Review Article

iMedPub Journals
http://www.imedpub.com

Clinical Psychiatry
ISSN 2471-9854

2021
Vol. 7 No. 3:99

Consent in Sexual Assault: Reflections on the Role of Testimonial and Expert Evidence

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Citation: Aurrekoetxea-Casaus M (2021) Consent in Sexual Assault: Reflections on the Role of Testimonial and Expert Evidence. Vol.7 No. 3:99

Abstract

This article offers a critical analysis of a very controversial concept in sexual assault trials: Consent. It discusses how difficult it is to determine the elements that help to assess the consent or refusal of the plaintiff. In the absence of evidence, the plaintiff's testimony becomes the prosecution's evidence and the role of forensic experts and psychologists is crucial. A content analysis was conducted with Atlas. Ti of one of the most mediatic sentences in Spain, Manada de San Fermines (San Fermin Wolf Pack) sentence. Results show that the legal scenario is not limited to the moment of the aggression. On the other hand, when there is no strong objective evidence, such as physical injuries due to resistance, the testimony and reports from experts become key pieces in the construction of an ideal victim. The discrepancies surrounding consent make it necessary to clarify this concept from a legal as well as from a social and cultural point of view.

Keywords: Sexual Assault; Role of Testimonial; Expert Evidence

Received: May 05, 2021; **Accepted:** May 19, 2021; **Published:** May 26, 2021

Introduction

The first-instance judgment in the infamous case “Manada de San Fermines” (“San Fermines Wolf Pack”), which was widely covered by the media, sentenced five young adults to three years of prison for “undue advantage sexual abuse.” A vote by one of the judges was quite peculiar, as he requested the acquittal of the accused, confronting an outraged society that was waiting for a “gang rape” judgment. Subsequently, the Supreme Court reversed the judgment, sentencing them to 15 years of imprisonment for rape.

From the moment of the crime and up to the judgment of the sentence, with each of the occurrences related to the case, the Spanish society plunged [1,2] into the debate of consent, without noticing that what was actually being discussed was the struggle between two ways of understanding consent. From a judicial point of view, consent is bound to a legal argument and what it tries to prove is whether there is implied consent. On the contrary, society proposed a paradigm shift as regards consent, specifically of what is known as “affirmative consent” [3].

Literature Review

In this context, the judgment of “Wolf Pack” has become a paradigmatic one because it encompasses all the components to find the roots of the legal and social debate around consent in sexual assault cases. From a legal point of view, it is established that people who are part of a sexual encounter, subject-matter of the trial, should gather all elements of evidence that demonstrate that the victim said “no.” However, society is claiming that a “yes” should be heard before someone engages in sexual intercourse, that is to say, affirmative consent.

The dissenting vote of one of the judges, whose argument took him to write the unusual number of 180 pages, presented a huge opportunity to untangle the dissonance between the legal approach toward consent and the pressing Spanish society that is shaken almost every day by cases of misogynist violence, women being murdered by their partners, sexual assaults, and gang rapes.

With the purpose of clarifying the elements that determined the stance of the dissenting judge in the judgment of “The San Fermines Wolf Pack” case, a software called Atlas. It was used to analyze the content and focus such analyses on the two contradictory versions, that of the plaintiff-victim, who explained that the sexual relations were carried out without her consent, and that of the defendants, who unanimously stated that as soon as they met, the six of them agreed to have group sex. Quoting the judge’s words, “determining whether the plaintiff gave her consent or not is based on the “ius decidendi” topic of the proceeding” (Sentence, 2018 p.245) [4].

The plaintiff’s main focus was on the events that occurred in a

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cubicle located 1.5 m from the end of a residential building's doorway, hidden from the sight of passers-by, and only the following six people were there: the five defendants and the victim. Thus, the only six people that could provide a direct testimony of what had happened were them. This circumstance elevates the testimony of the victim to an essential and determining evidence category. The five defendants recognized having had sexual relations and these included, at least, five fellatios, three vaginal penetrations, and one anal penetration (Sentence, 2018 p.182) [4]. As the following graph (**Figure 1**) illustrates, consent becomes a confrontation between testimonies, difficult to be determined, as Shumlich & Fisher (2018) would argue, because sexual relations are packed with indirect behaviors that are disguised and codified and that in the case of a trial must be understood by third parties, as there is no objective evidence.

