in question. The fault lies in invoking false ideas in relation to those facts and inviting false conclusions from them.

A prevalent myth drawn on by DC in four of these trials (2, 3, 4, and 6) was that marital rape, rape by a former partner, or rape by someone with whom C has previously had consensual sex is not really rape, and if consent was absent on a particular occasion, there is no real harm done. Contrary to this myth, the harm of rape by previous partners is well established (see, for example, Coker, Weston, Creson, Justice, & Blakeney, 2005). In Trial 3, C was allegedly raped by her husband. During the trial, DC repeatedly emphasized that D and C were married, referring to the "marital bed," "marital relations," "marital bedroom," and "marital home." There were 10 references in all to C's marital status. The clear

implication was that whatever had happened, this was after all a marriage and therefore it was not true rape. Similarly, in Trial 4, in cross-examining C and examining D, DC made 15 separate references to C's previous sexual relationship with D. While marriage or a previous relationship are clearly relevant to the issue of consent and therefore a legitimate subject for some cross-examination, DC, in heavily focusing on C's relationship with D, is pursuing a further agenda and also distancing the case from the real rape stereotype.

A related myth seen in Trial 3 is that if marital rape had indeed occurred, the wife would immediately depart the marital home never to return or, at the very least, abandon the marital bedroom until such time as she could secure her departure. Many women who have experienced intimate partner (sexual) violence are asked why they do not leave the abusive relationship (Murray, 2008; Rhodes & McKenzie, 1998). The factors associated with either staying or leaving are numerous and complex (see Rhodes & McKenzie, 1998, for a review). Indeed, Carline and Easteal (2014) emphasized that multiple forms of coercion may be brought to bear in abusive relationships, which restrict women's choices. In Trial 3, C, an asylum seeker, was cross-examined repeatedly in five different threads of questioning about why she continued to live with D at the time of the alleged rapes and why she shared the same bed with a "rapist." DC's constant refrain was that C would hardly have behaved like this if she was really being abused. C's failure to leave her husband has a bearing on the issue of consent and is a legitimate matter for some cross-examination. However, in suggesting that this is not something that true marital rape victims do, DC was resorting to one of the fables about rape. It furthermore fails to acknowledge the difficulties that face immigrant women who may well face deportation if they leave their husbands and are therefore effectively trapped in abusive relationships (Carline & Easteal, 2014).

A further myth seen in these trials denies any distinction between consenting to some intimate behavior and consenting to sex (Gray, 2015; Payne et al., 1999). In three trials (4, 5, and 7), DC emphasized that C had consented to some kissing. There is every reason for DC to have cross-examined C about consensual kissing in these trials but there was a further implication that consent to kissing effectively meant consent to sex or that C rather than D was to blame for what happened thereafter.

In Trial 7, kissing preceding the alleged rape was emphasized. DC questioned C as to whether she agreed to being kissed by D and whether she kissed him back. C said that she had kissed D albeit reluctantly. DC's response was to state in her closing speech, "She kissed him back and she knew that kissing led to other things, yet she did not ask him to leave." The issue in the case was not whether C consented to kissing but whether she consented to sexual intercourse. DC was implying that, to an experienced woman "who knew that kissing led to other things," kissing meant that she consented to sex as well. PC, conceding that kissing was a mistake on C's part, dealt with this implication robustly: "Even if she had a kiss that did not mean that she wanted full sex and oral sex."

Rape myths contain rigid prescriptions as to post-rape behavior. Genuine victims are expected to do all they can to escape from their attacker, to preserve the evidence as a prelude to reporting the matter to the police, and to exhibit appropriate emotion when reporting the matter and in court; but the trauma of the event may affect individuals in different ways (e.g., Foa & Rothbaum, 1998). Despite this, post-rape behavior came under scrutiny in four trials (1, 5, 6, and 7). In Trial 6, for example, C showered and washed the sheets after the alleged rape. DC declared that this was inconsistent with the behavior of someone who had been sexually assaulted as she was effectively getting rid of the evidence.

In Trial 7, DC drew the jury's attention to C's demeanor in court; rather than showing distress, she was "feisty" and responded with "fiery irritation" to questions put to her in cross-examination. The jury was asked to consider whether this was the type of woman who would have submitted to rape. C explained that she submitted to D after he had put a cushion over her face and she feared he was going to kill her. However, the jury was being invited to conclude that C's failure to show appropriate distress in court cast doubt on the legitimacy of her claim.

