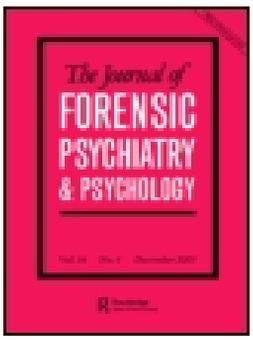

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Sexsomnia – a forensic psychiatric challenge – a case report

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ABSTRACT

In rare penal cases, a defendant makes a claim that he or she was asleep at the time of an alleged crime. This article discusses a case of alleged sexsomnia where a man claimed that he had been asleep during a sexual encounter (rape) with a woman. The question that often arises during an investigation and in court is how complex a behaviour is someone able to perform and still be asleep? To assist the court in answering this question, forensic psychiatric experts may be appointed. But the experts were not present during the act and must therefore consider each case on the basis of the available information and existing research. This paper provides a brief overview of the research regarding sexsomnia. It will also discuss what kind of information is important to elaborate in these cases in order to clarify the premises for the experts' conclusions to the court.

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KEYWORDS Criminal law; forensic psychiatry; forensic evaluation; parasomnia; sexsomnia; sleepwalking; somnambulism

Introduction

Occasionally, courts handle cases where a defendant claims that he or she was asleep during an alleged crime. Cases concerning sleep-related violence (SRV) and sexual behaviour in sleep (SBS), also called sexsomnia or sleep sex, are a medico-legal challenge to the courts. SBS has been clinically described by case reports and is considered a distinct variant of sleepwalking (Shapiro, Trajanovic, & Fedoroff, 2003).

The question that usually arises is, How complex a behaviour can someone perform and still be asleep? Myriad behaviours such as punching, kicking,

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leaping, destruction of property, or serious injuries to a sleeper, bed partner or others, have been reported in connection to persons who allegedly have been in a state of sleep (Moldofsky, Gilbert, Lue, & MacLean, 1995; Zadra, Desautels, Petit, & Montplaisir, 2013). Even driving (Pressman, 2011) and committing homicide (Broughton et al., 1994; Nofzinger & Wettstein, 1995; Podolsky, 1959) while asleep have been reported. SBS is reported to range from pronounced sexual vocalizations, (violent) masturbation, fondling another person, to complex and assaultive sexual acts including oral vaginal and anal penetration (Ebrahim, 2006; Ingravallo et al., 2014; Zaharna, Budur, & Noffsinger, 2008). As there is a limited number of cases of sexsomnia, case reports need to be published.

This article describes a case of claimed involuntary intercourse due to sexsomnia. We describe how the case was handled in a forensic psychiatric context and subsequently in the legal proceedings. The case illustrates several medico-legal dilemmas and how they were solved by the forensic experts and finally by the court.

The legal dilemmas

The foundation of penal law is that any reasonable doubt should benefit the defendant. Criminal cases require a very high degree of convincing evidence, that is, beyond reasonable doubt, before a fact can be assumed that entails punishment. It is often difficult to prove whether a person has acted in a given psychological state at a given time. Therefore, the courts often appoint forensic psychiatric experts to assist in such cases. However, experts can only give their professional advice based on the same evidence as the court has access to. In addition, there are not many sexsomnia cases, and the court has limited legal literature to rely on. In order to obtain information about how courts handle such cases, we obtained one Norwegian and seven Swedish cases (Table 1). These cases illustrate how courts have handled such cases in the past.

Despite different legislation in the two countries, the cases had several common denominators. In all but one case, the defendant had consumed alcohol before the alleged act. In all the proceedings, (forensic) experts were used by the courts to give advice regarding sleep disorders. In the Swedish cases, the same expert was used in six out of seven cases.

Background

SBS: sexsomnia

According to the International Classification of Sleep Disorders, third edition, SBS is classified as a parasomnia (International Classification of Sleep Disorders – Third Edition (ICSD-3) Online Version, 2014). The parasomnias are further classified as either non-rapid eye movement (NREM) parasomnias or REM sleep

Table 1. Verdicts of seven Swedish and one Norwegian case of claimed sexsomnia.

