Forensic psychiatric evaluation of sexual offence victims

Harald Jung*, Mihai Ardelean

Abstract: The role of the forensic medical expert in the field of forensic psychiatry in criminal cases is usually related to offenders’ examination in terms of evaluation of their discernment. Within this article we approach the tasks of forensic psychiatry in victims of sexual offence examination in order to bring elements of differentiation between rape and statutory rape in case of minors under the age of fifteen. In Romania the legal age of consent to sexual activities is 15 years. The inability or impossibility of the victim to defend or to express his/her will must be evaluated carefully since the presence of this criterion concludes the allegation of rape instead of sexual act with a minor. Although minor persons consent is considered invalid by Law if aged fewer than 15, it is important to establish the possibility or ability to express their consent. The state of impossibility to express the will may be either temporary (e.g. alcohol and/or drug intoxication) or permanent (mental retardation). The question of extreme youth is an issue of debate, with imprecise criteria of determination. The ethical concern of autonomy respect versus obligation of the society to protect its vulnerable members against undesired sexual acts is also discussed.

Key Words: statutory rape, consent, forensic psychiatry, expertise

Sexual offences raise difficult juridical and expert interpretation problems, concerning both the author and the victim. During the year 2010 as many as 1680 sexual offences have been investigated in Romania, among them 731 rapes, 760 cases of sexual acts with minors, 39 sexual perversions, 82 sexual corruptions and 42 incest cases [1].

The (current) Romanian Penal Code defines rape under article 197 as “sexual intercourse of any kind with someone of opposite or same sex by compulsion, or by taking advantage of his/her inability to defend or to express their will”, while sexual act with a minor is set forth in article 198: sexual intercourse of any kind, with a person of opposite or same sex under the age of fifteen [2]. The (new) Penal Code, adopted in 2009 and expected to come into force during the year 2012, brings some clarifications regarding the rape: “sexual intercourse, oral or anal sexual act with someone, by coercion, making it impossible to defend or express their will, or taking advantage of this state” [3]. If a minor under the age of 15 is involved in a sexual intercourse, the offender may be prosecuted either for sexual act with a minor (article 198) or for rape (article 197), depending on fulfillment of the criteria “taking advantage of his/her inability to defend or to express their will”.

The burden of proof lies on prosecution. In order to establish the existence of a health condition of the victim that might have determined the inability to defend or express his/her will, the prosecution may ask for an expert opinion. The psychiatric evaluation in both criminal and civil lawsuits is performed in Romania by a three-member commission, one forensic pathologist and two psychiatrists [4].

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We present two cases of victims that were referred to the psychiatric commission from the Institute of Legal Medicine Tîrgu Mureș, to be evaluated in the way of their mental state and ability/inability to express their will for sexual acts.

**Case presentations**

**Case 1**

Fourteen years old girl (actually two weeks before turned fifteen) went together with a group of boys and girls aged 16 – 23 to a vacation home; she decided to go with them by car, knowing one of the girls. During the first night a male member of the group proposed her to have intercourse, she refused motivating she is virgin and at menstruation; later she accepted to have oral sex with the same person. She denies alcohol beverage consumption and also states she was not forced, threatened or beaten. Psychological examination revealed IQ=82, personality in development with disharmonic traits, affective – emotional immaturity. Psychiatric examination revealed good orientation, clear and lucid consciousness, clear thinking and perception.

We concluded that at the moment of the sexual act the complainant was not in a status of inability to express her will concerning the particular act.

**Case 2**

Thirteen years old girl living in an orphanage left together with a female friend and two men in another town where they came into separate motel rooms. Our victim declares she refused sexual relationship but was forced to have vaginal intercourse. When she turned home she complained to the police and was examined at the Institute of Legal Medicine three days after the assault. No physical injuries have been found and genital examination revealed old defloration. To our question about her sexual life she answered she had multiple intercourses for one year; she had her first menstruation at the age of 12.

Present psychological examination revealed IQ=85, personality in development with disharmonic traits, educational deficiencies, behavioral disorders. Psychiatric examination revealed good orientation in all senses, clear and lucid consciousness, clear thinking and perception.

**Discussions**

Every person has fundamental rights which may not be infringed, unless there are special grounds justifying such an infringement. The European Convention on Human Rights mentions that “everyone has the right to respect for his private and family life … men and women of marriageable age have the right to marry and found a family” [5]. One of the central principles of modern bioethics refers to the respect for autonomy, defined as personal self-governance: personal rule of the self by adequate understanding while remaining free from controlling interferences by others and from personal limitations that prevent choice [6]. The right of the individuals to make free will decisions on their course of life is also defined as self-esteem or dignity [7]. However, personal autonomy including the right to sexual relationships must be balanced by the duty of society to protect vulnerable people from abuse. A special situation occurs when the perpetrator is boyfriend or husband of the victim, defined as intimate partner violence either sexual or not; trust, confidentiality and consent issues must be carefully handled because of the victim’s anxiety generated by the close relationship to the aggressor [8].

