

# Rape as ‘One Person’s Word against Another’s’:

## Challenging the Conventional Wisdom

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### Abstract

According to the conventional wisdom, rape is generally a case of ‘one person’s word against another’s’ and, in the absence of independent evidence, judgements regarding the truth or otherwise of an allegation are influenced by ‘rape myths’ and gender stereotypes. The meaning of ‘one person’s word against another’s’, however, and the extent to which it accurately describes the evidence in most rape cases, or usefully explains case disposal, are largely unexplored. This article subjects the conventional wisdom of rape as ‘one person’s word against another’s’, and the implicit claims and assumptions underpinning it, to close critical scrutiny. Drawing on original empirical data, I argue that the concept of ‘one person’s word against another’s’ is vague, ambiguous, and uninformative. It tells us virtually nothing about what rape cases look like evidentially, still less about case progression, and presents a partial and misleading view of English criminal proceedings and the process of proof. If we are to better understand attrition in rape cases, we need to meaningfully engage with the contentious issue of witness credibility and reliability—not only in the absence of independent evidence that supports or corroborates a witness’s account, but in the presence of evidence that undermines or contradicts it.

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## Introduction

When it comes to rape in the criminal justice system, ‘one person’s word against another’s’ is a commonplace phrase. Used by criminal justice professionals, scholars, and the man (or woman) in the street alike, ‘one person’s word against another’s’ is part of the common vernacular in discussing rape and is found, quite literally, everywhere: from conversations in the pub, tweets, blogs, and comments posted online; to newspaper articles (see e.g. Bowcott, 2013; Philipson, 2014; Burrowes, 2014; Dodd and Bengtsson, 2016; Street-Porter, 2017), research reports (see e.g. Burrowes, 2013), academic and practitioner texts (see e.g. Jordan, 2004a; Temkin and Krahe, 2008; Radcliffe et al, 2016), criminal justice policy (see e.g. Home Office, 2002a; CPS, 2011) and associated press releases (e.g. CPS, 2010), Crown Prosecution Service (CPS) legal guidance (CPS, undated), and law reports.<sup>1</sup> In contrast to, or, perhaps, by virtue of its pervasive use, the meaning of the term is seldom explored or defined. Instead, the discourse is awash with bald, matter-of-fact statements that rape is ‘one person’s word against another’s’. It seems, therefore, to be taken-for-granted that the term’s meaning is widely understood or at least readily inferred from the context in which it is used.

Whatever it means, categorizing rape as ‘one person’s word against another’s’ is clearly intended to be descriptive. But it also explains. The ‘attrition problem’ in rape cases (Hohl and Stanko, 2015)—the so-called ‘justice gap’ (Home Office, 2002b; Kelly et al, 2005)—and ‘one person’s word against another’s’ have long been causally linked (see e.g. Jordan, 2004a; Temkin and Krahe, 2008). The relationship between the two is concisely summarized by Cunliffe et al (2012, pp.3-4), who, exceptionally, also provide a rare insight as to what the authors mean by the term:

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<sup>1</sup> *R v O (Wayne)* [2009] EWCA Crim 2520; *R v F* [2010] EWCA Crim 3096; *R v Dizaei (Jamshid Ali)* [2013] EWCA Crim 88; *R v Jain Hua Xie* [2014] EWCA Crim 715; *R v Hunter (Nigel)* [2015] EWCA Crim 631.

In part the low conviction rate may be attributed to the particular characteristics of a rape case. In general, rape cases lack physical or any objective evidence and boil down to one persons' [*sic*] word against another's. A lack of objective evidence means that these cases often require jurors to assess whose story they believe—the complainant's or the defendant's... With little in the way of hard evidence to guide jury decision making rape cases are exactly the kind of cases that are open to influences of stereotypes and attitudes.

In the absence of independent evidence in rape cases, judgements about the credibility and reliability of the complainant's and accused's conflicting accounts are said to be susceptible to 'rape myths', a term first used by Burt (1980, p.217) to describe 'prejudicial, stereotyped or false beliefs about rape, rape victims, and rapists'. Although the definition of the 'rape myth' has altered drastically since the 1980s (see e.g. Gerger et al, 2007), and may be contested (Reece, 2013; Gurnham, 2016a; 2016b; Young, 2017), the prevalence of such myths and their impact on attrition have reportedly not diminished. According to the conventional wisdom, the trouble with rape is that, evidentially, such cases generally amount to 'one person's word against another's' and, prejudiced by 'rape myths', police, prosecutors, judges, juries, and society at large routinely fail to take rape victims at their word (Estrich, 1987; Harris and Grace, 1999; Jordan, 2004a; 2004b; 2011; Kelly et al, 2005; Kelly, 2010; Hohl and Stanko, 2015).

In addition to describing and explaining, 'one person's word against another's' is inherently normative. It speaks to an evidential case that is limited in both quantity and form. In so doing, the criminal case involving independent evidence and third-party witnesses is tacitly held up as the probative ideal against which cases comprised of 'one person's word against another's' are measured and found to be wanting. Such cases are, ostensibly, evidentially inferior—deficient, less than, weaker—and, as such, comparatively less likely to

result in conviction. And, if it enables us to anticipate which cases are more or less likely to progress through the criminal process, ‘one person’s word against another’s’ also has predictive value.

On the face of it, then, ‘one person’s word against another’s’ is a remarkably efficient and effective little turn of phrase. It tells us what rape cases look like. It helps us to understand when, and why, rape cases fail to result in prosecution and conviction. And it usefully informs criminal justice reform in a targeted effort to reduce rates of attrition (see, for example, demands for ‘enhanced evidence gathering’, Kelly et al, 2005; CPS, 2012; ACPO, 2015). It does all of these things, however, only *if* the various claims and assumptions underpinning ‘one person’s word against another’s’ withstand critical scrutiny. The argument presented here is that they do not.

Drawing on unique qualitative research data, relevant legal doctrine, and criminal justice policy and practice, this article undertakes a searching, empirically informed and context-sensitive critical examination of the notion of ‘one person’s word against another’s’. The structure of the analysis is organized around the important but typically overlooked definitional question: What does ‘one person’s word against another’s’ actually mean? In exploring this question, both conceptually and empirically, challenges to the conventional wisdom of rape as ‘one person’s word against another’s’ are exposed, the implications of which are discussed in the article’s closing section. This article thus not only contributes to the existing ‘anti-rape’ (Cook, 2011) research literature and the public- and policy discourse this extensive body of work informs, but also to legal scholarship on ‘taking facts seriously’ (Twining, 1984; 2005) and inferential reasoning (see e.g. Dawid et al, 2011) in the field of evidence, proof, and fact-finding (e.g. Roberts and Redmayne, 2009). It begins, however, with a brief account of how the data presented here were generated.

## **Methodology**

The analysis below draws on original qualitative data from two separate empirical research studies conducted by the author. The first, undertaken in 2007-09, and referred to throughout as ‘the male rape study’, examined Rape Specialist Crown Prosecutors’ decision-making in a sample (n=17) of male-on-male rape cases in three (of the then 42) CPS Areas. The second study, undertaken in 2012 and referred to throughout as ‘the female rape study’, examined police decision-making in a sample (n=20) of female rape cases dealt with by a specialist rape investigation unit covering one of the two divisions in a large, predominantly urban police constabulary.