Case nr.	Year of verdict	Accused	Complainant	Offence	Defendant intoxicated	SA[a] or SS[b]	Expert in case	Verdict	Reason given by court
1	2011	♀, 42	♂ < 18	Touching/fondling a boy's penis for about 15 min after restraining him with her body during the night. Accused claimed to have no memory of this and that she must have slept during act	Yes: Alcohol 3 gl. Wine 2 gl. Beer Stillnoct (uncertain)	Yes: SA, but no former episodes of SS	Yes: Treating psychiatrist stated: Typical for persons suffering from SA is: family history, use of Lithium, stress, snoring, apnea and restless legs. Defendant meets these criteria	Acquitted	Act committed during SA. Documented manic depressive and SA disorder as stated by the treating psychiatrist
2	2012	♂ 38	♀[c]	Vaginal penetration. Did not finish since complainant woke up and stopped him. Defendant claimed that he slept at the time of the act	Yes: Alcohol – amount not specified	Yes: Episodes of both SA and SS reported	Yes: JH[d] stated: It is possible to conduct a sexual act as described in this case	Acquitted	Act committed during somnambulism. Earlier episodes of SA and SS documented
3[e]	2012	♂ 30		Vaginal penetration. Defendant claimed he slept at the time of the act due to SA	Yes: Alcohol – amount not specified	Vaguely: Some in family, no former episodes of SA by defendant	Yes: Two forensic psychiatric experts. Doubt, but act did probably not occur during state of unconsciousness	Convicted: Two years and five months of prison	Act not committed during state of unconsciousness
4	2014	♂ 26	♀[c]	Vaginal penetration and use of fingers of the woman he slept next to. Defendant claimed that he slept at the time of the act	No	Yes: One episode of SS reported by former girlfriend and SA reported by mother	Yes: JH & LL[f] stated: It is possible to carry out a complete sexual intercourse when sleeping the way described in this case	Acquitted	Act committed during SA. Heredity reported and defendant had former episodes reported of SA and SS
5	2014	♂ 28	♀[c]	Vaginal penetration. Defendant claimed that he slept at the time of the act	Yes: Alcohol 5 gl. Beer 1 gl. Liquor during evening	Vaguely: One female friend thought that defendant slept while kissing her	Yes: JH and LL stated: Based on description of the case, no data suggest a SA behavior. Unlikely SS	Convicted: Two years of prison	No evidence of SA or SS. The expert did not find evidence of SA in this case. Information of SA from defendant given late in investigation

(*Continued*)

Table 1. (*Continued*).

Case nr.	Year of verdict	Accused	Complainant	Offence	Defendant intoxicated	SA[a] or SS[b]	Expert in case	Verdict	Reason given by court
6	2015	♂ 29	♀[c]	Vaginal penetration. Defendant claimed that he slept at the time of the act	Yes: Alcohol 9 gl. Beers during evening	Yes: According to defendant several episodes of SA	Yes: JH stated: It is not unlikely that the defendant acted in his sleep. The described circumstances do not exclude such possibility	Acquitted	Act committed during SA. Court found that the defendant had a former history of SA and that this episode was SS
7	2015	♂ 19	♀[c]	Sexual molestation; use of fingers into the woman he slept next to. Defendant claimed that he slept at the time of the act	Yes: Alcohol – amount not specified	Yes: Few episodes SA but never SS	Yes: JH stated: Found nothing specific in the description of the case which speaks for SA	Convicted: Community service 80 h	Based on expert statement defendant did not display SA or SS. Defendant could recall episode. Act not due to SA
8	2015	♂ 27	♀[c]	Attempted rape, vaginal penetration, but interrupted. Defendant could not remember that he had committed such act and claimed that he must have slept at the time of the act	Yes: Alcohol 'Lots of' Beer Several 'shots', (liquor)	Yes: SA in family, no reports that defendant had earlier episodes of SS	Yes: JH stated: SA present in family. Defendant denied act altogether. Incongruent with SS	Convicted: Two years of prison	Act not committed during SA or SS. Defendant tried to excuse and deny episode. Was not confused when interrupted

[a]SA: Somnambulism.
[b]SS: Sexsomnia.
[c]Age of complainant not revealed in verdict due to secrecy.
[d]JH: Professor of psychiatry and specialist in sleep disorders.
[e]The Norwegian case.
[f]LL: Specialist in sleep medicine.

behavioural disorder. The latter is usually an early sign of neurodegenerative disorders and mostly occurs late in life. The hallmark symptom is unconscious behaviour late in the night as a result of damaged inhibition of musculature during REM sleep.

