






# Analysing the British Criminal Justice System

*from a Women's Rights Perspective*



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## INTRODUCTION

Violence against women is one of the world's most chronic, widespread, and commonly unpunished human rights violations, which one out of three women will face in their lifetime (WHO, 2021). Although these figures vary across countries, the dangers posed by violence against women have not lessened. The case of the United Kingdom (UK) serves as an example.

According to the National Police Chief's Council, one woman is killed by a man every three days in the UK (Femicide Census, n.d). Moreover, while 68,109 rape cases were recorded by the police between July 2022 and June 2023, only 2.2 percent of these cases were brought to justice.<sup>1</sup> In other words, only two out of every 100 rape cases recorded by the police during this period resulted in a charge in the same year. Another concern raised by the Council was that domestic abuse accounted for 18 percent of all recorded crimes in England and Wales in 2021.<sup>2</sup> This outcome demonstrates the failure of the legal and criminal justice system in England and Wales to protect women and girls from violence and bring justice for the crimes they have been subjected to.

This paper firstly explores and analyses the different factors that led to these grim statistics of sexual violence in England and Wales. Among these, the criminal justice system itself creates a hurdle due to the characteristics of the UK's Common Law approach. The paper also seeks to shed light on the gap between theory and practice in dealing with allegations of sexual violence. Despite the existence of explicit procedures to support survivors during investigations of alleged crimes, police officers are often negligent in practice, and disregard the facts provided by female survivors. Discrimination based on gender permeates different levels within the criminal justice system.

The second part of this report further demonstrates the complex system in England and Wales which women and girls face. Analysing the steps taken after a sexual offence has been committed is indicative of the intricacies and complicated nature of the broader system.

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1 Rape Crisis England and Wales. (n.d). Rape and sexual assault statistics. Accessed September 1, 2023 <https://rapecrisis.org.uk/get-informed/statistics-sexual-violence/>.

2 Office for National Statistics. (November 24, 2021). Domestic abuse in England and Wales overview: November 2021. Accessed September 1, 2023 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinen-glandandwalesoverview/november2021>

# CHAPTER 1: UNDERSTANDING THE LEGAL AND CRIMINAL JUSTICE SYSTEM IN ENGLAND AND WALES FROM A WOMEN'S RIGHTS PERSPECTIVE

## 1.1. The legal system do England and Wales belong to

England and Wales are part of the common law system, and are therefore different from the civil law system that commonly prevails in Europe. Understanding the difference between these two systems is essential to comprehend the obstacles that victims and survivors of sexual violence in England and Wales face.

First and foremost, the civil law system uses codified statutes and ordinances, generally known as “written law”. This contrasts starkly with the common law system, which relies on the doctrine of precedent or past judicial rulings to create a legal system which is often referred to as “unwritten law”. In other words, as opposed to codes created by the legislature and legal scholars, a precedent is a previous court decision that is binding on another court when the facts are sufficiently similar (LexLaw, 2020). According to the orthodox application of the principle, a precedent is also considered binding on courts which are at a similar or lower level in the hierarchy. For example, the Court of Appeal is bound to follow the previous decision of the Court of Appeal on the same point, whereas this is not the case for the High Court’s previous decisions (Sales, 2023). Moreover, in the UK, the Supreme Court has the highest level in the hierarchy, which makes its decisions binding on lower courts in respect to an equivalent matter.

One recent example of the hierarchy of UK courts in practice is the case of *Trustees of the Barry Congregation of Jehovah's Witnesses (Appellant) v BXB (Respondent)* (2023) UKSC 15 (Introvigne, 2023). In April 2023, the UK Supreme Court issued an important ruling on the vicarious liability of a religious institution for a crime committed in a non-institutional setting by one of its elders. In this case, the UK Supreme Court overturned the judgment of the lower courts in which the sum of £62,000 (\$77,500) was awarded for the emotional damage suffered by a Welsh woman who was raped in 1990. It also ruled that vicarious liability was inapplicable as the rape had not taken place in an institutional setting. This highly critical decision resulted from an assessment of the two-stage test for vicarious liability, known as the “Sufficient Connection Test” (5 Essex Court, 2023). According to the UK Supreme Court, to hold the company, institution, or employer vicariously liable:

1. One needs to consider whether the relationship between the employer and individual is one of employment or “akin to employment”;
2. There must be a “close connection” between the wrong committed and the role and duties of the employee for it to be fair. This means that the individual was authorised to do so and

the wrongdoing must be considered to have been committed in the course of employment or “quasi-employment”.

In order to fully understand the impact of the common law system on victims and survivors of sexual offences, the following section will explore the difference between the adversarial and inquisitorial legal systems.

### **1.1.1 Adversarial vs. inquisitorial: the impacts of the roles of the judges**

It is important to note the engagement of judges in the common law system, since some may play a very active role in deciding cases, which in turn can greatly impact the justice system. On one hand, in the common law system, judges play an active role in interpreting and applying the law to the facts, relying on past precedents to reach a final decision (KC, March 2023). On the other hand, in civil law, the law is applied more strictly by the judges, who have a more passive and less interpretive role (KC, March 2023). Judges in the civil law system are obliged to apply the code as it appears in written law, and therefore have no legal obligation to take into account precedent when deciding a case. Certainly, it is possible to find references to previous legal decisions in the civil law system by judges. Nonetheless, this is rather to maintain consistency, as opposed to actually fulfilling a legal obligation, as is the case in the common law system. Hence, the crucial characteristic of the common law system is defined by the judges' dual mandate, who are empowered to both apply and develop the law.

