Rook and Ward on Sexual Offences 5th Ed.

Mainwork

Chapter 17 - Prosecuting Rape and Serious Sexual Offences—CPS Policy and Decision-Making

Introduction

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17.01

Crown Prosecution Service ("CPS") decisions as to whether to prosecute are governed by the Code for Crown Prosecutors. [3] This requires prosecutors to apply the test set out in section 4, known as the "Full Code Test", [4] which is described in the paragraphs which follow. Decisions in cases involving allegations of rape or other serious sexual offences are made on the same basis as those made in relation to all other kinds of crime, from fraud to road traffic, and involve the application of the same criteria. There is no different standard.

17.02

Sitting beneath the Code are a number of pieces of published Legal Guidance and policy. [5] These are issued sporadically by the CPS and have two distinct but related purposes. The first is to provide guidance to prosecutors to help them to apply the law in particular situations and in a consistent fashion. The second is to allow the public to see the basis upon which prosecutorial decisions are made: the guidance provides both transparency and accountability, in that the public can see the way in which decisions are reached, and victims [6] may be able to hold the CPS accountable, through the mechanism of judicial review, should prosecutors fail to apply it properly. There are a number of pieces of CPS Legal Guidance which are either directly or tangentially relevant to the prosecution of rape; some of these are considered in this chapter.

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1. Partner, Mishcon de Reya, Principal Legal Advisor to the Director of Public Prosecutions 2009–2014.

2. Managing Associate, Mishcon de Reya, Deputy Chief Crown Prosecutor CPS until 2015.

3. See http://www.cps.gov.uk/publications/code_for_crown_prosecutors [Accessed April 30, 2016]. The Code is issued by the Director of Public Prosecutions under the Prosecution of Offences Act 1985 s.10. The current edition is the seventh, issued in January 2013.

4. The Full Code Test is applied when the investigation is complete. Occasionally a prosecutor is required to apply the "threshold test" in cases where the evidence is incomplete, but this is of limited relevance in cases involving sexual offences.

5. The Code, para 2.6, requires prosecutors to have regard to CPS policy and legal guidance.

6. Most CPS policy and legal guidance uses the word "victim" rather than the less controversial "complainant". In common with the practice generally adopted in this book, we have tended to use "complainant" when referring to individual cases but "victim" when speaking generically.

1414

Rook and Ward on Sexual Offences 5th Ed.

Mainwork

Chapter 17 - Prosecuting Rape and Serious Sexual Offences—CPS Policy and Decision-Making

The Full Code Test

17.03

The test set out in the Code consists of two stages: an evidential sufficiency stage followed by a public interest stage. These must be applied sequentially. As a consequence, if there is insufficient evidence a prosecution will not take place, irrespective of such public interest factors as the seriousness of the allegation, the sensitivity of the case or the wishes of the complainant. As the Policy on Prosecuting Cases of Rape [7] makes clear, whilst the views and interests of the victim are important, they cannot be the final word on the subject of a CPS prosecution.

17.04

At the evidential sufficiency stage, the prosecutor is required to make an objective assessment as to whether there is a realistic prospect of conviction. [8] This means that he or she must conclude that " ... an objective, impartial and reasonable jury or bench of magistrates or judge hearing the case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged". [9] This is a higher standard than that applied by a judge when considering the state of the evidence at the conclusion of the prosecution case (that is to say, whether there is a case to answer), but is lower than the standard of proof required before the tribunal of fact can convict.

17.05

In considering whether the tribunal of fact is more likely than not to convict, the prosecutor should judge the available evidence according to its admissibility, reliability and credibility. [10] He or she must also take into account what is known about the defence case, including any evidence or other information provided on behalf of the suspect. This may involve more than simply considering what (if anything) has been said by the suspect in interview: for example, it is not uncommon for a suspect's legal representatives to write to the CPS at the pre-charge stage either drawing the prosecutor's attention to particular material or making representations as to the application of the Full Code Test. The Code requires prosecutors to give these representations proper, objective consideration. [11]

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7. "the Rape Policy", available at: http://www.cps.gov.uk/publications/docs/rape_policy_2012.pdf [Accessed April 30, 2016].

8. This is not uncontroversial. Some are strongly of the view that, provided there is sufficient evidence to establish a case to answer, the case should go before a court for determination rather than it being left to the judgement of an individual prosecutor as to the likely outcome.

9. The Code para.4.5.

10. The Code para.4.6.

11. The Code para.4.5.

Rook and Ward on Sexual Offences 5th Ed.

Mainwork

Chapter 17 - Prosecuting Rape and Serious Sexual Offences—CPS Policy and Decision-Making

The Evidential Stage: Common Myths and Stereotypes and the "Merit-Based" Approach

17.06

In rape cases, the evaluation of the reliability and credibility of evidence can give rise to particular difficulty. It is axiomatic that rape rarely takes place in front of witnesses, so that in the majority of cases the evidence consists of no more than the complainant's account. Because of concern about the risk of false allegations, investigators, prosecutors and juries may feel uneasy about the prospect of convicting on the basis of one person's word against another's. In some cases this has led to the burden of proof being interpreted as meaning that some supporting evidence (that is to say, evidence which, objectively considered, reinforces the truth of the complainant's allegation) is required before it is safe to convict. However, whilst taking a cautious approach is understandable and even superficially attractive, there can be little doubt that if it is followed to its logical conclusion many true complaints of rape would never be prosecuted. The Legal Guidance [12] and the Rape Policy make it explicit that, Parliament having abolished the requirement for corroboration, [13] the CPS must be careful not to reintroduce it by the back door, for example by deciding that there is no realistic prospect of conviction simply because there is no supporting evidence.

17.07

An inevitable consequence of this is that where the prosecution case consists solely of the complainant's account, with no supporting evidence, the prosecutor is faced with the difficult task of assessing how a jury will resolve the conflict in the evidence. In the absence of any independent material capable of acting as a barometer, the jury will have little option but to consider whether the complaint is inherently believable or whether there are features either of the complaint itself or aspects of the complainant's behaviour which make it less likely to be true.

17.08

Whilst this is unavoidable, experience has shown that the use of "common sense" as the touchstone of reliability and credibility should be approached with caution. As the psycho-legal analysis of violent sexual offences has evolved and become more sophisticated, it has revealed that many people—not just jurors, but lawyers and judges too—hold deeply-rooted beliefs about rape which are in fact wholly without scientific or other foundation. These assumptions, which are known collectively as "rape myths and stereotypes", continue to present obstacles to the successful prosecution of rape. [14] Some of them may have been consigned to history but there are others which undoubtedly have currency. For example, it is unlikely that evidence of the way a woman dresses would, these days, be seen as having any relevance to the issue of whether or not she consented to sexual activity. Thus a defendant who sought to argue that he believed that the complainant would consent to intercourse solely on the basis of her appearance would be unlikely to be acquitted. But that can be contrasted with the prevalent belief that rapists are likely to be inadequate and unattractive; thus those who are seen as having no "need" to rape (such as a good-looking man or a man who is married and whose wife gives evidence about the frequency with which they have sex) may be less likely to be convicted. Another frequently-encountered myth is that rape will usually result in some form of physical trauma, with the concomitant risk that if there is no evidence of injury the jury may treat that as proof that the complainant consented.