Although distinct in terms of their individual foci, the male and female rape studies’ aims were essentially the same. Both studies sought to identify, describe, and critically evaluate the factors influencing criminal justice professionals’ decision-making in rape cases, albeit at different stages in the criminal process and in relation to victims of different sexes. Reflecting their similar research questions, the two studies utilized similar methodologies. Namely, the systematic and detailed analysis of a purposive sample of case-files combined with in-depth, semi-structured research interviews with the relevant decision-maker in individual sample cases: Crown Prosecutors (n=14) and Area Rape Coordinators (n=6) in the male rape study; and Investigating Officers (n=10) and their superiors (n=5) in the female rape study.

Samples like these, which are neither random nor representative and have no statistical power, are prone to being dismissed out of hand by those unfamiliar with or unconvinced of the validity and exigencies of qualitative methods. Such dismissal is unwarranted here. The analysis that follows is not quantitative. It does not seek to measure the occurrence of rape as ‘one person’s word against another’s’. Rather, it asks how the concept is defined. What does ‘one person’s word against another’s’ mean—not just in the abstract, but in practice? What do

rape cases categorized as such actually look like, evidentially? In exploring these (purely qualitative) questions, the data from the male and female rape studies are invaluable.

Those data include transcripts from semi-structured research interviews during which respondents—specialist police investigators and Crown Prosecutors who deal with rape cases on a daily basis—talked explicitly and in detail about precisely the phenomenon under analysis here. Based on their professional experience, these respondents are key informants, uniquely placed to help us understand the meaning of ‘one person’s word against another’s’ and its implications for prosecution decision-making. In addition to the interview data, there are the case-files, the close examination of which enable us to cross-check, probe, and, where necessary, challenge respondents’ abstract conceptualisations in the light of concrete examples. Numerically, the case-file samples from the male and female rape studies are undoubtedly small compared to the large or at least *larger n-* (and primarily quantitative) studies commonly encountered in the mainstream rape research literature (e.g. Harris and Grace, 1999; Kelly et al, 2005; Feist et al, 2007; Hohl and Stanko, 2015). They are, nevertheless, diverse and comprehensive. The samples include allegations of rape occurring in a variety of circumstances, locations, and relationships, and include victims of different sexes, sexualities, ethnicities, mental and physical abilities, and ages. Combined, they cover the gamut of criminal justice outcomes from police decisions to ‘no crime’ an alleged incident right through to jury verdicts following a contested trial. And they contain cases that were, and others that were not, described as ‘one person’s word against another’s’, enabling us to identify and scrutinize the definitional boundaries of the concept: What does, and what does not, fall within its scope? Notwithstanding their limitations, the original data presented here shed fresh and much needed critical light on the conventional wisdom of rape as ‘one person’s word against another’s’ and contemporary understandings of criminal justice responses to rape.

Finally, for the reader's ease, it is worth taking a moment to set out the process of anonymization utilized in the analysis below. Reflecting the sensitive nature of the two studies and statutory guarantees of lifelong anonymity for rape complainants,<sup>2</sup> anonymization here goes beyond that required by ethical good practice and data protection in social research. Cases are numbered 1 through 17 in the male rape study (MRS), and 1 through 20 in the female rape study (FRS). A reference to MRS Case 1 thus denotes Case 1 from the male rape study. A reference to FRS Case 1 denotes Case 1 from the female rape study. Police respondents from the male rape study are designated MRS Police A through MRS Police F. Similarly, police respondents from the female rape study are designated FRS Police A through M. Crown Prosecutors, all of whom were interviewed in the course of the male rape study, are designated MRS Prosecutor A through Q. No information regarding individual respondents' gender, ethnicity, and so forth or rank/position in their respective organizational hierarchies is provided. Where personal pronouns are necessary, all police are designated male in the narrative, while all prosecutors are designated female. Complainants are referred to throughout the article as 'C'. Suspects/accused/defendants are referred to as 'D', and, where necessary, witnesses referred to as 'W'. Where there are multiple complainants, defendants, or witnesses, numerals are added: for example, C1, C2, C3, or D1, D2, and so on.

## **Defining Terms**

Given the dearth of discussion surrounding the definition of 'one person's word against another's, and, moreover, that it has no figurative sense or meaning, it seems reasonable to infer that the term may be taken literally; that it simply means what it says. Taken literally, and contextualized against the backdrop of the criminal process, 'one person's word against another's' is about evidence and proof in the reconstruction of disputed past events. More

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<sup>2</sup> Section 4 Sexual Offences (Amendment) Act 1976 (as amended).

specifically, it signals an absence of independent evidence that might settle the factual dispute—here, whether there was, in fact, a rape—one way or the other. ‘*One person’s word against an other’s*’ tells us that, faced with an allegation of rape, the relevant fact-finder is confronted with the conflicting testimonial accounts of two parties, neither of which is independently corroborated, and both of whom profess to be telling the truth.

Conceptually, this deductive interpretation of ‘one person’s word against another’s’ resonates with broader understandings of the term implicit in the critical rape discourse and broader public debate. It also tallies with what some police and prosecutors meant, or appeared to mean, when they told me during research interviews, as they frequently did, that rape is generally ‘one person’s word against another’s’. However, the interview data reveal a second, alternative interpretation of ‘one person’s word against another’s’, one which was more frequently invoked by respondents and broader in its scope. Both interpretative approaches are examined in detail below. They are referred to separately in the analysis as, (1) the literal approach, and, (2) the issue-based approach.

## **The Literal Approach**

During research interviews, a number of respondents—a sizeable minority but certainly not all—appeared to subscribe to the literal interpretation of ‘one person’s word against another’s’ with cases discussed in stark, black-and-white terms of no evidence beyond a complainant’s account and an accused’s denials. Referring to Case 4 from the female rape study, for example, FRS Police I was emphatic in his literal use of the term:

It is one of those [cases] that is one person’s word against another’s—*entirely*. She hasn’t seen a doctor for any injuries. She hasn’t immediately told somebody afterwards. You know? It is *literally* down to one person’s word against another’s.

While FRS Police I's comments related to a specific case, other respondents who adopted the same strictly literal, 'no evidence'-based interpretation of 'one person's word against another's' claimed that this descriptor applied to most rape cases:

Quite often, that's all you have. *All* you have is your complainant. You know, with other cases, you may have other witnesses, you may have corroborative evidence—you know, CCTV and all sorts of things which you can pull all those threads in to build up a case and, when you take everything into account, you've got a strong case. But quite often, in rape cases, you have your complainant. (MRS Prosecutor B)

Notably, MRS Prosecutor B was not alone in supporting her broader claim that rape 'quite often' involves 'one person's word against another's' by pointing out the absence or lack of evidence in rape cases relative to the evidence generally available in other criminal cases. The implications of the comparison, however, are that the resulting claim is not merely that, evidentially, *this*—i.e., no evidence beyond a complainant's account and an accused's denials—is what rape cases generally look like. Rather, the claim is that, evidentially, *this* is what rape cases generally look like and other cases generally do not. In other words, when it comes to investigating and prosecuting suspected criminal offending, rape is different or 'unique':

It's pretty well a unique type of offence in that you've rarely got a witness to it and often there is no other evidence other than the victim's account. And usually, with physical assault cases, you may have injuries or some peripheral evidence and often, with rape cases, that isn't the case. So, in any case that relies on one person's word

against another's, there are always going to be circumstances where a jury are not sure.