NREM parasomnias are always observed early in the sleep period when the slow wave sleep pressure is most pronounced. However, a recent Norwegian study has also demonstrated that circadian rhythm misalignment is also associated with NREM parasomnias in general (Bjorvatn, Magerøy, Moen, Pallesen, & Waage, 2015). We have not been able to identify further studies that have studied the relative contribution of slow wave sleep pressure and circadian rhythm to the probability of experiencing an episode of parasomnia.

The NREM parasomnias are further sub-classified into disorders of arousal: confusion arousals, sleepwalking, sleep terrors and sleep-related eating disorder. Sexsomnia is classified as a clinical subtype of confusion arousal or sleepwalking depending on the observed behaviour. Behaviour seen in these disorders mostly appears in the first half of the night and may be complex. Moreover, such behaviour is characterized by a lack of cognitive inhibition and is seldom recalled. Prevalence declines with age, and familial clustering has been described. NREM parasomnias may be triggered by other sleep disorders such as snoring or periodic leg movements or endogenous triggers such as pain or a full bladder. Common exogenous triggers are sleep deprivation and the use of a variety of drugs and alcohol (Popat & Winslade, 2015). SBS is most often diagnosed as a sub-type of a confusion arousal disorder or sleepwalking. A diagnosis of NREM parasomnias may be made without an objective sleep registration. However, a polysomnography is often performed in legal settings in order to identify co-morbid sleep disorders.

Background of the forensic psychiatric assessment

Different countries have differing legislation regulating which psychiatric states exclude criminal responsibility. In Norway, forensic psychiatry is regulated by both the Penal Code and the Criminal Procedure Act (CPA). It is the court as a neutral body that appoints forensic psychiatric experts to conduct forensic examinations. The general mandate given to the experts is to investigate whether a defendant was legally insane at the time of a crime according to three conditions listed in the Penal code Section 20: Psychosis, strong disturbance of consciousness or severe mental retardation (IQ < 55).

The case in question concerned possible unconsciousness/strong disturbance of consciousness[1] and is the only condition that will be described in detail here.

Unconsciousness is the inability to encode and store episodic memory due to organic or psychological reasons, but a person may be able to move and perform more or less complex acts. A defendant may not have been aware of

his or her actions when making the particular movements that constituted an (illegal) act. So, unconsciousness implies loss of (bodily) control, rational thinking and the ability to mutually interact with other persons. Whereas Norwegian law uses the term 'unconsciousness' (see note 1), other countries such as Australia, Canada and New Zealand use the term 'automatism', that is, involuntariness comprising a complete or considerable lack of capacity in the defendant to control his conduct (Yeo, 2002). Nevertheless, the notion that an individual can commit a criminal act while being unconscious or due to automatism is controversial (Cima, Nijman, Merckelbach, Kremer, & Hollnack, 2004; Grøndahl, Værøy, & Dahl, 2009; Jelicic & Merckelbach, 2007). Unconsciousness is both difficult to comprehend and complicated to evaluate (Merckelbach & Christianson, 2007). A claim of amnesia can be seen as a conscious defence strategy because it is easy to fake and hard to disprove (McSherry, 1998; Parkin, 1997).

An expert must assess whether a claimed amnesia is genuine, examine the causes of amnesia and if a clinical condition satisfies the criteria for the legal condition termed 'strong disturbance of consciousness'. As a consequence of this, experts' conclusions as to whether a defendant experienced such a disturbance at the time of a crime can be of vital importance to criminal proceedings. One of the possible conditions that can be regarded as unconsciousness is a sleep disorder such as sexsomnia.

The case and the subsequent legal proceedings

The case in question proved to be complicated, with both forensic psychiatric and legal challenges. The alleged act took place at a private party in 2011, but it was 2016 before the legal process ended with a ruling from the Supreme Court.