17.09

A further example of a prevalent myth is that a genuine victim of rape would be likely to make immediate complaint (a relic of the old rule about raising the hue and cry). The corollary is the belief that an allegation which is not reported straightaway is unlikely, or less likely, to be true. However, research has shown that many truthful complainants hesitate before telling anyone about what has happened to them, so that evidence of delay in making the complaint is likely, in the majority of cases, to be neutral (in the sense that in and of itself it is not a reliable indicator as to where the truth lies). Yet prosecutors continue to be confronted with evidence that investigators, as well as the public at large, consider delay in complaining to be a factor which weakens the allegation.

17.10

Issues such as these present a dilemma for the prosecutor, who is required by the Code to assess whether a jury is more likely than not to convict. Experience has taught many of those involved in the criminal justice system that, in what may be perceived as "difficult" cases, such as where there has been delay in reporting or the complainant has been drinking, juries have proved reluctant to convict. Yet to decline to charge on the basis of factors that are known to be without substance is not only intellectually unsatisfactory but may actively contribute to the problem, in that it reinforces some of these unfounded beliefs.

17.11

In 2009, the Administrative Court heard the case of *R. (FB) v DPP*. [15] Although the case concerned a physical rather than a sexual assault, the issues considered are of direct relevance to the decisions which prosecutors are required to make in rape cases. In *FB*, the prosecution had decided to offer no evidence on the basis that the complainant's mental health condition made him an inherently unreliable witness. Toulson J (as he then was), in a judgment which repays reading, said:

> "There was also discussion whether in applying the 'realistic prospect of conviction test' a prosecutor should adopt a 'bookmaker's approach' (as it was referred to in argument) or should imagine himself to be the fact finder and ask himself whether, on balance, the evidence was sufficient to merit a conviction taking into account what he knew about the defence case. In many cases it would make no difference, but in some it might …
>
> There are some types of case where it is notorious that convictions are hard to obtain, even though the officer in the case and the crown prosecutor may believe that the complainant is truthful and reliable. So-called 'date rape' cases are an obvious example. If the crown prosecutor were to apply a purely predictive approach based on past experience of similar cases (the bookmaker's approach), he might well feel unable to conclude that a jury was more likely than not to convict the defendant. But for a crown prosecutor effectively to adopt a corroboration requirement in such cases, which Parliament has abolished, would be wrong. On the alternative 'merits based' approach, the question whether the evidential test was satisfied would not depend on statistical guesswork."

17.12

It is this which has come to be known as the "merits-based approach". In the context of sexual offences, what this means is that even though past experience might tell a prosecutor that juries have been unwilling to convict in cases where, for example, the complainant has mental health issues or learning difficulties, factors of this sort should be treated with caution when deciding whether or not there is a realistic prospect of conviction. The prosecutor should proceed on the basis of a notional jury which is wholly unaffected by any myths or stereotypes, which will act in a rational way and will faithfully follow directions on the law. [16] Examples of the judicial directions on the way a jury should approach issues such as delay, consumption of alcohol, lack of injury, withdrawal of consent in long relationships and so on, are to be found elsewhere in this work.

17.13

Taking a merits-based approach is not uncontroversial. There has been criticism of the CPS attitude, on the basis that requiring prosecutors to charge cases in defiance of what is seen as common sense and experience of real life has a number of undesirable consequences. It is said that the complainant is unnecessarily exposed to the experience of being cross-examined before the inevitable acquittal, the defendant is put through the anxiety, expense and publicity of a trial, and scarce public resources are expended on prosecutions which are highly unlikely to succeed.

17.14

The CPS counters that to decline to prosecute a case on the basis that a jury may be ignorant, irrational or prejudiced, or will refuse to apply the directions on the law which it is given, is in fact to apply a different standard to rape cases from that which would be applied in any other. For example, were a black lesbian to be a victim of a street robbery, no prosecutor would decline to prosecute on the off-chance that the jury might prove to be racist or homophobic. In addition, predictions as to the outcome of a trial based on past experience are inescapably flawed, because a jury does not give reasons for its decision. Thus although the judge, lawyers or police may believe that the jury acquitted because of the existence of a factor such as delay in reporting, they may be mistaken. This would be a fragile foundation upon which to build a prosecutorial policy.

17.15

The CPS argues that in addition to the logic of not basing prosecutorial decisions on an intellectually flawed analysis, there are sound policy reasons for adopting the merits-based approach. Research has shown that many rapists seek out vulnerable people, such as those with mental health issues or physical disabilities, on the basis that it is easier to commit offences against them, they are less likely to report the behaviour and less likely to be believed if they do. A system which does not seek justice for the vulnerable not only offends against the provisions of the Human Rights Act 1998 but also runs counter to the beliefs and values of those who work within it and is plainly difficult either to justify or to explain. There is, too, evidence of success in the application of the merits-based approach, which has on occasion resulted in convictions being achieved in cases which would previously have been unimaginable, for example those where the victims have had physical disabilities, such as cerebral palsy, or learning difficulties. [17]

17.16

It is now settled that the merits-based approach will be adopted by prosecutors in all cases. Decisions in rape cases are made by specialist prosecutors who operate in Rape and Serious Sexual Offences units ("RASSOs") and have received extensive training on how to eliminate the so-called myths and stereotypes from their analysis of the evidence. That being said, there is evidence that some degree of oversteering may have taken place since the judgment in *FB*. Some prosecutors appear to have interpreted the guidance as meaning that all complaints should result in prosecution even when this involves ignoring obvious flaws in the case. As a result, further guidance has been issued [18] which reminds prosecutors that the merits-based approach does not require them to suspend logic or judgment, but merely to make decisions which are fair and reasonable. The prosecutor needs to be able to distinguish between a difficult case and one which is evidentially weak.

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12. http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences [Accessed April 30, 2016].

13. See paras 19.106 and following, below.

14. http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/societal_myths [Accessed April 30, 2016].

15. *[2009] EWHC 106 (Admin)*.

16. CPS Rape Policy.

17. See, e.g. *Watts (James Michael) [2010] EWCA Crim 1824*.

18. http://www.cps.gov.uk/legal/l_to_o/merits_based_approach [Accessed April 30, 2016].

