

What constitutes a ‘reasonable belief’ in consent to sex? A thematic analysis.

Jacqueline M. Gray

Psychology Department, Middlesex University, London, United Kingdom

Dr Jacqueline M. Gray, Psychology Department, Middlesex University, The Burroughs, Hendon, London NW4 4BT. Email: J.Gray@mdx.ac.uk

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The prosecution of rape frequently requires a jury to decide whether the defendant reasonably believed that the complainant consented to sexual intercourse, thereby assuming a shared understanding of what constitutes a ‘reasonable belief in consent’. This study provides a thematic analysis of interviews with 18 university students, studying in London, UK, to explore their perceptions of ‘a reasonable belief in consent’ when considering other people’s behaviour. The findings suggest that whilst these participants rejected many stereotypical ideas in judging reasonable belief in consent, the discussion regarding vulnerability, responsibility and the consumption of alcohol was less clear-cut. Discussions frequently sought to avoid directly blaming the victim for being raped, but would instead blame her for getting drunk or otherwise ‘allowing’ herself to become vulnerable. The implications of these findings for the prosecution of rape and wider public education are considered.

Keywords: Rape; sexual consent; rape myths; vulnerability

Introduction

There has been ongoing concern regarding the low conviction rate for rape (e.g. Feist, Ashe, Lawrence, McPhee & Wilson, 2007; Kelly, Lovett & Regan, 2005; Lea, Lanvers & Shaw, 2003; Lees, 2002). Despite this, there remain challenges to obtaining convictions, particularly where consent (or its absence) is the core issue, such as when the complainant and defendant have some degree of prior acquaintance. This paper focuses on this particular issue of consent in instances of acquaintance rape. In such cases jurors’ need to establish whether the complainant consented, to determine the guilt or innocence of the defendant. The Sexual Offences Act 2003 in England and Wales defines consent, and requires that belief in such consent be reasonable. However, the only guidance given as to what is ‘reasonable’ is that reasonableness should ‘be determined having regard to all the circumstances’.

Previous qualitative research has examined how sexual consent is negotiated in personal relationships (Beres, 2010; Kitzinger & Frith, 1999; O’Byrne, Rapley, & Hansen, 2006). Quasi-experimental studies have also identified various victim, offender and offence characteristics that may influence perceptions of consent and verdicts in rape scenarios (e.g. Ellison & Munro, 2009; Grubb & Harrower, 2008; Romero-Sánchez, Megías & Krahe, 2012). The present research takes a novel approach to the topic by drawing on both of these strands of research, and uses thematic analysis to explore perceptions of behaviours that could be drawn upon by jurors to indicate a reasonable belief in consent to sexual intercourse. Its focus is therefore upon lay interpretations of consent and its application to the behaviour of other people (rather than consent in their own relationships), which could differ from the way they would view sexual consent in their own relationships.

It is well established that sexual consent or refusal may be undertaken verbally and non-verbally, and that very subtle indicators are used and understood by both men and women (Beres, 2010; Beres, Herold & Maitland, 2004; Kitzinger & Frith, 1999; O’Byrne, Hansen & Rapley, 2008; O’Byrne, et al., 2006), even in casual sexual relationships (Beres, 2010). In his sample of US college students, Hall (1998) found that consent was most frequently communicated non-verbally, and that consent is usually not specifically given for individual sexual acts that are part of an ongoing sequence. Furthermore, Hickman and Muehlenhard (1999) found that the young adults in their study employed both verbal and non-verbal consent signals, which could be either direct or indirect, and both males and females reported almost never using a direct refusal (i.e. saying ‘no’). Kitzinger and Frith (1999) reported the often indirect nature of women’s sexual refusal, and also highlighted that social conventions mean that people rarely ‘just

say no' to any kind of an invitation, including (but not only) unwanted sex. Developing this idea, O'Byrne et al. (2006) demonstrated that young men are able to perceive women's refusals, including verbal refusals that do not contain the word 'no', and also other more subtle non-verbal refusals.

The 'miscommunication' model of acquaintance rape (Tannen, 1992) posits that rape is the result of men misunderstanding the supposedly ambiguous sexual signals given by women. It suggests that men and women have different communication styles, which lead to unavoidable errors in both men's and women's understanding of signals of sexual willingness, and that this ultimately leads to rape. The problematic implication of this approach for rape prevention is that acquaintance rape will be reduced or eliminated entirely if (particularly) women can be taught to say 'no' clearly and unambiguously, so that they cannot be misunderstood. The above studies show that sexual consent and refusal cannot be explained or understood as simple and singular events. They also indicate that the 'miscommunication' model (Tannen, 1992) is too simplistic, and that miscommunication is not the underlying problem as both men and women communicate and understand consent through a variety of subtle and indirect signals. O'Byrne et al. (2008) found that young men in their focus groups both used and understood normative styles of refusal that did not involve the use of the word 'no'. Despite this, these same men drew heavily on the miscommunication model to 'collaboratively work up claims 'not to know' what constitutes sexual refusal when performed by women' (p. 178), and to excuse male sexual aggression. In light of the persistence of the miscommunication account of rape, it seems likely that it would be influential in potential jurors interpretations of a reasonable belief in consent.

