

SLEEP-FACILITATED SEXUAL ASSAULT: AN ANALYSIS OF CASE DATA FEATURING FEMALE AND MALE VICTIMS OF RAPE

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Abstract

This note addresses a form of rape that is neglected in the scholarly literature. This form of offending occurs when a male uses his penis to vaginally, orally or anally penetrate a female or male who is sleeping at the time of the penetration. The data on which this note is based is gathered from a total sample of 441 police rape investigation case files, from which 39 of these sleep cases are identified. The note examines some of the characteristics of these cases, investigative trajectories through the criminal justice process and the behaviour of suspects. Given the neglect with which this issue has been treated, it is argued that further research would be beneficial so as to improve our understanding of the rape of those who are sleeping and the criminal justice and police response to this problem.

Keywords: rape; victims; suspects; sleep; police investigations.

[A] INTRODUCTION

This note addresses a form of rape that is neglected in the scholarly literature. This form of offending occurs when a male uses his penis to vaginally, orally or anally penetrate a female or male who is sleeping at the time of the penetration. This is a form of sleep-facilitated sexual victimization that has received only limited previous attention (Moore 2021). To some, it might seem impossible that such rapes could occur without waking the victim, but the filming of such attacks by offenders means such denials lack credibility. Further, recognition of the rape of sleeping women dates back to the 17th century (Chapman 1991: 137)

* Professor Phil Rumney sadly passed away on 4 September 2022. Phil was a dedicated academic who made significant contributions to the study of sexual violence and victimization over the course of his life and career. He will be very much missed by his family, friends and colleagues.

and recent research confirms the existence of this form of sexual violence (Taylor & Shrive 2021). This note uses police case file data to further the understanding of this form of sexual offending and its treatment within the criminal justice system. It examines case characteristics, police investigation strategies and the behaviour of suspects. Given the neglect with which this issue has been treated, it is argued that further research would be beneficial so as to improve our understanding of the rape of sleeping victims and the police response to this problem. The note proceeds by explaining the study methodology.

[B] STUDY METHODOLOGY

This note provides new data based on a study of 441 police case files involving rape investigations that occurred over a two-year period in two policing areas featuring male and female complainants who were 14 years' and older at the time of reporting. Studies featuring data that is derived from police records have the potential to reveal vital information about many elements of criminal offences, investigative approaches and criminal justice outcomes, though are reliant upon good initial record-keeping and are subject to imperfections (McPhee & Ors 2021). The project received university ethical approval and all data has been anonymized. For this note, a case file data search was conducted to find cases where complainants alleged they were asleep when being vaginally, anally, or orally penetrated by a male using his penis. A search was also conducted of the data to uncover cases in which knowledge of such attacks was found in some other way, for example, by a third-party disclosure or an admission by the suspect. In addition, the data was searched for references to 'sleep', 'woken', 'incapacitated', 'unconscious'. Some cases resulted in multiple convictions and, to avoid double counting cases in which there was more than one conviction, the most serious crime in terms of maximum sentence was counted. This search for sleep cases produced 39 'crimed' cases and one that is not included in the list of recorded (crimed) offences because under the Home Office counting rules 'additional verifiable information (AVI) is available that *determines* that no notifiable offence has occurred' (emphasis in original) (Home Office 2021: C2). In order to avoid the inclusion of other types of case, such as those involving drug-facilitated sexual assault, a separate search was conducted using terms, including: 'spiking', 'needle', 'alcohol', 'drink', 'drug' and a range of so-called 'date rape' drugs, including Rohypnol and gamma-Hydroxybutyric acid (GHB). A small number of such cases were

found in the complete sample of cases (9).¹ Separating out these cases increases confidence that the 39 crimed sleep cases were not spiking cases. Further, the complainants themselves raised no suspicions that they had been the victims of spiking, and there was an absence of such evidence in the available data. As such, the following analysis is based on data yielded from the 39 crimed sleep cases and 1 cancelled sleep case.

[C] SLEEP CASES

The medical literature has recognized the possibility of a woman being raped while asleep, as early as 1669 (Chapman 1991: 137). Indeed, there is long-standing evidence of bodily penetration or sexual assault occurring while a victim is sleeping in the research literature on male sexual violence against women (Roberts 1989: 78; Russell 1990: 45, 111, 238; Lees 2002: 54-55; Taylor & Shrive 2021), woman-to-woman sexual violence (Girshick 2002: 78, 81) and the rape and sexual assault of males (O'Brian 2011: 95; Cunningham 2021). This literature makes brief reference to the experience of victims with few studies examining larger sample sizes (Taylor & Shrive 2021). We have been unable to find any previous research that has examined sleep-facilitated rape cases through the criminal justice process.

