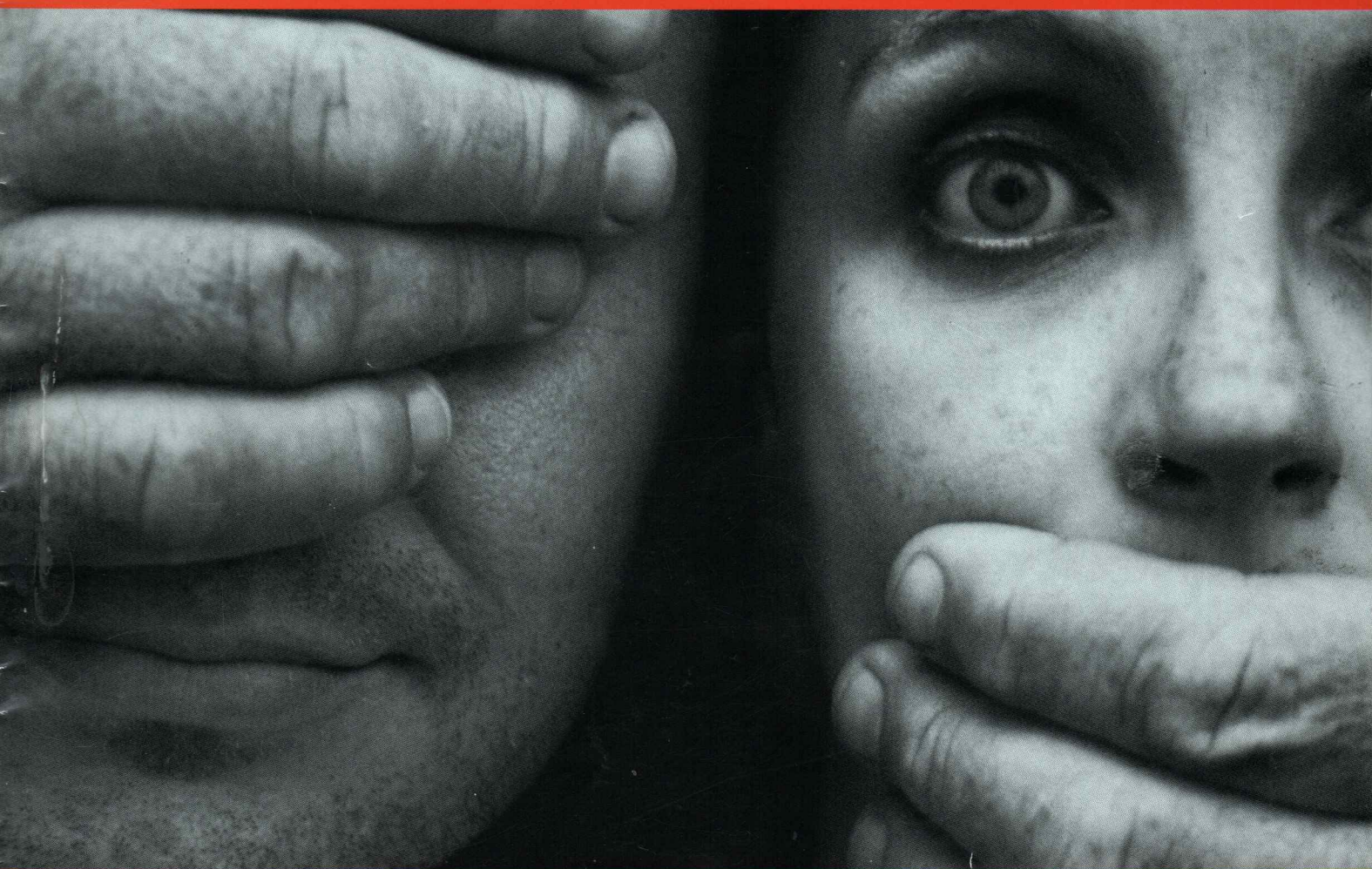


# CL&J CRIMINAL LAW & JUSTICE WEEKLY

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# Leaving Rape Charges on File

**Fiona Southward** considers the DPP's recent guidance on rape charges linked to murder

**T**he issue of leaving criminal charges to remain "on file" instead of taking them to trial can often be misunderstood. When applied in respect of stigmatic offences, like rape, orders to this effect can elicit responses akin to those occasioned by Scotland's contentious "not proven" verdict. On July 5, the Director of Public Prosecutions issued guidelines on determining when to leave rape charges on file in murder cases (available at [www.cps.gov](http://www.cps.gov)). These guidelines were prompted by public outcry after all rape charges against Jonathan Vass were ordered to lie on file following his guilty plea to brutally murdering his ex-partner, Lancashire nurse Jane Clough, whilst on bail for her rape. Ms Clough had agreed to testify to nine counts of rape shortly before her murder. The Clough family became one of three families campaigning about such disposals for sex offences. This article will shed some light on the procedure, utility and controversy surrounding orders to leave charges on file in the context of rape and murder.