Rook and Ward on Sexual Offences 5th Ed.

Mainwork

Chapter 17 - Prosecuting Rape and Serious Sexual Offences—CPS Policy and Decision-Making

Withdrawal of Allegations

17.17

It is a common feature of allegations of sexual offences that the complainant may reconsider having made the allegation and say that he or she no longer wishes to give evidence. The issue for the prosecutor is whether that decision should be accepted unquestioningly and the prosecution brought to an end, or whether more can or should be done. A related—and unresolved—issue is whether, where the prosecution is halted because of the complainant's wishes, this is an evidential decision or a matter for prosecutorial discretion at the public interest stage. This may matter little in the majority of cases but is likely to become important in the event that the decision is challenged. [19]

17.18

There is a distinction to be drawn between a complainant who is said no longer to "support" the prosecution and one who actually refuses to give evidence. Police and prosecutors sometimes treat these expressions as being interchangeable, but this is a mistake, as they give rise to different considerations. The first question a prosecutor should ask is whether the complainant is saying that, given the choice, he or she would rather a prosecution didn't take place, or whether he or she is in fact refusing to come to court. As far as the former is concerned, the Code makes it plain that whilst the views of victims are important, a prosecution is not a private matter between complainant and defendant, and so the victim's views cannot be determinative of whether a prosecution should or should not take place. Conversely, a complainant who refuses to come to court to give evidence may make a prosecution difficult or indeed impossible. But even then, the CPS Rape Policy makes it plain that the fact that the victim does not want to give evidence should not, without more, be treated as conclusive [20]:

> "We know that some victims will find it very difficult to give evidence and may need practical and emotional support ... Sometimes a victim may withdraw support for a prosecution and may no longer wish to give evidence. This does not mean that the case will automatically be stopped."

17.19

The Policy and the CPS Legal Guidance require that the prosecutor should approach the case by, first, considering the reasons given as to why the complainant does not wish to "support" the prosecution, and, secondly, seeing whether there are any special measures or other steps which could be taken to allay the concerns. If not, then consideration should be given to whether it is possible to continue the prosecution without the complainant's evidence, for example by obtaining other evidence or by use of the rules permitting hearsay evidence to be given. If this proves impossible then the prosecutor should consider whether to continue with the prosecution against the complainant's wishes by compelling him or her to attend court. Usually the means of compulsion will involve the obtaining of a witness summons, but real difficulties will arise if the complainant still declines to attend court as the next step will be to obtain a warrant for his or her arrest. Plainly, this would be an exceptional course to take because of the obvious risk that the complainant may see this as compounding the harm caused by the original offence, but the prosecutor's duty to the public at large requires that consideration should at least be given to this possibility.

17.20

In a small but nevertheless significant number of cases, the complainant not only declines to cooperate with the police but seeks to bring the investigation or prosecution to an end by asserting that the allegation was in fact untrue. Predominantly this occurs in situations where the complainant and suspect are married or in a relationship. This particular form of adamancy presents the prosecutor with real difficulty: he or she is required to form a judgment as to whether the original complaint was genuine and it is the retraction which is a lie, or vice versa. In some of these cases the prosecutor has concluded that, irrespective of the complainant's current attitude, the evidence remains sufficiently strong for there to be a realistic prospect of conviction in relation to the original charge. In the majority of cases, however, it is impossible to continue with the prosecution of the original allegation; where that is the case, the prosecutor must take care not to fall into the trap of concluding that, without more, the original allegation is necessarily false and thus could found a charge of perverting the course of justice. This aspect is considered in greater detail under the heading 'False rape allegations', below.

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19. It is suggested that the better view is that it is a public interest decision, unless there are factors which make the evidence unreliable or it actually becomes impossible to call the complainant, for example because he or she can no longer be put forward as a witness of truth.

20. CPS Rape Policy paras 5.7–5.20.

Rook and Ward on Sexual Offences 5th Ed.

Mainwork

Chapter 17 - Prosecuting Rape and Serious Sexual Offences—CPS Policy and Decision-Making

Cases Involving Children

17.21

Allegations of rape and sexual assaults against children are some of the most difficult cases with which prosecutors deal. Whilst the test for a prosecution is the same, the decisions as to reliability and credibility of evidence can be even more complex than those involving adult complainants. For example, it is a common characteristic of these offences that victims may feel unable to tell anyone for many years and the prosecutor will then have to consider the effect of the passage of time, with its attendant difficulties such as loss of documents, on the prospects of successfully prosecuting the case to conviction.

17.22

Where the victim complains close to the time of the commission of the offence and is thus still a child at the time of the trial, this brings further complications. Children often struggle to give their account in a conventional "linear" way, or may have difficulty in giving a coherent account of the time when the offence took place; factors such as these may make the complaint appear unreliable to adult eyes. In addition, it is now known that some children give their account piecemeal, often holding back the most serious allegations. Adults may be inclined to treat this as evidence of unreliability, but there is a psychological explanation for this behaviour: that the child may be testing the adults to see whether they believe him or her before giving the full story. It is not uncommon for a child to make an allegation of sexual touching which is then followed up some time later by a far more serious allegation of oral or vaginal rape. It is particularly important in such cases that the prosecutor does not allow him- or herself to fall into the trap of believing that if the child were telling the truth, he or she would necessarily have made the most serious allegations at the first available opportunity.

17.23

Recent cases have shown that police and prosecutors have not always got the decisions right. In 2013, the CPS was driven to conclude that when the late Jimmy Savile was still alive, it had made the wrong decision not to prosecute him for allegations of sexual assault on girls. Similar conclusions were reached about the failure to prosecute in cases involving the grooming of vulnerable children in the Rotherham and Rochdale cases. Although the issues were different, a common theme emerged from these cases: that in order to guard against false allegations, police and prosecutors had approached complaints of sexual offences with excessive caution. This reflects the concern of society at large, namely that there is a real and prevalent risk that someone will make a false allegation that a suspect will find impossible to disprove. In the Savile case, this manifested itself in a police decision not to tell each complainant that there were others, with the consequence that each believed that she was the only one and was thus understandably nervous about making a complaint against such a famous and powerful man. In the grooming cases, a similarly equivocal approach informed the assessment of the complainants and their lifestyles. Frequently, great weight was placed upon the fact that the complainants were in care, took drugs, drank to excess or had a history of making complaints and then retracting them. These factors were seen as making their allegations inherently unreliable. Whilst superficially understandable, this ignored the reality that many victims are preyed upon precisely because their lifestyles or personal difficulties make them susceptible to abuse. To decline to prosecute such cases risks leaving vulnerable children unprotected by the criminal law. It is also unlawful. [21]

17.24

Following the conclusion of the Savile investigation, the then Director of Public Prosecutions, Sir Keir Starmer QC, expressed his intention that this should be a watershed moment. He announced a raft of measures intended to improve the handling of sexual abuse cases, including the issuing of new guidelines on child sexual abuse. The interim guidelines were published in June 2013 following extensive consultation with the police, and informed by a series of round-table discussions attended by front-line investigators, lawyers, victims' representatives, academics, social services, the judiciary, and others with an interest or expertise in criminal justice. The interim guidelines were put out for public consultation, the result of which indicated broad endorsement of the new approach. The final guidelines were published in October 2013 [22] and apply to all allegations of sexual assaults on children, regardless of whether the complainant is still a child or is now an adult. Cases where the allegations relate to a period some time earlier are generically described by police and CPS as "non-recent", as the expression "historic" is disliked by victim groups on the ground that it suggests the harm and damage caused is confined to the past.