Myths relating to the complainant's clothing were also found in the study. The myth here is that clothing or its absence may be an indicator of consent to sex or may precipitate rape, so that the blame for rape lies with the complainant rather than the perpetrator (e.g., Payne et al., 1999). It featured strongly in Trial 6, in which C was allegedly raped by a former partner when she allowed him to stay over after he turned up at her flat. In cross-examination and in her closing speech DC referred 9 times to the fact that C wore only a T-shirt and no undergarments in bed. DC's argument was summed up in her closing speech: "If C was telling the truth why did she go to bed in that way?" Without expressing it in so many words, the jury was also plainly being invited to conclude that even if she was telling the truth about the rape, she had only herself to blame for what happened. Yet, DC expressly denied to the jury that she was having recourse to "the Neanderthal belief that, if you go to bed with a bare bottom, you are asking for it."

The final myth identified in these trials focuses on the defendant, and suggests that rapists are identifiable because they are "other," different from normal men and not "the man next door." However, most perpetrators are known to the victim (MJ, HO, & ONS, 2013), and not noticeably "different" from other men. This myth cropped up in two trials (4 and 7). In Trial 4, the idea that sex offenders are "other" was a convenient myth for DC when defending a seemingly respectable man. D had been in the army for many years and was employed as a part-time teacher. There were in all 13 separate references to D's good character by DC and the judge. In her closing speech DC summed it up by saying that the jury had to decide "Whether D was a respectable but silly older man who had had his head turned by a gothic redhead or whether he was a sex offender," clearly suggesting that he could not be both.

In Trial 7, DC was faced with the difficult task of defending a man with a previous conviction for a sex offence, which had been disclosed to the court. DC sought to show that that this conviction was a one-off which did not make him a sex offender. Had he been so, DC argued, he would have attacked C in the street and the attack would have been rushed. But, as it was, the alleged rape had taken place in the victim's home and did not involve a quick attack. In other words, D's behavior did not match that of a true sex offender.

In Theme 3, myths associated with the particular facts of the case are operationalized. There may well be good reason to cross-examine C about the facts in question but this becomes problematic when the jury is, through repeated questioning and suggestion, invited to fall back on the stereotypes and conclude that these facts lead to the mythological conclusion.

Challenging the Stereotypes

In an adversarial trial, the use of rape mythology by the defense can be challenged by prosecution witnesses, by PC, and by the judge. The extent to which this happened in the present study will now be considered.

Prosecution challenges. Not all complainants in the study were afraid to take issue with the myths used by the defense. In Trial 7, for example, where DC put it to C that she had made a false allegation motivated by a desire to get close to a male friend, she retorted, "The idea that I would put myself through this in an attention seeking exercise is unbelievable." However, such a robust reply from a complainant was unusual.

There were comparatively few attempts by PC to challenge the myths. However, such an attempt was made in Trial 6, which involved the alleged rape by a former partner. As noted above, the defense in this case had much to say about C's night attire. PC in her closing speech directly and skillfully addressed this issue:

> Rape does not always involve somebody being dragged off the street into the bushes. Rapes happen in relationships; they are committed by people you trust. Was C not entitled to trust this person with whom she had been in a relationship for 6 years? She knew him really well and felt that it was ok for him to be in her house. He had never done anything like this before so she felt safe. Her getting into bed with no knickers did not mean anything. It did not mean to him, as he had told the court, that sex was on the agenda.

Similarly, in Trial 7, PC directly addressed the stereotypes in a case where C had allowed a stranger into her flat and had on previous occasions had sex with strangers:

> That night she did not want sex. She was entitled to say that she did not want sex. Even if she had a kiss that did not mean that she wanted full sex and oral sex. A woman was entitled to say no and she did say no.

In these trials, there are a few instances of well-constructed challenges to rape myths. However, despite the number and variety of myths used by DC and the opportunity to challenge them in cross-examination of D, and in re-examination of C, such challenges were rare. PC were therefore missing opportunities to warn the jury against drawing conclusions based on generalized and false assumptions about rape.