This is not the only difference that can be found in the role of judges in these two systems. Another key differentiating factor in their roles is the adversarial approach used in common law, and the inquisitorial process in civil law. In the inquisitorial process, judges play a more active role by questioning witnesses and gathering evidence (KC, March 2023). It requires judges to actively investigate the case before them. This means that while inquisitorial systems generally get to the truth of the case through a thorough investigation and examination of all the evidence, adversarial systems open the way to a competition between the prosecution and the defence to find the truth (KC, April 2023). Thus, in the common law system, as in England and Wales, two opposing parties appear before a judge who moderates them. However, the burden of proof lies with the prosecution rather than the defence, which means that the prosecution must discharge the burden of proof and prove the guilt of the defendant, ultimately leading to difficulties in practice (Ellison, 1997).

### **1.1.2. Hurdles caused by the jury: Who will “win the case”?**

Another aspect which impedes the efficiency of the criminal justice system is the role of the jury, who also has an active presence in criminal trials. In England and Wales, the jury is usually composed of

people who have no legal training at all (Morgan 2023). If a rape case is being tried, for instance, it is highly unlikely that experts on sexual violence and women's rights will be present among the 12 members of the jury, who will decide on the defendant's guilt based on the evidence presented before them in court (Rape Crisis England and Wales, n.d). Although this is a mainstream practice in courts around the world, it also begs the question of whether a jury with appropriate expertise may rule differently in such cases. Furthermore, once the jury decides upon the guilt of the defendant, it is the judge's duty to determine the appropriate sentence (Courts and Tribunals Judiciary, n.d).

Upon a closer analysis of these two legal systems, it becomes apparent that there are more obstacles to obtaining conviction in the adversarial system than in the inquisitorial system, particularly in cases involving allegations of rape (Ellison, 1997). This is because the adversarial system is competitive in nature, meaning that both parties defend their own point of view, and present their own version of events in a convincing way before the jury reaches its verdict (Ellison, 1997). This results in competition between the two parties to convince the jury of their version of events and thus "win the case". The quality of the legal representation is therefore very likely to change the outcome of a case in the adversarial system (Advoc, 2015).

As Louis Elaine Ellison cited in her *Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems* in 1997, an adversarial trial is "... a contest between prosecution and defence as to whether the prosecution can prove guilt to the requisite standard, rather than an inquiry by the state into certain events" (Ellison, 1997, p. 25). For instance, a survivor will have to "convince" the jury that she was forced to have sexual intercourse by the defendant. The prosecution has to convince the jury that a reasonable person would characterise what happened as non-consensual. Thus, under this system, the active and critical role of the jury in criminal proceedings may pave the way for an environment where the focus is on winning the case rather than revealing the truth.

Finally, since the court or judge is not actively involved in investigating the facts of the case before reaching a decision, women who do not fit the credible survivor "mould" or who resemble certain societal "myths and stereotypes" are more likely to be turned away by the justice system (Rape Crisis England and Wales, n.d). Even if survivors are willing to relive their trauma in a court setting, the perpetrators constantly attempt to justify their actions by making outrageous claims such as "she asked for it", "she was wearing revealing clothes", "she was drunk", with a defence lawyer backing his client blindly and harshly throughout the trial (Fox, 2022). The heavy influence of these types of statements is even more concerning in the criminal justice system in England and Wales where oral statements are often considered more important than written statements (Ellison, 1997). Consequently, "convincing" the jury by using conventional societal norms and stereotypes can often give the defendant the upper hand, which disadvantages and further traumatises the survivor.



It should also be noted that some court judgements have created alarming precedents for female victims, particularly concerning issues of consent in rape cases. For instance, prior to the changes made by the Sexual Offences Act 2003, the House of Lords decision in *DPP v. Morgan* ([1976] AC 182) was regarded as a “rapist’s charter” because of the threat this decision posed to women and girls (Parliament UK, n.d). The judgment in this case stated that where a defendant has had sexual intercourse with a woman without her consent, sincerely believing that she was consenting, he is not guilty of rape, even if he had no reasonable grounds for his belief (Parliament UK, n.d.). In *DPP v. Morgan* ([1976] AC 182), the defendant had taken three friends home to have sexual intercourse with his wife, assuring them that she had agreed to it and that if she resisted, it did not mean she was not consenting, because that was the way she liked it. The amendments made by the 2003 Act eventually established a more objective assessment of whether the defendant’s belief would be deemed reasonable in such circumstances, which would be decided by the jury.

Following the amendments to the 2003 Act, the defendant has a responsibility to ensure that the victim consents to the sexual activity at the time in question. Therefore, during questioning, it is important for the police to ask the suspect what steps they took to ensure that the victim consented, in order to show their state of mind at the time.

The following table summarises the differences between the adversarial system and the inquisitorial system to further elucidate the above mentioned points.



	Adversarial System (Common law)	Inquisitorial System (Civil law)
Role of the judge	<ul style="list-style-type: none"> <li>● Active</li> <li>● Based on past precedents as a legal requirement</li> </ul>	<ul style="list-style-type: none"> <li>● Passive</li> <li>● Based on Codes</li> <li>● Can make a reference to previous courts' decision but not as an obligation</li> </ul>
Presence of Jury	<ul style="list-style-type: none"> <li>● Active presence for indictable only or either-way offences</li> <li>● Made up by people with no legal background or expertise on the matter</li> </ul>	<ul style="list-style-type: none"> <li>● No jury required</li> </ul>
Investigating and gathering evidence	<ul style="list-style-type: none"> <li>● No need for a thorough investigation</li> <li>● Competition between the prosecution and the defendant</li> </ul>	<ul style="list-style-type: none"> <li>● Thorough investigation and examination of all evidence</li> <li>● More actively involved in gathering evidence</li> </ul>