As well as expectations arising from the reliance on the miscommunication model it is likely that rape myths will also influence the understanding of what is a

reasonable belief in consent. Research has consistently indicated that people who endorse rape myths are more likely to see situations where consent is the issue (e.g. acquaintance rape) as not being rape, are likely to attribute more blame to the victim, and to conclude that the defendant is not guilty (Frese, Moya & Megias, 2004; Gray, 2006; Grubb & Harrower, 2008; Hammond, Berry & Rodriguez, 2011; Peterson & Muehlenhard, 2004).

Rape myths function to blame victims and exonerate perpetrators, and frequently suggest that rape occurred because of something that the victim did or did not do, for example what she was wearing, how she was behaving, and such like (see Burt, 1980; Gerger, Kley, Bohner & Siebler, 2007; Payne, Lonsway & Fitzgerald, 1999). As with the miscommunication model, these ideas place the responsibility for rape on the victim who is seen to have done something to invite (or even deserve) her victimization, rather than blaming the sexually coercive behaviour of perpetrators (Bohner, Eyssel, Pina, Siebler & Viki, 2009; Temkin & Krahé, 2008).

Stereotypical expectations of appropriate masculine and feminine behaviour underpin many rape myths, and the consequences of this type of myth are particularly evident in the interpretation of consent when the complainant has consumed alcohol (Finch & Munro, 2005). Lovett and Horvath (2009) identify three main myths relating to alcohol and rape: women are always capable of giving or refusing consent, regardless of their degree of intoxication; women who are drunk are to blame for being raped; women who are raped whilst drunk 'cry rape' because they regret having had sex, or the sex was bad. The influence of the first two of these myths was clearly seen in the study conducted by Finch and Munro (2005), whose participants believed that women who voluntarily consume alcohol bear a substantial degree of responsibility if they are subsequently raped, and furthermore that drunken consent was still consent.

Rape myths can be seen as a prescriptive framework that guides expectations as to what does and does not constitute rape (Temkin & Krahé, 2008). These expectations therefore provide a 'schema' that will be likely to guide the way in which jurors interpret evidence about rape. They will readily accept information that fits with their schema, be more likely to reject or ignore information that does not fit, and may make inferences in line with their schema where information is missing (see Bohner et al., 2009). A related concept is that of sexual scripts, which again provide a template for the way in which people expect events to unfold. Sexual scripts have been found to be influential in the interpretation of whether or not sexual experiences are considered to be rape (e.g. Littleton & Axsom, 2003; Peterson & Muehlenhard, 2004). The perception of what constitutes a reasonable belief in consent, and the steps that a complainant would have to take to make belief in consent unreasonable, is therefore likely to draw on the cognitive shortcuts provided by schemas and scripts.

The present study employs a mixture of semi-structured interviews and focus groups to explore participants' understanding of what constitutes a reasonable belief in consent. The focus is therefore not directly upon how consent is negotiated in sexual relationships, but instead is upon how observers perceive and judge individuals and their behaviours in situations where sexual consent or refusal might be questioned.

Method

Design

A qualitative semi-structured interview design was employed to explore how participants understand and interpret interactions that could convey sexual consent, or the lack thereof. Thematic analysis was carried out on the data. Braun and Clarke (2006) argue that thematic analysis should be recognised as a discrete method of

qualitative analysis in its own right, that is not tied to a particular theoretical or epistemological tradition. This method was chosen for these reasons, and because its flexibility allows the exploration of new ideas, drawing on participants' answers, which will provide an ecologically grounded and nuanced understanding of what constitutes a reasonable belief in consent. The research takes an essentialist approach, and the interviews are analysed using an inductive, semantic level thematic analysis (Braun & Clarke, 2006).

Participants

The participants were 18 (4 male and 14 female) students at a London university who took part in the study for partial course credit. The average age of the 16 participants who recorded their age was 24.8 years (range 18 to 46). They were given the choice whether to participate in one-to one or small focus group sessions, to allow for individual preferences for discussing such issues publicly. This resulted in five one-to-one interviews, five focus groups with two participants and one with three. The distribution of participants by type of session is shown in Table 1.

Insert Table 1 about here

Materials

The interview schedule (available from the author) focused on acquaintance rape, and the types of behaviours, both verbal and non-verbal, that might be used to convey consent, or a lack thereof. The interview schedule was designed to tap participants' schematic thinking about acquaintance rape, to find out what rape myths were

particularly prevalent, and most importantly what a woman could do to undermine the perception that a man's belief in consent was reasonable.