Ethics

Two of the present authors (PG and ØE) were expert witnesses in this current case. All the information was based on the written verdicts, which is official, and can be retrieved by any citizen after the names of those involved in the case have been removed. In order to be absolutely sure that we were allowed to write up this case, we asked the Oslo University Hospital Data Inspectorate whether a formal approval was required. We were advised to contact the judge in the case. He answered that we could write the manuscript if we restricted reference to the case based on the written verdict. The judge did not consider it necessary to read the manuscript before submission.

Case report

A was a single employed male in his thirties. After an eastbound flight, crossing six time zones without any sleep medication, he went straight to a party. This

was the first time he met the complainant (*B*). Alcohol was consumed for many hours. Late at night, the defendant asked if he could stay the night because he otherwise would have a long way home. This was accepted by the female host. She shared a flat with two other women, who were also present. One of their female friends also stayed overnight. It was agreed that the latter and A should sleep in the bed with the complainant in a 120 cm double bed. The third person that shared the bed, however, couldn't sleep and moved to another room in the apartment. B had made it clear to A that she wasn't interested in any sexual invitation.

Suddenly, early in the morning, B woke up experiencing A attempting to cuddle with her. She tried to push him away and asked him to stop. She was, however, hampered in her attempts because A put his fingers in her mouth moaning: 'I must, I just must'. According to the victim's statement, she tried to bite him. The biting did not seem to be hard, as the defendant did not remove his finger or show any marks of any wounds. The biting did not make the defendant change his behaviour significantly, and he seems to have continued to communicate with the victim. B was afraid of choking and signalled that she surrendered. She established eye contact and A relaxed slightly. B then tried to move A's fingers out of her mouth, but he stopped her, holding her hands tightly, staring hard at her and saying; 'No …, no …, you mustn't do that'. He then managed to take off his trousers with one hand and moved his penis towards B's mouth. The attempt was unsuccessful because he still had his fingers in her mouth. Instead, he removed her trousers and pants and penetrated her, still with his fingers in her mouth. Finally, she sensed that his penile tone changed after he had ejaculated and became more relaxed, and she managed to scream. A rose quickly, and put on his pants in a hurried and clumsy way when the others from the adjoining rooms entered the room. One of them witnessed that the defendant spoke somewhat incoherently, and she thought that he might be drugged. It seemed to her like he had been caught after having done something wrong, taking a 'hands-up' position. Another witness also described him as speaking incoherently, as if he had realized that he had done something wrong. She asked him if they had had sex, and he answered yes, but said that it had been voluntary. The police arrived, and A told them that he and B had had a short intercourse, and that it had been voluntary. He admitted that he had been attracted to B and had been somewhat flirting. He also said that the intercourse had been 'short and pathetic'. The police officer asked if he had done something wrong, and A answered that the only wrong thing he had done was that he had been unfaithful to his girlfriend. In the formal interrogation later the same day, he could not recall any intercourse and found it unlikely, as he usually remembered when he had sex.

The defendant explained that the reason for admitting the sexual encounter in the first place was that he had hoped to 'get out' of the situation with the police by just admitting what he thought the police wanted to hear.

Nevertheless, he was arrested and taken into custody for 24 h. He subsequently repeated the same story to the police investigators the next day. But in later interrogations, he altered his explanation. In his new version, he stated that he couldn't recall anything of the alleged episode. He claimed that the reason for this amnesia was that he must have acted in a somnambulistic state, as he had suffered from a somnambulistic sleep disorder since he was a child. He recalled that he had attended about 10 sessions with a psychologist due to stress reactions in connection to his work. He and the therapist had talked somewhat about his somnambulism. He had received a few exercises to improve his sleep and reduce the frequency of his somnambulistic episodes, which did help for a while.

A was charged with rape. His DNA was found on B's body, and due to a possible insanity defence based on his alleged sleep disorder, the court appointed two experts to conduct a forensic psychiatric examination of the defendant.

The forensic examination

The two appointed experts read the documents that followed the case and had three meetings with A. They also interviewed B, in addition to a former girlfriend of A and also his mother. To obtain a complete picture of A's psychological profile, they also applied several structural instruments.[2]

A's girlfriend told the experts that they had occasionally had intercourse while he was asleep, that he seemed more detached when it happened and that she could stop him whenever she wanted. In her last testimony in the Court of Appeal, she said that sometimes she was not able to stop him.