17.25

Fundamental to the new guidelines is the approach to be taken when assessing the complainant's evidence: police and prosecutors are reminded that they are required to focus on the credibility of the allegation rather than forming value judgements about the personal characteristics or lifestyle of the person making it. It is emphasised that the complainant's circumstances or experiences may influence his or her choices and behaviour and prosecutors need to have an understanding of these issues. By way of example, victims of grooming may themselves have committed criminal offences; this should not be seen as inevitably fatal to the prospects of a successful prosecution. It is recognised too that groomed children frequently return to the suspect, mistaking the attention given for genuine love and concern: they often do not see themselves as victims, instead believing that they are in authentic loving relationships. In situations such as these, both police and prosecutors need to have a sophisticated and informed attitude to the issue of consent.

17.26

The need to challenge canards such as these does not end with the CPS and police. The prevalence of myths and stereotypes has caused prosecutions to fail at trial. The CPS Legal Guidance requires that prosecuting advocates should be instructed to present the case in a way which addresses and neutralises any false assumptions, should they arise. They should consider the directions which appear at Ch.17 of the Crown Court Bench Book and, where appropriate, invite the trial judge to give them.

17.27

An unsatisfactory feature of investigations into the sexual abuse of children has been the haphazard approach taken to material in the possession of social services, schools and other organisations not party to the criminal trial process. All too frequently it has been left to individual resident judges to issue local practice directions which would determine whether or not it was possible to gain access to those files even for the preliminary purpose of assessing their content for relevance. This had obvious potential for injustice. In an effort to address this, the CPS has published a joint Protocol and Good Practice Model [23] governing disclosure of information in cases of alleged child abuse and linked criminal and family proceedings, the intention being that the approach to so-called third-party disclosure in such cases will be both streamlined and consistent across England and Wales. The Protocol deals with how material can, and should, be exchanged from the outset of a police investigation and from the stage when Family Court proceedings are contemplated by a local authority. It is, though, a matter for each local authority to decide whether to adopt the Protocol. The Protocol is considered in Ch.18.

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21. *R. (FB) v Director of Public Prosecutions [2009] EWHC 106 (Admin)*.

22. http://www.cps.gov.uk/legal/a_to_c/child_sexual_abuse [Accessed April 30, 2016].

23. Published October 2013 and available at http://www.cps.gov.uk/publications/docs/third_party_protocol_2013.pdf [Accessed April 30, 2016].

Rook and Ward on Sexual Offences 5th Ed.

Mainwork

Chapter 17 - Prosecuting Rape and Serious Sexual Offences—CPS Policy and Decision-Making

Abuse of Process, Reconsideration of Decisions not to Prosecute and the Victims' Right to Review Scheme

17.28

It should be noted that the CPS Legal Guidance on Abuse of Process [24] appears not to have been updated for some time and as a result should be approached with caution. One important point of principle which should be borne in mind is this: the fact that there is a potential abuse of process argument rarely provides a proper basis for not prosecuting or not continuing with an existing prosecution. *R. (on the application of Guest) v DPP* [25] is authority for the proposition that, in a case which would otherwise have gone ahead, prosecutors should decide not to charge on the basis of a possible abuse of process application only where it is clear that the application would succeed. The majority of cases should be put before a court for the decision to be made.

17.29

There is a discrete aspect of the abuse of process jurisprudence which can properly to be considered in this context, which is the CPS approach to reconsidering an earlier decision not to prosecute. Section 10 of the Code provides as follows:

> "People should be able to rely on decisions taken by the CPS. Normally, if the CPS tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, the case will not start again. But occasionally there are reasons why the CPS will overturn a decision not to prosecute or to deal with the case by way of an out-of-court disposal or when it will restart the prosecution, particularly if the case is serious."

17.30

Section 10 gives four examples of situations in which a decision not to prosecute might be reversed, the most significant of which in this context is where:

> "a new look at the original decision shows that it was wrong and, in order to maintain confidence in the criminal justice system, a prosecution should be brought despite the original decision".

The CPS has given anxious consideration to what is meant by a decision which is "wrong". Some have taken the view that a decision not to prosecute should only be overturned where it fails the *Wednesbury* test, that is to say, it was a decision which no reasonable prosecutor could have made. The previous DPP took the view that such a restrictive test was neither fair to complainants nor conducive to public confidence and the test should be simply whether, on consideration of the Code Test, the decision was "wrong". Thus under the present system, the views of the most senior prosecutor involved in the chain of decision-making will prevail.

17.31

Such cases are sometimes characterised as the CPS "going back on a decision" not to prosecute. The limits as to when this is permissible were considered in *Abu Hamza*, [26] in which it was held that reconsideration by the prosecution was unlikely to constitute an abuse of process unless there has been both an unequivocal representation by those charged with the conduct of the investigation or prosecution of a case that the defendant would not be prosecuted, and the defendant has acted on that representation to his or her detriment.

17.32

Abu Hamza was applied in *Killick*, [27] in which three adult men with cerebral palsy had made allegations of rape against the defendant. The defendant had been told on more than one occasion that he would not be prosecuted; nevertheless (following a complaint from the victims) the decision was found by the CPS to have been wrong. The defendant was charged and subsequently convicted on two of three counts, the convictions being upheld by the Court of Appeal. The Court held that victims have a right to a review in circumstances such as these but should not have to seek recourse to judicial review. It invited the CPS to put in place a clearer procedure compatible with art.10 of European Union Directive 2012/29/EU, which establishes minimum standards as to the rights, support and protection of victims of crime.