(MRS Prosecutor J)

[Rapes] aren't straightforward cases. ... It's like, it's a case that you will not deal with in any other department. It's not like you're taking something that doesn't belong to you or, potentially, you're having a street fight where we've got injury and we can see it and we've got CCTV and we've got loads of witnesses and we've got these people who've seen you drunk before and we've got your mate who's said you fell out at the bar. You don't, very often, you don't *have* all of that [in rape cases]. So, it's looking at the micro-detail and it's building your case from scratch because nothing's there for you. In some cases, in a lot of your volume crime, a lot of your case is present for you already. But in sex cases, they very often are just offender and victim. (FRS Police H)

## **The Trouble with the Literal Approach**

Conceptually, there is no ambiguity in this interpretative approach to 'one person's word against another's'. The term means exactly what it says. The totality of evidence available in the case amounts to no more than '*one person's word against an other's*': No physical or other tangible evidence; no scientific or medical evidence; no CCTV; no third-party witnesses (i.e., a person, other than the complainant or the accused, with firsthand knowledge of matters in issue); and so on. As a definition, then, the literal approach is clear, precise, and readily understood. Empirically, however, it is unconvincing. First, it is debatable what constitutes an absence or lack of evidence. Second, interpreted literally, 'one person's word against another's' does not accurately describe the available evidence in the relevant cases. Finally, and relatedly, given that further evidence was available in every case in the male and female rape studies said by respondents to be comprised of literally 'one person's word against another's', there is

reason to doubt whether those respondents intended or expected to be taken too literally. Each of these difficulties is now considered in detail.

### ***‘No evidence’ may constitute evidence***

In order to understand what it means to say that there is ‘no evidence’ in a case, we need first to understand what evidence *is*. In the criminal process, and bracketing questions of admissibility, evidence simply means relevant information, or, as Murphy (2003, p.1) puts it, ‘any factual datum which in some manner assists in drawing conclusions, either favourable or unfavourable, to some hypothesis whose proof or refutation is being attempted’. Defined in this manner, distinguishing between the presence and absence of evidence is complex. Sometimes, a lack of evidence *is* evidence in that its absence may inform and assist fact-finders in drawing factual conclusions.

What might reasonably be inferred from the absence of independent evidence in a particular case depends, of course, on why such evidence is ‘missing’ (Nance, 1991. See also Hamer, 2012). For instance, if there is no evidence beyond a complainant’s account and the accused’s denials because police did not take the allegation seriously and failed to conduct an adequate investigation, then the resulting lack of evidence is not probative. If, however, independent evidence that might reasonably be expected to be available in a given case is ‘missing’ despite a thorough police investigation and efforts to secure it, the inferences that might reasonably be drawn from its absence are altogether different. Depending on a complainant’s account of events (and the timing of the report), for example, ‘no evidence’ of injuries sustained by the complainant may positively contradict her (or his) factual claims and assertions, thereby impugning the allegation:

Has she got any injuries? Because she's saying she was pinned down. And no, there's nothing. I've dealt with quite a few, not just necessarily rapes but in other jobs, 'Oh, he's punched me in the face. Five, six times.' Well, did he? Because there's not a mark. He hasn't punched you! If I punched you like that [*punches fist into opposite hand*]—and that's not hard—*you would bruise*. (FRS Police J)

While FRS Police J was speaking in the abstract, a case from the female rape study provides a concrete example of an absence of evidence—or, 'no evidence' beyond the complainant's allegations and the accused's denials—having probative value.

The complainant, C, in FRS Case 6 was a long-term resident in a care home for mentally disordered adults. She disclosed to staff that she had been raped one weekday lunchtime in a narrow and secluded alleyway off the marketplace in her local town by her boyfriend at the time, D, also a resident in the home. Contrary to C's wishes, staff reported the alleged incident to the police. When officers attended, she repeated her allegations and agreed to make a formal complaint. C's various accounts of the incident, to her carers and to the police, were inconsistent. The alleged incident had occurred one month ago; three months ago; sometime during the summer. The accused had not been violent and had not threatened C in any way; the accused had slapped and punched her repeatedly during the incident and the complainant had screamed and physically resisted throughout. She had been raped against the wall in the alley; she had been raped on the floor in the alley; she had been raped against the wall *and* on the floor.

Despite their best efforts and extensive local knowledge, officers could not locate an alleyway off the marketplace, or anything vaguely resembling C's description of the crime scene in the town centre. Unable to determine where or when the alleged incident occurred, CCTV footage could not be secured. Given the delay—whatever its length—in reporting the

incident, neither scientific nor medical evidence was available. Staff at the home did not recall seeing any visible injuries on C at any point during the relevant period or beyond. While they confirmed that C and D occasionally went out on shopping trips together, staff could not recall C coming back from any such a trip in a distressed state as C (intermittently) claimed. They also stated that C had made numerous complaints (of a non-sexual nature) against D in the past and that on each occasion, when police had been called, she had always either refused to repeat her allegations and make a formal complaint, or had made complaints that she subsequently retracted. Her forensic social worker reported that C's fluctuating mental health presented, amongst other things, as acute anxiety, paranoia, and psychosis, and that her mental condition had deteriorated significantly over the preceding months. As a result, C had now been moved to a secure hospital unit in a neighbouring county. Again, given the uncertainty around when the alleged rape occurred, it was impossible to ascertain—and unwise to speculate—whether C's deterioration was triggered by the alleged events, a trigger for the allegation, or entirely unrelated. In his police interview, D consistently denied the allegations on the basis that he had never had sexual intercourse with C. Having exhausted all potential lines of inquiry, no further action was taken against D.

It would be both inaccurate and misleading to describe FRS Case 6, or to attempt to explain its failure to progress through the criminal process, in terms of an absence or lack of independent evidence and the case boiling down to simply 'one person's word against another's'. There *was* evidence—relevant information—available, beyond C's account(s) and D's denial, and it included: *not* being able to find the crime scene; witnesses, including her professional carers, *not* observing any injuries or distress consistent with C's account; and *no* good Samaritans, or witnesses of any other ilk, reporting a screaming woman being sexually and physically assaulted in broad daylight, at lunchtime, in a bustling town centre. FRS Police F was alert to the impact that C's (and D's) mental health difficulties might have on her ability

to provide police with a coherent and comprehensive account of events. He was also clear that the ‘absence’ of independent evidence (if that is what it was) did not prove that C was not, in fact, raped. It did, however, raise significant—and, crucially, evidence- rather than myth-based—doubts regarding the accuracy and reliability, if not the veracity, of the complainant’s account:

What she was saying, it couldn’t have, it *couldn’t* have happened... A two foot alley? In [town centre], as well, where she said it happened... I mean, these are two people with learning difficulties so you’ve got to factor that in as well... But what she’d said in her disclosure, it just didn’t ring true. Not where she was suggesting. It was the middle of the town centre. There *are* alleyways but she said it was around [the marketplace] and there isn’t anywhere quiet there. You are always within shouting distance of somebody, definitely. Especially on a lunchtime. *Any* lunchtime on *any* day, there’s always folks knocking about. It just didn’t sound right.

The fact that the police and prosecution are not in possession of independent evidence that corroborates or supports a complainant’s account does not automatically equate to there being ‘no evidence’ beyond a complainant’s allegations and an accused’s denials. There may, as in FRS Case 6, be a good deal of additional information. It may not support the complaint but, as ‘factual datum which in some manner assists in drawing conclusions, either favourable or unfavourable, to some hypothesis whose proof or refutation is being attempted’ (Murphy, 2003, p.1), it *is* evidence. Consequently, while it would be true to say that the only evidence of rape in FRS Case 6 came from the complainant, it would be disingenuous to characterize this case or attempt to explain its outcome in terms of ‘no evidence’, as *literally* boiling down to ‘one person’s word against another’s’. On any sensible evaluation, it was the presence rather

than the absence of evidence that brought FRS Case 6 to a close in the investigative stages of the criminal process.