Judicial interventions and directions. The sheer number of myth invocations in the course of the eight trials meant there was ample opportunity for judges to tackle some of them by intervening where cross-examination of C became oppressive or irrelevant and in their jury directions. Myth-related judicial interventions were rare. But in Trial 7, DC, invoking the myth that false allegations are very common because many complainants are mentally ill, questioned C about suffering depression in the past and whether she had attempted suicide as a teenager. The judge intervened saying, "What's that got to do with the price of eggs? If you want to pursue that, I want to hear the legal argument." Undeterred, DC then put it to C that she had the tendency to be low and depressed.

The Crown Court Bench Book[4] (JSB, 2010) provides a non-exhaustive list of commonly held and mistaken assumptions about rape. These include the following: C wore provocative clothing, therefore she must have wanted sex; C got drunk in male company, therefore she must have been prepared for sex; a complainant in a relationship with the alleged attacker is likely to have consented; rape takes place between strangers; rape does not take place without physical resistance from the victim; if it is rape, there must be injuries; a person who has been sexually assaulted reports it as soon as possible; a person who has been sexually assaulted remembers events consistently.

The Bench Book also provides a series of illustrative directions, referred to as "Illustrations," for judges to use if they so choose when directing the jury to correct the listed mistaken assumptions (for a critique, see Temkin, 2010). The first Illustration concerns avoiding judgments based on stereotypes of the nature of rape and the type of person who can be a rapist or the victim of rape. The rest are geared to the following: "avoiding assumptions when the complainant and defendant are known to one another," "effect of trauma on demeanor in evidence," "late reporting," "absence of force or the threat of force," "some consensual activity—no overt force—lack of resistance" (including lack of injury), "provocative dress—hard drinking—flirtation—previous sexual relationship," "the defendant's assertion of other (and better) opportunities for consensual activity," and "inconsistent complaints." In six out of the eight trials (Trial 2 did not reach the summing-up stage) in this study, stereotypes were utilized by the defense, which could have been addressed using these Illustrations.

In Trial 1, three stereotypes were invoked by the defense none of which were clearly covered by the Illustrations. The judge did, however, respond to DC's character assassination of the complainant. He said that the jury might perceive C to be "troublesome and troubling," but that the jury should deal with the hard evidence, and that "Even people who've behaved badly in the past are entitled to the protection of the law."

In Trial 3, six myths were utilized by the defense. The judge used the three available Illustrations—"avoiding assumptions when the complainant and defendant are known to one another," "lack of resistance," and "late reporting"—and did so most effectively. He said that the issue was whether C consented to sexual intercourse. The fact that they were married did not create a legal obligation on her part to consent. There was no obligation to fight or scream when not consenting, and indeed there might be good reason for not doing so—in this case, C had said that she feared her daughter might hear what was happening. He went on to say that the jury had to be careful when considering delay. They had to bear in mind that there could be a reason why a woman did not immediately tell the police or a friend. Reticence could be very understandable, for example, C needed a roof over her head and funds to live off. In this case, delay was a material consideration that the jury had to think about.

In Trial 4, six myths were utilized by the defense. There were 15 references to the fact that D and C were former partners, much was made of D's army background and good character, and myths relating to kissing and delay in reporting were also invoked. The Illustrations on previous sexual relationship, who can be a rapist, some consensual activity, and late reporting were thus available, but the judge chose to give no judicial directions on stereotypes at all.

In Trial 5, the defense used five myths of which three were covered by the Illustrations on "late reporting," "some consensual activity," and "demeanor in evidence." Some reference was made to two of them. The judge said that if the jury found there was a late complaint; they had to consider what the reasons for this were. Using the language of the Illustration, he said, "a late complaint is not necessarily a false complaint." This phrasing suggests that the late complaint might well have been a false complaint. The judge also gave a direction regarding C's manifest distress in court, during the police interview and when reporting the matter to friends, which was referred to by the prosecution. He said that it was for the jury to decide whether such distress was genuine or feigned. If they decided it was genuine, they must decide whether it was related to what she had alleged had happened to her. It might be thought that, in the form they were given, these directions would have served if anything to increase skepticism about the complainant.

In Trial 6, seven myths were invoked. There were three relevant Illustrations: those concerning "avoiding assumptions when the complainant and defendant are known to one another," "provocative dress," and "lack of injury." The judge made reference to all three albeit very briefly. Before doing so, he repeated Hale's notorious dictum: "Sexual allegations are easy allegations to make but difficult to refute." As to C's lack of undergarments in bed, which the defense had heavily emphasized, he commented that if it was the automatic assumption of a man that it was "game on" if she was in bed with no knickers, then it would also be the assumption of a mature woman. In other words, the judge was suggesting that C either knew that D would think she was consenting or should have known. If she did not actually consent, she was to blame for what happened. But he added that the jury had to be careful about making assumptions. They had to consider what evidence in this case was relevant.