17.33

As a result the CPS introduced the Victims' Right to Review ("VRR") scheme. [28] The scheme provides a mechanism whereby a victim is able to seek a review of a decision not to charge, to discontinue or otherwise to terminate proceedings. A *"victim"* is defined, for the purposes of complaints made on or after December 10, 2013, as "a person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by criminal conduct". This includes bereaved relatives and parents of children under 18. The scheme has two stages: a review at local level, followed, if the complainant remains unsatisfied, by a further review at either Chief Crown Prosecutor [29] level or within the Appeals and Review Unit. Perhaps understandably, there have been suggestions that the lawyers involved in the Appeals and Review Unit will be unlikely to overturn decisions made elsewhere in the CPS. This scepticism is not borne out by the decisions made by the Unit which, at least on an anecdotal basis, displays an admirable independence and has reversed a number of decisions not to prosecute.

17.34

In October 2015, in *S v CPS*, [30] the Administrative Court considered an application for permission to apply for judicial review of a decision taken under the VRR scheme. The case concerned an allegation of rape and the issue was the complainant's capacity to consent to intercourse in the light of the amount of alcohol she had consumed. The principal submissions were, first, that the suspect should have been notified that the review was taking place and given the right to make representations and, secondly, that in order to prosecute the suspect at this stage, the CPS needed to prove to the criminal standard that the original decision was *Wednesbury* unreasonable. Those arguments were roundly rejected by Sir Brian Leveson P. Although the VRR scheme guidance provided that a suspect was not to be made aware of a victim's request for a review during the review process, which meant that the suspect could not make representations to the reviewing prosecutor, that did not mean it was contrary to natural justice. The guidance required the reviewing prosecutor to take account only of information available at the time of the decision under review, which would include any explanation the suspect provided during the preceding investigation. Natural justice did not require a decision-maker who was assessing only pre-existing material, and who was prohibited from taking into account new evidence or information from the person seeking the review, to invite a response from a third party who might be effected by the result of the review. As for the claimant's argument relating to the *Wednesbury* test, this would impose a duty on the CPS to prove its case in judicial review proceedings, whereas the function of the review was to provide a mechanism for a fresh reconsideration of the facts. In the present case, the reviewing prosecutor considered the available evidence fully and properly, correctly identified evidence from which a penetrative sexual act could be inferred, and properly approached the law which required the issue of capacity to consent to

fall within the province of the jury. Since there was sufficient evidence to demonstrate that the complainant lacked capacity to give consent to sexual intercourse, there was evidence to demonstrate lack of consent. On that basis, the reviewer concluded that the case should be tried. Axiomatically, she considered that the approach of the original decision-makers was wrong, and was entitled to conclude that the instant case was one in which maintenance of public confidence in the criminal justice system required a prosecution. It was not remotely arguable that her decision was irrational or unreasonable. The Court took the opportunity to restate the general principles governing the role of the court in the superintendence by judicial review of prosecutorial decisions: future applications for judicial review will depend on the reasonableness of the VRR decision which is being impugned.

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24. http://www.cps.gov.uk/legal/a_to_c/abuse_of_process [Accessed April 30, 2016].

25. *[2009] EWHC 5494 (Admin).*

26. *[2007] 1 Cr. App. R. 27.*

27. *(2011) EWCA Crim 1608.*

28. http://www.cps.gov.uk/victims_witnesses/victims_right_to_review [Accessed April 30, 2016].

29. Or Head of Division.

30. *[2015] EWHC 2868 (Admin).*

Rook and Ward on Sexual Offences 5th Ed.

Mainwork

Chapter 17 - Prosecuting Rape and Serious Sexual Offences—CPS Policy and Decision-Making

The Public Interest Stage of the Full Code Test

17.35

It has never been the rule that simply because there is sufficient evidence to bring a prosecution, one will automatically take place. In every case, once the prosecutor has determined that there is a realistic prospect of conviction, he or she must then go on to consider whether the public interest requires a prosecution to take place. That being said, in a case in which there is sufficient evidence, a prosecution will generally take place unless the prosecutor determines that there are public interest factors tending against prosecution which outweigh those tending in favour. [31] It must be emphasised that this is not simply a question of adding up the factors on each side: each case is fact-sensitive and a single factor may be of such significance that it outweighs a number on the other side. In all cases, prosecutors are required to consider whether the case should go ahead and the judge invited to consider any public interest factors in the suspect's favour as mitigation when determining the sentence.

17.36

The Code lists seven factors which should be considered at the public interest stage but stresses that these are not exhaustive. The factors are: the seriousness of the offence, the culpability of the offender, the harm caused to the victim, the victim's circumstances (for example whether he or she was especially vulnerable, or whether the offence involved a breach of trust), whether the suspect is under 18, community impact, proportionality and the protection of confidential sources.

17.37

In the majority of cases involving sexual offences, the allegations are so serious that it is likely that a prosecution will be required, irrespective of the public interest factors tending against. There are two exceptions to this general rule: where the suspect is a child and where the offence alleged took place a very long time ago and a nominal penalty appears likely, particularly if the suspect is now in poor health.

Where the suspect is a child

17.38

In all cases, the Code requires prosecutors to address with particular care the question whether to prosecute a suspect who is under the age of 18. The starting point is, as in every case, the evidential stage of the full Code test: if there is no realistic prospect of conviction then the consideration of the public interest does not arise. If there is sufficient evidence, then the age of the suspect is a factor which requires specific and explicit consideration in relation to the public interest in prosecuting. There is extensive CPS Legal Guidance on the topic of prosecuting children, both generally and in relation to sexual offences. [32] Decisions to prosecute children must only be taken or approved by prosecutors who are designated "youth specialists". The prosecutor must consider a range of factors including the views of the alleged victim, the interests of the child suspect, the views of expert agencies concerned in the welfare of children, the need to divert children away from the criminal justice system where possible and the potential need for positive action.

17.39

Where the alleged victim was under 13 at the relevant time, CPS Guidance states that the appropriate charge will be under ss.5–8 of the Act and that prosecutors should not charge under ss.1–4. In cases where the alleged victim was 13, 14 or 15 at the relevant time, the appropriate charge will be under ss.9–12 of the Act, but will be charged as an offence contrary to section 13. See further paras 4.144 and following, above.