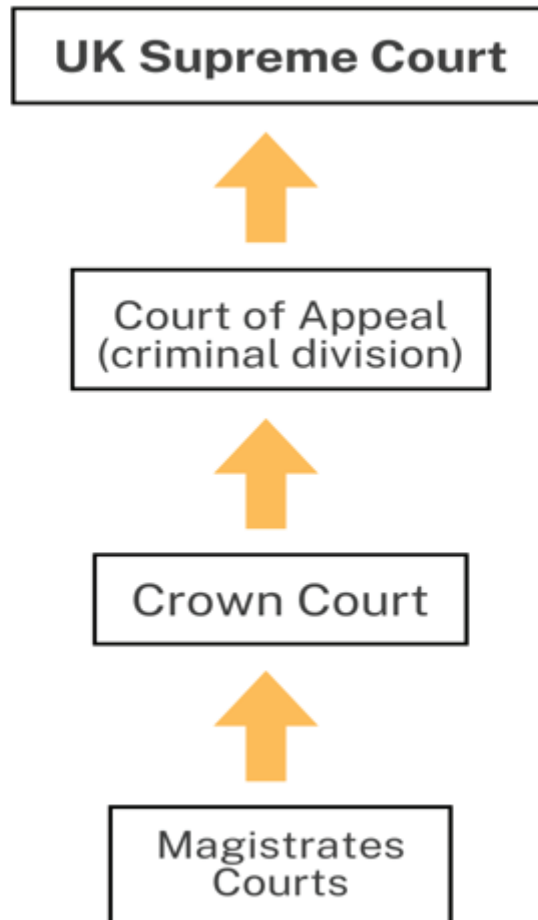
Figure 1 : Author's elaboration of the differences between the adversarial and inquisitorial systems in England and Wales.

## 1.2. Competent courts for sexual offences in England and Wales

In England and Wales, all criminal cases start in the Magistrates' Courts, unless the case is a more serious criminal matter such as rape, sexual assault or assault by penetration (Reeds Solicitors, n.d). In such situations, the case will be referred to the Crown Court and their appeals will be dealt with by the Court of Appeal Criminal Division and therefore potentially by the UK Supreme Court. It should be borne in mind that the cases referred to the Supreme Court of the UK are those of the greatest public or constitutional importance affecting the entire population. The hierarchical structure of the courts in the UK can be observed in Figure 2.



***For Criminal Cases:***



*Figure 2 : Author's elaboration of the differences between the adversarial and inquisitorial systems in England and Wales.*

Before outlining which courts deal with which type or level of sexual offence in England and Wales, it is first necessary to clarify the division of criminal offences into the “summary only”, “either way” and “indictable only” categories (Courts and Tribunal Judiciary, n.d).

### 1.2.1. Summary only offences



Figure 3 : Author's elaboration of the differences between the adversarial and inquisitorial systems in England and Wales.

“Summary only” offences are considered to be the least serious of the three categories. They mainly comprise common assault or battery that can only be tried by Magistrates’ courts. However, if the summary offence is linked to an either-way or indictable-only offence, it may, in certain limited circumstances, be tried in the Crown Court. So what do common assault or battery mean in England and Wales and how do their definitions affect women and girls?

First of all, in light of section 39 of the Criminal Justice Act 1988, which covers common assault and battery offences, assault can be defined as a person acting intentionally or recklessly to cause or apprehend immediate unlawful violence (Sentencing Council, 2018). Therefore, even if the victim of an assault reacts in time and avoids physical injury, it may still constitute an assault. That being said, there is a critical difference between the nature of assault and battery:

**1. An assault** will have taken place as long as there is an act that shows **an intention** to use unlawful violence against another person, for example, a punch that does not reach its target (Lawton Solicitors, n.d./c). The victim’s immediate fear of being subjected to unlawful physical contact is therefore sufficient for it to be considered an assault. There is no need for any injury to have occurred. For instance, in the case *R v. Ireland* [1998] AC

147, it was determined that a common assault can occur without verbal warning or action. The court held that several silent phone calls made to the victim led her to fear violence in the immediate future, and therefore amounted to assault (Gray and Co Solicitors, 2012).

**2. A battery** can be committed through an act of violence which usually, but not always, follows a threat made to the victim (Gray and Co Solicitors, 2012). In this case, there is an unlawful, intentional or reckless use of force, and therefore **physical contact** between the victim and the defendant, unlike an assault. However, it can also be a case of “indirect” contact. To illustrate, in the case *R v. Thomas* (1985), the defendant touched the hem of a 12-year-old’s skirt, which constituted an offence of battery because touching a skirt was likened to touching a woman indecently (Gray and Co Solicitors, 2012).

Under section 39 of the Criminal Justice Act 1988, common assault can be punishable by up to six months imprisonment and/or a fine up to 5000 GBP (BloomsburyLaw, n.d./d). If the defendant is charged with common assault for the first time, they will likely receive a fine rather than a prison sentence. Nevertheless, it is also **possible for the case to be transferred to the Crown Court if it involves a more serious injury that could cause serious detriment to the victim’s health**, in other words, Grievous Bodily Harm (GBH) or Actual Bodily Harm (ABH) (BloomsburyLaw, n.d./d). Both GBH and ABH can be committed intentionally or recklessly. The intention does not have to cause injury, only to apply unlawful force to another person (Sentencing Council, n.d).