The interview schedule started by asking questions to establish participants' ideas of the scenario(s) in which acquaintance rape is likely to start, and how they perceive that events might unfold. Questions then addressed male and female behaviour in the period leading up to rape (e.g. In these situations, what sorts of behaviour suggest to you that the people involved would like to have sex?). Questions were specifically included to determine what participants thought a woman would have to do to make a man's belief in consent unreasonable (e.g. If, having behaved in a 'flirty' or sexually provocative way, what do you think a woman would have to do to make it clear that she is not interested in sex?). The specific examples of acquaintance rape in social situations and the perceived role of alcohol in the perception of consent were also explored. The interviews were recorded using a digital voice recorder.

Procedure

Participants signed up to either individual or group sessions (which could be single or mixed sex) to allow for personal preferences for discussing a potentially challenging topic, which took place in a private room. On arrival participants were briefed verbally and in writing regarding the content of the study, that it would be recorded for later transcription, and then signed a consent form. The interviews were conducted by a research assistant, overseen and supported by the author. On completion of the interview, participants were debriefed and provided with details of various sources of support that could be accessed in case they had been affected by the study. The research assistant transcribed the interviews, which were then checked for accuracy by the

author. The study was conducted in accordance with the British Psychological Society's Code of Human Research Ethics.

Data Analysis

The analysis was conducted in accordance with the guidelines for carrying out thematic analysis proposed by Braun and Clarke (2006). The first phase of the analysis entailed transcribing the interviews, and then reading and rereading the transcripts to become familiar with the data. Preliminary, descriptive codes were identified for the entire data corpus, which were then grouped into initial themes. The initial themes were then reviewed through an iterative process, using a series of thematic maps, to develop the final, refined themes that are shown in the thematic map in Figure 1 (below).

Analysis and Discussion

Echoing the rape and seduction scripts identified by Littleton and Axsom (2003), participants overwhelmingly considered that acquaintance rapes were likely to start in evening, social situations such as pubs, clubs, bars or parties, particularly including the consumption of alcohol, and this provides the context for the themes identified.

Thematic Map of sexual consent

Four main themes were identified that may be drawn on in determining whether or not an encounter was rape or consensual sex. These themes, their sub-themes and a brief description of each are shown in Table 2.

Insert Table 2 about here

The themes relate to the giving or refusing of consent by the female (complainant), the interpretation of consent by the male (defendant), consent as process and vulnerability. In their discussions, these participants gave quite substantial attention to the behaviour and beliefs of the perpetrator. However, it is possible that this is a function of the interview questions, which asked participants' views on the reasonableness of the belief in consent, and that without this framework the discussion may have focused more on the behaviours of the complainant. The thematic map shown in Figure 1 illustrates the relationships between these themes, in the perception of sexual consent.

Insert Figure 1 about here

Consent as process

This theme characterises sexual consent as a complex process, rather than as a single act or verbal response.

'... when you're younger you have that whole like er, first base, second base, third base. If someone went past a certain boundary like kissing and touching then um, you'd sort of expect them to go all the way kind of thing if they've already crossed the line.' (David)

'I don't think it's reasonable to assume that she might want sex, but again he thinks that she's already started the process, so he might expect sex'. (Jodie)

Other participants do not directly use the term ‘process’ but nonetheless suggest the progressive nature of consent and the implications that might therefore be drawn. For example:

‘... if you’re on a sofa at a party ... with your arm around someone, I suppose that’s an indication that there’s some kind of potential there for kissing and ... if you left together and got a cab, particularly to her place, then um that would definitely, you would definitely feel that there was some potential there.’ (John)

Whilst these interpretations are based upon stereotypical assumptions such as an invitation home is a coded invitation for sex (Burt, 1980; Gerger et al., 2007; Payne et al., 1999), they suggest ways that both individuals involved and jurors may perceive such behaviours. However, it is notable that none of the participants suggest that starting, or even pursuing the ‘process’ means that consent is actually given. As Sally notes, *‘even in the club situation, it might say that she may be interested, but it doesn’t say yes’*.

Certain behaviours, in certain contexts, were seen as the start of the process of consent. This is consistent with previous research that has suggested that consent is often not explicitly granted, but that a range of behaviours can be seen as indicating consent, until such time as that consent is withdrawn (e.g. Beres, 2010; Beres, et al., 2004; Hall, 1998). The specific cues that participants draw on to determine whether or not consent is given will be discussed in the next theme of ‘giving and refusing consent’.

Giving and Refusing Consent

This theme consists of two sub-themes, reflecting the different ways in which participants characterise the communication of consent: Behavioural Cues, and the Primacy of Language.