## Letting Things Lie

Letting charges lie on file is an option available to the prosecution principally in considering mixed pleas. As an alternative to offering no evidence (entailing acquittal) or proceeding to trial, it allows the prosecutor to request an order that remaining counts or indictments be shelved – resulting in neither conviction nor acquittal – to be proceeded with only with the leave of a court. Whilst in theory these charges may be resurrected at a later stage, in practice such cases are extremely rare. Being, in effect, an order for no trial, such a decision is the prerogative of the prosecution (*DPP v. Humphreys* [1977] AC 1 at 46; *Derby Crown Court ex parte Brooks* (1985) 80 Cr App R 164).

When might such a disposal be sought? It is useful, for example, where an accused faces multiple counts for the same offence and he has pled guilty to the majority, or where only ancillary charges remain in contention. It may be that the public interest has begun to militate against trial in light of a mixed plea but, due to the weight of evidence against the accused, an acquittal on remaining counts may be inappropriate. In

occupying a grey space in public-interest decisions, the "charges on file" disposal can occasionally court controversy.

## A Contentious Order

In light of the potential finality of a decision to let charges lie, ensuring its appropriateness is essential. In respect of linked rape and murder cases, such a disposal raises numerous possible concerns from a victim's perspective: that assailants be enabled to avoid accountability for rape by murdering victims, and that, in pleading not guilty to rape and guilty to murder, they be spared not only the stigma of trial but also benefit from the presumption of innocent until proven guilty. The sense of injustice occasioned where a deceased victim appears to be "silenced" about their rape can create significant barriers to closure, as evidenced by the fact that one of the families consulted by the DPP on this issue has been campaigning on it for several years. Meanwhile, from a public-safety perspective, questions are raised about implications for offender treatment in prison, eligibility for release, and conditions thereupon, where an individual has never been convicted of a sex offence. Defendants too have considered failure to proceed or abandon certain charges violative of their right to challenge the prosecution case (see

*"Defendants too have considered failure to proceed or abandon certain charges violative of their right to challenge the prosecution case."*

*Central Criminal Court ex parte Raymond* [1986] 1 WLR 710). Indeed, whilst the Crown can now appeal a judicial order to leave charges on file under s.58 of the Criminal Justice Act 2003, such an order is not challengeable by the defence (*ibid*, 715; *Mackell* (1981) 74 Cr App R 27).

## Seeking Clarity

The DPP's guidelines provide a framework to ensure that, in handling mixed rape and murder pleas, the proper factors are given due attention. Clarifying and consolidating CPS policy as it relates to rape in murder cases, the guidelines state that rape counts should be left to lie only in exceptional circumstances. They highlight the need for charging to reflect the extent and seriousness of offending and address risk management and rehabilitation. Similar public-interest considerations are to be brought to bear on decisions on



accepting pleas, which must also take into account views expressed by victims' families.

But what kind of considerations might such decisions entail in practice?

In relation to risk management and offender rehabilitation, it is notable that, unlike other rehabilitation programmes, eligibility for sex-offender treatment programmes requires an admission of guilt. This is because such programmes necessitate full and frank disclosure of the offence by the prisoner. A prisoner maintaining his innocence regarding rape is thus unlikely to see it as in his best interests to attend such treatment, not least where there is no conviction on that count. However, failure to attend relevant treatment programmes can affect eligibility for release, as a prisoner cannot then show that his offending behaviour has been addressed. This requires sexual offending to be identified as a risk factor in sentence planning and parole board review. Here, much will depend on the circumstances of the case. The precise implications of leaving charges on file for determining the defendant's basis of plea are unclear, particularly where the entirety of a separate indictment remains untried. A prisoner might seek to challenge a sentence plan that includes sexual offending as a risk factor where no part of his index offence(s), basis of plea or any previous offending behaviour confirms the commission of such an offence. Untried evidence of rape may still be considered by risk assessors and,

*"It is questionable whether leaving rape on file where there is no other or previous conviction for a sexual offence is ever in the public interest."*

indeed, the parole board (for example, *R (on the application of McGetrick) v. Parole Board and Another* [2012] All ER (D) 39 (Apr)); however, its untested nature is likely to negate the weight it might rightly be attributed. Moreover, where there is no conviction for an offence of a sexual nature on a prisoner's record, the inclusion of and weight attributed to such evidence may well raise issues of fairness to the prisoner (*R (McKeown) v. Wirral MBC* [2001] 2 Cr App R 12, para.57). It is unclear how such issues are to be resolved at a stage where a lifer's minimum term has already been served. Indeed, it is questionable whether leaving rape on file where there is no other or previous conviction for a sexual offence is ever in the public interest.

That "accuracy and reasonableness of plea plays an important part in ensuring fairness to both the accused and the victim" (Attorney General's guidelines on accepting pleas (2009)

A2) is plain, particularly in deeply sensitive rape and murder cases. In the interests of both parties, therefore, it is hoped that the DPP's guidelines will ensure that rape charges truly are left on file only in the most exceptional and appropriate cases.

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