‘David and Goliath’ judicial review brought against CPS over rape and sexual assault

Readers may be aware of the Crown Prosecution Service’s (CPS) ‘Full Code Test’ when deciding whether to charge an offence. The evidential limb of this test reads: Crown Prosecutors must be satisfied there is enough evidence to provide a “realistic prospect of conviction” against each defendant’ (The Code for Crown Prosecutors, see www.cps.gov.uk/publication/code-crown-prosecutors).

Prosecutions of rape and sexual assault are notoriously fraught, partly due to the impact of rape myths and stereotypes. These are commonly held but incorrect beliefs and prejudices concerning rape, for example about how someone may behave after being raped. Rape myths disproportionately impact people who face additional barriers to justice. This includes people who don’t conform to heteronormative stereotypes, people from Black, Brown, Racialised and migrant communities, those from disadvantaged class backgrounds and people with mental health difficulties.

These beliefs are prevalent and the legal system is not exempt. In January 2020 in the case of ReH v F [2020] EWHC 86 (Fam), an appeal overturned the decision of HHJ Touison QC, the Designated Family Judge and the Central Family Court. The initial judgment espoused the rape myth ‘that a complainant must and should physically resist penetration, in order to establish a lack of consent’ (Para 37).

To mitigate the insidious influence of rape myths on CPS charging decisions, the ‘merit-based’ approach (MBA) was introduced. This approach comprises a set of principles that live within the ‘full-code test’. The MBA does not and never did replace the full-code test, rather it is supplementary, necessary because of the biases which affect rape charging decisions.

In Summer 2018 the End Violence Against Women and Girls Coalition (EVAW), represented by the Centre for Women’s Justice (CWJ), launched a historic, ‘David and Goliath’ Judicial Review of the Crown Prosecution Service’s policy on rape charging decisions. The basis for the litigation was the CPS’ quiet withdrawal of the MBA. The CPS initially denied any knowledge of the removal of the approach. After a damning disclosure exercise, the CPS appeared to partially accept that there was a change in the approach, however argued that this was not a policy change, rather a ‘corrective’ measure due to fears of overcharging rape and sexual assault. When this is contextualised against the attrition rate of rape cases (that being the rate at which cases are funneld out of the legal system from the decision to report the crime to conviction), the poorly evidenced speculation of overcharging is wholly rejected. The most recent comprehensive study of attrition found that only 5.6 per cent of reported rapes ended in conviction.

‘The litigation was partially successful, impacting existing policy, the CPS’ engagement with public awareness of crucial issues associated with rape and the criminal justice system, despite the Court of Appeal ultimately ruling in favour of the CPS in March 2021.’

I (GC) spoke to Kate Ellis (KE) of the Centre for Women’s Justice, and I started by asking her: how does the MBA operate?

KE: ‘In the case of FB v DPP [2009] EWHC 106, the High Court considered two competing approaches of the CPS to the evidential test when making a charging decision: (i) the predictive approach, which considers the likelihood or odds of whether a jury would convict, from the prosecutor’s experience of prosecuting similar cases, and (ii) the MBA, where it does not try to predict the jury’s decision but charges on the merits of a particular case, e.g. a credible account from victim. The High Court found that it was important that the prosecutor should always apply the MBA approach, focussing objectively on the evidence in the case, considering an objective and impartial jury.’

GC: Why is it important to apply the MBA?

KE: The predictive approach can assume jurors subscribe to rape myths, and thereby perpetuate rape myths further by only prosecuting the ‘perfect’ case. The...
MBA is aware of rape myths and doesn’t simply reassert the full-code test but provides a practical approach for prosecutors to take when considering the evidence. In lots of cases, it would not make much difference, but in a lot of non-binary people or working-class child victims of grooming with complex backgrounds. For these children, many complaints of abuse had not been pursued partly because police and prosecutors deemed that they might not be considered ‘credible’ witnesses, and their behaviour might not be understood or accepted by a jury.

‘Rape myths disproportionately impact people who face additional barriers to justice, including people who don’t conform to heteronormative stereotypes.’

15: More asylum seekers die in Home Office care than in crossing the English Channel, with 59 people dying in government accommodation so far this year [2020], five times as many who lost their lives on perilous small-boat crossings over the same period.

7: Four families of dead children, whose identities were stolen by undercover police officers, have launched legal action against the Met over their resulting trauma. At least 42 undercover cops created fake personas, ‘assuming squatters’ rights over the unfortunate’s identity’, as one wrote for their handbook.

