

**DRUG FACILITATED SEXUAL ASSAULT:
A GUIDE FOR CANADIAN SEXUAL
ASSAULT INVESTIGATORS, FORENSIC
MEDICAL EXAMINERS, AND
PROSECUTORS**

The Making a Difference Canada Project

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Drug Facilitated Sexual Assaults: A Guide for Canadian Sexual Assault Investigators, Medical Forensic Examiners, and Prosecutors

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INTRODUCTION

The purpose of this guideline is to assist and support the efforts of Canadian sexual assault support workers, investigators, forensic medical examiners and prosecutors.

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DRUG FACILITATED SEXUAL ASSAULT: A CANADIAN POLICE INVESTIGATIVE GUIDELINE

By Sgt. Deb Jolly, Edmonton Police Service

INTRODUCTION

Drug facilitated sexual assault (DFSA) can pose challenges for the investigator, however, understanding the salient issues, as well as implementing a systematic and integrated approach can mitigate many of these challenges.

Public misperceptions, spawned at times by sensationalized media articles, persist in terms of drugs favored and modus operandi utilized by suspects in the commission of the offence. We most often hear about the *proactive perpetrator*¹, who surreptitiously deposits a drug into the drink of an unsuspecting victim, yet it is the *opportunistic perpetrator*¹, one who specifically targets the already severely intoxicated victim, whom we most often encounter as investigators.

Alcohol is by far the most common drug found in victims of DFSA. That does not mean to say, however, that cases involving GHB, Rohypnol and the other so-called “date rape” drugs do not occur. We know they do. One of the challenges DFSA investigators encounter is the rate which the body processes these substances. Some are undetectable as little as 10-12 hours after ingestion.

Several of the investigative steps taken by the DFSA investigator will be consistent with those of the sexual assault investigator, as both require the investigator to prove a sexual assault occurred. The DFSA investigator will also focus on the issue of consent, gathering evidence to prove the victim could not consent to a sexual act due to severe intoxication by drug, including alcohol.

PURPOSE

This document provides guidelines for investigators of cases involving suspected drug facilitated sexual assault in Canada with a view to presenting the best possible evidence for effective prosecution in a court of law.

DEFINITIONS

Drug Facilitated Sexual Assault

A drug facilitated sexual assault occurs when a suspect commits a sexual act upon a person who is intoxicated by a drug, including alcohol, to the extent that said person cannot provide consent to the sexual act. In essence, the suspect utilizes incapacitating substances as a weapon to facilitate the sexual assault.

¹The concept of proactive vs. opportunistic DFSA emerges from “Operation MATISSE”, Assoc. of Chief Police Officers, England., 2006

It is not necessary to prove the covert or forcible administration of an incapacitating substance by the suspect to prove a drug facilitated sexual assault has occurred; rather if this element can be proven the additional charge of *Administering Noxious Thing* should be considered.

Administering Noxious Thing ²

“Every one who administers or causes to be administered to any person or causes any person to take poison or any other destructive or noxious thing is guilty of an indictable offence.” (Section 245, Criminal Code of Canada)

Consent ³

“The voluntary agreement of the complainant to engage in the sexual activity in question”.

“No consent is obtained, for the purposes of sections 271, 272 and 273, where

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
- (b) the complainant is incapable of consenting to the activity;
- (c) the accused counsels or incites the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e) the complainant having consented to engage in the sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity”.

Admission Blood

Blood products collected for a medical purpose by health care workers upon a victim’s arrival at a health care facility.

GUIDING PRINCIPLES

1. An integrated approach among professionals in the community to confronting DFSA provides the best possible opportunity for a successful criminal investigation and prosecution.
2. The investigator of DFSA should allow the *evidence* to lead the investigation, thereby ensuring value judgments and/or personal biases do not cloud the issues.

² Definitions, Criminal Code of Canada, 2008

³ Definitions, for the purposes of sections 271, 272 and 273, Criminal Code of Canada, 2008

3. The investigation should be “victim driven” meaning the needs of the victim shall supercede those of the criminal investigation serving to maintain the victim’s security and wellness, and allaying fears of further victimization.