His mother explained both to the experts and in court that the defendant had been sleepwalking since he was a child and gave several vivid examples of such behaviour. As well, two of the defendant's friends testified that they had seen the defendant walking and talking in his sleep.

The experts concluded according to the given mandate that A probably had had some degree of reduced consciousness at the time of the act due to the influence of alcohol and little sleep. They also found that the defendant had a sleep disorder of parasomnia, NREM type. However, they concluded that A was not to be considered as unconscious at the time of the alleged act. The basis for their conclusion was twofold. First, he had changed his explanation of what had happened. His first version contained a detailed explanation of what had happened that night. In addition, he had appeared to one of the witnesses to be somewhat ashamed and had tried to minimize that he had done anything wrong. Later, he changed his story. In the second version, he did not remember anything and referred to his somnambulism. The second basis of the experts' conclusions was how B had described the vividness of A's behaviour. He had adjusted his body, been talking, had looked at her directly, had held her tightly and shown purposefulness, and she had made several futile attempts to stop

him. However, the experts stated that they were in some doubt about their conclusion. The foundation for their doubt was that A fulfilled the diagnostic criteria of a somnambulistic sleep disorder.

The court proceedings and the final legal judgement

This case was also complicated for the courts. The case would take place over three trials and one appeal (to Supreme Court). It involved all three levels of the court system: The District Court, the Court of Appeal and Supreme Court. In none of the three court proceedings was there any real question that the alleged act (actus reus) had taken place. This was due to both the findings of A's DNA in B's body and the vivid testimony of B and other witness statements. The defendant also admitted that he must have been the person behind the sexual act. But in court, he stated that he could not recall anything of the act due to his sleep disorder. So the question was whether A was unaccountable (mens rea) according to the penal law due to an episode of somnambulistic disorder at the time of the crime.

The District court

The District court consists of three members: one professional judge and two lay judges.

After the explanations of the defendant and the witnesses, the forensic psychiatric experts presented their assessment and conclusion that they did not find that A was unconscious at the time of the act.

The majority, the two lay judges, ruled that the defendant was not somnambulistic at the time of the act. They argued that the defendant had changed his history about what had happened, and, as they wrote in their decision:

> Out from an overall assessment of the statements from the experts, the degree of force and coercion used, ref. physical wounds in the complainant's mouth afterwards, and her (B) testimony that she saw the defendant as awake makes it impossible that this took place in a state of sleep.[3]

Such use of force was considered to be an indication that the defendant could not have been asleep during the act. Consequently, the majority found that A could be held responsible and punished. The minority, the professional judge, did not agree. He believed that A had been sleeping and committed the sexual act due to his somnambulistic disorder. The judge found that it was unreasonable to believe that the defendant would first admit to the intercourse and then deny it unless he really believed that there had been no intercourse. Accordingly, the judge argued that the most likely explanation was that A had actually been sleeping. The judge also referred to an American expert witness called by the defendant's lawyer who explained that there are in fact people who can remember what they have done during sleepwalking. The judge considered that it was deeply irresponsible for a man with sexsomnia to share a bed with

the complainant. Nevertheless, the professional judge had to rule according to the majority of the court members.

The defendant was sentenced to three years in prison, one year suspended. The defence appealed this ruling at once.

The initial hearing in the Court of Appeal

The Court of Appeal consists of 3 professional judges and 10 (lay) members of a jury. After the conclusion of the proceedings, the jury considered that the defendant had not been unconscious during the act. Therefore, they ruled that A was accountable and consequently guilty. Two of the three professional judges, however, disagreed with the jury and set aside the ruling, as they are obliged to do if they considered the verdict not to be legally justified. Because of this, the case had to be handled once again in a new Court of Appeal.

The second hearing in the Court of Appeal

A second handling in the Court of Appeal involves three professional judges and four lay judges. In addition to the two experts appointed by the court, the defendant's lawyer called the same American expert of sleep disorders who stated that it is possible to remember from sleepwalking, and a Swedish expert[4] of sleep disorders who explained that acts of rape can be conducted in somnambulistic states. Both these experts made their statements during phone calls. The prosecutor called another Norwegian forensic psychiatric expert who explained in court that complex behaviour is impossible during somnambulism. One of the lay judges stated that there was so much doubt in the case whether A had been sleeping or not that the doubt should benefit the defendant. Six of the seven judges, however, found that the defendant had not been unconscious during the act. He had been direct, had used coercion and force, had performed complex behaviours such as undressing himself and the complainant, had stared, talked and forced her and had adjusted his body when B tried to avoid him. The court ruled that A's behaviour, as explained by the experts, was not compatible with being unconscious. He was therefore found guilty and sentenced to the same punishment which he had been given by the District Court: three years in prison. However, one and a half years (six months more than the District Court) was suspended due to the lengthy investigation and court proceedings.