### 1.2.2. An either-way offence

An “either-way” offence can be heard **either in the Magistrates’ Court** or the **Crown Court**, depending on the seriousness of the offence, as indicated in the Figure 3 (Cestaro, 2019). A person charged with an either-way offence must first appear before the Magistrates’ Court where they will be asked to submit a plea of guilty or not guilty. Some examples of what can amount to an “either-way” offence are: Assault & GBH, possession of an offensive weapon, or certain sexual offences such as possession of indecent images. The Sexual Offences Act 2003 offers some examples of sexual offences that can be considered as an “either-way” offence and not an “indictable-only”(CPS, 2022):

1. Trafficking people for sexual exploitation;
2. Sexual Assault;
3. Voyeurism and upskirting (a criminal offence since the new law in 2019);
4. Causing sexual activity without consent (non-penetrative); and
5. Sexual communication with a child.

In the case of either-way sexual offences, the case may be transferred to the Crown Court if the Magistrates’ Court considers the offence to be too serious to remain before it, and therefore deems its

sentencing powers to be insufficient for the case (Brett Wilson, n.d). However, in certain cases, the defendant may be able to choose between the two courts if the case is considered as ‘not so serious’ (triable summarily). In such cases, the defendant may choose to remain in the Magistrate’s Court or decide to go to the Crown Court where they will be tried before a judge and jury (Stuart Miller Solicitors, n.d). It should be noted, however, that Magistrates are not judges, and therefore do not need to be legally qualified (Reeds Solicitors, n.d). Rather, Magistrates are informed by advisers, who provide them with legal advice and ensure they follow a lawful procedure.

Another critical feature of Magistrates’ Courts is the limits to the length of the maximum potential sentencing. By contrast, the Crown Court can sentence any individual, for both either-way and indictable only offences, to up to life imprisonment for the most serious crimes. In an attempt to deal with the backlog in the Crown Court caused by the COVID-19 pandemic, magistrates were given the power to sentence people to up to twelve months’ imprisonment instead of six in May 2022 (Ministry of Justice & HM Courts & Tribunals Service & Raab, 2022). However, the magistrates’ sentencing powers were reverted to six months in March 2023 (The Guardian, 2023). Unlimited fines, on the other hand, can be imposed in both the Magistrates’ Court and the Crown Court.

### 1.2.2.1. Sexual assault

According to Section 3 of the Sexual Offences Act 2003, sexual assault is when a person intentionally touches another person sexually with an object or any part of their body, such as a finger, tongue or toe, without consent (CPS, 2022). It is also an offence to force an individual to do aforementioned acts or see something sexual without their consent.

Sexual touching through clothing can also be deemed a sexual assault offence, which was confirmed by the Court of Appeal in *R v. H* (Karl Anthony) in 2005 (Ipsa Loquitur, 2005). In this case, a stranger grabbed a woman by the back pocket of her tracksuit bottoms while she was walking her dog at night, and asked her if she “fancied a shag”. The accused was found guilty of sexual assault but argued that he had not “touched” the complainant, but merely her clothes, and that this touching was not of a sexual nature. However, the Court of Appeal upheld the conviction and ruled that touching a person’s clothing was sufficient to constitute “touching” for the purposes of Section 3. The Court found that the touching was indeed sexual, given that the defendant had made sexual comments towards the complainant prior to touching her (Ipsa Loquitur, 2005).

However, when a case of sexual assault is considered too serious to remain before the Magistrates’ Court, the victim’s case will be decided by a jury in the Crown Court. To find the defendant guilty, the jury must be satisfied that a reasonable person would regard the act as being of a sexual nature.

inherently and unambiguously ; or that any reasonable person would regard the act as possibly sexual (but not unambiguously so). Moreover, they must find that because of the circumstances or aims of any person involved, the act is in fact sexual. Consequently, in order to constitute sexual assault, the touching must be regarded as sexual.

Therefore, the constituent elements of the offence of sexual assault are as follows:

- Intentionally touch another person;
- The touching is sexual;
- Lack of consent;
- They do not reasonably believe that the other person consents; and
- The touching can be with any part of the body or with anything else.

#### 1.2.2.2. Voyeurism and upskirting

The Voyeurism (offences) Act 2019 came into force on April 12th, 2019, and established new offences that will be applicable in England and Wales without retrospect (on matters taking place after its enactment) (CPS, 2019). In light of the new Act, these offences can be tried either-way and carry a maximum sentence of two years of imprisonment. Prior to the establishment of this new category of offences, there was no specific upskirting offence in England and Wales. Depending on the particular circumstances, it could be prosecuted under Section 67 of the Sexual Offences Act 2003, which holds that a person commits an offence if they (Sexual Offence Act, 2023 ;

- Use equipment with the intention of causing another person to observe,
- Performe a private act for the purpose of obtaining sexual gratification,
- Record another person performing a private act with the intention that he or a third person will look at an image of the victim performing the act for the purpose of obtaining sexual gratification).

The introduction of the Voyeurism Act minimises the possibility of avoiding prosecution for certain acts of upskirting, such was the case before.

“Upskirting” has thus been made a criminal offence since April 2019 and denotes the placement of equipment, such as a camera or mobile phone, under one’s clothing without their permission (CPS, 2019). This offence is usually carried out in public places, more precisely and commonly including on public transport, in nightclubs, or other crowded places where it would be more convenient for perpetrators to disguise themselves, or lose themselves in crowds.

Ultimately, according to an analysis by the Crown Prosecution Service (CPS), “in total, 46 men and one teenage boy were prosecuted for 128 offences under the Voyeurism (Offences) Act between 1 April 2020 and 30 June 2021” (CPS, 2021). These results demonstrate once again that, despite the legal

codification of such criminal offences, offenders are not deterred from violating the privacy of women and girls in “a most degrading way”, as described by Siobhan Blake, the CPS national lead for the prosecution of sexual offences (CPS, 2021).