EVIDENCE COLLECTION

File Assignment

In some jurisdictions, a patrol investigator may respond to the initial complaint and carry the investigation through to its conclusion while in others a specialized sexual assault investigator will assume investigative responsibility after the initial response of a patrol investigator. Reviewing a case file with experienced sexual assault investigators will assist in ensuring all investigative avenues available have been considered.

Rapport Building

Establishing rapport with the victim is of paramount importance to the investigation and, therefore, should be considered a priority for investigators. A kind, reassuring word can go a long way. Providing information and answering questions about the process the victim is about to embark upon can put him/her at ease. The investigator should disclose that he/she will conduct only those investigations or enquiries that the victim wishes to participate in, and will not force them to do anything they do not wish to do. This alleviates fears of further victimization.

Sexual Assault Forensic Examination Kit

Sexual Assault Forensic Examination Kits are available to all police investigators in Canada. The investigator must obtain the written consent of the victim prior to the forensic examination and taking of forensic exhibits. In some instances, the investigator may have to wait several hours before the victim is capable of consenting to the forensic examination as he/she may still be under the influence of an incapacitating drug, including alcohol. Be patient. Once consent is obtained, ascertain from the physician/sexual assault nurse examiner what the victim disclosed in relation to the occurrence. This will put the investigator in a better position to make suggestions as to additional exhibits that might be secured in addition to those normally collected. For example, if it is disclosed that the victim scratched the suspect’s face, ensure fingernail scrapings are secured. The exhibits gathered during the forensic examination can provide potential evidence of the suspect DNA within, or on the body of, the victim, thereby assisting in proving that the suspect engaged in sexual activity with the victim.

A physician or sexual assault nurse examiner will conduct the sexual assault forensic examination. This examination will always be conducted in private, between the physician/sexual assault nurse examiner and the victim. At the conclusion of the examination, the kit will be turned over to the forensic identification member or the investigator who will go through each item contained within the kit, mark it for evidentiary purposes, and seal it with security tape. If the investigator is taking custody of the kit, he/she will make necessary arrangements to deliver it to a forensic identification member who will in turn arrange for proper, secure storage. In the absence of a forensic

identification member, the investigator will follow approved practices for the storage of the kit.

Toxicological Evidence

The singular most common form of physical evidence the investigator should consider gathering, with consent, in a suspected drug facilitated sexual assault occurrence is the collection of blood and/or urine for the purpose of toxicological examination. Drugs most commonly associated with DFSA include ethyl alcohol, central nervous system depressants including GHB and the benzodiazepines and hallucinogenics, including Ketamine, and MDMA/MDA. ⁴ The investigator should access the most current scientific information available on time lines, symptoms, collection methods and storage preferences when considering the possible collection of toxicological exhibits (see pg. 26-27 for details).

Collection vessels for blood and/or urine will be supplied by the health care facility. The less time that has elapsed between the sexual assault occurrence and the collection of the exhibits, the greater the possibility of detecting a foreign substance. In most circumstances, the investigator will acquire blood products drawn from the victim by the individual performing the forensic examination. In the case where an investigator has forgotten, or simply does not have the opportunity, to acquire blood products during the forensic examination, the admission blood should be considered. This is blood product drawn from the victim by health care staff for a medical purpose. It can be seized either by consent of the victim, or by search warrant. For example, a victim arrives at the health care facility in an unconscious state, perhaps due to severe physical trauma or drug ingestion even though the sexual assault forensic examination will have to wait, investigators may seize, by search warrant, admission blood drawn from the victim, collected by health care staff for a medical purpose. Remember, the likelihood of detecting a drug, including alcohol, is higher the nearer to the offence time it is captured. Ask the health care staff how many days the “admission blood” will be held prior to its destruction. Usually, it will be a period of approximately 10 days.

In many cases, drug facilitated sexual assault investigations continue in the absence of toxicological evidence. For example evidence may be lost due to a delay in reporting, or with the receipt of negative results from the forensic laboratory. This does not mean the end of the investigation.

INVESTIGATIVE TOOLS

An array of investigative tools is available to support and strengthen the drug facilitated sexual assault case. While the following list is not exhaustive, investigators may find reviewing it helpful to confirm they have covered all investigative options available to them.