17.40

A common feature of cases involving child suspects is that the suspect asserts that the alleged victim consented or indeed actively participated in the behaviour complained of. However, the law does not permit a defence of consent where the alleged victim was under the age of 16. Thus the arguably absurd position is reached where each child is in law the "victim" of the behaviour of the other and the designation as suspect or victim is dictated solely by whose parents or carers go to the police first. In these cases it is particularly important to assess factors which in the majority of cases involving an adult suspect would be largely irrelevant. These include the relative ages of the suspect and the alleged victim, their sexual and emotional maturity, the existence and nature of any relationship between them, any element of seduction or exploitation, and the impact of a prosecution on each child involved. In some cases it may be clear that a serious sexual offence has been committed, but the prosecutor must be cautious about jumping to conclusions that one child was the victim of the other, when that may not have been the case. Often parents and carers of the alleged victim find it impossible to accept that their child may have been a willing participant or even the instigator, particularly if the sexual activity includes some form of penetration. The investigator must be encouraged to obtain material such as internet searches or social media exchanges, which may provide evidence of the true nature of the relationship or the relative degree of involvement of each child. As Lord Thomas CJ said in *R. v DS, TS*[33] (albeit in a different context):

> "[investigators should appreciate] given the widespread use of social media, that it is likely that in many cases of sexual offending which arise contemporaneously that what is contained on social media is likely to be relevant and sometimes of great importance".

Additional guidance is provided to prosecutors in cases where the children involved are siblings, with the emphasis on considering alternatives to prosecution where the activity was wholly consensual.

Non-recent cases in which a nominal penalty is likely

17.41

In some cases it is clear from an early stage in the investigation that a nominal penalty is likely in the event of conviction. Two situations in which this is likely to arise are:

- Where the suspect has been already been prosecuted, convicted and sentenced for offending which is in effect part of the same conduct; and

- Where the suspect is unfit to plead but would not be made subject to a mental health disposal in the event of a finding of fact, so that an absolute discharge is the only likely outcome.

17.42

However, even in situations such as these, it is by no means certain that no prosecution should take place. Often it is far from automatic that there will in fact be a "nominal penalty". Whilst consideration should be given to the guidance on "Minor Offences", [34] it is emphasised that some offences would now be viewed more seriously than they may have been in the past. Prosecutors are also reminded to consider possible ancillary orders such as Sexual Harm Prevention Orders (where they are available given the date of the alleged offence).

17.43

Even where it is concluded that a nominal penalty is likely, there may still be legitimate reasons why a prosecution is in the public interest. Prosecutors are reminded that punishment is only one of the reasons for prosecuting: others include rehabilitation of the offender (for example, if restorative justice measures are available), deterrence of others, justice for victims, encouragement to others to report similar offences and public confidence in the administration of justice.

17.44

In the section headed "Offender's culpability in hiding the offending", [35] the guidance indicates that particular consideration should be given to the question whether the suspect has failed to take an earlier opportunity to admit the offences now under consideration, or to have them taken into consideration by an earlier sentencing court.

17.45

The guidance deals in some detail with the need for the prosecutor to take the views of the complainant into account. But it reminds prosecutors that these views should be weighed against the likely outcome, and that the prosecutor must not treat himself or herself as being bound by them.

17.46

By their nature, many non-recent cases may involve suspects who are elderly. As people are living longer, dementia is becoming more common amongst elderly persons and, as a result, some suspects may not be fit to plead. Such suspects are unlikely to be suitable for a mental health disposal, as there is no treatment that will cure dementia. They would therefore be likely to receive an absolute discharge (a nominal penalty). The guidance states that where the suspect is unfit to plead, "where a mental health disposal is not available or not appropriate, in some circumstances this may mean that it is less likely that a prosecution is required". The fact that this single sentence contains three qualifications ("some", "may" and "less likely") is an indication of the difficulties these cases present. Prosecutors are referred to the Legal Guidance on Mentally Disordered Offenders, [36] para.4.12 of the Code; the public interest factors in the specific guidance, and two additional principles, namely that the seriousness of the disorder should be evaluated against the seriousness of the offence and the risk of reoffending, and that criminal proceedings should be a proportionate response in all the circumstances of the case.

17.47

In cases in which a suspect has been told by the police or the CPS that he or she will not be prosecuted the guidance on "Reconsidering a Prosecution Decision" [37] will also need to be applied.

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31. The Code para.4.8.

32. http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/youths [Accessed April 30, 2016].

33. *[2015] EWCA Crim 662* at [51].

34. http://www.cps.gov.uk/legal/l_to_o/non-recent_cases [Accessed April 30, 2016].

35. The heading suggests a wider range of potential factors than does the text which follows.

36. http://www.cps.gov.uk/legal/l_to_o/mentally_disordered_offenders [Accessed April 30, 2016].

37. http://www.cps.gov.uk/legal/p_to_r/reconsidering_a_prosecution_decision [Accessed April 30, 2016].

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Chapter 17 - Prosecuting Rape and Serious Sexual Offences—CPS Policy and Decision-Making

False Rape Allegations

17.48

It is sometimes believed that the CPS is reluctant to prosecute cases where a false allegation of rape has been made. In fact, the CPS recognises that such an allegation not only has a devastating impact on the person wrongly accused, but also makes it commensurately more difficult successfully to prosecute truthful complaints to conviction.

17.49

That is not to say that prosecuting allegedly false rape allegations is easy: the existence of assumptions about human sexual behaviour (the so-called myths and stereotypes) can make it as difficult to identify cases which are demonstrably false as it can be to prosecute a genuine case of rape. Were a prosecutor to make the wrong decision, he or she risks both criminalising someone who is in fact a victim of rape and discouraging other victims from coming forward.

17.50

The case of *R. v A*[38] prompted the issue of guidance in this area. A had reported to the police that she had been raped on three occasions by her husband; this was against a background of other domestic violence. As a result of her complaint, her husband was arrested and charged. Some weeks later, A told the police that, whilst what she had said about the rapes was true, she and her husband were reconciled and she wished to retract her allegations. After consideration, the CPS decided that the prosecution should continue, on the ground that cases involving a serious allegation such as rape are not a private matter between the parties.

17.51

Upon being told that the case would continue, A then said that she had lied in her statements and that her husband had never raped or otherwise assaulted her. The reviewing lawyer decided that, in light of the fact that she appeared to be untruthful by her own admission, there was no longer a realistic prospect of conviction and offered no evidence. A's husband, who had been in custody for some months, was released. Following this, a decision was made to charge A with perverting the course of justice on the basis that she had made false allegations against her husband.

17.52

After she was charged, A said that she had not perverted the course of justice, because the original allegations of rape had been true and she had only withdrawn them because she and her husband were trying to rebuild their marriage.

