DRUG FACILITATED SEXUAL ASSAULT

Sexual Offences Act 2003

Rape

(1) A person (A) commits an offence if-
(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
(b) B does not consent to the penetration, and
(c) A does not ***reasonably believe*** that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

74 "Consent"

For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.

75 Evidential presumptions about consent

(1) If in proceedings for an offence to which this section applies it is proved-
(a) that the defendant did the relevant act,
(b) that any of the circumstances specified in subsection (2) existed, and
(c) that the defendant knew that those circumstances existed,
the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(2) The circumstances are that-
(a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
(b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
(c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;
(d) ***the complainant was asleep or otherwise unconscious at the time of the relevant act;***
(e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;
(f) ***any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of***

causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.

Rape and Alcohol

Proposal to clarify the law on consent and alcohol and create a new statutory definition of capacity to consent were brought forward following landmark case where a student was cleared of rape. The alleged victim said she could not remember having sex. After her evidence, the prosecution barrister, Huw Rees, said the prosecution would abandon the case. "Drunken consent is still consent. She said she could not remember giving consent and that is fatal for the prosecution's case."

However proposals are now being reconsidered after quashed conviction by the appeal court on “drunken consent” ruling stated changes are unecessary. Sir Igor Judge, president of the Queen's bench division of the high court, said the court's view was that the Sexual Offences Act 2003 "sufficiently addresses the issue of consent in the context of voluntary consumption of alcohol by the complainant".

Sir Igor and two other senior judges issued the guidance while giving their reasons for quashing the conviction of a 25-year-old computer software engineer, Benjamin Bree, for raping a 19-year-old student after a night of binge drinking with friends from Bournemouth University.

Ruling on the issue of consent in such cases, Sir Igor said: "If, through drink - or for any other reason - the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and subject to questions about the defendant's state of mind, if the intercourse takes place, this would be rape.

"However, where the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape."

ADVISORY COUNCIL ON THE MISUSE OF DRUGS

Drug facilitated sexual assault

The 2001 British Crime Survey showed that of those who had ever been subjected to a serious sexual assault, 5% stated that they had undergone vaginal or anal penetration with a penis whilst drugged in some way; and 15% admitted to penetrative sexual activity whilst incapable of giving consent due to alcohol.

The low reporting rates, to the police, by victims of serious sexual assault are likely to be even lower than for those subjected to drug facilitated sexual assault. The reasons include

- feelings of guilt or self-blame because of prior voluntary ingestion of alcohol and/or drugs;
- confusion and uncertainty, as a result of memory impairment due to the drug's effects, about what happened;
- reluctance to make accusations without personal knowledge, or memory, of the circumstances leading to the assault.

The drugs

Two groups of drugs – central nervous system depressants (alcohol, benzodiazepines, GHB) and central nervous system stimulants (cocaine, MDMA) – have been implicated, in the literature, with drug facilitated sexual assault.

UK forensic experience

Forensic Science Service Study describes toxicological findings in 1014 cases of alleged DFSA from 2000 to 2002. Alcohol, alone or with an illicit drug and/or medicinal drug, was present in 46% of cases. Illicit drugs were detected in 34%.In the instances where alcohol was detected, back extrapolation suggested that, at the time of the alleged incident, 60% had levels in excess of 150 mg/100ml and 40% had levels above 200 mg/100ml. Levels above 150 mg/ml are associated with intense intoxication and memory impairment.

Operation Matisse was a 12 month study by the police, the Forensic Science Service and the Sexual Assault Referral Centres, in 6 areas of England. It investigated 120 police-referred victims who had reported a drug facilitated sexual assault within the previous 72 hours.

Although in 119 out of 120 cases alcohol had allegedly been taken before the offence, it could be detected in only 62 (52%) instances. There were marked time delays, between the incident and sample collection, where victims stated that alcohol had been consumed but none was detected. In 41 of the 62 instances where alcohol was detected one or more controlled drugs were also present.

Conclusions

Drug facilitated sexual assault, including with alcohol, is a significant problem in Britain and the Council recognises two forms :

- Proactive drug facilitated sexual assault involves the covert or forcible administration of an incapacitating or disinhibiting substance, by an assailant, for the purpose of sexual assault.
- Opportunistic drug facilitated sexual assault involves sexual activity, by an assailant, with a victim who is profoundly intoxicated by his or her own actions to the point of near or actual unconsciousness, and thus lacks the capacity to consent.

The incidence of drug facilitated sexual assault is unclear. Many victims fail to report the incident for reasons discussed above. Where victims do report the incident, the elapsed time may be too long for drugs to be reliably detected in blood or urine. This particularly applies to alcohol and GHB.

The evidence suggests that the most common weapon used in drug facilitated sexual assault, whether proactive or opportunistic, is probably alcohol.

Although no case of drug facilitated sexual assault using flunitrazepam was identified in either the Forensic Science Services study, or in Operation Matisse, other benzodiazepines appear to have been used as weapons.

Other controlled drugs – especially cocaine and GHB – appear to have been used as weapons in some instances of drug facilitated sexual assault.

Recommendations

The Council considers drug facilitated sexual assault to be no less coercive as forcible sexual assault: both remove the capacity to consent. The Sexual Offences Act (2003) makes it an offence to administer any drug with intent to commit a sexual offence against them. Although this provision covers proactive drug facilitated sexual assault it fails to provide protection against opportunistic drug facilitated sexual assault. The Council is uncertain as to whether the law could be strengthened in this respect, but recommends that the Home Secretary seeks advice from the Government's law officers.

The Association of Chief Police Officers, in consultation with the Forensic Science Service, should issue further advice to ensure that appropriate samples of blood and urine are obtained from potential victims of drug facilitated sexual assault, at the earliest possible time, using the "early evidence kit" or other appropriate sampling techniques. In particular, this advice should emphasise that the collection of urine samples should not await the arrival of a forensic medical examiner. Advice on the collection of hair samples should also be included. All samples should be saved and tested for alcohol as well as drugs.

The Department of Health should ensure that "early evidence kits" are available in all Accident and Emergency Departments. The Department of Health should also consider developing, and disseminating, guidance to staff in Accident and

Emergency Departments and Sexual Assault Referral Centres, to improve the management of victims of alleged drug facilitated sexual assault. Health ministers may wish to ask the National Institute for Health and Clinical Excellence (NICE) to develop such guidance.