Table 1 indicates that in this sample most suspects were identified, which is perhaps unsurprising given that most sleep cases involved people known to each other (see Table 2). From the sample of 39 crimed cases, 4 complainants were male (10.2%) and 35 were female (89.7%). A large proportion of the suspects in the sample of cases were arrested and denied the allegations when questioned by the police.

In 35 of these cases complainants were woken by the suspect penetrating them with his penis and sometimes touching them in other ways. In the remaining four cases the complainants were entirely unaware that they had been vaginally, anally or orally penetrated by the suspect, with these cases coming to light via suspect disclosures to third parties, the police and/or electronic device searches. The examination of suspect electronic devices, previous criminal history, complainant and witness interviews, CCTV and toxicology evidence were all pursued by officers. A large proportion of suspects were arrested (82.5%), 3 suspects fled the country and in the remaining 3 cases the complainants did not support

¹ Of the 9 spiking cases, 8 were crimed and one case was removed from the list of recorded offences on the ground that under the Home Office counting rules 'additional verifiable information (AVI) is available that *determines* that no notifiable offence has occurred' (emphasis in original) (Home Office 2021: C2).

Table 1
Sleep case attrition (n=40)

Stage	Number	Percentage
Reports to police	40	100
Crimed	39	97.5
Suspect identified	37	92.5
Arrest	33	82.5
Charge	18	45.0
Reached court	17*	42.5
Guilty of any offence	8	20.0
Guilty of rape	4	10.0

* Of these cases, one was re-tried after the first jury could not reach a verdict. The prosecution was later discontinued after the complainant withdrew co-operation. The second case involved a prosecution for rape that had not reached trial at the time the case file data was collected.

Table 2
Relationship between suspect and complainant (n=39)

Suspect	Number	Percentage
Stranger†	13	33.3
Husband/partner	11	28.2
Acquaintance	7	17.9
Friend	4	10.2
Family	4	10.2

† In this note a stranger is defined as a suspect who met the complainant within 24 hours of the alleged rape.

a police investigation and no arrest was made. In 4 of the 8 cases that resulted in conviction for rape or another offence, electronic evidence assisted the police in a variety of ways. This included a case in which the use of photos posted on social media following a party enabled police to identify a suspect who was subsequently convicted and a case in which photos found on the suspect’s phone featured a sleeping complainant being penetrated by the suspect. The use of electronic data in this way fits the idea of the ‘offender-centric policing’ model in which the behaviour of suspects before, during and after the alleged offence is scrutinized by the police and Crown Prosecution Service (CPS) (Rumney & McPhee 2021).

The focus on suspect behaviour emphasizes the importance of identifying predatory or opportunistic conduct, including the timing and location of the alleged offence. In this context, the targeting of sleeping victims strengthens the legal case that the complainant did not consent to penetration and that there is an absence of a reasonable belief in consent. Indeed, section 1(1) (3) of the Sexual Offences Act 2003 makes reference to ‘any steps’ taken by the suspect to ‘ascertain’ whether the complainant has consented. In sleep cases, no such steps have been taken and complainants have no opportunity to actively consent and exercise their autonomy to indicate agreement or refusal (Rumney & McPhee 2021: 427). Male entitlement has been identified as an important concept in understanding many forms of sexual aggression, including rape (Bouffard 2010). The sense of entitlement demonstrated by suspects in sleep cases is palpable, with complete disregard being shown for the interests of victims and their welfare.

As indicated in Table 2, most suspects were known to the complainants (66.6%) and included husbands, family members, boyfriends and acquaintances. Ten of the crimed sleep cases (25.6%) involved a complainant and suspect in a marriage or relationship that included a history of domestic violence and/or sexual violence involving the same suspect.² This is of importance because evidence suggests that when marital rape occurs it commonly occurs more than once (Painter 1991). Recent research involving the male partners of women has come to a similar conclusion (Taylor & Shrive 2001: 24). Given that such attacks can occur without a victim’s knowledge, this enables an offender to rape many times. In one case for example, reported by *The Independent*, a woman was woken by her husband as he raped her and a subsequent police search uncovered 316 videos featuring rapes and other acts of sexual violence that he had previously committed against her without her knowledge (Buchanan 2015). In the current study, of those cases in which there was a previous history of domestic violence there were six cases involving a total of 19 rape allegations. The remaining cases involved single rape allegations. In one of these cases, the police examined the suspect’s phone that had been used to send an apology to the complainant after she had been woken while he penetrated her. The suspect admitted sending the text but claimed he had mistyped the message. During the investigation, a relative of the complainant came forward and accused the suspect of rape. He was subsequently convicted of rape in the first case and sexual assault in the other.

² The police case files contained previous allegations made by the complainant against the suspect, as well as intelligence reports suggesting a history of physical and/or sexual violence. In only one case was such a history absent.

