

The merits-based approach to prosecuting cases of rape
Alison Levitt QC

1. I know that the whole idea of the merits-based approach has proved controversial in some quarters on the basis that it is felt that :
 - (a) it runs counter to common sense to prosecute cases which we know as experienced prosecutors we are bound to lose, especially in these times of straitened finances and criticisms of our attrition rates;
 - (b) it is not in the interests of rape victims to get their hopes up when we know that the outcome will be an unpleasant XX followed by an acquittal;
 - (c) as a point of principle it means that we are treating rape victims differently – in the sense that we are applying a lower standard than we would to other offences
 - (d) it is potentially unfair to defendants, to put them through a trial we know will result in acquittal
 - especially when the complainant is protected but the defendant ends up all over the newspapers.

2. But what I hope to do this morning is to persuade you that in fact :
 - (a) analysed correctly, some of these criticisms of the merits based approach are actually wrong, and
 - (b) even those that are correct are outweighed by the advantages of following the merits-based approach

3. So first what I want to do is go through FB quickly – I know that many of you have read it, all of you are aware of it, but you are all busy people and probably have not had time to sit down and analyse it

(then go through case of FB)

- 4. So what is the starting point?
- 5. The *CPS Policy for Prosecuting Offences of Rape* makes it clear that the CPS' aim is to prosecute cases of rape effectively and that we are committed to improving our performance, particularly by ensuring that any myths or stereotypes play no part in our decision-making.
- 6. That being said, the *Rape Policy* does not supersede the *Code for Crown Prosecutors*.
- 7. In other words, the test for rape prosecutions is the same as for any other offence : it must still be more likely than not that there will be a conviction.
- 8. If there is no realistic prospect of conviction, the evidential stage is not met and no prosecution can be brought, irrespective of the public interest or the views of the victim.
- 9. As the *Policy* 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.
- 10. How then is the question of whether there is a realistic prospect of conviction to be approached?

Toulson LJ in FB

"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."

11. It is this that has come to be known as the “merits-based approach”.
12. In the context of sexual offences, what this means is that even though past experience might tell a prosecutor that juries can be unwilling to convict in cases where, for example, there has been a lengthy delay in reporting the offence or the complainant had been drinking at the time the rape was committed, these sorts of prejudices against complaints should be ignored for the purposes of deciding whether or not there is a realistic prospect of conviction.
13. In other words, the prosecutor should proceed on the basis of a notional jury which is wholly unaffected by any myths or stereotypes of the type which, sadly, still have a degree of prevalence in some quarters.
14. Instead of asking necessarily what is the LIKELIHOOD of conviction we should ask ourselves, what are the MERITS of a conviction – taking into account what we know about the defence case
15. May sound like a subjective approach, even a morality judgement
16. But it is not : the merits -based approach simply reminds prosecutors of how to approach the evidential stage of the Full Code Test in tricky cases
17. It does not establish a different standard for sexual offences.
18. So returning to where I started : I said some of the criticisms of the merits-based approach are in fact incorrect . In what way?
19. The first is that we are not in fact applying a different standard : if you think about it, it is the same approach we take to all cases
20. For example, with robbery we approach the case on the basis of the notional unprejudiced jury. After all, there are potential jurors out there who believe all kinds of strange and alarming things –
 - that the earth is flat,
 - that homosexuality is a sin,

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- that black people have smaller brain than whites,
 - even that all police officers tell lies about everything
 - immigrants have no right to be treated on the same basis as the "indigenous population"

but we don't decide whether there is a realistic prospect of conviction on the off chance that we might end up with one of them on our jury