⁴ Forensic Nursing: Detecting the User of Alcohol and Drugs and DFSA, (2008)

The Victim Interview

- The medical needs of the victim will supersede the criminal investigation.
- Investigators should conduct the victim interview only when he/she is ready to provide the statement. This may mean that only an introduction and basic account of the events occurs at the hospital, and that the complete statement is provided the following day, once the victim has had an opportunity to recover. Ensure you secure enough evidence, however, to secure a search warrant if a crime scene requires examination.
- Limit the number of interviews the victim is asked to provide.
- A recorded statement can later be used to refresh memory in Court. Record if possible on DVD a pure version statement, and follow up with questions.
- The victim may make statements that are later corroborated by the suspect.
- During the interview, ascertain the amount of alcohol he/she consumed, along with the type and size of drinks. Ascertain if the victim was taking prescribed medications at the time of the occurrence and if so, what were they and what is the prescribed dosage. Ask if there was voluntary ingestion of any recreational drugs.
- Establish the victim's normal pattern of alcohol and/or recreational drug use and how these substances affect him/her.
- Conduct an interview even if the victim has no memory of the actual sexual assault. Loss of memory can be considered evidence in itself of drug, including alcohol, intoxication.

The Suspect/Accused Interview

- Investigators too often overlook this interview. Even if the suspect elects not to talk, at minimum you can demonstrate to the court that you were fair in providing both parties, the victim and the suspect, with an opportunity to tell their side of the events.
- Record if possible on DVD, the statement obtained after Charter/Caution.
- Many suspects will admit to the sexual activity claiming it was consensual, and therefore the main issue becomes consent. You will need to prove the victim was incapable of consenting due to a severe degree of intoxication by drug, including alcohol.
- Attempt to have the suspect admit the victim's severe degree of intoxication.
- The suspect may make statements consistent with that of the complainant.
- The suspect may make statements implicating him/herself, minimizing culpability, blaming the victim, or putting himself in a poor light.
- The suspect may admit to the offence.

The Witness Interview

- A witness may be able to corroborate the victim's signs of impairment.
- A witness may be able to identify the suspect.
- A witness may provide the investigator with background information on the suspect. For example, an ex-girlfriend of a suspect might disclose to the investigator the suspect's sexual paraphilias. For example: An ex-girlfriend disclosed to an investigator that she was aware that her ex-boyfriend fantasized about rape and that he had downloaded rape related materials from the internet.

- Cast a wide net when considering potential witnesses. A witness can include anyone who may have information relative to the case, and is not restricted to eyewitnesses.

Video Surveillance

- Determine if video surveillance equipment was operating at the offence location, or anywhere else along the route traveled by the victim at the time of occurrence i.e.: lounge, dance club, convenience store, bank, etc.
- If surveillance video is available, seize it either by consent or through search warrant. Note: Some urgency is required in completing this task as many outlets record over the same videotape every 24 hours.
- The surveillance footage is of excellent evidentiary value as it can not only corroborate the victim's version of events, but can provide telling images of a victim under the influence of a drug, including alcohol. For example, the victim is shown being carried out by a bouncer as he/she is unable to walk, or the victim is depicted vomiting just outside of the club, or the suspect clearly depicted.

Medical Records

- The investigator should consider seizing medical records. Normally, this is done with the consent of the victim. Some investigations may require the investigator to serve a search warrant. For example: An elderly victim suffering with a series of unrelated medical concerns, was able to consent to the sexual assault forensic examination but within days had deteriorated to the extent she was unable to provide consent for the seizure of medical records and so a search warrant was required to seize the required records.
- Collect medical records not only from the health care facility, but also from paramedics if they were involved. These records may be included with the health care facility records.
- Medical records can provide evidence in terms of observations made by medical staff, statements made to health care staff, injuries sustained, and a time-line of events.

Media

- The media should be used to the investigator's advantage. Still images produced from surveillance footage can be released to the media in an effort to identify persons of interest or suspects. Images of wanted persons can be released to the media encouraging suspects to turn themselves in.
- Additional witnesses to the occurrence can be developed through media exposure.
- Investigators can utilize the media to warn the public about a suspected trend in the community involving cases of drug facilitated sexual assault.