### 1.2.3. *An indictable-only offence*

An indictable-only offence is the most serious category of crimes and is to be dealt with in the **Crown Court, by a judge** (Draycott Browne Solicitors, n.d.). The defendant will be expected to enter their plea at the first hearing to know which direction the case will go. If the defendant enters a “not guilty” plea, the case proceeds to a trial, and 12 juries will decide whether the defendant is innocent or guilty (Cestaro, 2019). On the other hand, if the defendant decides to plead guilty, the judge will consider which sentence is appropriate.

#### 1.2.3.1. Legal definition of rape and assault by penetration

Rape and assault by penetration without consent are indictable-only offences, with a maximum sentence of life imprisonment. Also, non-consensual offences under the section 1-4 Sexual Offences Act 2003 are considered to be too serious that a prosecution is almost certainly required in the public interest (CPS, 2022).

The legal definition of **rape** is provided by the Sexual Offences Act 2003. Rape is when a person intentionally penetrates the vagina, anus, or mouth of another person with a penis, without the other person's consent, and does not reasonably believe that the other person is consenting (Local Solicitors, n.d.). Put succinctly, **rape is sexual intercourse without consent**. Rape is one of the most grave and violent crimes committed against women. It can also occur when:

- The two people are married or in a relationship;
- The other person has consented to one type of penetration but not to another;
- Someone removes a condom without the other person's permission or lies about having used one, also known as “stealthing” (Rape Crisis England&Wales, n.d./c); and
- If the individual is under 13, in which case they can never be considered as legally giving consent to anyone to do a sexual activity (Metropolitan Police, n.d./c).

In addition, the Court of Appeal decision in *R v. K* [2008] EWCA Crim 1923 established that where there is uncertainty as to whether penetration took place into the vagina or anus by the defendant, the jury will be entitled to convict if they confirm there was non-consensual penetration of either by the defendant with their penis (CPS, 2022).



In England and Wales, according to figures from the Office for National Statistics for 2023, one in four women has been raped or sexually assaulted as an adult. Therefore, 6.54 million women having experienced rape or sexual assault, compared to one in three hundred men (Rape Crisis England&Wales, n.d./a). In March 2022, a total of 798,000 women had been raped or sexually assaulted in England and Wales (Office for National Statistics, 2023). Also, as of February 3rd, 2023, there were 2,210 adult rape cases waiting to be heard in the Crown Court (Rape Crisis England&Wales, 2023).

There is a difference between rape and **assault by penetration**, but both are considered criminal acts in that they will only be tried in the Crown Court in the presence of a jury and a judge. In this case, a person penetrates the vagina or anus of another person with a body part which is not the penis, or by using an object, without that person's consent (CPS, 2022). It is an act of physical, psychological, and emotional violation in the form of a sexual act, inflicted upon a person without their consent. In accordance with Section 2 of the Sexual Offences Act 2003, "this offence should be charged where, by virtue of the fact that the complainant is unsure if penetration was by a penis or something else, there is insufficient evidence to charge rape" (CPS, 2022). The crucial differences between rape and assault by penetration are further illustrated in Figure 4.

	Rape	Assault by penetration
Consent	No	No
Intentionally force penetration of the vagina and anus	Yes	Yes
Intentionally force penetration of the mouth	Yes	No
With a penis	Yes	No
With an object or any part of the body	No	Yes

Figure 4 : Author's elaboration of the differences between the adversarial and inquisitorial systems in England and Wales.

### 1.2.3.1.1. The red line drawn by the legal definition of rape: time for an update or not?

As mentioned above, in order to qualify as rape in England and Wales, there are two stages in the system. Firstly, there must be penetration by a penis without the consent of the other person and secondly, the person must not have reasonably believed the other person was consenting. This current version has created three different issues. First, the narrow definition of rape creates an environment of discrimination against survivors of sexual assaults that do not involve penile penetration (Stevens, 2021). A victim of sexual assault by someone without penile penetration, no matter how profoundly serious and critical the situation, cannot be considered a victim of rape due to the restrictive nature of the legal definition under the Sexual Offences Act 2003 in England and Wales. Second, the requirement

to characterise the act with a penis gives rise to a gendered perpetrator. Under current UK law, a woman cannot be charged with rape (Nizirova, 2022). Lastly, the need for the defendant to satisfy the “did not reasonably believe” test generates a misapplication of justice while failing to uphold one of the secondary functions of the law, which is to educate the general public on the societal intolerance towards and immorality of rape (Power, 2003).

### **1.3. What is the “criminal standard of proof” in criminal cases in England and Wales and how does it affect victims and survivors of rape?**

In England and Wales, during criminal proceedings, the prosecution must prove the case against the defendant “beyond reasonable doubt” in all elements of the offence (Bell Lamb & Joynson, n.d.). This is also unofficially described as the “99 percent test” (Bell Lamb & Joynson, n.d.). That is, in the Crown Court, the prosecution must convince the jury that the defendant is guilty. Generally, the prosecution is carried out by the Crown Prosecution Service (CPS), which is a public prosecution service acting on behalf of the Crown. However, as previously mentioned, the issue lies in the inherent unfairness of needing to convince 12 juries that the defendant is most likely not telling the truth, so that the sexual intercourse was indeed non-consensual, and the requirements for rape have been met. As a result of this challenging process posed by the system, the prosecution rate for rape in England and Wales was 1.3 percent for the year to September 2021, reflecting the failure to get justice for the victims (Proudman, 2022). A study conducted in July 2020 also revealed that a victim or survivor reporting a rape has around a one in 70 chance of having her case charged<sup>3</sup>.