The Supreme Court

The defence appealed to the Supreme Court. The Supreme Court declined without further reasoning to open the case, thereby leaving the matter legally enforceable.

Discussion

Cases with possible unconsciousness are difficult to assess, since the defendant claims to have acted in a given psychological state at a given time. The experts are unable to be sure whether a defendant's claim is true. On the one hand, they should exercise professional scepticism regarding assertions made by any defendant that he or she had a particular illness at the time of a criminal act that can provide exemption from punishment. On the other hand, experts should never lose sight of the possibility that an individual did actually suffer from a (statistically) rare condition at the time of the crime. Confirmatory bias ought to be avoided in either direction.

Sexsomnia is seldom used as a legal defence, and no tidal wave of accused seeking acquittals due to sexsomnia has so far materialized (Shapiro, Mixon, Jackson, & Shook, 2015). In order to assess the validity of the assertion that a defendant was sleeping during a sexual offence, experts have to take into account details from several sources and assess whether (1) the defendant has a somnambulistic disorder, (2) the defendant was in a somnambulistic state when the act took place and (3) the (somnambulistic) state in question is, within the conditions of the penal law, a necessary condition for regarding the person as unaccountable.

The forensic dilemmas

This case proved to be challenging for several reasons. First, the defendant actually changed his story. He initially admitted that he and the complainant had had a short and voluntary intercourse, but this explanation changed after several police interrogations. He then stated that he could not remember any sexual encounter and that he must have been in a somnambulistic state. When witnesses entered in the room, after the rape, the accused (A) could have tried to make it look like he was confused and sleeping at the time of the sexual aggression, that is, made an attempt of deliberate malingering. On the other hand, it is not uncommon for people with somnambulism to confabulate about what happened. A clear dilemma was which of his versions one should give the most weight to. His second version – that he acted in a somnambulistic state – could, as mentioned, be seen as a deliberate defence strategy. But such a view was complicated by the second challenge: Information from the defendant's girlfriend, mother and friends clearly indicated that he actually had a NREM sleep disorder. This implied that the experts had to find indications of whether the defendant had been acting out symptoms of sexsomnia at the time of the act or not. The reduced consciousness that was observed after the act argues in favour of sexsomnia. However, the complicated behaviour that was observed and the fact that the act happened early in the morning argues in favour of it having been a deliberate action. Sexsomnias have been observed to occur

at all times during the sleep period. However, it is reasonable to assume that sexsomnias, as other NREM parasomnias, are much more likely to occur early in the sleep phase because the slow wave sleep pressure is at its highest early in the night (Horváth, 2016). We therefore believe that the timing of the act in relation to the circadian rhythm may be of importance for the court in future cases. However, none of the two court-appointed experts or the three experts appointed by the parties explored the fact that the defendant had travelled across six time zones eastbound only hours prior to the act. Accordingly, it can be argued that the act occurred early in the night according to his biological clock. A third dilemma was the level of alcohol intake and the possible influence of fatigue after a long flight. Both can trigger a somnambulistic episode (Ebrahim, 2006; Zaharna et al., 2008).

In addition to several hours interviewing the defendant, the experts talked to the defendant's girlfriend, mother and friends. They also interviewed the complainant who described in detail the behaviour of the defendant during the act. Her description indicated a person that had acted in a very sophisticated way physically, verbally and with his apparent direct use of eye contact.

Testing did not provide sufficient information either to confirm or disprove any kind of severe pathology. In addition, even if testing results had indicated pathology, they would only have verified that the pathology was present, but not that he had been influenced by the illness at the time of the act.