Behavioural cues

One aim of this study was to explore the distinction between behaviours that could be considered to indicate that a person was merely interested in having sex (e.g. going out to 'pull') and actual consent. A number of behaviours were considered to indicate that a woman could be interested in sex, drawing on both general demeanour and specific behaviours. For example, *'maybe talking with each other, and expressing interest only by that person, flirting, touching maybe, eye contact, that sort of thing, body posture, body language, stuff like that.'* (Bella)

Various specific behaviours including provocative dancing, touching, kissing and flirting were also identified as indicating interest in sex, rather than the more nebulous ideas around body language and demeanour. In addition, participants also identified that the way a woman is dressed might indicate that she is interested in sex, but this was always included in the context of other behaviours. *'In some way, for example, if she's dressed like really sexy, if she's showing some cleavage or her dress is like really, really short or tight, and then the way she'll carry herself through the night...'* (Jane)

These participants did not consider dress by itself to be indicative of interest in sex, but saw that it could form part of the broader context, when other characteristics of the situation might also reinforce the idea that sex is a possibility. Indeed Judith

highlighted that changing social norms mean that revealing clothing, at least to her, is just part of current fashion: *'people are more open now and it's very general for people to wear tight clothes, short clothes, revealing clothes, it's just general fashion now.'*

Whilst these responses bear some similarity to previous research that has considered the ways in which people convey consent (e.g. Beres, 2007; Hall, 1998; Hickman & Muehlenhard, 1999), these participants clearly drew a distinction between behaviours that could indicate interest in sex and consent. A common example was flirting, which was described as nothing more than a bit of fun and a part of having a good time.

'...some girls can just be naturally like flirty anyway and that could be like, their going out and having a good time could just be being flirty'. (Claire)

'I don't think flirting makes you promiscuous. I think flirting makes you a flirt.'
(Sally)

The participants also discussed the implications of going back to either the man or woman's house after a night out, and as with flirting this was generally seen to be something that should not be taken as indicating consent, despite this being a long-standing rape myth (Burt, 1980; Gerger et al., 2007; Payne et al., 1999) that would lead to the expectation that the woman would be seen to be blameworthy (although see the section on vulnerability below).

Julie: *'... No I don't think so because you have the right to opt out whenever you choose to. You don't give them a definite, I'm having sex, I'm going back to your place.'*

Karen: *'... if you've had a good night together and the club's closed and you don't want to go home, the only place you're going to go is to somebody's house. So just because you're going to somebody's house ... it doesn't necessarily mean anything's going to happen...'*

Whilst this exchange suggests that this could be part of the process of consent, Karen succinctly summed up the view that an invite home is not consent *'... you're just sharing your home with them, it's not like you're opening up your legs!'*

It was apparent from the participants' responses that whilst they would not see these various behaviours as indicating consent, they were aware that other people (particularly men) could read more into it.

'Yeah, I think it depends, cos if a girl was to start flirting ... he could take that as "oh she's up for it and she wants to go and have sex later", but she might just be playing round and having a bit of a laugh and doesn't necessarily mean she wants to go that far with him.' (Sandra)

Giving a male perspective, David was clear that whilst he personally knew that flirting was probably just for fun, there were other men who would not see it that way (linking to the 'good guys/bad guys' theme below).

'I see it really differently. 'Cos if they, if they come onto you and stuff. ... a group of my female friends ... they'd just go flirt with a guy and say let's just do it for fun, but I'm saying just be careful how the guy's gonna – cos they're my friends I look out for them.' (David)

It therefore seems that whilst these participants would personally take these behaviours at face value, they are aware that other people may see them as indicating at least an interest in having sex, if not actual consent. Laura provides a neat summary:

'I totally understand that some women do go out and they are looking for sex ... I think the majority of them aren't ... But even if they are looking for sex, it doesn't mean that if they come on to a man, they should, like, be raped or whatever...' (Laura)

In addition to the cues that could be used to indicate consent, participants were also asked what a woman would have to do to make it clear that she was not consenting to sex. Some participants primarily relied upon behavioural responses, whilst others saw this as a time when verbal interactions become more important (explored in the following sub-theme). Some of the non-verbal ways suggested to demonstrate lack of interest or consent were very overt: *'If she doesn't want to say, try and walk away. Or go and find some other company...'* (Sally). However, other non-verbal indicators suggested were perhaps more subtle, such as Nick's suggestion that the woman *'pull back'*, or as Julie put it: *'Sometimes if things are a bit too comfortable, too forward, then you would be inclined to push back and your behaviour would change.'*

These suggestions for non-verbal means of communicating a lack of consent resonate with the findings of Beres (2010), whose participants reported using, and also perceiving, a variety of subtle behavioural cues to indicate their consent or lack thereof. Further supporting this, Karen explicitly argued that verbal refusal or consent is not necessary.

'... I don't think you should have to state whether you are going to have sex with that person or not. I think it should be, you know you just met, you're going to be getting to know each other ... it doesn't necessarily mean it's going to end up with sexual relations.' (Karen)

There are a number of rape myths relevant to the discussions throughout this sub-theme (Burt, 1980; Payne et al., 1999), particularly the way women dress and the implications of flirting. The situations drawn on also share features with the 'sexually teasing' behaviour described by Peterson and Muehlenhard (2004), which was particularly influential in determining whether the women in their study who had been raped interpreted their victimisation in that way. It would be expected that when considering the behaviour of others a similar pattern would emerge, with women being at least partially blamed for their victimisation. These participants revealed an understanding that integrated a range of behaviours, and whilst these may be seen as indicating an interest in sex, they were not seen as implying consent. The means of conveying consent or refusal mentioned by these participants are similar to previous findings (e.g. Beres, 2010; O'Byrne et al., 2006) that have demonstrated that non-verbal communication of consent and refusal is well understood by both young men and young women (Kitzinger & Frith, 1999; O'Byrne et al., 2006; O'Byrne et al., 2008). However,

they also recognise that other people might read more into these behaviours (see ‘Interpreting Consent’ theme, below), and they also went on to emphasise the importance to them of verbal consent and refusal.