One Party Consent Warrant

- A one party consent warrant allows the investigator to surreptitiously listen to and record a conversation between two named individuals.
- This type of search warrant is required when an investigator is considering the use of a pre-text phone call. With this investigative technique, the investigator and victim produce a script (one that is plausible under the circumstances), contact the suspect by phone, and engage in a (scripted) conversation about the day, time, and location of the offence and the incident itself, while the call is being recorded. While the suspect may not admit to the offence, he/she may make incriminating statements. For further information on using pretext phone calls, see www.makingadifferencecanada.ca
- The investigator is best advised to acquire the consent of a crown prosecutor prior to execution of a pre-text phone call.

Search Warrant

- Things to search for might include medical prescriptions, pill vials, literature relating to DFSA, medications, items corroborating what the victim disclosed might be found, photographic images, computers, cell phone (images). The sky is the limit – simply ensure the grounds exist for the search of said articles.
- Places to search might include residences, nightclubs, vehicles, and/ or other locations identified by the victim, witnesses, or suspect(s).
- The investigator may consider using a production order to a search health care insurance company or pharmacy for documentation. For example, if the investigator has grounds to believe Temazepam prescribed to the suspect was used in the commission of an offence, it might be advantageous to the investigation to secure all of the drug prescription records in the name of the suspect from a pharmacy.

Police Computer Searches

- The investigator can learn important information by searching not only his/her own police service's databases, but also those of other jurisdictions. For example, a suspect operated in various areas throughout Alberta, committing drug facilitated sexual assaults on young male victims for a 10 year period before an investigator linked all of the crimes. This information would have been missed if only local databases were searched.
- Consider gathering and reading all reports attached to a suspect's name. Even though they might be classed as a theft, robbery or trouble with man complaints, they may in fact be drug facilitated events, including sexual assaults (see scenario, pg. 14)

VICLAS Submission

Ensure either a written or computer version of ViCLAS is submitted.

EVIDENCE PRESERVATION

Continuity of Evidence

Wherever practicable, employ the assistance of a forensic identification member to collect, categorize and preserve exhibits. In the event that the investigator is the only person available to conduct these tasks, ensure the same methodology and sequencing of tasks is employed each and every time in order that the presentation of evidence in a court of law will be consistent.

When an investigation involves the execution of a search warrant, the investigator should not attempt to complete this task without assistance, either from forensic identification members or other available members. Have a plan for executing the warrant, and assign specific tasks to assisting members. One member should be assigned as the “exhibit member”, with all found items being turned over to that identified member.

All items that an investigator accepts or turns over in relation to the occurrence should be noted in his/her notebook. A simple way to mark exhibits is by using the initials of the investigator. For example, if the investigator’s name is Mary Lewis, the exhibits can be marked ML01, ML02, ML03, and so on.

Exhibits should be stored at an approved property/exhibit site. Transfer of exhibits from one location to another should be documented. Transfer of exhibits to forensic laboratories can be accomplished by hand delivery or courier service. The investigator should retain all courier receipts associated with exhibit transfer.

Investigators should follow their agency’s policy and procedure in regards to the retention of exhibits. It stands to reason that DFSA exhibits relating to a file with an unidentified suspect will be retained indefinitely.

EVIDENCE PRESENTATION

An important aspect of any criminal investigation is meeting disclosure requirements. Evidence tracking sheets provide for an accurate accounting of each and every exhibit provided to defense counsel, as well as the crown prosecutor. An evidence tracking sheet simply lists each individual piece of evidence that the investigator is turning over to defense counsel and the crown prosecutor, the date and time of transfer, exhibit number assigned, and a place for defense counsel and crown counsel to sign, acknowledging receipt of the listed exhibits. Other investigators, including forensic identification members, will complete evidence-tracking sheets for exhibits they themselves seized and turned over.

The investigator should attempt to maintain some degree of contact with the victim and witnesses between the conclusion of the investigation and the court case. This task can be turned over to a victim service advocate where practicable.

The victim and witnesses should meet individually with the investigator several days prior to the court case in order that they may refresh their memories by viewing their DVD recorded interviews. Alternatively, a written statement can be reviewed.