***‘One person’s word against another’s’ does not reflect the research data***

Despite its proponents’ claims to the contrary, the literal, ‘no evidence’-based definition of ‘one person’s word against another’s’ does not accurately depict the extent of the evidence available in the relevant cases. Indeed, the closest I came to observing a case which might plausibly be described as *literally* ‘one person’s word against another’s’ was FRS Case 16. This case involved a three-year-old girl, C, who, spontaneously and unprompted, disclosed to her mother that D, C’s 15-year-old uncle, had made her ‘suck his tail’ when he babysat the child a couple of weeks earlier. The incident was reported to the police almost immediately following this disclosure. However, apart from saying that D made her sad, C would not repeat her allegations. Given the delay between the offence being committed and being reported, and the nature of the allegation (oral penetration), a forensic medical examination was not conducted. Arrested and interviewed by police, D denied the allegation outright. The act alleged, he said, had simply never happened.

At this point, the case could, indeed, be characterized as ‘one person’s word against another’s’, albeit that it was not the complainant’s testimony but rather the mother’s hearsay account of her daughter’s original disclosure on which any anticipated prosecution would rely. However, it could not be so characterized for very long. Three-quarters of an hour into his police interview, D confessed. He subsequently pleaded guilty to rape of a child under 13 contrary to s.5 Sexual Offences Act 2003. On the one hand, and at the risk of stating the obvious, it is counterintuitive if not nonsensical to refer to a case in which an accused fully admits the offence alleged in terms of ‘one person’s word against another’s’. In such a scenario, there is no conflicting ‘word’. The prosecution’s case is uncontested. On the other hand, and

rather less obvious, are the implications this has for the relationship between ‘one person’s word against another’s’ and attrition. That relationship will, to some extent, be an artefact of the concept’s definition in that it excludes cases resulting in a caution or guilty plea. With around 20 per cent of defendants charged with rape pleading guilty (Ministry of Justice, 2013), that is a sizeable chunk of convictions taken out of the attritional analysis on the basis that they cannot, as a matter of logic and commonsense, be described as ‘one person’s word against another’s’. Yet, at least until D confessed, that is precisely what FRS Case 16 was. While it may make sense, in the abstract, to say that this was *not* a case of ‘one person’s word against another’s’, if we are to develop a more robust understanding of the complex and nuanced relationship between the evidence in a rape case and its outcome, it would arguably be more enlightening to say that this *was* such a case and the defendant pleaded guilty anyway.

Beyond this solitary case, the literal interpretation was thoroughly unconvincing in the male and female rape studies. It just does not reflect the evidential nature of the cases analysed. Across both samples, *where a rape allegation was contested by an accused* (which, as we have now seen, is a necessary condition for the descriptor’s application), there was *always* more evidence available than a complainant’s and the accused’s conflicting accounts. This may, of course, simply mean that, in addition to being unrepresentative and non-random, both samples were entirely populated with atypical cases. That, however, seems unlikely. To be sure, the male rape sample may have been skewed to some (unknown and unquantifiable) degree by the sampling frame—as ‘one person’s word against another’s’ is reportedly associated with attrition in rape cases, such cases are more likely to be filtered out of the criminal process in the investigative stages and consequently less likely to appear in the CPS case-load from which the male rape sample was drawn. But as an ‘inactive subjects’ snapshot sample (Kaplan, 1997) including all allegations of female rape recorded and finalized by a specialist rape investigation

unit over roughly a six month period, the same methodological criticism cannot be levelled at the female rape study.

A more compelling cause for confidence, in that it does not rely on chance, is that similar findings have been reported elsewhere. In their joint review of the investigation and prosecution of rape, for example, Her Majesty's Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary (2007, p.113) observed, 'despite the general view about most cases consisting of the victim's word against the defendant's, in the majority of cases there was other evidence that provided additional weight to the victim's account.' Similarly, in their analysis of case progression in serious offences, including rape, Burton et al (2012, pp.10-11, 29) reported that, *inter alia*, 'other' witness statements were available in 60 per cent of rape cases analysed, case exhibits ('photos, clothing, weapon, bag, etc') were available in 45 per cent, forensic evidence in 32 per cent, and medical evidence in 29 per cent. The generalisations that can sensibly be drawn from the male and female rape studies are undoubtedly limited. In combination with findings elsewhere, however, these data present an empirical challenge to widely accepted claims that rape is generally 'one person's word against another's'.

### ***The literal definition is not (always) applied literally***

Without exception, respondents who identified a particular case as 'one person's word against another's' on the basis that there was 'no evidence' beyond a complainant's account and an accused's denials nevertheless went on to discuss further evidence available in that same case. They explained how that additional evidence supported or undermined a complainant's account and gave a reasoned and detailed commentary regarding its impact on decision-making in the case.

In Case 4 from the female rape study, for example, which FRS Police I, quoted above, described as being 'entirely' and 'literally' a case of 'one person's word against another's',

evidence beyond the complainant's allegations and the accused's denials *was* available. None of it, however, supported the complainant's account and, in fact, generally undermined where it did not directly contradict it. Individuals the complainant had identified as friends in whom she had confided about the incident gave police witness statements denying any recollection of such disclosures. Another friend, a male who was in the adjoining room when the alleged rape occurred and whom, according to the complainant, had heard her physically and verbally resisting the accused, gave a statement to police saying that he had heard nothing of the kind that evening. This witness further contradicted the complainant by stating that there was nothing about her demeanour the following morning that had suggested to him that anything untoward might have occurred and concluded his statement by expressing his surprise at C's allegations.

Further difficulties were raised by C's conduct following the alleged incident. The complainant and accused had previously been in a long term sexual relationship which had ended some weeks prior to the alleged rape. This relationship had been rekindled immediately following the alleged rape, before coming to a final and embittered end a couple of months later. This evidence, in combination with the problematic witness evidence outlined above, raised questions surrounding the perceived reliability of the complainant's account:

She says she told her friends at certain times and her friends say, 'She didn't tell us that.' And there were *lots* of inconsistencies there. ... To take that to court and ask someone to be *sure*, beyond reasonable doubt. It's not a popularity contest. It's not a case of who they believe most at court. But, then, it isn't even a level playing field with that because then you take into account the fact that, well, there were other people in the house and she *didn't* shout out or anything, and she *didn't* tell anybody about it immediately, even if it wasn't reported to police, and then she *has* gone back and had a

normal consenting relationship with him when she was under no pressure to do that. And those undermining things, rightly or wrongly, *matter* in court. (FRS Police I)

In addition, some weeks after the couple's final break-up, and coinciding with the accused having met a new girlfriend, the complainant sent D a 'friend request' on Facebook. When he did not accept this request, C contacted D via Facebook Messenger demanding an explanation. A heated and increasingly hostile exchange between the two followed, during which C threatened, several times, to tell the police that he had raped her. The content of this exchange was reproduced and documented in full by D following his arrest. It was anticipated that this evidence would be used by the defence to support the accused's claim that this was a false and malicious allegation by a slighted ex-girlfriend motivated by jealousy and a desire for revenge:

It would be something the defence would make something of, rightly or wrongly. I'm a big believer in it doesn't matter what happens before and it doesn't matter what happens afterwards, it's actually what happens *at that point in time*. But, if the defence can then twist that to, 'He's interested in another girl and you've got bitter about that, and why would you want to "friend" somebody who'd raped you? Why would you do that?' And defence would make a play of that because the jury will sit there and say, 'Well, yes. If she *has* been raped by him, why *would* she want to be friends with him? And they've split up. Why doesn't she just walk off?' And it's putting those little bits of doubt in a jury's minds which is what the defence lawyers are very good at doing.