The Primacy of Language

Verbal refusal was seen by most of the participants as being the most certain way of being understood, demonstrated in the following exchange:

Julie: ... you meet somebody, you think it's a good idea, you go back to his place or your place, and then you get to the point, you start whatever, being intimate, and then you decide it's not for you, and then you say 'no'. No should mean no.

Karen: It doesn't matter how late it is.

Julie: It doesn't, no. No matter if you gave consent prior to that.

Karen: Yeah so I think probably the verbal, point it out at any point really, is the only way that you can. Cos I think that's also the most obvious. I mean, if you're relying on body language or something like that, if somebody wants to see something, they're not gonna see what you're trying to put across.'

Verbal refusal was commonly explained as the only way to be ‘clear’ that a woman does not want to have sex (Sally, Bella and David). This emphasis on verbal refusal suggests that these participants believe that not only is a verbal refusal necessary, but that it is also effective. They talk about ‘no’ as meaning ‘no’, which perhaps reflects Muehlenhard and Rodgers’ (1998) findings that both men and women rarely engaged in ‘token refusal’ (i.e. that women play ‘hard to get’ by initially say ‘no’

to sex when they do actually intend to consent), particularly outside of established relationships. However, other parts of the discussions revealed participants' awareness that verbal refusals are not always listened to. *'She would have to say no very firmly, and if she feels that the no is not being listened to, she'd have to try to get out of the situation.'* (Sally).

As noted above, sexual consent can be seen as a process (Hall, 1999) and consent can be communicated effectively both verbally and non-verbally (Beres, 2010; Hickman & Muehlenhard, 1999; Kitzinger & Frith, 1999; O'Byrne, et al., 2008; O'Byrne, et al., 2006). However, as highlighted by O'Byrne et al. (2008), this is not necessarily acknowledged. The young men in their focus groups were able to understand subtle verbal and non-verbal signals of sexual refusal, but they drew on ideas from the miscommunication model, to deny men's accountability for rape, claiming not to understand the signs of refusal. O'Byrne et al. suggest that even verbal sexual refusal can be wilfully misinterpreted, thereby maintaining a position in which women are blamed for their sexual victimisation. This is not reflected by participants in the present study who maintained the view that a verbal refusal would be the best way to be clear about sexual refusal, and suggests they would see a verbal form of refusal as important if they were required to assess whether or not a rape complainant had consented. As noted by Hickman and Muehlenhard (1999), direct verbal refusal is rarely used, so participants' view that verbal refusal is a 'gold standard' underlines the unreasonable expectations are frequently placed on rape victims.

Interpreting Consent

The process of consent requires both the person giving (or refusing) consent and the person who receives and interprets that message. This second part of the interaction

forms the basis for this theme of interpreting consent. As was indicated by participants' responses in the previous section, it is possible that the person receiving the message of consent or refusal will not receive it as intended. Two sub-themes have been identified that may contribute to how the message of consent or refusal may be interpreted.

Consent versus expectation

The essence of this sub-theme is that there are behaviours, discussed above, that could be a signal that a woman is potentially interested in having sex. However, whilst the man receiving these signals may be justified in hoping, or maybe expecting, that they will have sex later, this is not consent and he should not take it as such.

'He might believe she's going to have sex with him, or he might hope that she's going to have sex with him, but he shouldn't believe that's definite.' (Sally)

'No because it's a thought he has in his head, it's not a definite...' (Julie)

John also picked up on this point, from a more personal perspective, and demonstrating his awareness that this is separate from consent.

'... for me, if a girl went, came home with me at 4 o'clock in the morning after the club. Um, then I would think there is definitely a possibility, a fairly high possibility here, but at the same time I wouldn't think it was guaranteed ...'

(John)

Although these participants were of the view that a reasonable belief in consent was different from hoping for or expecting sex, some of the female participants thought that men would see the situation differently.