In Trial 7, the defense resorted to six separate myths five of which were dealt with by the Illustrations, "lack of resistance," "avoiding judgments based on stereotypes as to what kind of person may be a rapist," "demeanor in court," "sexual history," and "some consensual activity." The judge adapted the last two of these Illustrations. He addressed the myth relating to some consensual activity with admirable clarity:

> A woman is entitled to "snog" a stranger and then say "That's enough: that's as far as I am going." Even if they were sharing cannabis and drinking, that did not mean that D had a license to continue to do whatever he wanted sexually without her consent.

The judge's direction on sexual history, evidence of which emerged during the trial, was again exemplary:

> The manner in which C gave evidence made it clear that she was sexually experienced before the incident. This is not a court of morals; it is a court of law. If someone chose to have sexual intercourse with a hundred people, that should have no bearing on the jury's consideration of what happened that night. A person could consent to sex with a hundred people but if he or she said no to the 101st, then that was No . . . The fact that she had previous sexual partners and that some of these might have been strangers was irrelevant to the issue of consent on the night.

In Trial 8, C was a 16-year-old allegedly raped by another teenager. The defense focused heavily on the lack of resistance myth for which an Illustration is available. There were no fewer than 14 references and questions as to why she did not shout for help, seek to escape, or seek assistance from the police who were nearby. The judge said no more to the jury than that it was unnecessary to prove resistance and then simply repeated what C had said without further comment. He went on to give a general direction on stereotypes based on the first Illustration. However, without relating it in any way to the case in hand, the jury may well have been baffled as to what he was getting at.

The list of myths mentioned in the Bench Book is expressed to be non-exhaustive (JSB, 2010). The judges in this study, for the most part, chose not to stray beyond the list to address other myths. At the same time, many of the myths specifically mentioned in the Bench Book were not properly addressed. The Bench Book is emphatic that there is no need for the judge to caution the jury about myths and, if a choice is made to address a particular myth, this must be done in a fair and balanced way and in consultation with both advocates. Across the seven cases in which there was a summing-up, myths were used 34 times by the

defense and there were 19 opportunities to make use of an Illustration to warn the jury about specific myths. Eleven such warnings were given (see Table 2) with one further general warning about stereotypes. But of the 11, at least four were perfunctory and, if the purpose of a myth direction is to correct misleading assumptions, several more were of no use in that regard. While the judges in Trials 3 and 7 dealt very effectively and fairly with the stereotypes, in the remaining five trials, they were handled with considerably less assurance. It is concerning that in Trial 4 where the defense drew heavily upon six myths, the judge chose to say nothing whatever about any of them and that in Trial 6 the judge solemnly repeated Hale's infamous dictum. It is also less than reassuring that in Trial 5 the myths were addressed in such a way as conceivably to augment skepticism about the complainant.

The only convictions in the sample were in Trials 1, 3, and 7. In any trial, there are likely to be a number of factors that contribute to the jury's verdict. In the absence of access to the jury's deliberations,[5] it cannot be ascertained with any degree of certainty how much the rape myths mobilized in the trials influenced the verdicts, how much the challenges to them had any effect, or what the significance was of other variables. Certainly, in Trial 1, the evidence against the defendant was overwhelming and the conviction was therefore to be expected and, in Trial 3, C was a particularly credible witness. It has been argued by Bohner et al. (2009) that, as schemas, rape myths are likely to provide an attitudinal scaffolding within which the evidence is interpreted. If this is so, it follows that effective challenges to these myths may undermine that attitudinal scaffolding. In Trials 3 and 7, the judges' excellent directions on myths may therefore have had some impact on the jury and, in Trial 7, both C and PC also challenged the myths and this may have had some effect. Conversely, in the cases where there was an acquittal, there were no effective directions from the judge. Indeed, in Trial 6, the judge's summing-up, if anything, would have reinforced the rape myths that were used by the defense in the trial. The value of myth directions, properly delivered, does, of course, transcend their likely effect in any particular trial as they send a public message about the dangers of false assumptions about rape.