21. We would not decline to prosecute a robbery because the victim was black and gay, but we might get a juror who is racist and homophobic.
22. In the same way, we know that there are prospective jurors out there who think – for example -
 - that a woman who has been drinking has only herself to blame if she is raped
 - or that a woman who was really raped would of course report it immediately, and delay in reporting IN AND OF ITSELF means that she is likely not to be telling the truth
23. WE KNOW THAT THAT BOTH OF THESE ARE UNTRUE . So why should we apply a different standard for rape victims?
 - Why should we refuse to prosecute simply because we know that we MIGHT get a juror who believes something that is prejudiced, irrational and untrue
24. At the risk of sounding somewhat sanctimonious I would make this point – sexual offenders often commit sexual offences against vulnerable victims BECAUSE they know that they are unlikely to be believed – they target them
 - Children
 - Women with chaotic lifestyles
 - Men(!) – prevalent myth that they can't be raped
 - People with disabilities

- Sex workers
25. Many of these are the most vulnerable people in society – what is the point of us if we do not strive to achieve justice for them?
26. But even if all that is correct - what about the criticisms that are true?
27. The public in general – and politicians in particular – are of course hugely critical of the number of sexual offences prosecutions which do not result in conviction.
28. It is certainly true that if we prosecute a lesser number, and restrict ourselves to what might be seen as the “safer” cases
- (a) Our attrition rate is going to be less, which is good reputationally
 - (b) We don't waste scarce resources on cases that are likely to fail
 - (c) We save victims from the trauma of XX and a trial, which is in their best interests
 - (d) We don't subject defendants who are bound to be acquitted to the trauma and publicity
29. Can I deal with the last two first?
- (a) what is good for defendants is not our problem – they have their own lawyers. If there is a realistic prospect of conviction ON THE BASIS OF A NOTIONAL UNBIASED JURY our duties are to the victims.
 - (b) The issue of publicity is for parliament not us
 - (c) It is not our job to decide whether saving the victims from the trauma of a trial is in their best interests or not– that is I would venture to suggest part of the patronising attitude that assumes, in particular, that women do not know what is good for them
30. But the first two are trickier, namely attrition rate and finances

- 31. This brings me to what we are asking you to do for us - We want to see the volume of prosecutions go up!

- 32. We will accept will cost more and we accept that possibly initially we will lose more cases. But we think it is worth it

- 33. We want to see the merits-based approach applied in all the Areas and SCD, and we would accept a short-term increase in the attrition rate

- 34. Reasons?
 - First, because it is morally right
 - Secondly, because it is the intellectually rigorous approach to take to the Full Code Test
 - Thirdly because by clever and sensitive prosecuting we can actually change attitudes

- 35. Think about the new Specimen Direction on delay which came about from the case of Doody. Think about rape within marriage

- 36. Time was when many people, men and women, thought and said that a woman wearing revealing clothes had only herself to blame. Well if they still think it, they certainly wouldn't say it – and thus we start to win the battles

- 37. We have all sorts of weapons at our disposal :
 - Special measures
 - Intermediaries
 - PTWI
 - Case building
 - Judicial directions

- 38. Even – maybe - in the odd very specialised case e.g. recovered memory expert evidence
- 39. Ten years ago would we have prosecuted the case of Watts?
 - Cerebral palsy
 - Unable to communicate except by blinking
- 40. And now a dangerous man who preyed on vulnerable women because he didn't believe that they were human beings with the right to choose or to say no - is doing 12 ½ years, *and that is what we are here for.*
- 41. Remember that there is a difference between a difficult case and a weak case – just because it is difficult does not mean it is weak. They don't come more difficult than Watts – but actually it was a strong case
- 42. When I started here six months ago I asked someone whom I respect for their one piece of advice for a new prosecutor (as I am). She said "fortune favours the brave". Not the foolhardy, but the brave.
- 43. This is what we are asking you to do : please will you go back to your prosecutors, and help them to understand the approach, help them to implement it.
- 44. Ask them to be bold, to be brave and to be creative
- 45. Also, make sure in any case where they are briefing counsel rather than doing it ourselves, that they ONLY use counsel who understand and subscribe to the merits-based approach
 - Remember that FB was dropped by counsel!!!

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46. In conclusion, I hope that I have persuaded you of the advantages of it. If not I fear you are going to have to do it anyway because the Director has made it clear it is a priority

47. We are here to help, you have only to ask.

Alison Levitt QC