Departing from the rational structure of the evaluation process of the judge, the analyses carried out on the dissenting vote of the judge in the "San Fermines Wolf Pack Rape" case delivered two results to be noted: 1. The legal scenario of consent is not confined to the moment of the "sexual intercourse"; 2. In the absence of objective evidence, the role of forensic and psychological expert evidence becomes crucial to aid the judge's decision.

Results

The legal scenario of consent is not confined to the moment of the assault.

The first item for evaluation is the scenario where the events considered as sexual assault took place, to try to decide based on the type of verbal or non-verbal communication, the quality of the communication, etc. and the degree of resistance of the woman (plaintiff), which is fundamental as regards consent from a legal stand point.

During the events, the defendants recorded 6 videos of no more than 96 seconds, so it was impossible to gather enough evidence to determine the "non-consent," and, together with the lack of physical evidence that characterizes a sexual assault, this led to the "subjective interpretation of the different scenes." These scenes that lack continuity and were recorded by the defendants were to be analyzed by the experts.

The purpose of analyzing the video scenes was to determine the passive attitude or the degree of "collaboration or initiative" of the plaintiff-victim. To this regard, the experts of the defendants stated that, overall, there was a passive response. That response is recognized in scientific literature as one of the possible ones to take into account. Further, they connected their explanation to what the plaintiff herself had narrated, but they did not put any effort in making a contrast with any other objective data they had available, and so they were deeply questioned by the judge.

"Yes, in a sexual assault or sexual abuse situation (sic), it is possible that the victim reacts by defending herself or shouting, but her reaction can be that of a shock, so she does not react; she becomes numb and cannot get out of that situation, and by the time she is able to react, the assault is over." (Claiming Expert, Sentence, 2018 p. 240) [4].

"It is described in the scientific literature. Any book about trauma presents this reaction; it is called blockage, paralyses, dissociation, or disconnection, but it is a "non-reaction" that is recognized as possible (…). There is no rational thinking; the person is incapable of thinking rationally, how they usually elaborate a strategy to act and get out of the situation or react to that situation." (Plaintiff's expert, Sentence, 2018:240) [4].

The argument used, was overridden by the judge because of the lack of strength of the approach, as the plaintiff's reaction, in her own words, was "I did not understand what was happening, I did not know where I was, I could not think, and I could not react." This testimony, according to the judge, could be one of the "possible reactions" that can be found in the scientific literature but not a reaction indicating "shock."

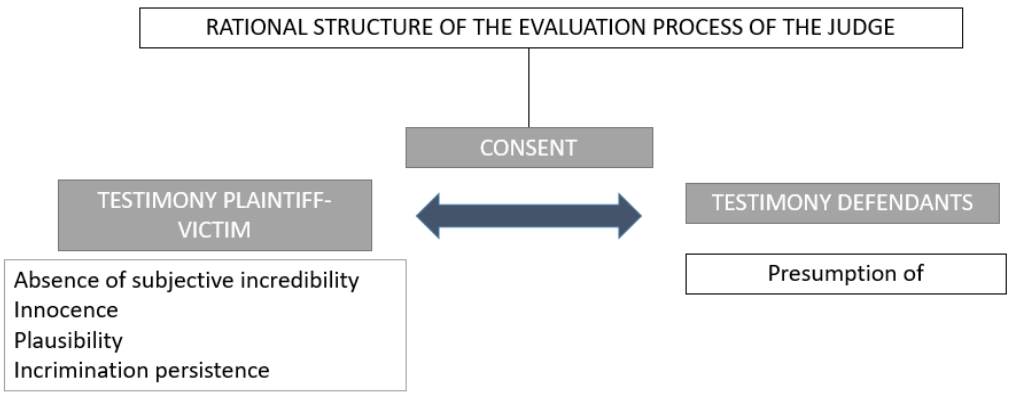

Figure 1: Rational structure of the evaluation process of the dissenting judge.

On the contrary, the defendants' expert, supported by the videos, pointed out that the images did not match a submission caused by acute stress, "because we can see more activity than inactivity" (in his own words). According to the defendants' expert, the revealing moment was "In IMG7410, we cannot see forced movements but synchronized ones that require the active participation of the woman" (Sentence, 2018: 290) [4].