For the most part, the judges did not employ the stilted language used in the Illustrations but preferred to adapt and simplify them. This practice is to be welcomed and is given full license in the Bench Book itself (JSB, 2010). The list of myths used in the trials as set out in Table 2 demonstrates that the Illustrations are far from covering the full range. It may well be that some are unsuited to a direction. However, some more Illustrations to cover, for example, responses to marital rape including failure to leave the marital bed or home, post-rape behavior, and previous allegations of rape would undoubtedly be helpful.

Conclusion

The extensive modern literature on rape myths—be it psychological or socio-legal—has so far lacked sufficient grounding in the actual evidence of myth usage in the courtroom. As an observational study of practice in the courts, this study makes a novel contribution to understanding the way in which rape myths are used and challenged in the "real world." Its originality lies in its delineation of the different ways in which myths are deployed to manipulate jurors. Thus, rape myths are seen to serve a variety of different functions, supplying DC with a range of options in seeking to influence juries. The study also suggests the possibility that skillful challenges to rape myths may help to counter their influence.

Given the small number of trials, generalizable claims cannot be made. Further large-scale observational research, both in the United Kingdom and in other jurisdictions with

adversarial systems, would be useful to generate quantitative data, which would provide stronger evidence of the nature and extent of the myths used and the effectiveness of prosecution and judicial challenges to the myths. However, the finding that a wide repertoire of myths was pressed into service by the defense in the observed trials—five or more myths in the majority of trials—suggests that the use of rape mythology is still well entrenched. Nor is there any indication in this study that any of the well-worn myths about rape have fallen into desuetude. Indeed, rape mythology would appear to be a key defense tool regardless of the nature of the alleged assault or the overall strength of the prosecution case. Given the wealth of knowledge about the likely impact of stereotyping on jurors Temkin & Krahé, 2008), this should cause some concern. The Angiolini (2015) review found that prosecutors failed consistently to identify rape myths and concluded that the handling of rape cases by the Criminal Justice System remains problematic.

It is disappointing that, on the whole, myth usage by the defense was insufficiently challenged by the prosecution although there were a few instances of counsel employing skillful and robust counter-arguments. Similarly, while several judges in the study addressed the myths very fairly and adeptly, others failed to give adequate or indeed any warning about them or to make use of the Illustrations.

The study also suggests that s.41, which places strict limits on the use of sexual history evidence in court, is still not doing the job it is supposed to do. Moreover, if Trial 1 is anything to go by, s.100 may also not be providing much protection for complainants from over-reaching cross-examination about their "bad character." Given the nature of the adversarial system, it may be too much to expect defense barristers to curb their ways. However, at the very least, they must be held to account for flagrant breaches of the law such as in England and Wales when s.41 is ignored.

All these findings suggest that further training for prosecutors and judges is necessary. The Angiolini review recommended that more training programs for prosecutors be introduced urgently to enhance rape myth recognition and it is suggested here that such training should be extended to all barristers who appear in sexual assault cases involving both adults and children. Training about rape mythology could usefully take the form of encouraging awareness of the subtle ways in which myths are invoked and the misleading assumptions that arise from them, as well as enabling prosecution counsel to develop effective counter-narratives to those employed by the defense. As noted above, there is some excellent prosecutorial and judicial practice in this area that could be put to good use in training programs.

It is disturbing that false ideas about rape played such a prominent role in these eight 21st-century trials. If the adversarial system and jury trials countenance the use of any tricks or falsities in the interests of playing the game and defending the accused, then serious questions must be asked about its moral validity and the extent to which it is capable of giving protection to victims. It is suggested here that the way forward lies in further and deeper education of prosecuting authorities and judges about rape myths and their malign effect. A reconsideration of the role of experts in this context would also be of value. Moreover, powers exist in many jurisdictions to challenge the use of rape myths in the courtroom in a variety of different ways. It is high time these were fully operationalized.

Notes

1. In England and Wales, "barristers" are lawyers trained to practice as advocates in court.

2. The Crown Prosecution Service (CPS) is in charge of all public prosecutions in England and Wales.
3. Serious offences are dealt with by judge and jury in the Crown Courts
4. The Crown Court Bench Book is the official handbook for judges presiding over criminal trials in the Crown Courts in England and Wales.
5. Access to jury discussions in England and Wales is prevented by the Contempt of Court Act 1981.

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