During our research interview, FRS Police I had been emphatic in his assertions that this was literally a case of 'one person's word against another's'. Nevertheless, in explaining

the decision to take no further action against the accused, it was the presence rather than an absence of independent evidence to which he referred. It seems reasonable to suggest therefore that, either, FRS Police I did not literally mean what he said, or, he did, and FRS Case 4 cannot persuasively be described in such terms.

MRS Prosecutor B's anecdotal discussions of a (female) rape case she was dealing with at the time of our research interview raises the same interpretative dilemma:

There's no medical [evidence]. There's not really any forensic [evidence]. It's her word against his. That's what it boils down to at the end of the day. And, on paper, she comes across as very credible and very plausible. But who knows? Because obviously he's—the defendant—he's going to say, 'It was normal sexual intercourse. She consented to it. We have sex all the time and this was just another occasion when we had sex and there's no way she didn't consent.' And she's going to say, 'Well, I didn't.' And that's it. We've got nothing really. [*Pause.*] I mean, we've got the recent complaint to the friend and the sister, which is good, but, apart from that, we don't have anything. Whereas, in other [types of criminal] cases, you know, you do have. In other cases, there's forensic or other corroborative evidence that you can rely on to back up what your complainant is saying.

In contrast to FRS Case 4, the accused in the instant case had been charged with two counts of rape and was due to stand trial the following week. When asked to explain how she had reached the decision that there was sufficient evidence to prosecute in this case, MRS Prosecutor B referred not only to the positive impact of independent evidence gathered by investigators that supported the complainant's account, but also to the verified 'absence' of evidence—no record of Social Services involvement with the family; no previous allegations

by the complainant; and no criminal convictions—that might be exploited by the defence in an effort to undermine it. Her comments, worth quoting in full, are both incisive and revealing:

We decided that there was a likely prospect of conviction because she had made immediate complaints both times. She was clearly distraught—told her work colleague. And the work colleague gives evidence that she was very upset and all the rest of it. She then goes home and is allegedly raped again and tells her sister. Immediately goes to the police station, goes for the [forensic medical] examination and all the rest of it and there's nothing in her background to suggest that she, she—you know, sometimes we get cases where the complainant comes forward and, of course, then you find out that they've made allegations in the past. They've made false allegations and all sorts of things which would undermine their credibility. There's *absolutely nothing* to suggest that she would do that. And so it was felt that there would be a likely prospect [of conviction] because she *is* plausible. And he's *not*, particularly, in interview. Well, I don't think he answers any questions actually. I think he just gives a prepared statement. He says, I think, he says something like, 'Yes, we've been married and we have a normal sexual relationship between husband and wife and I don't want to talk about it anymore.' And then doesn't answer any more questions. So I think *that* counts against him. But, really, it's very borderline. I think they are very borderline, these cases. And lots of them don't get that far. And I think, possibly, if there was any indication that she had any kind of background of making allegations in the past, or any criminal convictions, that might sway it the other way.

If 'one person's word against another's' literally means what it says, then, like FRS Case 4 above, its application here is unconvincing. Evidence beyond the complainant's allegations and

the accused's denials *was* available. MRS Prosecutor B had taken it into account in her own decision-making and, the following week, the jury in D's trial would be taking it into account in theirs. This was not, in short, a case of literally 'one person's word against another's'.

This material discrepancy, this mis-match between how the concept is defined and how it may be used or applied in practice, problematizes what we can reliably infer about the nature and extent of the evidence available in rape cases explicitly described as 'one person's word against another's' and broader empirical claims that this is what rape cases generally look like. In other words, if people—here, police and prosecutors, but, by extrapolation, researchers, commentators, policy-makers, and so on—do not always mean what they say, then 'one person's word against another's' cannot be taken as a reliable signal for the wholesale absence of independent evidence in a given case of rape. Nor can it reliably tell us anything about the availability or otherwise of independent evidence in rape cases generally. But then, as will be seen below, other respondents did not suggest that it did.

## **The Issue-based Approach**

On close inspection, the interview data reveal a second, more common interpretative approach to 'one person's word against another's'. Respondents who subscribed to this alternate interpretation did not focus on the availability or otherwise of independent evidence in the case as a whole but rather on the evidence relating to what they identified as being the key or pivotal contested issue in a given case. If direct evidence on that particular issue was limited to a complainant's account and the accused's denial, then the case was likely to be described as 'one person's word against another's'.

Although by no means the only issue identified by respondents as amounting, evidentially, to 'one person's word against another's', consent was the issue most frequently referred to in these terms. Specifically, and reported to be the most common scenario in rape

cases, police and prosecutors referred to the accused who has admitted penetrative sexual activity but denies rape on the basis that the complainant was consenting at the time:

Most rape cases, the defence is going to be consent. You know, male or female, that's generally speaking going to be the defence. And it's just par for the course ... Generally speaking, rapes happen in private between two people and it's very—it's going to always end up being the word of the one against the other as to whether there was consensual intercourse or not. (MRS Prosecutor N)

In such a scenario, the probative value of independent evidence is often equivocal. Scientific or medical evidence demonstrating that the accused engaged in penetrative sexual activity with the complainant, for example, or, third party witnesses or CCTV images indicating that the complainant and the accused were together at a particular place or a particular time will, typically, be as consistent with the accused's innocence as it is with his guilt. The crux of the issue-based approach, then, is not so much the absence of independent evidence *per se* on a particular issue, but rather the absence of unambiguous independent evidence on that issue:

It's the nature of the offence that makes it very, very difficult to get a conviction. Because the forensic element of it can often be explained away by consent so that the issue just becomes consent. It's not, 'We can prove you did it. So you must have done it. We can place you at the scene for a burglary.' In the absence of another explanation, there's a really strong inference that he's committed the burglary. But the fact that he's had sex with her doesn't mean he's raped her, because he's saying it's consent and she's saying it isn't. If there isn't a lot of injuries—if there's injuries, photographs, force, it

helps. You've always got to try and look for these other things. But very often there isn't. Very often, it's word against word. (MRS Prosecutor I)

In a rape investigation, it's usually one person's word against another's. That's a bit of a generalisation, but it—you know, in the instances of consent, where the defendant says, 'No, it was with consent', there aren't normally any witnesses to that. And you've immediately taken forensics out of the equation. So we have the victim saying, 'I was raped', and the defendant saying, 'No. She was happy at the time.' (FRS Police E)

Thus, according to respondents, consent is generally the pivotal issue in a rape case and, absent compelling, if not conclusive, independent evidence of guilt—like significant injuries or a third-party witness to material events—the case will almost inevitably boil down to 'one person's word against another's':

[Rape] is harder to prove. Just because it's normally one person's word against another. That's what it boils down to. If anybody with half a brain's cute about it, then he can play the consent route. That's the easiest way to get yourself out of it. Because if there's only two of you in that room, only two of you know what's happened. (MRS Police E)

Evidentially, they don't do it in the semi-circle at [the local football stadium] at half-time. It's nearly always word against word. (MRS Prosecutor I)

## **The Trouble with the Issue-based Approach**

Compared to the literal, 'no evidence'-based approach, the issue-based interpretation of 'one person's word against another's' is ambiguous. In referring to the evidence available on a

particular contested issue in the case, rather than to the totality of evidence available in the case as a whole, the term means what it says, but it means what it says only indirectly. The concept is thus vague and somewhat elusive.