'... they would always hope it ... if the girl is going into a cab, well he's like yeah this is home, I'm going to have sex with her. But he'll hope so, ... I would never say that he's then, that it's reasonable for him to think. (Janice)

'...I mean you could probably just talk to a guy and he would think there's a possibility that he's going to get something out of you.' (Karen)

Another facet of this sub-theme was the idea that even if the signals might lead a man to expect sex, if the woman refuses consent at any stage, then the previous behaviour does not justify him carrying on and having sex with her regardless. *'I think he'd be expecting something, so therefore he'd think it'd be justified. But at the same time too, a girl can say no as well up to the last minute.'* (Bella). However, there were a few responses that indicated that this distinction between consent and expectation was not always clear-cut. For example in the following discussion of the meaning of accepting a lift from someone you don't know:

Sandra: *'... if a guy and a girl meet at a club and the guy says "Oh come back to mine, or I'll give you a lift to wherever you want to go", then I think you, by the girl's getting in the car with him that's consenting to it, I'd say. Or at least I'd say that's far enough for a guy to ... expect it.'*

David: ... *stuff like getting in the car, giving a lift, inviting you to someone's house, I think that's sort of bring someone into your space if you do that, so it could be considered consent, yeah.*

Amongst these participants the prevailing perception was that consent and expectation are separate, and that whilst some behaviours might lead a man to hope or expect that he will have sex, they do not constitute a reasonable belief in consent. However, this view was not unanimous, and perhaps more significantly, these participants did not consider their views to be held universally. This suggests that there was some awareness of the common stereotypes and myths around rape (Burt, 1980; Gerger et al., 2007; Payne et al., 1999), and that whilst they (for the most part) did not hold these views, they were aware that others do.

This sub-theme seems to be in line with Beres' (2010) findings of a tacit knowledge of willingness to engage in sexual behaviours, and probably reflects the way that many unproblematic sexual encounters take place, with cues of sexual interest being given and understood throughout a consensual process. However, Littleton and Axsom (2003) found that students' 'scripts' for seduction and rape shared some characteristics, such as the likelihood of the interaction starting in a bar-type setting, and the woman having participated in behaviours such as flirting or kissing. These similarities may therefore contribute to the difficulty in establishing the boundary between expectation and consent. For some, ideas such as miscommunication and claimed ignorance of the normative ways of conveying consent or refusal (O'Byrne et al., 2008) may be drawn upon to excuse the defendant. This is explored further in the next sub-theme 'good guys/bad guys', but more research is necessary to explore this

distinction between expectation and consent, to understand what constitutes a reasonable belief in consent.

Good guys/bad guys

Whilst these participants generally differentiated between expectation of sex and consent, a distinction could be seen in their accounts between 'good guys' and 'bad guys'. This encompasses the idea that whilst most men (good guys) would view consent in the same way that they do, there are other men (bad guys) who would seek to use the same behaviours as an excuse and convenient justification for forcing a woman to have sex.

'... if a guy was decent enough then he'd, like probably say, say do you want to come back to mine after ... if he's not then probably he'll just try it anyway.'

(Sandra)

Claire: *'...But I think it depends on the guy. If he wasn't a nice guy then he probably...*

Jessica: *He's probably cruising around like looking for drunken girls to, d'you know, d'you need a lift and...'*

Janice takes this further by making it clear that she sees rapists as abnormal, and that a 'normal guy' would not interpret a woman's behaviour in that way, thereby casting rapists as 'other', in line with a common rape myth (e.g. Payne et al., 1999): *'... every guy who rapes, he can always find an excuse for anything, but any normal guy wouldn't*

take it as consent to sex no matter what she did.' The separation of rapists from normal men is a theme also identifiable in the male perspective:

'It's quite a big step for me as a guy, it's quite a big step to go from expectation to rape ... In my view they're quite different individuals – you know the rapist and the one that has a high expectation.' (John)

Janice further suggests that some men (bad guys), relying on rape myths, will not just use them to justify his actions after the event, but may also use them to permit his actions in the first place.

'I think the guys who rape, I think they will see anything as a sign that she wants to have sex with them, like with the clothes. If a guy, he's twisted or whatever he needs to be to rape someone, if he sees a girl, it could be you, you're wearing a red shirt, red means sex, oh my gosh, she so wants to have sex with me, like the way she's sitting. He can find an excuse whatever she does.' (Janice)

The two sub-themes of 'consent versus expectation' and 'good guy/bad guys' are closely interwoven, and whilst these participants generally differentiate between consent and expectation, they are aware that others may not. The implication being that good guys will interpret the contextual information, such as the woman's behaviour and dress, as being indicative that sex is possible, whereas a bad guy will interpret it as consent. This sub-theme has some similarity to the rape myths about the types of men that rape (Payne et al., 1999), but it is unclear from this analysis what cues these

participants would use to decide whether a particular individual was a 'good guy' or a 'bad guy', and this is something that requires further exploration.

In terms of the implications of these perceptions for the courts, most of these participants would probably be sceptical of a defence based on a claim that a woman's behaviour throughout an evening meant that the defendant believed she consented to sex. However, in light of the distinction between good guys and bad guys, it is possible that a man who could present an image of being a 'good guy' would have a better chance of being acquitted, based on the stereotype that 'good guys' do not rape.

Vulnerability

The final theme of this analysis focuses upon the way in which participants conceptualised vulnerability in relation to rape, particularly focusing on alcohol consumption and the responsibility of the people involved. Participants talked about responsibility within sexual encounters in two distinct ways. The first was around where the responsibility to check consent lies, and some participants felt that this was a shared responsibility.

