

## FAQs on Memory and Rape

*Dr Heather Flowe, PhD*

### **What constitutes rape/sexual assault?**

Sexual assault is any sexual act that a person did not consent to, or is forced into against their will.

It is a form of sexual violence that can include rape (an assault committed by a man involving penile penetration of the vagina, anus, or mouth), sexual assault by penetration (an assault committed by a man or a woman involving penetration of the vagina, anus or mouth) or other types of sexual offences, such as groping, forced kissing, or other non-penetrative sexual acts.

### **Why are prosecution rates so low?**

In the UK, prosecution rates are as low as 1%. It is a similar story across the world.

There is more than one reason for this.

The high prevalence rate of rape, and sexual assault more broadly, is part of a broader societal and cultural problem. This can be seen in the many myths and falsehoods that persist in conversations about rape and sexual assaults.

Some of these include:

- Victims always physically resist and fight off their attacker;
- Victims always receive injuries;
- Victims provoke / invite offences because of the way they act and dress or because they have consumed alcohol or drugs;
- Victims report the crime as soon as possible;
- Victims always recall events consistently;
- Victims always get away from their attacker as soon as possible;
- Many rape allegations are false;
- Many sexual assaults are really just miscommunications and misunderstandings about consent.

Though these myths have been disproven (i.e., disconfirmed) by multiple studies, and legal authorities (such as the Crown Prosecution Service) recognise the myths as such, they still exist and influence responses to rape.

The low prosecution rates also point towards a problem in the justice system. From the moment that a crime is first reported to the police, to a decision actually being made in court, there are a number of hurdles that have to be overcome. Though said hurdles differ between countries, research and insight from survivors and prosecutors tells a similar story.

While corroboration is not required (more later on that), the nature of rape means that it often takes place away from witnesses. While witnesses may be able to place both victim and perpetrator at the scene of the crime, they can rarely testify to the actual criminal activity itself. If there is an absence of clear evidence of violent coercion (which happens in an 64% of rapes and sexual assault by penetration according to the [most recent ONS estimates](#)), then the testimony of both parties is the primary evidence. What is more, the vast majority of rape victims [do not sustain vaginal injury](#)

Here, the perpetrator often claims to have received consent (even where it was not given). Doubts are often cast on the accuracy of victim survivors' testimony – calling their character into question, blaming intoxication, false memory, a quest for personal vengeance, or otherwise. The defence often relies on there being sufficient doubt, that consent 'may' have been given, and, as a result, cases are often dropped or dismissed.

### **How can we improve prosecution rates?**

That is a big question, and a key focus of my work.

Improving prosecution rates requires a rethink of our justice systems.

We need to have a survivor-centred approach that provides both *proper* consistent support, and better understands the nature of the legal procedures used to gather statements and testimony, and memory reporting, and puts greater focus on the perpetrator than legally irrelevant characteristics of the victim.

Central to this is improving the quality of evidence gathered by the police and given in court, and improving the ability of prosecutors, judges and other officials to properly understand the science of memory.

We see examples of believable survivors having their case thrown out due to an inaccurate understanding of how memory works. It allows defence lawyers to cast doubts on a survivors' testimony by leaning on disproven ideas about memory, such as the impact of alcohol on memory recall.

My aim is to help police forces and first responders to design better interview processes, to assist prosecutors in countering the myths and falsehoods that persist in the courtroom, and to help lawmakers across the globe pass legislation that can bring perpetrators to justice.

### **Is the problem for prosecutors that memory is fallible?**

No, actually. It's that the procedures used by legal systems are problematic and assessments of the victim's memory are heavily reliant myths that have been debunked by science.

There needs to be a step-change in how we handle memory evidence in the legal system (and indeed in broader society). We inherently trust DNA and video evidence because we accept that the likelihood of DNA contamination or video doctoring is incredibly slight, and we know how helpful they are in informing successful prosecution of perpetrators. Yet despite the evidence base that finds that memory recall is highly accurate when proper evidence-based interviewing procedures are used our legal procedures position memory as something fallible. The legal system should have more confidence in memory reports than it currently does.

That's why I help police and prosecutors to access the science that challenges those problematic procedures and better serve justice through the correct understanding of memory evidence.

### **Is corroborating evidence always required?**

In short, no.

Exact interpretation may differ from country to country but in England, common law has never had any general requirement that evidence be corroborated.

The same is true in the US, which is where I was born and raised. Until the late 20th century, sexual offense laws contained a 'corroboration requirement' that a rape prosecution could not be proven solely by the word of the victim, no matter how credible. No, that was not the case for any other crime, and fortunately it is now a thing of the past – in legal terms at least.

In rape cases we often see a clamour for corroborating evidence, be it forensic or otherwise, to 'confirm' that a sexual assault took place. While forensic evidence is often helpful in bringing a perpetrator to justice, it is not required, nor should it be because it is not the holy grail, and usually cannot prove rape occurred. The requirement of corroboration would be a presumption that rape victims lie.

### **Without corroborating evidence, is there a risk of false accusations?**

No more than there is in any other crime.

[Studies](#) carried out in Europe and the US indicate rates of between 2% and 6%.

Some people say that even though false allegations are rare, they do happen, and that is reason enough to consider it a problem. However, [research](#) shows that the majority of false claims do not name an alleged perpetrator and they're more likely to be relatively vague accusations about a stranger. Confident assertions about the perpetrator are shown to be very accurate.