Empirically, as a description of rape cases, the issue-based approach is more sustainable than its literal counterpart. It might legitimately be applied, at some stage in proceedings, to somewhere over half of the male and female sample cases and therefore sits reasonably comfortably with police and prosecutors' claims here—and the received wisdom more broadly—that rape is generally 'one person's word against another's'. Quantitatively, for reasons set out in the following sections, this conceptualization is amenable to, at best, rough-and-ready measurement and it is trickier than might be imagined to provide a more concrete and precise count here. The more pressing problems with this conceptualization, however, are qualitative. On the issue-based approach, 'one person's word against another's' is decidedly (and deceptively) uninformative, over-inclusive, and misleading. The various, and often profound, difficulties presented by this interpretation, and their implications for the term's descriptive and explanatory value, will now be explored.

***The accused does not have to say anything and anything he does say is liable to change***

On the issue-based approach to 'one person's word against another's', categorization is contingent upon the factual issues contested by the defence and the evidence available to prove those contested issues either way. It depends, in short, on what the accused is saying, what facts he is disputing. While the paradigmatic image conjured up by 'one person's word against another's' involves a dramatic and acrimonious courtroom battle with the word of the complainant pitted against that of the accused, the procedural reality is that the accused does not have to say anything. Instead, he enjoys the privilege against self-incrimination and the

associated right to silence which means he does not have to give an account of the events alleged at any stage of the criminal process, and he most certainly does not have to give us his word (see generally Quirk, 2016).

To be sure, these rights are not without their limits. Following the enactment of sections 34-38 of the Criminal Justice and Public Order Act 1994, a jury may, under certain circumstances, be entitled to draw such inferences as are proper from an accused's silence—essentially, if he later changes his story or introduces previously unmentioned exculpatory facts (ibid. See also Jackson, 2001; Dennis, 2002; Cooper, 2006). Nevertheless, an accused is under no obligation to answer questions put to him during the pre-trial, investigative stages of the criminal process. Nor is he obliged, and cannot be compelled, to testify or adduce any evidence in his own defence at any subsequent trial. Instead, the burden of proof rests squarely on the prosecution which, single-handedly, must persuade the jury of the accused's guilt beyond reasonable doubt,<sup>3</sup> or, in its more contemporary juridical form, 'so that they are sure'.<sup>4</sup>

Despite the popular imagery of fact-finders in rape cases choosing which of the complainant's and accused's competing accounts they believe, in reality, there might not be two accounts. And if there are two accounts, the steep, and principled, asymmetry of the probative burdens borne by the parties in English criminal proceedings means that it is for the prosecution, and the prosecution alone, to prove its case and to do so to the requisite criminal standard. The individual accused of rape is neither required nor expected to prove his innocence. Consequently, the only account that must persuade the jury—and to an exacting standard—is the one adduced by the prosecution. Where it fails to do so, the presumption of innocence mandates that the jury acquit.

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<sup>3</sup> *Woolmington v DPP* [1935] AC 462.

<sup>4</sup> *R v Summers* [1952] 1 All ER 1059; *Walters v R* [1969] 1 AC 26; *R v Majid* [2009] EWCA Crim 2563.

This procedural context problematizes the categorization of cases as amounting, or not amounting, to ‘one person’s word against another’s’ under the issue-based approach. Where an accused exercises his right to silence, it will not always be clear what the contested issues in the case actually are:

He’s not giving an account is he? If he just sits there and goes ‘No comment’ then he’s not actually giving an account. He’s not telling us he hasn’t done it. If he was to give an account and say, ‘I haven’t done it because of X, Y and Z’, then potentially there are lines of inquiry that we can then follow. But, if he was to sit there and say, ‘No comment’, then he’s not saying he hasn’t done it—he’s not saying he *has*. But he’s not saying he *hasn’t*. (FRS Police H)

Anticipating the pivotal issue or issues in any given case may therefore be something of a guessing game:

You’ve got to guess at what their case is going to be. To guess at what line of defence they’re going to put... Most of the time, to be honest, you can guess—you *can* guess—what they’re going to say or what their line of attack’s going to be. And generally, there’s only going to be one or two or three possible defences. Either, ‘It wasn’t me. I wasn’t there. Wrong ID’. Or it’s a factual issue, ‘They’re making it up. They’re lying’.

(MRS Prosecutor A)

In the absence of an account from the accused, the investigation must, by necessity, be led by the complainant’s account and will proceed on the assumption that anything and everything she (or he) has said may be contested by the defence.

Evidence gathering and case construction is an ongoing and dynamic process. Typically, the evidential case will emerge and evolve over time, and may do so in unanticipated ways: a witness's evidence may change; complainants (and other witnesses) may retract or withdraw their statements, or simply refuse to cooperate with an ongoing investigation or to testify at any subsequent trial; scientific test results may be inconclusive or, alternatively, may exonerate a suspect; existing lines of inquiry may lead to naught; and new and unexpected lines of inquiry may come to light. In short, even the most diligent and comprehensive of investigations may not yield a strong evidential case against an accused. Notwithstanding the threat of adverse inferences being drawn from his pre-trial silence further down the line—which is no threat at all to the suspect who is not subsequently charged—an accused's interests in avoiding prosecution may be best served by keeping quiet, particularly in the early stages of an investigation, and simply waiting to see what, if any, evidence the police can come up with. Once the accused has a clearer and more complete picture of the evidence against him, he may then decide to waive the right to silence and start talking:

Sometimes, if they say nothing initially—'no reply' the interview—but then we get [forensic test results], 'Well, you obviously *did* have sex with her because we've found semen inside her and it's yours a million to one.' 'Oh. Yeah. It was consensual.' That's the difficulty. Certainly with adults. It's, 'She consented.' (MRS Prosecutor I)

Moreover, if the accused is talking, if he has given an account—indeed, even following the submission of a statement outlining his defence,<sup>5</sup> should the case have progressed that far—

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<sup>5</sup> Section 5 Criminal Procedure and Investigations Act 1996 (as amended). Defence statements are not always submitted in a timely manner, or at all, and those that are provided may be vague and reveal little of any real usefulness. See further M Redmayne, 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' [2004] Crim LR 441-462; R Denyer, 'Non-compliance with Case Management Orders and Directions' [2008] Crim LR 784-792; R Denyer, 'The Defence Statement' [2009] Crim LR 340-345.

he does not have to stick to it. In MRS Case 9, for example, the defendant's account altered throughout the pre-trial process, apparently to fit and explain the medical and other scientific evidence that slowly but surely mounted against him: there had been no physical let alone any sexual contact between him and C; he had engaged in some rough horseplay with C but there had been no sexual activity or sexual undertones whatsoever; they had engaged in rough horseplay on the night in question, and D had masturbated when he returned home the following morning; C had initiated some non-penetrative, and entirely—mutually—consensual sexual exploration between the (under-age) parties, culminating in D having masturbated and ejaculated onto C's stomach.

The minute that our forensic evidence came back with his semen was the time when his defence statement changed, and most dramatically, to say that there was sexual activity of some kind. And at that point, once we got the forensic evidence, we thought he'd plead guilty. But he didn't. (MRS Prosecutor G)

D's version of events changed yet again when he testified in his own defence at trial to the effect that, at C's request and with C's express consent, D had, in fact, attempted to penetrate C anally but, he said, had been unsuccessful having 'only got the tip in'. As the slightest penetration suffices for the purposes of the SOA 2003, and given the complainant's age, this was tantamount to a courtroom confession to sexual activity with a child contrary to s.9 SOA 2003. D was immediately re-arraigned, charged accordingly, and pleaded guilty.