Moreover, the failure of the UK justice system to protect and bring justice to rape victims and survivors is illustrated by the fact that more are turning to the civil courts rather than criminal courts (Proudman, 2022). The reason for this lies in the fact that the standard of proof in civil cases is lower than in criminal courts. In the former, the claimant must prove that the defendant raped her on the balance of probabilities, unofficially known as the “51 percent test” (Bell Lamb & Joynson, n.d.). Therefore, the party only needs to provide sufficient evidence to the court that the probability of the event occurring is more likely than not, instead of proving that it is “beyond any reasonable doubt”, which would imply presenting evidence that may be harder to collect. However, the civil procedure also poses distinct challenges for the claimant. While it may be easier to satisfy the burden of proof in civil cases, the capacity and legal power to gather evidence by the claimant is less than the police (Proudman, 2022). To this are sometimes added years of waiting for closure.

3 Centre for Women's Justice, End Violence Against Women coalition, Imkaan, and Rape Crisis England & Wales in response to the England & Wales Government's 'End to End' Review of the Criminal Justice System's Response to Rape. (2022, November). *The decriminalisation of rape : Why the justice system is failing rape survivors and what needs to change*. Accessed September 21, 2023 <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/C-Decriminalisation-of-Rape-Report-CWJ-EVAW-IMKAAN-RCEW-NOV-2020.pdf>

## CHAPTER 2: WHAT HAPPENS AFTER SOMEONE REPORTS RAPE OR SEXUAL ASSAULT?

In the first chapter, the report described the criminal system in England and Wales and explored the significant difference between the common law and the civil justice system, as well as the obstacles that the justice system presents for women and girls. In particular, obtaining and providing evidence alongside the necessity of satisfying juries often causes further trauma for victims in their pursuit for justice. In this chapter, the report will assess the following step in criminal proceedings, unpacking what happens after someone reports rape or sexual assault.

### 2.1. A step-by-step approach to understanding the process

Witnessing or being a victim of a crime is a traumatising experience in itself, leaving victims vulnerable and isolated. Nothing is more relatable than being afraid or hesitant when taking the first step on a labyrinth, a path that may be lengthy and arduous, often unknown to the survivor. The physical and psychological effects caused by the crime may also affect their further actions and decisions. In many countries, including the UK, women and girls who have been subjected to rape and sexual violence are sometimes left in limbo, drowning in paperwork, facing judgemental police officers, and further traumatised in front of courts and juries, rather than being assisted and supported by the system. This section will examine the effective steps that can, or should, be taken after the crime occurred, and who the victim or survivor may encounter along the way to obtaining justice.

#### 2.1.1. Reporting and time limit

The first step after a crime has been committed is to decide whether or not to report it to the police. This decision must always be the survivor's choice without external force or physical or psychological pressure.

If the survivor decides to go to the police, there is no time limit imposed on when such a report can be made following the incident. In such a case, they have the option to contact the national non-emergency number, 101, which is available 24/7 (Metropolitan Police, n.d./a). Alternatively, if the incident has just taken place and there is immediate danger they can dial 999. The Metropolitan Police also offers the option to report rape or sexual assault online and are typically reviewed within a few hours or a maximum of two days.

Nevertheless, there are many women and girls in England and Wales who choose not to report sexual violence, particularly rape, to the police. According to the charity Rape Crisis, just two in 100 rapes

recorded by the police between October 2022 and September 2023 resulted in someone being charged that same year. Only one in six women report having been raped; it is also similar to men, with only one in five reporting. The Office of National Statistics found the reasons for non-reporting to be as follows (Rape Crisis England&Wales, n.d./a):

- 40 percent cited 'embarrassment' as a factor;
- 38 percent believed that the police would be unable to assist them; and
- 34 percent anticipated humiliation in the reporting process.

These statistics, with multiple responses, highlight the complex reasons why victims, particularly women, may choose not to report sexual violence, emphasising the importance of creating a supportive environment for survivors seeking justice within the legal system.

### **2.1.2. Before and after reporting rape or sexual assault**

If rape or sexual assault has taken place within the week of reporting, the police ensure the victim is safe and has the necessary medical assistance. In rape and sexual assault cases the evidence is crucial, thus, the survivor should try not to, according to Rape and Crisis (Rape Crisis England&Wales, n.d./b):

- Eat or drink;
- Smoke;
- Wash themselves;
- Brush or comb their hair;
- Brush their teeth;
- Change their clothes;
- Go to the toilet (if one need to go to the toilet, prioritise to do this into a clean container);  
and
- Move or clean anything where the rape or sexual assault took place.

These precautions are necessary to secure and safeguard the evidence, which plays a vital role in conducting thorough and credible investigations. Failure to comply with these guidelines can have a negative impact on the case, particularly if it proceeds to trial. Even if the survivor is not sure about reporting the incident to the police, it is important to refrain from those actions until a final decision is made.

Furthermore, in case a survivor decides to report to the police, an early evidence kit can be used to collect evidence by taking a urine sample or a swab from the survivor's mouth. In cases of rape especially, DNA samples can be immensely crucial for furthering the investigation stage. Forensic medical examination usually takes place at a Sexual Assault Referral Centre (SARC) which offers medical, emotional, and practical support to people who have recently been raped or sexually assaulted.

(Rape Crisis England & Wales, n.d./b). There are over 40 SARC's across England, Wales and Scotland. A survivor can contact a SARC and obtain forensic medical examinations without going through the procedure of reporting or even talking to the police (Rape Crisis England & Wales, n.d./b). Moreover, individuals can receive free medical assistance for injuries, pregnancy, and tests for sexually transmitted infections and diseases.