As it results from the definition, autonomy requires the presence of critical mental capacity, including understanding, intending and voluntary decision-making capacity. Sexual interactions are by definition serious undertakings that are fraught with grave risks of injury and harm to the reputation and self-esteem of vulnerable girls; in some authors opinion, when girls consent to sex for “foolish and mistaken reasons” we should conclude that they lack the capacity for meaningful consent [9]. In most countries a legal age of consent for sexual relationships has been established, under this age it is considered that due to insufficient psycho-physical development the person is not able to give proper consent. In Romania this age is fifteen, consequently the Penal Code incriminates sexual act with a minor under the age of 15 as a criminal offence. In table 1 we present several countries provisions regarding legal age of consent to sexual acts [10].
The minimum age at which a person is considered to be legally competent to sexual acts (legal age for sexual activities) should not be confused with the:

- Age of majority (in Romania 18 years);
- Age of criminal responsibility (in Romania two limits – 14 and 16 years);
- Marryable age;
- Voting age;
- Driving age, etc..

Assessment of capacity to consent to sexual relationships is not a task of forensic expertise in criminal charges, since a legal age of consent is defined. However, in civil cases (e.g. marriage capacity, personal relationships) it might come into discussion and following factors should be evaluated:

- understanding of what is involved in sexual intercourses;
- basic knowledge about pregnancy and sexually transmitted diseases;
- the kind of relationship;
- experienced pleasure or gratifications.

In criminal cases the essential question is not the validity of consent, but the possibility or impossibility (inability) to express it. This means, under age of fifteen the consent given by the complainant is not a valid one (from the legal point of view) but if he or she was able to express her/his will, the offence is not rape but sexual act with a minor. Circumstances associated with inability or impossibility to express their will may be temporary or permanent and some are listed below:

- conditions under influence of alcohol or drugs;
- coma or significant alteration of consciousness;
- hypnosis;
- moderate or severe mental retardation;
- learning disabilities;
- very young age (extreme youth).

When talking about drugs we should include, beside major drugs of abuse like opiates or cannabis, various plants that can produce ecstatic frenzy or erotic hallucinations: mandrake, jimson weed seeds in combination with alcohol, bay laurel and other ethno-botanic derived substances [11, 12, 13]. Interview by the commission must reveal any situation associated with the impossibility of the vulnerable victim to comprehend what was happening to her/him during the sexual approach. Another legal requirement is that the perpetrator should have taken advantage of that state, namely he knew or could reasonably be expected to know of the victim’s condition and that this made the victim unable to refuse.

Concerning extreme youth, there is no medico-legal limit; the younger the victim is the more probable the inability to consent is. Factors like onset of puberty, first menstruation, and previous sexual relationships demonstrate stages of experience and therefore less chances of “not realizing what is going on”. Specific questions should establish knowledge level about and understanding the nature of sexual activities.

<table>
<thead>
<tr>
<th>Countries</th>
<th>Age of legal consent to sexual relationships</th>
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<tbody>
<tr>
<td>Spain</td>
<td>13</td>
</tr>
<tr>
<td>Albania, Austria, Bosnia, Bulgaria, Croatia, Estonia, Germany, Hungary, Italy, Lichtenstein, Macedonia, Montenegro, Portugal, Serbia</td>
<td>14</td>
</tr>
<tr>
<td>Denmark, France, Greece, Poland, Romania, Slovakia, Slovenia, Sweden,</td>
<td>15</td>
</tr>
<tr>
<td>Andorra, Armenia, Belgium, Finland, Georgia, Latvia, Lithuania, Luxembourg, Moldova, Netherlands, Norway, Russia, Switzerland, Ukraine, England, Wales, Scotland</td>
<td>16</td>
</tr>
<tr>
<td>Cyprus, Ireland</td>
<td>17</td>
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<tr>
<td>Turkey, Malta</td>
<td>18</td>
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</tbody>
</table>

Table 1. Legal age of consent to sexual activities in Europe
Conclusions

Inability to express his/her desire (choice) concerning sexual relationships may be a core issue in differentiating sexual offences with minor victims.

This concept is different from the valid consent, which is a legal provision related to the age of the victim. In Romania the age of legal consent is 15.

Medico-legal evaluation of inability or impossibility to express the victims will must focus on temporary or permanent conditions determining a severe perturbation of the awareness that must be known or should be obvious to the perpetrator. Expressing the consent disproves the charge of rape, though the given consent might not be valid if the victim is underage (less than 15).

References

2. *** The Romanian Penal Code