In the face of an unknown or shifting defence, categorizing a case in terms of 'one person's word against another's' on the issue-based approach is a precarious and tentative exercise based, to varying degrees, on speculation and guesswork. As both the issues being disputed and the evidence available to prove them are dynamic over time, whether we can

accurately describe a case as ‘one person’s word against another’s’ may vary depending on *when* we observe and seek to categorize the case. Just because a case amounts to ‘one person’s word against another’s’ today does not mean it will amount to ‘one person’s word against another’s’ tomorrow, and certainly does not mean it will still be ‘one person’s word against another’s’ by the time the case gets to trial, should it do so. Moreover, as FRS Case 16 above demonstrates, even in the absence of evidence beyond the complaint itself, there is always the possibility that an accused will suddenly confess all and plead guilty. At different stages of the proceedings, then, the same case may look very different. This inherent contingency problematizes categorical assertions that a case does or does not—or, where the descriptor is applied retrospectively, did or did not—amount to ‘one person’s word against another’s’.

### ***‘One person’s word against another’s’ reveals little about a case***

As a description, at least as it is defined on the issue-based approach, ‘one person’s word against another’s’ is astonishingly nondescript. Despite the widespread belief that ‘one person’s word against another’s’ captures some essential evidential feature or attribute common to rape that sets it apart from other criminal offences and, in turn, goes some way to explaining high rates of attrition in rape cases, in reality, it tells us very little about a case, and still less about its outcome. In some instances, the disparity between what it *sounds* like ‘one person’s word against another’s’ tells us about a case and what it *actually* tells us is so vast that the descriptor is not merely uninformative, it is positively misleading.

In MRS Case 3, for example, the complainant alleged that he had been beaten, robbed, and (repeatedly) raped, anally and orally, by two unknown males as he was making his way home after a night out with friends. As C had immediately reported the incident to police, investigators were able to secure a good deal of independent evidence. CCTV footage showed the two accused following C on foot for some time through the local area before catching hold

of him and forcibly dragging him into an alleyway not covered by CCTV cameras. Further footage showed the two accused subsequently leaving the alleyway together before the (now visibly distressed and injured) complainant emerged and made his way directly to the nearby police station. In addition, there was medical and other documentary evidence of C's extensive injuries consistent with a violent physical and sexual assault; scientific evidence indicating that the two accused had engaged in recent penetrative activity with C; and valuable personal effects belonging to C recovered by the police during searches of the two accused's homes.

Following his arrest, D1 admitted the relevant penetrative sexual activity but claimed that this was consensual and had been actively procured by C in return for payment in cash and in kind. Despite forensic evidence to the contrary, D2 maintained that he had not engaged in any sexual activity whatsoever with C but had merely held C's coat for him and kept look-out. Both accused consistently denied being physically violent towards C and could offer no explanation as to how his injuries had come about.

Unsurprisingly, given the wealth and strength of the evidence against them, D1 and D2 were charged with and prosecuted for multiple offences, including, between them, seven counts of rape and attempted rape.

There was so much external corroboration. ... On paper, I thought that was a sure-fire conviction, in as much as you ever have a sure-fire conviction on a rape case. ... It's a totally straightforward case and I thought it was a stone bonker.<sup>6</sup> (MRS Prosecutor N)

I was somewhat taken aback therefore, when, during our research interview, MRS Prosecutor N described the case as 'one person's word against another's'. In response to my (presumably

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<sup>6</sup> 'Stone bonker' is British slang for 'a certainty'.

palpable) surprise, she remarked, ‘I know there was a lot of corroboration. But at the end of the day, the only real evidence of the rape was coming from him.’

Of course, as we have seen, on the issue-based approach, ‘one person’s word against another’s’ does not reflect and does not endeavour to describe the nature, scope, or strength of the totality of evidence against an accused. The trouble is, *it sounds like it does*. It is surely counterintuitive to describe a case involving an abundance of highly probative and compelling independent evidence that supports and corroborates a complainant’s account and undermines, although is not wholly inconsistent with, the accused’s (dubious) version(s) of events in terms of ‘one person’s word against another’s’, with all the undeniably negative connotations that the descriptor entails. ‘One person’s word against another’s’ does not meaningfully or usefully describe MRS Case 3 and it certainly does not explain why the case was so confidently prosecuted. Its application here *is*, nevertheless, revealing in that it throws the descriptive limitations of the concept into sharp relief.

On the issue-based approach, ‘one person’s word against another’s’ tells us that there is an allegation of rape, but it does not tell us who made it. It tells us that *something* is in issue between the prosecution and defence, but it does not directly or infallibly tell us what that issue is. And while consent may be the matter most commonly or most commonly anticipated to be disputed by an accused, across the male and female rape studies, consent and/or reasonable belief therein was raised in a little under half of the sampled cases (16 out of 37). It should not be assumed, therefore, that consent *will* be the pivotal issue in any given case, or that it will be the pivotal issue in the overwhelming majority of cases. Whatever the pivotal issue is, ‘one person’s word against another’s’ tells us that, in proving that issue, the prosecution will be reliant on the direct testimonial evidence of a particular witness, often but not invariably the complainant. It does not tell us whether and, if so, to what extent that witness’s evidence is generally supported or, conversely, contradicted by other independent evidence. Indeed, it does

not tell us anything about the credibility of that witness or the reliability of his or her evidence. In short, ‘one person’s word against another’s’ reveals virtually nothing about the quantity or quality of evidence available in any given case. It certainly does not mean that the only evidence available to the police, prosecution, and, ultimately, the court is a complainant’s testimonial account—her (or his) ‘word’. Nor does it mean that the only evidence available to challenge the prosecution’s case is the ‘word’ of the accused.

Given that, on this approach, ‘one person’s word against another’s’ reveals so little about the evidence in rape cases, individually or collectively, it is difficult to see how the concept might usefully contribute to our understanding of why rape is so prone to attrition. Unless, of course, the epistemological claim underpinning ‘one person’s word against another’s’ (on *either* the literal *or* the issue-based interpretative approach) is that, for the purposes of criminal adjudication, ‘taking someone’s word for it’ does not suffice as proof. As the discussion below demonstrates, if that *is* the claim, then, at least in relation to criminal proceedings in England and Wales, it is simply wrong.

### ***One person’s ‘word’ is enough***

Institutionally, the English criminal process has no qualms about convicting an accused on the ‘word’ of a single witness and is positively, and on principle, set up to do so. Reflecting ‘English law’s culturally embedded ideological preference for live witness testimony’ (Roberts and Zuckerman, 2010, p.292), the sworn testimonial account of a witness is the paradigmatic form of evidence in English criminal proceedings in which, generally, there is no legally mandated quantitative evidential threshold for conviction:

In contrast to most continental legal systems (and also, intriguingly, Scotland), there is no general corroboration requirement in English criminal law. Even very serious

offences like murder, robbery, and rape are capable of being proved by the testimony of a single witness, or, in theory at least, entirely by damning circumstantial evidence. ... Once evidence is before the fact-finder, the only question is whether the appropriate standard of proof has been met. Jurors in England and Wales, for the most part, are not required to calibrate their verdicts to quantitative evidentiary standards. (ibid, p.662, footnotes omitted.)

That it is the quality and not the quantity of evidence that matters is clearly reflected in criminal justice policy, and, specifically, in the principles to be applied to prosecution decision-making as set out in the *Code for Crown Prosecutors* (CPS, 2013). The *CPS Legal Guidance* on what is now commonly referred to as the ‘merits based approach’ (CPS, undated. See further Ashworth and Redmayne, 2010; Birch and Price, 2016) to prosecution decision-making under the Code—and applicable in all cases, not just rape—explicitly cautions prosecutors as follows:

It is essential that prosecutors do not introduce a requirement for corroboration in the review process—one person’s word can be enough (and often is)—but the quality of the evidence must be assessed. Where it is one person’s word against another’s then a jury will look to other factors to help decide whether the prosecution has proved its case. The review should disregard factors that are irrelevant or based on myths or stereotypes. We should expect juries to be properly directed about delayed complaints and other matters that might give rise to misconceived assumptions.