### **2.1.3. Initial account**

At this stage, police officers will take the survivor's initial statement either at their own home, in a police station, or at a Rape Crisis centre if they have an advocate (specialist at Rape Crisis Centre). It is also possible to request a female officer when a 101 call is made (Metropolitan Police, n.d./b). Furthermore, when the officer takes the initial statement, there are generally four standard questions asked. These are:

- What happened?
- Who did this?
- Where did it happen?
- When did it happen? (Metropolitan Police, n.d./b)

At this stage, it may be difficult for victims to remember the details and sequence of the event. Police will try to obtain as much general information as possible to start an investigation. From this point, the survivor's initial statement will be on the crime reporting system and if possible, will be handed over to the specialist sexual offences team (RASASC, n.d.). Here, their case will be assigned to a specially trained Sexual Offences Investigate Techniques (SOIT) officer who will be the point of contact throughout the case.

### **2.1.4. Full Account**

Contrary to the initial account, the goal of the full account is to gather as many details as possible through the questions and answers, rather than general information. A full account is the official statement that will be taken in a police station. At this stage, the statement is usually recorded so that it can be used and presented as evidence in court. As this requires a more private and silent environment, the video must be recorded in a suitable place and the survivor must be able to choose whether to speak to male or female police officers (Metropolitan Police, n.d./b). However there is no obligation to do a video-recorded interview. The survivor can choose to give a written statement instead.

### **2.1.5. Police Investigation**

The critical situation for the survivor during the police investigation process is whether the perpetrator

will be remanded (held in prison) while the investigation takes place. However, this is often unlikely. Even if police arrest the suspect, in most cases they will be released on bail, usually with a condition, until a later date. The process may be faster if the perpetrator can be identified by the survivor. But in other cases, police will try to find them by asking the survivor to look at a selection of photos or videos of people who are not suspects in the case, to see whether they can identify the perpetrator (RASASC, n.d.).

Eventually, when the police are convinced that there is sufficient evidence to bring the case to trial, they will refer it to the Crown Prosecution Service (CPS) to be reviewed. It must be noted that all rape and serious sexual offence cases are reviewed by specialists who are trained to understand all aspects of sexual offences (RASASC, n.d.).

In some circumstances, the case will be treated as “no further action”. This means that the police officer has not found sufficient evidence to move forward. There are several actions that can be taken by the victim in this situation (Rape Crisis England&Wales, n.d./b):

- Request a review of the case under the Victim’s Right to Review programme through the detective on the case;
- Have a face-to-face meeting with the officials who made the decision so that they can explain their reasoning to you; or
- Have these decisions set out in writing.

#### **2.1.5.1. The impact of the police officers on the failure of the criminal justice system**

The inadequacies of police behaviour during the investigation stage have inevitably contributed to the systematic failure of the criminal justice system. Police investigations in England and Wales can take up to two years and more. Following this lengthy investigation period, rape convictions remain alarmingly low (Rape Crisis England&Wales, n.d./b). For instance, in May 2023, it was reported that nearly 70 percent of rape victims withdrew from investigations in England and Wales (Syal, 2023).

Many reasons and causes can be identified to explain what led to this outcome. The behaviour of police officers when they first approach victims and survivors is certainly a key factor in the process. One may expect the police to provide a place of refuge and safety, but the reality is that survivors are often subjected to a “victim-blaming” attitude. This is supported by the 191-page independent report of Operation Soteria Bluestone<sup>4</sup> in 2022, which clearly stated that, “At worst, officers demonstrated explicit victim blaming and lack of belief in the victim, which impacted on the subsequent investigation. For example, victim credibility was often focused on and used to either close or not investigate cases within some forces” (Stanko, 2023).

<sup>4</sup> Operation Soteria Bluestone is an operation “is a Home Office funded research and change programme which has developed a new national operating model for the investigation and prosecution of rape and serious sexual assault” (Wiltshire Police, 2023).



A study entitled “Rape myths in a large English police force” carried out in 2023 also revealed striking evidence of police officers’ belief in rape myths during their investigations, such as unfounded suspicions about the woman’s role in inciting the crime. The study highlighted that such attitudes may contribute to the low charge rate of 1.6 percent in rape cases in England and Wales (Gekoski & Massey & Davies, 2023). One senior officer expressed concern within their force: “We massively pre-judge the credibility of the victim. We investigate the victim more than the offence itself” (Topping, 2023). Thus, this rape myth is one of the barriers to effective dealing with rape cases not only in societies, but also among police officers and public servants. Across the world, not just in England and Wales, an alarming pattern of allowing perpetrators to get away with rape exists as a result of ineffective protection and insufficient convictions after the commission of the crime.

In addition, the 191-page independent report of Operation Soteria Bluestone in 2022 identified other ongoing structural and systemic problems, including the lack of specialised units, the necessary data system, analysts, or analytical capability. Following the report’s publication, a former officer of the Criminal Investigation Department admitted that he considered sexual offence cases to be “pink and fluffy” because they were victim-oriented, so he prioritised burglary and robbery cases (Stanko, 2023).