'Er, like they say, it takes two people to tango and therefore ... doesn't really rely on one person, it's both of their responsibilities, and it shouldn't be up to just the man to find out.' (Mark)

'Everyone knows that if you invite someone to your place ... there's a likelihood that something is gonna happen ... she's got the responsibility as well to say to him "look, I don't want to have sex" ... but he has as well to ensure that she's in the right frame of mind, that this is what she actually wants.' (Bella)

Whilst these participants suggest that there is joint responsibility for establishing consent, there remains the idea that women are sexual gatekeepers, and are therefore expected to control whether or not sex takes place. This is consistent with the traditional role commonly assigned to women, and seen in both the rape myth and sexual scripts literature (Gerger et al., 2007; Littleton & Axsom, 2003). If alcohol was involved, then responsibility was explained as shifting depending upon who was drunk. This seems to reflect the notion of men potentially taking advantage of women who are drunk, with these participants tending towards placing greater responsibility on the man.

'I think the man should have a responsibility, knowing that the woman isn't ... alert to what is going on around her.' (Julie)

'I think there's times where he might be drunk as well, but I think the man's responsibility is to ensure that she knows what's happening ... he's gotta make himself clear' (Bella)

These responses contrast to the conclusions drawn by Lovett and Horvath (2009) and Finch and Munro (2005), which suggest that women who drink are still deemed able to consent, regardless of their degree of intoxication, and that women who are drunk are seen to be to blame for being raped. However, such views were not universal, and both male and female participants achieved the attribution of blame to the victim by blaming the woman for getting drunk in the first place, rather than directly for being raped.

'Yes, because first of all in being drunk it was her choice, so making decisions when she was drunk it was her choice before she gets drunk.' (Nick)

'But then I think it's kind of her own fault. I think, I'm not saying she should have been raped ... if you feel like you're mature enough to drink then you're mature enough not to get that drunk ...' (Janice)

Whilst none of the participants directly said that they thought that excessive alcohol consumption meant that a woman deserved to be raped, there was a fairly frequent view that women should take responsibility for their drinking and therefore, by extension, have some degree of responsibility for being raped while drunk.

Alcohol was frequently identified as a factor that increased the vulnerability of both men and women. For some of the participants this was seen in the lack of awareness of how a situation is developing when a person is drunk, or because it affects judgment.

'What you do in normal situations may not exactly be what you do when you're drunk. ... maybe in normal life you wouldn't say yes to sex, because when you're drunk you lack all your inhibitions ...' (Jane)

It was also highlighted that alcohol can affect the decision making and behaviour of men, similarly dulling their ability to perceive what they are doing: *'Drinking can bring encouragement and confidence, so if they want to do something with someone, they're gonna go for it ...'* (Vanessa). Vulnerability was also invoked in discussing an invitation

home, which again also draws on the idea responsibility, showing the potential difficulty jurors may have in interpreting consent in such cases.

'You can't just say to someone that you've just met "oh come back to mine and we'll just talk all night." ... I think the woman would be putting herself in a lot of danger if she did that and just expected nothing to happen.' (Sandra)

In line with previous research, some participants drew on stereotypical ideas such as women as sexual gatekeepers (Gerger et al., 2007; Littleton & Axsom, 2003), and women who are drunk putting themselves at risk of being raped and hence being to blame for their victimisation (e.g. Finch & Munro, 2005; Lovett & Horvath, 2009). However, the discussions also reflected the complexity of establishing whether consent was given in a sexual encounter. Some participants recognised that drinking alcohol can adversely affect decision-making and the ability to make sound judgments, and spoke of the responsibilities of both men and women for establishing consent. Indeed, some accounts placed an increased responsibility for ensuring consent onto the man if a woman was very drunk.

Participants avoided saying directly that women should ever be blamed for being raped, but nonetheless some clearly placed at least some of the blame for rape onto those who 'put' themselves into risky situations. Although there were some attempts to lessen the attribution of responsibility to the victim, the conclusion frequently reached was that if a woman puts herself at risk or leaves herself vulnerable, then she carries at least some of the responsibility for rape. Participants framed this in a way that, on the surface, may seem more socially acceptable by drawing on ideas of responsible drinking

and knowing one's own limits, whilst still effectively blaming women for their victimization.

This final theme therefore stands in some contrast to the earlier themes in which the participants have generally expressed quite subtle and nuanced understandings of sexual consent and refusal, particularly related to other rape myths such as those around dress and behaviour. These findings therefore suggest that cases where the complainant has acted in such a way that she could be perceived as having 'allowed' herself to become vulnerable could present particular difficulties for the prosecution.

Conclusion

It is well known that rape cases where consent is the main issue, and so do not conform to the very limited, stereotypical view of what constitutes rape, are particularly likely to drop from the Criminal Justice System throughout the investigation and prosecution process (Munro & Kelly, 2009; Temkin & Krahé, 2008). It is therefore necessary to understand what decision-makers in this process interpret as a reasonable indicator of consent. Previous research has considered how consent is negotiated in sexual relationships (e.g. Beres, 2007 & 2010; Hickman & Muehlenhard, 1999), people's ability to understand indirect and non-verbal sexual refusals (e.g. Kitzinger & Frith, 1999; O'Byrne et al., 2006), and factors that influence verdicts in court style judgements (e.g. Grubb & Harrower, 2008; Hammond et al., 2011). The present study brings together these areas of research to examine what people, judging the behaviour of others, would consider as a reasonable belief in consent.