That same expert highlighted, regarding the analyzed images, that the face of the woman "showed a distended expression, and we cannot see that she's being forced nor that she's resisting; there's no image showing that the woman is suffering, nor any other where she shows disgust, even if there aren't images showing that she is actually enjoying it" (Sentence, 2018:291) [4]. He described the images as "pathetic" but said that it was not possible to perceive fear, horror, self-defense, or any attitude of the woman trying to stop the intercourse. "There should have been at least an attempt of minimum resistance."

To the question of whether the images showed something resembling "shock" or emotional blockage, the defendants' expert responded that the word "shock" does not exist in psychiatry, and that maybe, there must be a reference to a reaction of adaptation or stress, but that was discarded because the images should have shown self-defense and avoidance, and they did not show that, in his regard.

As there was no objective evidence "beyond any reasonable doubt," as the judge in the sentence would say (Sentence, 2018:282) [4], whether the plaintiff was aware of the situation or gave consent, the scenario of consent is not confined to the moment of the sexual relations, and from that moment on, the scenario broadens.

According to Fernet et al. [5], who talks about the ambiguity of consent, evaluating the events and how the defendants and the plaintiff-victim acted is important, not just at that moment but also before and after entrance and exit from the doorway where the subject-matter of the trial took place. The idea is to find in each of the accounts of the events the existence or lack of awareness, consent, and intention of each of the people involved in the event. This is why everything that happened before the event, mainly for the plaintiff-victim, and after the event is to be investigated. Moreover, the plaintiff-victim is subject to evaluation to the extent that her personal life is scrutinized on social media to try to match her life to a trauma, her personality, etc. However, let us not forget that the defendants enjoy the privilege of the presumption of innocence.

About the key role of forensic and psychological expert evidence

In this scenario (**Figure 2**) and because of the lack of strong objective evidence (videos recorded by the defendants), expert and psychological evidence become key elements. The participating health professionals were, first, the forensic doctor and second, two psychologists from the plaintiff's side and a psychiatrist and a psychologist from the defendant's side.

The first professionals to evaluate the plaintiff-victim did not find any damage or physical injuries showing an unequivocal use of physical violence or the plaintiff-victim's resistance. They are questioned because of the generic allusions to medical literature. The forensic experts themselves recognized that the evaluations that were carried out and the theories they posed "do not necessarily need to fit a case of sexual assault" (Sentence, 2018: 265) [4].

One of the experts from the plaintiff's side sustained that scientific literature points out that 40–50% of rapes leave no injuries; this testimony was questioned when specifying that this fact corresponds to oral and vaginal penetration, thus revealing that they forgot about the injuries produced by anal penetration, and in the court, they recognized their lack of knowledge expressing the following: "There might have been, but honestly, I do not fully know about it" (Sentence, 2018: 265) [4].

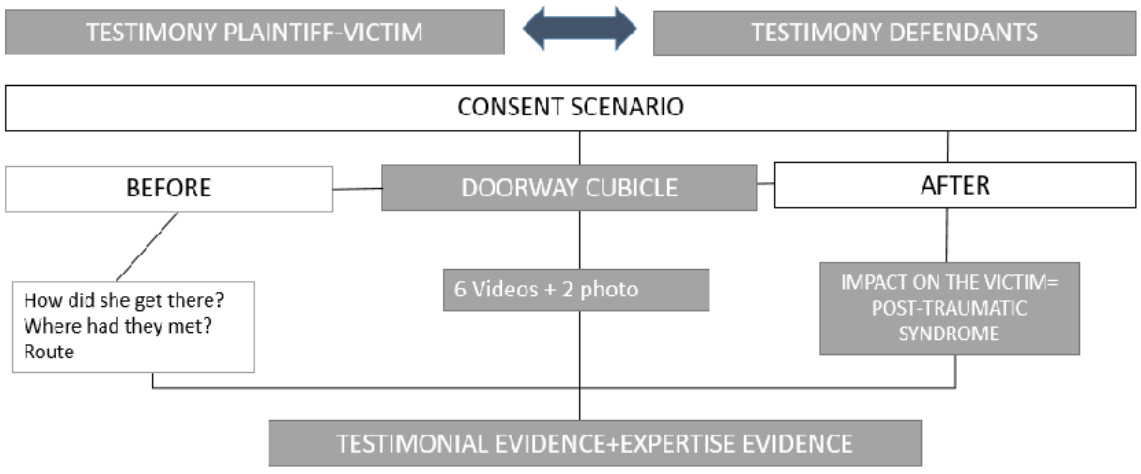

Figure 2: Judicial scenario of consent.