On February 21st, 2018, the UK Supreme Court ruled in *Commissioner of Police of the Metropolis v. DSD and Another* [2018] UKSC 11 that the police infringed on victims’ rights by failing to properly investigate sexual assaults (Thomas-Evans, 2018). The case was brought by two victims of sexual assault by the same perpetrator between 2003 and 2008 against the Metropolitan Police Service following their significant failure to investigate the crimes. The UK Supreme Court ruled that Article 3 of the European Convention on Human Rights<sup>5</sup> (ECHR) imposes a positive obligation on the police to carry out effective investigations into offences that result in harm to another individual (Thomas-Evans, 2018). While the police argued that Article 3 ECHR did not extend to the operational conduct of the police when investigating crimes by non-state actors, Lord Kerr cited paragraph 151 of *MC v. Bulgaria* as authority for the proposition that the duty under Article 3 ECHR was not limited to the criminal acts of state agents. That being said, Article 3 does not apply to simple errors or omissions. In 2015, the Supreme Court held in *Michael v. Chief Constable of South Wales Police* [2015] AC 1732 that the police do not owe a general duty of care to individual members of the public to identify or apprehend a criminal (Clyde & Co, 2015). The same rule applies where a member of the public presents reliable evidence of a specific and imminent threat to the life or physical safety of an identifiable third party.

### 2.1.6. Crown Prosecution Service (CPS)

Crown Prosecution Service (CPS) prosecutes criminal cases that have been investigated by the police

5 Article 3 of the European Convention on Human Rights stipulates that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”.



and other investigative bodies in England and Wales. As mentioned above, the CPS will review the case sent by the police. However, in order to decide whether to charge the suspect, the prosecution will apply a two-stage test (Ministry of Justice, n.d.). This involves the consideration of two questions. Firstly, is there enough evidence against the suspect to be a likely prospect of conviction by a jury? Secondly, is it in the public interest to bring this case to trial? These two stages are also known as the “evidence stage” and the “public interest test”. The evidence stage requires examination of facts, including the seriousness of the offence, the harm caused to the survivor, and the age and maturity of the suspect at the time of the offence (Ministry of Justice, n.d.).

If the two-stage test is met, the prosecution will inform the police what offences the suspect, or future defendant, can be charged with. However, in an alternative scenario, the CPS may either decide to drop the charges or investigate further if it decides that more material is needed or if there are other possible lines of inquiry. Ultimately, the suspect will be charged and the case will go to trial unless the survivor asks the CPS not to under the Victims’ Right to Review Scheme (Ministry of Justice, n.d.). All CPS decisions are made following the rules set out in the Code for Crown Prosecutors (CPS, n.d/c).

#### **2.1.6.1. The vicious circle: Consent, Rape cases, and Prosecution**

When the CPS prosecutes a case, it presents all the evidence in court and asks the judge and jury to find the defendant guilty. The issue that interests survivors the most at this point has been aptly described by Siobhan Blake, Chief Crown Prosecutor for CPS West Midlands and CPS National Lead on Rape and Serious Sexual Offences: “It is necessary under the law for the prosecution to provide evidence not only that a person did not consent to the act but that the perpetrator did not reasonably believe that they were consenting” (CPS, n.d/a). That is, for the perpetrator to be convicted for the crime, the prosecution will be required to prove not only the lack of consent, but also that the perpetrator did not have a reasonable belief that the consent had been given by the victim (CPS, n.d/a). Prosecutors therefore consider consent in two stages (CPS, n.d/b).

Under section 74 of the Sexual Offences Act 2003, consent is firstly considered to have been given by a person engaging in sexual activity if they are willing by choice and have the freedom and capacity to make that choice (Noble Solicitors, n.d). Therefore, there may be multiple situations in which consent has been absent or withdrawn. Moreover, giving consent to a particular sexual activity does not automatically extend to other types of sexual activities. For example, if one person gives consent to oral sex or penetration under certain conditions, such as wearing a condom, the other party cannot try to have anal sex or withdraw the condom. Consequently, consent can be withdrawn at any time during sexual activity and each time the activity occurs. This point is particularly important for married couples, as some refuse to acknowledge and recognise the seriousness or prevalence of marital rape. In

England and Wales, marital rape became illegal in 1992 as a result of the *R v. R* UKHL 12 (1991), and can now also be considered domestic violence (Noble Solicitors, n.d). Consequently, while rape refers to lack of consent as the definition states, the legal definition adopted by the UK creates a vicious circle as lack of consent alone does not authorise the commission of the crime.

## CONCLUSION

Being a victim or survivor of a sexual offence is a traumatic experience and the situation is more dire for women and girls. This is not to say that men are less significant among victims, but rather to underscore the reality that women and girls face greater injustice and trauma due to the deeply rooted patriarchal and sexist ideology embedded in the criminal justice system. From police officers to juries, women and girls struggle not only with complex paperwork and processes, but also with prejudices and myths that further disadvantage them. This is exemplified by the fact that women are not only fighting to prove that they have been raped, but also to demonstrate that the perpetrator did not reasonably believe the victim was consenting. Fortunately, progress has been made in England and Wales thanks to the Sexual Offence Act 2003 which made an improvement in the objective assessment of whether the defendant's belief was reasonable in the circumstances. Another new step taken by the UK is the Sentencing Bill introduced by the Government in November 2023, which provides for rapists to spend their entire custodial sentence in prison, with no Parole Board hearing, and Whole Life Orders for any murder involving sexual or sadistic behaviour (Ministry of Justice, 2023). The reform bill seeks to crackdown on violent offenders and reinforce victim protection in the country.

Yet, despite some improvements and new measures, the alarming situation in England and Wales appears to be exacerbating. In 2023, around 70 percent of rape victims had withdrawn from investigations for a variety of reasons, including court delays, low conviction rates by the police, and fears over the trauma of reliving the crime in the court (Syal, 2023). From a legal perspective, the outdated definition of rape in the country is another source of growing insecurity and the low prosecution rate in rape cases. A consent-based definition of rape is a necessity, rather than a preference, to overcome the deadlock in the prosecution of rape cases and to protect women and girls from the myths and stereotypes that the system silently perpetuates on the path to justice.

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