No one will be as familiar with the details of the DFSA file as the investigator who has invested considerable time and effort to ensure a successful resolution to, and prosecution of, the assault. It is the investigator's duty to be at the courthouse to assist the prosecutor in the supervision and organization of witnesses and presentation of the evidence.

DFSA Investigation Scenario

Scenario - Felix, a 21 year old male, disclosed during an interview that he had been taken to various city hotels, drugged with an unknown substance, anally assaulted, physically assaulted and that sexually explicit photographs had been taken of him, while in an unconscious state, which were now being posted around the city by Johnny M. in an attempt to humiliate and extort sexual favors. During the interview, Felix shed tears and was physically shaking. He disclosed Johnny M. had threatened to kill him on more than one occasion. Felix disclosed he had recently made a suicide attempt. He produced for the investigator some of the copies of the sexually explicit posters he had pulled down from outside his parents' home earlier that day. Felix was last assaulted 4 or 5 days prior to reporting, and did not wish to submit to a forensic examination or toxicology tests. Johnny M. had been contacting Felix on a regular basis via cell phone.

Investigative Steps and Tools Employed -

- The investigator conducted a victim interview.
- As the investigator had limited experience in this type of investigation, the expertise of a senior investigator was sought.
- A one-party consent warrant was written with an expectation that Johnny M. would continue to contact Felix. Johnny M. contacted Felix by cell phone, and within 45 minutes from the commencement of the surreptitious recording, made statements threatening to kill Felix if he did not meet him at a named location.
- A plain-clothes special project team set up on the named location to await the arrival of Johnny M. Upon his arrival he was arrested in the driver's seat of his vehicle.
- Incident to his arrest, Johnny M. was searched. In his left jacket pocket police members located several small pills in a crumpled up tissue, which were later discovered to be Temazepam (Restoril). Located strewn about the front passenger seat in plain view were a series of different posters depicting males, including Felix, in sexually explicit positions.
- Based on information gathered to date, a property search warrant was executed at the residence of Johnny M. Items seized included the original, sexually explicit photographs taken of Felix, as well as other young, unknown male victims, various home made photocopied posters created for the purpose of extorting Felix, multiple prescriptions in the name of Johnny M. for Temazepam (Restoril), a photocopier and several stacks of photocopy paper.
- Through a series of computer searches it was discovered Johnny M. was currently on judicial interim release pending sentencing on two different sexual assaults committed upon young male victims in northern Alberta. The investigator acquired copies of these reports and was able to determine that Temazepam (Restoril) had been the drug used by Johnny M. in committing these offences.

Johnny M. was arrested for sexual assault, assault, administer noxious thing, extortion, and uttering threats.

- The investigation continued after the arrest was made and charges were laid.
- Additional computer searches also revealed that Johnny M. had been a suspect in a series of complaints other than sexual assault – he was a suspect in trouble with man complaints, thefts, frauds, etc. Only upon acquiring copies of each of these reports did the investigator realize that Johnny M. had been drugging and sexually assaulting young men for several years. The calls would not always be classed as sexual assaults, even though they likely were. For instance, a victim of theft reported to police that an older male, known to him as Johnny M. had stolen cash from him. Upon police investigation, videotape from the local bank clearly showed the victim withdrawing cash from his account and placing it in the hands of Johnny M. The call was dismissed, but it is important to note that the initial investigator came upon this victim laying in a car, apparently sleeping, with his trousers at his knees. It was certainly possible that this victim was under the influence of Temazepam (Restoril) at the time of the bank withdrawal and was also the victim of a drug facilitated sexual assault.
- In all, 8 additional male victims of Johnny M. were located. By reviewing each and every report, the investigator determined Johnny M.'s modus operandi was to meet young male victims at a local bar and offer to purchase, ironically, a "Paralyzer" drink, into which he placed a Temazepam (Restoril) pill for the purpose of later facilitating a sexual assault, and other criminal offences.
- A victim of Johnny M., who had been assaulted 10 years prior to this scenario, suffered battery acid burns to his genitals and feet while in an unconscious state. Medical staff suggested the injuries were self-inflicted. After reporting to the hospital on several occasions with the same story and additional injuries, this victim simply gave up reporting and moved away.