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As no physical consequences could be found from resisting, indicating that she was saying "no," psychological expert tests focused on determining whether the occurred events caused psychological damage to the plaintiff-victim. It would thus be possible to evaluate the existence of possible consequences, especially to try to diagnose post-traumatic stress disorder.

As expected, the reports of the parties arrived at radically opposing conclusions. While the plaintiff's experts concluded that "as a consequence of the events, a post-traumatic stress disorder can be detected. We recommend psychological treatment to prevent symptoms from becoming chronic" (Sentence, 2018:262) [4]. The defendants' experts concluded with the same strength that "she does not meet the necessary criteria to be diagnosed with post-traumatic stress disorder."

The questioning of the defendants' experts came from the link between post-traumatic stress disorder and sexual assault. Their starting point was the assumption of the existence of this sexual assault, which in the judge's words "have unconsciously dismissed the impartiality expected from an expert" (Sentence, 2018: 274-275) [4]. When asked about the causes of post-traumatic stress disorder, one of the plaintiff's experts pointed out the following:

"When examining the girl, have you considered the possibility that post-traumatic stress disorder could have been triggered by any other cause foreign to the sexual assault?"; It's just that she did not have any other relevant event in her life. There was not any other ongoing event that could result in trauma!

On the contrary, the defendants' experts concluded that there was no post-traumatic stress based on a "comprehensive report" on the results of the different tests and tools, but most importantly, based on the argument that the plaintiff-victim did not undergo any therapy nor psychological or pharmaceutical treatment after the event. To support their argument, they presented data obtained from the controversial questioning of her personal life in her spare time and her social networks. This strategy of trying to find symptoms of social withdrawal in the plaintiff-victim, as Dick [6] would say, is supported by the ideal of the sexually assaulted victim, or ideal victim, represented by a sexually assaulted woman that is locked within herself and isolated from the world to bear the damage and the shame. It seems that the plaintiff-victim did not fit that profile.

Discussión and Conclusión

Sexual assault trials do not occur in a cultural void [7]; on the contrary, they occur in a context filled with deep suspicion about female sexuality. Thus, the scope of consent will always be a floating rule that depends on each case event and on the subjective interpretation of such events by those who are responsible for determining the meaning of consent and, in this case, the experts appointed by both the defendant and the plaintiff.

In this regard, both the argument of the dissenting judge and the defendants' expert's report show an interpretative model based on the "ideal woman" [6]. The judge and the experts supported their arguments with informal ideas about sexual relations, on an ideal victim, reproducing the myths of rape culture, and leaving the full protection of the law for the ideal victims and the presumption of innocence for the defendants.

The analyzed case is proof that in rape trials the "implicit consent narratives" endure (Burgin & Flinn, 2019), and these narratives become a key factor in the defense of the defendants. When there is no strong objective evidence, such as physical injuries due to resistance, the testimony and reports from experts become key pieces to construe the behavior of the "woman" without any limitations; they even dig into her personal life during the year after the events. Do you think the defendants have been questioned? What were the emotional responses to the perpetration of the assault? Shame, guilt, depression, rage?

It is time to reflect on the five defendants. Why did they understand there was consent in the plaintiff's passiveness? Did they not hear her say "no"? [8]. Did they consider their sexual violence as acceptable and expected, or even desired? [9]. According to Halley [3], what the defendants might have interpreted is within the gender frameworks that emphasize the sexual right of men. Did they hear a "yes"? Did they perceive that the woman was feeling pleasure and desire? Can anyone think an 18-year-old woman in a 1.5 m cubicle surrounded by 5 men did not feel at all intimidated? What was expected of her, to defend herself violently? If so, to what extent?

All in all, what this sentence summarizes is that, under the epigraph of consent, the different parties involved—the plaintiff, the defendants, the judges, the experts, and society in general—systematically considered different definitions of consent [3]. On the one hand, some of the social actors started from an idea of "performative" consent based on the indication that consent could be expressed through physical signs and speech, and, on the other hand, others supported the idea of "restricted" consent, described as a situation wherein the sexual behavior is consented only to avoid something unpleasant and, finally, what social media and the Spanish society altogether claimed was the idea of "affirmative subjective consent," based on affirmative desire. To combine all these concepts under one single idea about consent to avoid discrepancies in the judicial field will take some time and will call for legal and social changes.

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