That ‘one person’s word’ is enough to secure a conviction plays no part in the critical discourse around rape in the English criminal justice system. This striking omission risks presenting an, at best, incomplete and, at worst, misleading picture of the domestic criminal

process and one which, potentially, misinforms both the debate and its audience—including existing and future victims of rape who, given the conventional wisdom, might reasonably conclude that if their case involves ‘one person’s word against another’s’ (whatever they think that means) it will not proceed and may be reluctant to report an incident, or co-operate with its investigation and prosecution, as a result. As MRS Prosecutor L observed:

I think there’s this perception as well that if it’s one person’s word against the other, we don’t prosecute. That couldn’t be *further* from the truth. The *majority* of rapes will be one person’s word against another’s. There’s this perception that people who are being raped will shout and scream very, very loudly for help and they often don’t—for a whole variety of reasons. And there’s this perception that people who are raped are going to have extensive bruising or injury or trauma to the tissues around their body and the vast majority—I would say something like 80 per cent of rape victims—have no visible injury at all. And so, if it were simply the case that one person’s word against another’s was not enough, we might as well all pack up and go home.

FRS Police M concurred that rape cases constituting ‘one person’s word against another’s’ do progress through the criminal process:

That’s our system isn’t it? One person’s word against the other’s and see who the jury believe. But they *do* go forward. They do, yeah.

Indeed, according to MRS Prosecutor J, when it comes to prosecuting rape, proceeding with cases involving ‘one person’s word against another’s’ is unexceptional:

We don't need corroboration clearly. We don't necessarily need support. Clearly, we're perfectly able to run a one against one case. It's just that sometimes juries may find it difficult to be sure to the required standard if it is just one against one. But we do frequently run one against one cases.

As discussed above, 'one person's word against another's' is not easily quantified. Although crude and imprecise, it is, nevertheless, true to say that *some* of the cases in the male and female rape studies might plausibly be described as 'one person's word against another's', at least on the issue-based approach, and at least momentarily. *Some* of those sample cases amounting to 'one person's word against another's' were prosecuted. And *some* of those prosecuted cases resulted in conviction. In practice, then, as well as in principle, 'one person's word' is enough. It is clearly not *always* enough. But as a matter of both doctrinal law and empirically verifiable practice, the 'word' of one witness will do.

## **The Trouble with 'One Person's Word against Another's'**

According to the mainstream account, a 'culture of scepticism' (Kelly et al, 2005) prevails in the investigation and prosecution of rape where, in the absence of independent evidence, complainants are routinely disbelieved. Underpinning this widely accepted narrative, is the conventional wisdom of rape as 'one person's word against another's' which purports to not only describe what rape cases look like evidentially, but to also shed explanatory light on why they so frequently fail to result in conviction. The trouble with 'one person's word against another's', however, and the key finding reported here, is that while we may all use the phrase, or nod knowingly along when others use it, there is a lack of consensus as to its meaning. Some interpret the term literally. Others do not.

Interpreted literally, ‘one person’s word against another’s’ means exactly what it says—no evidence is available beyond the conflicting accounts of the complainant and the accused. Although unambiguous, this conceptualization is problematic. As we have seen, what amounts to ‘no evidence’ is, itself, open to debate. Given the available research data, there is also reason to doubt whether it accurately reflects the evidence available in most rape cases. Moreover, there is a potential disconnect between the term’s interpretation in the abstract and its application in practice. Certainly, respondents here described cases that were patently *not* literally ‘one person’s word against another’s’ as ‘literally’ ‘one person’s word against another’s’. The second, and, here, more common, issue-based interpretative approach is also problematic, albeit for different reasons. On this alternate conceptualization, ‘one person’s word against another’s’ does not reflect, and does not pretend to describe, the totality of evidence in a case. Instead, it refers to the limited direct evidence on a pivotal issue. Whether a case amounts to ‘one person’s word against another’s’ thus depends on what, if anything, the accused is saying, and the evidence available to refute those claims, factors that, as we have seen, can and do change over the lifetime of a case, up to and including at trial. Categorization on this approach may therefore be tentative and mercurial. But it is also counterintuitive in that cases involving a good deal of compelling probative evidence—even ‘stone bonkers’—may fall within its definitional scope. Finally, and like its literal counterpart, the issue-based interpretation implies a need for corroborative evidence. Yet, as we have seen, while a plethora of independent evidence and a legion of third-party witnesses may make for a weightier case against an accused (depending, of course, on what such evidence tends to show, and what those witnesses have to say), the ‘word’ of a single witness is proof enough.

Because the concept’s meaning is not universally shared or consistently applied, ‘one person’s word against another’s’ does not reliably tell us anything about the quantity, quality, nature, or form of the evidence in rape cases and the strength (or otherwise) of an individual

case. Indeed, all it tells us for sure is that an allegation has been made which the accused is (currently) denying and that, should the case proceed to trial, the defence intends (or is expected) to take issue with the direct testimonial evidence of a key prosecution witness—often, but not always, the complainant. In the context of an adversarial criminal process committed to the principle of orality (McEwan, 1992; Roberts and Zuckerman, 2010), and the evidential significance of cross-examination within such an adjudicative framework, this is not to tell us very much. Moreover, in the course of not telling us very much, and certainly nothing unique or distinctive about rape cases or why they are so susceptible to attrition, ‘one person’s word against another’s’ presents a partial and misleading view of English criminal proceedings and the process of proof.

As we have seen, in English criminal proceedings, the uncorroborated testimony of a single witness is sufficient to secure a conviction for rape, both in principle and in practice. If we genuinely want to understand attrition in rape cases, and endeavour to reduce it, we need to understand why the ‘word’ of a single witness constituted sufficient proof in one rape case but not in another. The data and findings presented here suggest that, in order to do that, we need to grapple with the thorny issue of the credibility of witnesses, including rape complainants, and the reliability of their evidence—not just in terms of the absence of independent evidence that supports or corroborates a witness’s account, but also the presence of independent evidence that undermines it. We need, in short, to start talking—frankly, reasonably, and rationally—about the inferences that might reasonably be drawn from such ostensibly mundane and trivial issues as who said what on Facebook and not being able to find the alleged crime scene.

Such complex, case-specific factual issues and evidential circumstances are not generally acknowledged, let alone examined, in mainstream (predominantly feminist) research and analyses, presumably on the basis that they are not the stuff of ‘rape myths’ or indicative of gendered power relations. The trouble with the mainstream’s approach, however, is that

proof beyond reasonable doubt is an exacting standard. And it is precisely these ostensibly mundane and trivial issues that raise bone fide, and, crucially, evidence- rather than myth-based doubts about the credibility and reliability of a significant witness in the case—usually, but not invariably, the complainant—and may make an alleged rape difficult, if not impossible, to prove. This is not to rule out the possibility of gendered stereotyping or the operation of ‘rape myths’ in other cases. Rather it is to say that, if we are to push the boundaries of our critical understanding of rape in the contemporary criminal process and develop a comprehensive and robust account of when and why cases are filtered out pre-trial, we need to broaden the inquiry to include sustained attention to evidence and proof. In the meantime, appeals to the conceptually, empirically, and normatively troublesome conventional wisdom of ‘one person’s word against another’s’ obscure significantly more than they reveal.

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