This scenario supports the fact that a drug facilitated sexual assault case can move forward in the absence of toxicological evidence taken from the body of the victim. While the patrol investigator may have been skeptical at the beginning of the investigation, personal biases and value judgments were set aside allowing the evidence to lead the investigation.

Johnny M. was convicted and sentenced to federal penitentiary time.

The Prosecution of Drug Facilitated Sexual Assaults

By David O'Brien, Sr. Crown Attorney, Prince Edward Island

1.) Drugs need not be detected for a finding of guilt to be made.

The prosecution of a sexual assault involving what is commonly referred to as a date-rape drug is a difficult prosecution and will usually be resolved on the basis of credibility. However, when the police undertake a thorough investigation, convictions are possible, even though there is no forensic evidence of a date rape drug being detected and/or, without proving what drug was actually used. see: **R. v. Bell**, [2004] O.J. No. 5066, aff'd. [2007] O.J. No. 1725 (Ont. C.A.) application for leave to appeal dismissed without reasons, [2007] S.C.C.A. No. 351.

2.) An expert witness may still be required even if no drugs are detected.

It is also to be noted that even if no drugs are detected, an expert is still able to be called to testify on the ramifications of such a finding as was noted in **R. v. Alouache**, [2003] O.J. No. 5280 as follows:

5 I find that it is absolutely necessary to define the issue before me. It is to allow the Crown to expand on the negative results of the tests that were given and to permit the Toxicologist to explain that a "negative result" does not necessarily mean that the complainant is fabricating a belief that she was drugged. It would be the expert's evidence that scientifically, the lack of a finding of drug in her blood and urine is not proof conclusive that there was no such drug. It is not evidence that there was or was not any drug in her blood and urine. It is simply that the negative finding is not conclusive one way or the other.

6 Dr. Langille would testify that there exists several reasons as to why a "negative test result" is not conclusive, and amongst those reasons are:

- (a) The half life of a drug, namely, the time it takes to eliminate one-half of the drug concentration in one's blood varies depending on the type of drug as well as the fact that it is not eliminated in a straight line of reduction. It is rather eliminated in a curved line making it possible that noticeable traces of the drug might have been eliminated by the time the samples were taken.
- (b) Some 10% of the drugs that could affect one's ability to resist a sexual assault are still undetectable by modern scientific means.
- (c) The resources which are available to the Centre of Forensic Science cannot realistically speaking be made available to do all of the testing. Evidence was tendered on the application that were all of the facilities of the Centre be made available to test all of the likely testable drugs it might require approximately one month on an emergency basis while to do so as a standard routine, would likely take some 9 months of testing. This would still leave the 10% of undetectable drugs that are likely on the market.

As to whether the evidence would meet the test set out in **R. v. Mohan** (1994), 89 C.C.C. (3d) 402 (S.C.C.) for the reception of expert evidence, the Court noted in part as follows:

11 Before addressing the issue of the test, it is therefore necessary to determine the actual purpose for the reception of such evidence.

12 Defense counsel in his submissions claims the proposed evidence of Dr. Langille is an "oath helping" type of evidence, namely, that it was being tendered solely to give credibility to the complainant's statement. It seems clear that this type of evidence is not acceptable for that purpose. In *R. v. Drover*, [2000 NFCA 9](#), Roberts J.A., of the Newfoundland Court of Appeal at paragraph 35 stated:

"After a thorough review of the expert evidence, I am left with the conclusion that, whether intended to or not, its only purpose could have been to bolster the credibility of A.W., something which as indicated above, expert evidence is not permitted to do. I refer to McLauchlin J. in *R. v. Marquard* ([1993](#)), [85 C.C.C. \(3d\) 193](#) (S.C.C.), at p. 228:

It is a fundamental axiom of our trial process that the ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact, and is not the proper subject of expert opinion".

13 I certainly agree with defense counsel that were that the purpose for which Dr. Langille's evidence be given before this Jury would be inappropriate. However, I find that the reason for the proposed evidence is entirely different, namely, it is:

"To explain the scientific finding in that the testing of the blood and urine samples taken from the complainant showing negative is not indicative of a lack of drug in those samples".