The sleep cases are illustrative of the importance of an offender-centric investigative approach that considers suspect behaviour in the context of victim vulnerability, including the timing of the offence (eg targeting a sleeping victim), location of the alleged offence (eg a private location in which the suspect's behaviour is unlikely to be seen) and 'use of drugs and alcohol to disarm the victim' (CPS Toolkit 2015: 1). The CPS Toolkit on Vulnerable Victims notes that complainant 'vulnerabilities might support rather than detract from an allegation' (ibid). Sleep is an important factor to take into account when considering the idea of victim vulnerability to male violence and as a means of strengthening an allegation. Section 74 of the Sexual Offences 2003 states that a 'person consents if he or she agrees by choice, and has the freedom and capacity to make that choice'. There can be few better examples of the absence of choice and the freedom and capacity to make such a choice than when a victim is sleeping. Rook and Ward note that the 2003 Act represented a 'step backwards' in that under the prior common law 'if a complainant was asleep or unconscious for any reason at the time of penetration, she was incapable of consenting' (Rook & Ward 2021: para 1.327). This statutory arrangement further hinders the ability of the police and prosecution to build a case strong enough to present to a jury. In many instances suspects and defendants will dispute the complainant's claim that they were sleeping or that sex took place at all. However, with a focus on how a suspect may 'disarm' a victim when sleeping, an offender-centric approach may shift attention to the actions and *mens rea* of the suspect.

One case from the files with a history of domestic and sexual violence revealed an example of poor reasoning by an officer in stating that it would be:

difficult to secure a prosecution as the victim states she woke up (several times with her partner penetrating her). However, at no point does she call the police immediately nor does she ask him to leave or leave herself.

The comments of the officer are little more than victim-blaming and, as such, are irrelevant to the credibility of the complainant's allegation. Victims of sexual violence are often reluctant to disclose abuse to anyone, including the police. Further, there is abundant evidence that victims of rape delay reporting (Kelly & Ors 2005: 43; Feist & Ors 2007: 25) and failing to leave can be for a wide range of reasons, including: fear of the suspect, economic dependency, lack of alternative housing or childcare concerns.

There was some evidence from the data that suspect behaviour differed based on the relationship with the complainant. For example, there was a

group of 12 cases (30.0%) that involved a pattern of behaviour by strangers and acquaintances. In this group of cases the complainant would agree to share a room, flat or house for the night—usually because of the lateness of the hour—but sex was not part of the arrangement, yet during the night the complainant would wake to find the suspect touching and penetrating them. It is unclear whether this behaviour was opportunistic or pre-planned, but does fit with our growing understanding that sex offender behaviour is influenced by situational factors that sex offenders may exploit in order to offend (Rebocho & Gonçalves 2012). Research has found that '[s]exually aggressive men have higher levels of general and sexual entitlement' than men who are not sexually aggressive (Beech & Ors 2006: 1642; Bouffard 2010). In a broad sense, of course, all of the behaviours discussed in this paper can be described as entitled—the use of sleep is a means by which an offender can exercise control and penetrate the bodies of others. Some of the suspects in the sample were opportunistic in their behaviour with little or no pre-planning, others, however, penetrated their victims as part of a pattern of controlling behaviour and long-standing domestic abuse. In terms of other underlying motivations for this type of offending, these behaviours 'are sometimes discussed in the context of somnophilia; a paraphilia which involves the wish to have sex with 'an unconscious, sleeping or comatose person who is unable to respond' (Pettigrew 2018: 302). Research suggests that somnophilia takes different forms, including consensual and non-consensual somnophilia (Deehan & Bartells 2019), though it should be acknowledged that there is much less research available on this sexual paraphilia compared to others.

[D] CONCLUSION

The rape cases discussed in this note point to a form of sleep-facilitated victimization that involves the targeting of predominantly female victims. This is a new, small-scale study and, as with all police case file data studies, the findings cannot be assumed to apply to all police force areas generally. The note does, however, raise a number of important issues for further exploration, including the prevalence of this form of offending and its treatment by criminal justice professionals, particularly in cases in which there has been a previous history of domestic violence. The data suggests that such cases may involve complainants where there is a history of repeat offending. Further, the data suggests that suspects may be targeting vulnerable complainants by offering to share accommodation. The data suggests also that it is not only drugs and alcohol that are utilized to 'disarm' victims and facilitate abuse (CPS Toolkit 2015: Table 1).

Sleep is also a means of targeting vulnerable victims and survivors. As such, it is an issue that requires further attention from policymakers and criminal justice professionals. It is hoped that scholars will, in turn, examine the way sex offenders target sleeping victims, irrespective of sex, and consider their history and the means by which they perpetrate their crimes.

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Legislation

Sexual Offences Act 2003