False allegations also tend to be identified early on, often by an admission from the complainant.

Therefore, we should dismiss the idea that false allegations are rife and challenge those who use it as a means of casting doubt on an accuser.

### **How does alcohol effect memory?**

Alcohol intoxication during memory acquisition reduces the number of correct details recalled about a crime, but it does not increase the number of incorrect details recalled.

So, we can say that acute alcohol-intoxication at the time of the crime reduces the completeness, but not the accuracy, of participant witnesses' memory reports.

Research also indicates that confidence is predictive of accuracy, with details remembered with high confidence more likely to be accurate.

[Read more about our meta-analysis of the latest research on alcohol and memory](#)

### **Could someone who has been drinking alcohol forget having given consent?**

This is no more likely than a sober person forgetting something.

So far, research has not demonstrated differential rates of forgetting for sober compared to intoxicated people, and research has not found intoxicated individuals to be more prone to incorporating misleading information into their memory reports. My research over the past decade shows that [women can accurately distinguish](#) between consensual and nonconsensual sex, even when they were [alcohol-intoxicated](#) during the event.

### **Does acute alcohol intoxication increase the odds that someone will consent to sex, and then falsely remember it as rape?**

The dominant theories of alcohol's effects on memory posit that alcohol affects attention, and memory consolidation, thereby leading to fewer details being recalled about events. My research suggests [that women blame themselves and are less likely to report rape](#) if they were alcohol-intoxicated during the event, but that (as above) women *can* distinguish between consensual and nonconsensual sex, and that false rape allegations are rare.

### **Shouldn't people take some responsibility for drinking to the point of not being able to remember?**

This is a problematic way of thinking.

It speaks to a culture of victim-blaming, similar to ideas that wearing certain clothes or 'flirting' invites or provokes an attack. At no point does consumption of alcohol or drugs become a question of 'responsibility'. Indeed, our focus should be on the perpetrator and their own responsibility to *not* commit a sexual assault.

### **Can we fully trust the memory of someone who has been through a traumatic event?**

This is a topic where expert opinion, and the research evidence are mixed. There is a clinical body of research suggesting that memory for traumatic events can feel quite different to the person (e.g., incomplete), whereas there's other empirical work finding that memory report accuracy does not vary as a function of trauma. My lab is currently reviewing and synthesising these areas of research.

### **Some people freeze during trauma, can they really remember events clearly?**

Tonic immobility – the idea that someone enters a state of involuntary paralysis when being sexually assaulted – is a popular concept in discussions about rape law.

This, some argue, is why many victims do not fight back. But this is problematic.

The concept of tonic immobility comes out of the literature on other animals, including sharks and rats. There have been no objective studies in humans to establish whether the concept and theory can be generalised to humans. There [already have been round criticisms](#) in this regard.

This line of argument also implies that if victims could fight back, then we would *expect* them to. (For what other crime do we expect the person being attacked to fight back?)

So, we need to be very careful about using terms like 'frozen' during traumatic events and understanding what it really means.

In terms of whether people who report having 'frozen' can remember events, there is no direct research on the matter that I am aware of to suggest that events are not registered in memory. Indirectly, research that studies tonic immobility often studies people who have sought medical, counselling and other services, which suggests that people do remember what has happened to them.

### **Is past sexual behaviour evidence relevant to determining the likelihood that someone will consent to sex and then make a false rape accusation?**

No.

There is zero evidence to support that myth.

### **Why is false memory research not relevant to evaluating the complainant's memory in rape cases?**

Research shows that the occurrence of false memories varies depending on a range of factors, such as how memory is assessed (e.g., recognition, forced report, or free recall test, for examples), whether we are talking about memory for a central versus peripheral event detail, the credibility of the source used to implant a false memory, the delay between misinformation presentation and the final memory report, and so on.

In my research on rape and false memory, I have observed the same (e.g., misinformation is seldom recalled when real-world police questioning procedures are used). It would be misleading to broadly generalise false memory research to a given case in the legal system without taking these (and a myriad of other context-specific factors) into account.

### **Is the “forgetting curve” relevant to evaluating the likely accuracy of victim and eyewitness memory when there is a delay between the crime and reporting it to the police?**

It is common for experts to testify in cases for the defence that memory decays as a function of time, drawing on psychology research that has varied the length of time between a to-be-remembered event and the memory test. The implication is that the victim(s) and witness(es) in the case are remembering inaccurately because time has passed. One problem with this, however, is that witnesses and victims in the real world are questioned repeatedly over time by criminal justice officials. A number of studies show that [repeated testing](#) and [giving an account relatively soon after the event](#) both preserve memory (reducing the rate of forgetting) and protect memory from contamination.

### **If I’ve been a victim of rape, who can I turn to?**

If you have been sexually assaulted, it is important to remember that it was not your fault. Sexual violence is a crime, no matter who commits it or where it happens. Help is at hand.

You can visit my [Resources page](#), where I’ve outlined some of the free support available to you. It covers the US and UK, but do get in touch if you are struggling to find support local to you.

This content was first posted on 25<sup>th</sup> May 2021.

For more information, visit [www.heatherflowe.com](http://www.heatherflowe.com)