Taken together, the case did not contain decisive or indisputable information that enabled the experts to make a clear and concise conclusion in their advice to the court. Their solution was to state their conclusion in the report and in court, (i.e. that the defendant did not act in a somnambulistic state at the time of the act), but point out that the case nevertheless contained a number of uncertainties.

The forensic advice

The forensic psychiatric experts made an evaluation of the defendant according to the given mandate and provided this in a written report and orally during the three trials in the case. The evaluation provided the court with several premises, including the fact of his somnambulistic condition and vulnerability factors that could trigger a somnambulistic condition. In addition, a thorough review describing whether his acts conformed with expected somnambulistic behaviour was provided.

The court is sovereign in its weighting of evidence and does not have to agree with experts' advice. It appeared that the most important evidence in this case was the witness statement from the complainant. This was in line with and of importance to the reasoning of the experts. The ruling from the district court emphasized the alteration of A's explanation and the explanation from B. It did not directly refer to the experts as a basis for their decision on guilt. The

reasoning behind the ruling of the jury in the court of appeal is never given, but in the appeal case (i.e. the third trial), the majority also emphasized the change in the defendant's explanation. In their reasoning, they referred to the statements of the experts several times. It is a rare event that judges set aside a verdict made by a jury in Norway. This illustrates that the case was complicated, as is also shown by the fact that five experts were used for advice.

It is interesting to note that in the two first trials the lay judges did not believe that the defendant could have acted in such an advanced way and still be asleep. But the professional judges in two courts of competent jurisdiction stressed their doubts about the case and found against both the legal judges and the forensic experts.

It appears that the legal system can benefit from forensic psychiatric expertise. Not in the form of monolithically firm conclusions, but from the premises given in the forensic reports and testimonies. Here, the legal actors may find information that they can use as part of their decision-making. This is illustrated by Table 1 in which the (Swedish) courts followed the advice given from the same court-appointed expert. This also occurred in this case, as many of the points in the verdict had been raised by the forensic experts.

Conclusion

Criminal acts like sexual offences that are claimed to be due to sleep disorders are rare. There are several signs that may indicate a sleep disorder in the form of somnambulism and possible sexsomnia: (1) a history of sleepwalking disorder in the family; (2) somnambulistic behaviour displayed by the defendant witnessed by others early in the night; (3) with regard to sexsomnia, defendant's being confused upon wakening and not having any need to excuse him or herself because of being unaware that anything wrong has happened (i.e. lack of memory of the sexual act); (4) use of psychoactive substances and fatigue which might also trigger sexsomnia and (5) somnambulistic behaviour almost always occurs early in the sleep period. However, the importance of circadian misalignment is not known. Polysomnographic tests and other structural instruments are apparently not often used. The reason may be that such instruments only provide indirect evidence. That is, they only measure some clinical indications at the time of the testing but not at the time the defendant was said to have acted in his or her sleep.

In the current case, the verdict in the court was that the defendant was not unconscious and therefore considered guilty after the third court proceeding. This was mainly because the defendant initially had acknowledged and partly described the intercourse, but later withdrew that explanation and claimed to have acted while asleep. In addition, the defendant had displayed very complex behaviour and use of force and coercion, indicating purposefulness behind the sexual act. Finally, the complainant reported what she considered to be clear

interactions with the defendant during the act. So, as in many cases concerning questions regarding possible unconsciousness/automatism, the case was not clear-cut. On the contrary, no less than three court proceedings with five experts appeared to be necessary in order to arrive at a final verdict.

Notes

1. In the new Penal Code from 2005 the term is 'strong disturbance of consciousness', but to simplify the use of language, we will refer to this condition as 'unconsciousness' in this article.
2. Minnesota Multiphasic Personality Inventory (MMPI-2), Hospital Anxiety and Depression Scale (HAD), Becks Depression Scale (BDI), SCL-90-R, Bergen Insomnia Scale and The Epsworth Sleepiness Scale. The forensic experts considered conducting a polysomnographic test. However, the laboratories that do such tests could not do so before the written reports had to be submitted to the court. Furthermore, the sleep experts working at the laboratories considered that it was unlikely to demonstrate a somnambulistic state based on a one-night observation. They also supported our assessment that the behaviour was unlikely to be due to a somnambulistic state.
3. Translation made by the authors.
4. The same expert, JH, who appeared in six of the seven Swedish cases in Table 1.

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