24% Reduction in funding for justice in real terms between 2010 and 2019.

14: Researchers at the University of Oxford can now use artificial intelligence (AI) to explore judicial cases after the British and Irish Legal Information Institute (BAILI) granted the AI for English Law research team access to a dataset of more than 400,000 searchable judicial decisions.

16: Judgment by the Investigatory Powers Tribunal says that MI6 and GCHQ may have authorised informants to commit crimes within the UK and raised the question ‘whether that conduct was lawful’. MI6 appears to be operating the policy despite parliament having only given the spy agency powers to break the law overseas.
News & Comment

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>> KE: The CPS was not forthcoming at all, despite being a public body with a duty of candour. One of the grounds of the judicial review was that the CPS had breached their duty of transparency. Their management of the litigation supported this ground.

At a late stage in proceedings, we found that Sarah Crew, the National Lead for Adult Sexual Offences for the National Police Chiefs Council, had written privately to DPP Max Hill. Ms Crew drew his attention to a large number of cases where decision-making seemed to show a move away from the MBA, showing that other erroneous factors had been taken into account, and expressing her concerns. Ms Crew has also spoken out publicly about her concerns in The Guardian newspaper.

The CPS ended up having to admit that they had tried to steer prosecutors away from the MBA; however it was justified, they said, by concerns that prosecutors were overcharging. But the evidence of overcharging that they cited was unimpressive: they primarily relied upon a single inspection, involving a very small sample of cases from some years previously, from which it was concluded that the MBA was being occasionally misinterpreted or misapplied. The inspectors who had carried out that inspection had in fact recommended that prosecutors receive more training on the MBA to ensure that they applied it correctly – they did not recommend that the MBA be withdrawn altogether.

Meanwhile, we had been able to refer to a series of reports over a number of years, all indicating that the training and guidance on the MBA remained effective, and in fact vital, in order to address common misconceptions on the part of prosecutors and ensure that they were not missing opportunities to prosecute cases successfully. A number of those reports also found that if conviction rates for sexual offences were low, there might be other reasons for this than simply that prosecutors were charging too many weak cases – including, for example, issues around the quality of trial advocacy in some cases.

One of the most troubling aspects of the decision to remove the MBA was that there was no consultation with women’s groups. A key piece of disclosure was an internal communication by the Director of Legal Services from 2016, acknowledging that the removal of the MBA would likely be met with public concern by stakeholders, and that any “communication” around this would need to be very carefully managed. In the end it seems, they decided not to communicate it to stakeholders at all.

GC: What was the CPS’ position at trial?
KE: After accepting that the MBA had in fact been excised, the CPS argued that it had been applied over-vigorously. They suggested that the full-code test was sufficient.

GC: How did the Court of Appeal rule?
KE: The Court of Appeal ruled in favour of the CPS, holding that the removal of the MBA was not unlawful and that the amendments reinforced the correct test to be applied: ‘the full-code test’.

GC: What is your response to the judgment?
KE: Judgment was released in an extraordinary week: one week after International Women’s Day, and in the midst of the national outcry that followed Sarah Everard’s death. It felt as if everyone was concerned about the police’s response to violence against women and girls (VAWG), either within its ranks or outside, and women feeling silenced when they sought to protest. It felt particularly tone-deaf. The suggestion that there can be nothing unlawful about the CPS failing to bring suspects to justice on such a massive scale, to whatever extent you agree with court’s analysis, didn’t feel right. The suggestion that the CPS were overcharging in 2016 and that a subsequent decline of over 30 per cent in rape prosecutions was merely a corrective measure … when we have seen such a collapse in the rate of prosecutions, feels complacent.

This was not a political challenge, rather a public law challenge regarding bad decisions made by public authorities without a proper evidence base, being properly tested or consulted on.

Most importantly, the MBA guidance was initially introduced due to the effect of rape myths on charging decisions. The subsequent drop in prosecutions after the MBA was removed is concerning.

There was further an extraordinary lack of transparency from the CPS. However the court felt about the substance of the litigation, the fact that the CPS had been so resistant to revealing their
change in guidance, and the reasons for it, is very concerning. It is accepted that this was policy guidance for prosecutors and can be subject to change, however it has been published for a long time. The CPS has previously chosen to be transparent and recognises that it has duty of transparency about the way it prosecutes offences.