Reflecting previous research (e.g. Hall, 1998), the first theme reflected consent as a process rather than being directly and solely related to one particular word or behaviour. To evaluate whether consent had been given, participants produced a variety

of behavioural and linguistic cues, which were mostly viewed in a manner contrary to the popular rape myths. For example wearing revealing clothing, flirting, and dancing provocatively were not seen as being signs of consent, although they might be seen as a sign that a woman was interested in finding a sexual partner. These participants seem to characterise this sort of behaviour more in line with a seduction script than a rape script (Littleton and Axsom, 2003). In the discussion of refusing consent, some participants argued that a verbal refusal was clearest, whilst some recognised that even 'no' (or its equivalent) may not be listened to. This links to the sub-themes identified relating to the interpretation of consent. In this theme participants drew a clear distinction between 'bad guys' who would use any excuse to justify their sexually coercive behaviour, and other men who would know that the way a woman was dressed or behaved was not a sign of consent. However, a common perception was that any man might hope or expect that he was going to have sex with a woman, based on the behaviours discussed, but that this was different to believing that the woman consented. This provides further support for the arguments made against the miscommunication model (Kitzinger & Frith, 1999; O'Byrne et al, 2006; O'Byrne et al., 2008), as these participants gave accounts that suggested that any such claim was grounded in an insincere attempt by a 'bad guy' to justify sexually coercive behaviour, rather than genuine miscommunication.

It is in the final theme of vulnerability that the views of some of the participants suggest that the prosecution may face particular challenges. A series of linked ideas around alcohol and responsibility indicated that a woman who puts herself in a risky position has some degree of responsibility if she is raped, although such claims always came with the caveat that nobody deserves to be raped. Similarly, it was suggested that women are responsible for their alcohol consumption, and therefore if they allow

themselves to drink excessively they are by extension at least partially responsible if they are raped whilst drunk. However, men were not completely excused responsibility, and shared responsibility for ensuring consent, and (for some participants) a greater responsibility to ensure consent placed on the person who is more sober was raised.

This study has demonstrated, that even amongst a reasonably small and homogeneous sample, there is not a clear and simple answer to the question of what constitutes a reasonable belief in consent? It suggests that some of the more traditional beliefs about female behaviour and dress may not be taken as implying consent, although they could indicate being potentially interested in having sex. Using these types of idea as a justification for sexually coercive behaviour was also seen as characteristic of 'bad guys', and could therefore have the effect of undermining a defence argument that such features led to a reasonable belief in consent.

The other key concern arising from this data is the way in which victim responsibility was attributed. Whilst these participants did not directly blame women who got drunk for being raped, they did blame them for getting drunk in the first place, and thereby making themselves vulnerable. Through this amendment to the traditional rape myth, participants are able to maintain a position in which women are blamed for their victimisation, but in a possibly more socially acceptable way. It seems likely that if a victim is seen as having done something that leaves her vulnerable, such as getting drunk or accepting a lift with a stranger, then she is still likely to be blamed for being raped and therefore the implication being that she had effectively consented.

The nature of this study means that there are some limitations. The data collection was carried out individually or in small groups (the largest was a group of three), to allow participants to choose how they were most comfortable discussing these issues. These different forms of interaction with the interviewer may have influenced

the discussions and the ideas generated by participants. However, it was considered that the benefits of allowing participants to be comfortable discussing the topic outweighed this drawback, and in all the data collection sessions, every participant contributed repeatedly to the discussions. There were also substantially more female than male participants. This may mean that the overall views identified in this study are somewhat more sympathetic to the complainant than would be found with a gender-matched sample. However, it is notable that the views that could be considered to be more victim-blaming, and also the distinction between 'good guys' and 'bad guys' were seen in both male and female participants.

As a qualitative study it is not possible to indicate the generalisability of these findings, and indeed, as a relatively young and well-educated sample their views may differ from those of a wider population. This study found that third-party assessments of consent, as would be conducted by a juror, have some similarities to assessing interpersonal consent. However, it also indicated some areas where traditional stereotypes, and defence claims to naivety and misunderstanding, may not be accepted uncritically. As such, this study provides a basis for future research, and highlights lines of inquiry that need further exploration to understand what the public perceive as a reasonable belief in consent. The particularly challenging area of drunken consent also needs to be carefully examined in future research.

Lack of consent is a defining feature of rape, and in England and Wales the prosecution must prove that the defendant did not *reasonably believe* that the complainant consented. If, as in cases heard before a jury, members of the public are responsible for deciding whether the defendant's belief in consent was reasonable, it is necessary to understand the consensus view to know how the legislation will be put into practice. This study therefore offers a starting point in obtaining that understanding.

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