17.53

A situation such as this (which is far from uncommon in rape cases where the allegation arises in the context of other domestic violence) has come to be known as a "double retraction". In *R. v A*, the CPS reviewing lawyer considered that it was not possible to distinguish between A's two versions of what had happened. Given that she was, by her own admission, undoubtedly guilty on one or other basis, the indictment was drafted so that it contained two mutually inconsistent counts of perverting the

course of justice: the first alleging that she had done so by making a false allegation of rape and the second that she had done so by falsely saying that a truthful allegation of rape was a lie. A pleaded guilty to the count which averred that the original rape allegation was true and she had lied when retracting it; no evidence was offered on the alternative count. It follows as a matter of logic that A had been prosecuted for retracting what the prosecutor accepted was a truthful complaint of rape. Her status as a genuine rape victim notwithstanding, she was sentenced at the Crown Court to eight months' imprisonment. [39]

17.54

This case caused the CPS to consider how the Full Code Test should be applied in difficult circumstances such as these. The first question is whether the evidential stage is met when the prosecution has evidence which leads to one of two mutually exclusive conclusions but finds itself unable to choose between them. However much common sense might revolt at the idea that the defendant should escape punishment entirely, if the prosecution is wholly unable to say which version is correct, then the case cannot meet the criminal standard of proof. [40] In such a situation, the Legal Guidance accepts that it is wrong in law to charge mutually contradictory counts and simply invite the jury to choose which it prefers. [41]

17.55

Further, when the prosecution accepts a plea on the factual basis that the complainant had lied when he or she withdrew a truthful allegation of rape, then the reviewing lawyer must go on to consider whether the decision to prosecute is in the public interest, given that the only logical inference will be that he or she was a victim of rape.

17.56

As a result of A's case, and following a period of public consultation, CPS Legal Guidance on how to approach such cases was published in July 2011. [42] It seeks to strike a balance between ensuring that genuine victims who retract truthful allegations (often as a result of emotional pressure or violence) are not prosecuted, whilst recognising the need to protect the innocent against false allegations of rape or domestic violence.

17.57

Because the then DPP wished to ensure that the Guidance was being applied in a consistent manner, he personally approved all charging decisions [43] in these cases from January 2011 to May 2013. During that 17-month period the CPS made 159 decisions involving allegedly false complaints of rape and domestic violence. Those decisions were analysed and became the foundation for a report which was published in March 2013. [44] One of the things that emerged from the analysis was that only a very small proportion of the complaints of rape and domestic violence investigated by the police and referred to the CPS for a charging decision could be shown to be demonstrably false to the criminal standard. In the other cases, it had to be accepted that the original allegation of rape might have been true. These figures have to be treated with some caution because the way the data was collected does not permit a direct comparison to be made, [45] but the overall comparison makes an arguably sound point: during the period of the review there were 5,651 prosecutions for rape and 111,891 for domestic violence, compared with 35 prosecutions for false allegations of rape, six for false allegations of domestic violence and three for false allegations involving both.

CPS Charging Standards

17.58

False allegations can be prosecuted either as perverting the course of justice or wasting police time. [46] Usually the less serious charge of wasting police time is used when there has been a generalised complaint of rape rather than one made against a specific person. Charges of perverting the course of justice are usually reserved for cases where an identifiable person was in jeopardy of being arrested

or tried for the offence, [47] the allegation was persisted in for a long period of time, other evidence was manufactured, or the complaint could fairly be described as not merely false but malicious.

17.59

Wasting police time is a summary-only offence. In some cases, by the time the investigation has concluded it is clear that the proper charge would have been wasting police time, but the statutory time limit has expired, leaving the choice of charging the more serious but less appropriate offence or taking no further action. This is not an unusual situation: it arises most commonly in relation to allegations of assault. The CPS Charging Standards for assaults [48] state that:

> "From time to time, there may be exceptional circumstances where a case would ordinarily be considered more suitable for being charged as Common Assault under this Charging Standard, but more than six months has passed since the incident complained of. In such circumstances, it may be appropriate (where the injuries were more than 'transient and trifling') to charge an offence of ABH, but great care must be taken in making such a decision.
>
> Such a course of action may be argued as being an abuse of process, and it is therefore necessary to clearly establish [sic] the reason for not bringing summary proceedings within six months (or laying a protective information within that time). Issues around the nature and complexity of the investigation will be relevant, as will be the stage at which the case was referred by the police. In determining whether the preferring of a charge of ABH in these circumstances is manifestly an abuse of process, or whether in fact it would be regarded as an affront to justice for proceedings not to be brought, reference should be had to the Legal Guidance chapter on Abuse of Process"

Thus where, following an investigation, it appears that a false rape allegation would more usually be prosecuted as wasting police time but the statutory time limit has elapsed, the reviewing lawyer will need to determine whether the case should be dealt with as perverting the course of justice, if the alternative is that otherwise the suspect would escape justice entirely. One of the factors which the reviewing lawyer should take into account is that, in the event of a conviction, the trial judge will be able to reflect the mitigating factors in sentence.

Difficult issues

17.60

The Legal Guidance reminds prosecutors that the Crown will need to be able to prove to the criminal standard that the suspect [49] has made a clear and unambiguous complaint. It is a feature of many investigations that complaints to the police can be made by persons other than the alleged victim, for example, the parents of teenagers. In a surprising number of cases the suspect had made an allegation of rape but had failed to appreciate that the fact that he or she did not actually want to have intercourse did not mean that he or she did not consent to it. In addition, there is some evidence that the police may occasionally conclude that the complainant is alleging rape when there is no clear evidence that this is what was in fact said. [50] Particular care needs to be taken in cases in which the suspect is young, has mental health issues or learning difficulties.

17.61

It may be felt that there should be few problems in the requirement that the prosecution prove that the complaint was in fact false, but in practice this may present considerable difficulty. The fact that the original rape allegation did not meet the test for a prosecution, or that the complainant withdrew the allegation or the jury acquitted the alleged rapist, does not necessarily mean that the complaint was untrue. This is particularly complicated when the alleged victim has made allegations in the past which he or she has either withdrawn or which have not resulted in prosecution. "Common sense"

might suggest that this indicates a history of making false allegations (the "lightning doesn't strike twice" principle), but this is in fact another example of how common sense can prove to be an unreliable touchstone: there is some evidence to show that victims may have been subjected to other sexual and other violent offences, possibly as a result of their vulnerability. This is characterised as "repeat victimisation". There is a risk that a circular kind of logic can develop: a complaint is not believed because the complainant has a history of making allegations which have not resulted in prosecution or conviction, then that complaint itself joins the list so that were he or she to make another allegation, that too would not be taken seriously. In light of this, prosecutors are reminded that a previous allegation is of no significance unless there is evidence to show that that allegation was itself provably false; and even then, a previous false allegation will rarely be conclusive.

17.62

Prosecutors should also be careful not to conclude that the allegation was false solely on the basis of the so-called "myths and stereotypes". Examples of flawed decision-making have, in the past, included a case in which the reviewing lawyer concluded that because the complainant had no injuries, this in itself amounted to evidence that it was a false allegation.