**GC:** Has there been any remedy to the initial grounds for the judicial review?

**KE:** Despite the ruling in favour of the CPS, the judicial review has been successful to an extent by putting the CPS under pressure. In October 2020 the CPS quietly reintroduced much of the guidance which had been removed. Some of that guidance has actually been reinstated, word for word.

The CPS have also engaged with women’s groups around the need for improved outcomes: certainly, they have been consulting in relation to their “RASSO 2025” strategy, and we are assured by the EVAW Coalition that they have some good relationships with senior policy staff at the CPS. Finally, we felt we had won in the court of public opinion. There was a significant amount of support, public scrutiny and concern generated by this case, particularly about the decline in prosecution rates. We do believe the CPS has felt this and been responsive, as evidenced in the reinstitution of much of the guidance, formulation of a new strategy and production of an enormous set of new guidance for prosecutors on recognising and avoiding rape myths and stereotypes, as part of their RASSO 2025 strategy.

**GC:** Would you bring this challenge again?

**KE:** I think in 2021 more than ever there is a real sense of collective responsibility to address violence against women and girls, and a profound feeling of anger, that authorities are not responding to, or are not properly equipped to respond to, sexual violence and harassment. This was a challenge worth bringing and we would do it again. Judicial review is a crucial tool to monitor public authorities where transparency is lacking. I hope that CWJ can serve as a “watchdog” as regards changes in state policy that affects women and girls, and that it will always respond to concerns of systemic failings about violence against women and girls that may amount to illegality.

**Grace Cowell**

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**Justice for Pat Finucane: the fight continues**

On 22nd December 2020, the Haldane Society was glad to host a panel discussion posing a vital question: ‘Is the British State Still Colluding in the Murder of Pat Finucane?’ Short answer: yes.

Pat Finucane was an Irish solicitor who was assassinated by loyalist paramilitaries in 1989. This came just a few weeks after Douglas Hogg MP, a member of the Thatcher cabinet, said that some lawyers in the north of Ireland were ‘too sympathetic’ to their clients. His murder was undoubtedly because of his provision of legal representation to members of the IRA. Finucane’s family and supporters have been continuously campaigning for an inquiry into his murder and the role that the British State had to play in it ever since. In November 2020 Brandon Lewis, Secretary of State for Northern Ireland, announced that there will not be a public inquiry ‘at this time’. Lewis was responding to the Supreme Court Judgement of February 2019 which found that the UK was failing to uphold its Article 2 ECHR obligations to investigate state-caused deaths (In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland) [2019] UKSC 7).

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**Nearly nine out of 10 children**

held in custody on remand in London between July and September 2020 were from a black, Asian or minority ethnic background, according to statistics released after FOIs.

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22: Home Office accused of lack of transparency after repeatedly declining to provide breakdowns of deportations under the 2007 UK Borders Act by nationality. Government claims to do so was ‘likely to prejudice diplomatic relations between the UK and a foreign government’.

23: Nearly nine out of 10 children held in custody on remand in London between July and September 2020 were from a black, Asian or minority ethnic background, according to statistics released after FOIs.

24: ‘Discrimination perpetuates even with children who have not been convicted.’ Penelope Gibbs, director of Transform Justice.

22: Good Law Project files claim against Health Secretary Matt Hancock accusing the government of operating an illegal ‘Buy British’ policy when it signed contracts worth up to £130m with a small UK firm (Abingdon Health) to supply Covid anti-body tests without going out to tender, when other companies were in a better position to supply tests.

30: Argentina becomes the largest Latin American country to legalise abortion after its senate approved the historic law change, the result of five years of mass protest marches by the country’s grassroots women’s movement.

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**Comment**

Peter Madden, Finucane’s colleague, and comrade in the Belfast-based law firm Madden and Finucane; and Richard Harvey, a London-based barrister and Vice-Chair of the Haldane Society, who worked with and knew Pat Finucane; discussed Finucane’s life and work and the arduous and continuing journey in seeking a full public inquiry into his death. We were honoured to have Pat Finucane’s son, Michael Finucane, speak about why he and his family continue in their battle. His father’s murder remains important, not just for them, but because it is a prime example of why state accountability is paramount. It also provides solid evidence for arguing against allowing covert intelligence agents to commit crimes in the name of what some people would define as justice. The full talk is available on our YouTube channel.

Margo Munro Kerr