17.63

The Legal Guidance reminds prosecutors that in these cases the principle that it is generally safe to rely on an admission of guilt (as being a declaration against interest) may not in fact apply. An example of this is provided by "double retraction" cases such as that of *R. v A* [51] where the relationship between the parties, in addition to other factors such as their having children, may lead to the withdrawal of a truthful allegation. As the Court said in *R. v A* [52]:

> "Experience shows that the withdrawal of a truthful complaint of crime committed in a domestic environment usually stems from pressures, sometimes direct, sometimes indirect, sometimes immensely subtle, which are consequent on the nature of the individual relationship and the characters of the people who are involved in it."

17.64

The Legal Guidance sets out a number of factors which prosecutors should bear in mind, such as whether there is any other evidence which tends to support one version of events over the other.

17.65

A further example of the difficulties which may confront prosecutors is where the alleged rape victim has lied or manufactured evidence [53] to support an allegation which otherwise appears to be true, or where there is clear evidence of violent assaults on other occasions. In such cases although it would be possible as a matter of law to charge him or her with perverting the course of justice, careful consideration needs to be given to the public interest. Examples of public interest considerations in this context are to be found in the Guidance.

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38. *[2012] EWCA Crim 434; [2012] 2 Cr. App. R. 8*.

39. This was reduced by the Court of Appeal to a community order: see *[2010] EWCA Crim 2913*.

40. See, by analogy, the line of authority dealing with offences committed by a closed group where there is no evidence of common purpose and the prosecution is unable to choose between the suspects, e.g. *Abbot [1955] 2 Q.B. 497*.

41. *Tsang Ping-Nam v R (1982) 74 Cr. App. R. 139*.

42. The current, updated guidance is to be found at http://www.cps.gov.uk/legal/p_to_r/perverting_the_course_of_justice_-_rape_and_dv_allegations [Accessed April 30, 2016].

43. The expression *"charging decision"* is used within the CPS to mean the decision whether to charge or not, and thus encompasses cases in which no further action is taken.

44. http://www.cps.gov.uk/publications/research/perverting_course_of_justice_march_2013.pdf [Accessed April 30, 2016].

45. Not least because in some of the cases which did not result in prosecution, this may have been for public interest reasons.

46. s.5(2) of the Criminal Law Act 1967.

47. See *Rowell (1977) 65 Cr. App. R. 174* at p.179.

48. http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/£a23 [Accessed April 30, 2016].

49. There are some difficulties with the terminology. In this context *"suspect"* is used to mean the person who has made the allegedly false complaint.

50. For example, in one case, careful analysis of the original complaint to the police revealed that what the suspect had in fact said was that she "felt" that she had been "taken advantage of", but that she could not remember exactly what had happened because of the amount of alcohol she had had to drink. It became clear that at no stage had she said explicitly that she was raped, rather it was the police who had drawn the conclusion that this was what she was alleging.

51. *[2012] EWCA Crim 434; [2012] 2 Cr. App. R. 8*, discussed in paras 17.50 and following, above.

52. At [5].

53. In one case a false diary entry.

Rook and Ward on Sexual Offences 5th Ed.

Mainwork

Chapter 17 - Prosecuting Rape and Serious Sexual Offences—CPS Policy and Decision-Making

Breaches of the Non-Reporting Provisions

17.66

Most allegations involving sexual offences carry with them so-called "anonymity" for the victim, by virtue of the Sexual Offences (Amendment) Act 1992. This subject is fully discussed in Ch.29, below. Although the Act uses the expression "anonymity" in the section headings, the actual protection conferred is from publication of matters likely to lead members of the public to identify the person concerned. This is not to be confused with "anonymity" in the sense provided for in the Coroners and Justice Act 2009: in almost every case the complainant's identity will be disclosed to the suspect and his or her name will be given in open court.

17.67

The 1992 Act provisions are akin to reporting restrictions but their effect is not limited to the media: individuals may be prosecuted for publishing information. The advent of widespread use of social media has increased the speed and ease with which such information may be distributed. It has also had a profound effect on the impact it may have. The rape conviction in 2012 of a footballer, Ched Evans, [54] was followed by extensive comment on social media, in some of which the victim's identity was deliberately and maliciously revealed to the public at large. A number of those who published such comments were prosecuted under the 1992 Act. Similar prosecutions have taken place in other cases but the extent of the impact on the victim in that case has been of particular concern and has been widely reported.

17.68

Proceedings for an offence under the 1992 Act may be instituted only with the consent of the Attorney General [55] and thus the public interest decision in such cases falls to the Law Officers to make rather than the CPS, although the prosecutor will make recommendations. The CPS Legal Guidance sets out the procedure for submitting these cases to the Attorney General's Office. [56] Recommendations on the public interest stage are likely to reflect the circumstances in which the alleged offence occurred, which may range from inadvertent publication [57] (where a prosecution is less likely to be considered necessary) to malicious publication where the clear intention was to victimise, or further victimise, the person concerned, in which case a prosecution is more likely to be required, subject to other factors specific to the individual concerned. It is of note that the protection is limited in that the offence only carries a financial penalty.

17.69

The protection of the Act is automatic (that is to say, it is not dependent on the judge making an order) and extends throughout the lifetime of the person concerned, though they can, if over 16, waive the entitlement by written consent. However, s.1(4) provides that:

> "nothing in this section prohibits the inclusion in a publication of matter consisting only of a report of criminal proceedings other than proceedings at, or intended to lead to, or on an appeal arising out of, a trial at which the accused is charged with the offence."

The Judicial College guidance Reporting restrictions in the Criminal Courts [58] includes this comment,

annotated by reference to s.1(4):

> "the media is free to report the victim's identity in the event of criminal proceedings other than the actual trial or appeal in relation to the sexual offence e.g. if the complainant were to be prosecuted for perjury in separate proceedings."

It is by no means clear that the wording of s.1(4) actually provides a basis for the example contended for in the guidance, but the point has not yet been tested. If the example is right, then it follows that those accused of making a false allegation lose the protection of the 1992 Act merely as a result of being prosecuted, potentially in proceedings launched by a private prosecutor, and while still presumed in law to be innocent.

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54. The conviction was recently quashed and a retrial ordered: see http://www.independent.co.uk/news/uk/crime/ched-evans-wins-appeal-against-rape-conviction-and-faces-retr [Accessed April 30, 2016].

55. Or the Solicitor General by virtue of the Law Officers Act 1997.

56. http://www.cps.gov.uk/legal/a_to_c/contempt_of_court/£a19 [Accessed April 30, 2016].

57. For example, where someone commenting, critically, on one act of publication accidentally re-publishes that on which they are commenting.

58. http://www.judiciary.gov.uk/publications/reporting-restrictions-in-the-criminal-courts [Accessed April 16, 2016].