14 The question that I must determine is whether the evidence or the proposed evidence of Dr. Langille meets the Mohan test.

Relevancy

15 It is the finding of this Court that the proposed evidence is very relevant to the issue before this Court. Unless such evidence is given to the Jury, the Jury will inevitably draw the conclusion that there was in fact no drug in the blood and urine of the complainant. I therefore find that it is relevant for the Jury to know that there are over 2000 drugs or types of drugs that could have been tested. I find that it is relevant for the Jury to know that they were not all tested; that only a small percentage of the available drugs were in fact tested and that that small percentage proved negative. I also further find that it is relevant for the Jury to know that, science as it presently exists, cannot test or be used to test the existence of all of the different types of drugs that could have been administered to the complainant. For reasons given above, it is relevant for the Jury to know that a negative finding of drug in the blood and urine of the complainant by the Centre of Forensic Science simply is indicative that at the time when the samples were taken, it did not contain the drugs for which the tests were administered. I find that it is not speculative or voodoo science as suggested by the defense. It is a scientific fact. It is not being tendered to show the existence or possible existence of some other drugs that might have been in the blood and urine of the complainant. It is rather simply to determine that the blood and urine did not contain the drugs for which it was tested.

Necessity in Assisting the Trial of Fact

16 It is my finding that taken the purpose for which the proposed evidence is to be tendered, it is necessary in order to assist the trier of facts in understanding the Toxicologist Report that the blood and urine tested negative. I find that if this result were given to the Jury in simpliciter, it would mislead the Jury and remove from the Jury some evidence that might assist them in determining whether or not the symptoms given by the complainant namely the description of what happened to her, if believed, is sufficient to make a finding that she had been drugged and that therefore, she was unable to resist the alleged sexual assault.

...

And further:

19 I am conscious of defense submission that permitting this evidence to go before the Jury would be highly prejudicial to the defense. I accept that there is a danger that the proposed evidence of Dr. Langille might be received as evidence to support the complainant's allegations that she had been drugged. I believe that this danger can be properly addressed in my charge and that the Jury can be properly cautioned to refrain themselves from making such inference from such evidence.

20 For all those reasons, I will allow the evidence of Dr. Langille to be introduced before the Jury at the trial of this action.

3.) Corroboration of the consumption of a drug is not required.

As was noted in **R. v. Fleming**, [2007] O.J. No. 4562 at paras. 2 – 4, the actual consumption of the drug by the victim/survivor needs no corroboration:

2 The trial judge's finding that the appellant drugged the complainant was amply supported by the complainant's evidence at trial. The complainant testified that she accepted an invitation from the appellant to have dinner with him at his apartment. After they dined and drank some beer, the complainant went to the washroom. She said that when she returned from the washroom she saw the appellant, who had his back to her, pouring something into her glass, which she assumed was beer. She stated that she began to drink what the appellant had poured for her but very quickly began to feel immobilized, disoriented and sick. In addition, her vision became blurry and distorted, the appellant's voice sounded far away, and she felt limp - like a rag doll or a dead person - although she was conscious. The complainant indicated that although she had a high tolerance for alcohol, she had never felt anything like this before and that it was not an alcoholic high.

3 As the Crown argues, this testimony painted a picture of "a rapid and over-whelming deterioration" in the complainant's ability to function, the onset of which occurred almost immediately after she began to consume the last drink poured for her by the appellant.

4 Based on this evidence, which the trial judge accepted, it was open to the trial judge to find that the complainant was drugged by the appellant. See the recent decisions of this court of *R. v. Bell* (2007), 223 O.A.C. 243, at paras. 30-37, leave to appeal to the S.C.C. dismissed [2007] S.C.C.A. No. 351; and *R. v. L.G.*, [2007] O.J. No. 3611, at paras. 5, 10 and

80. No evidence corroborating the complainant's version of events was required to support this key factual finding, which attracts considerable deference from this court. We see no basis for appellate interference with it.

4.) Basic evidence gathering remains important.

Obviously, the medical tests to prove the presence of a drug within the complainant's system is important evidence to gather. However, equally important is basic evidence collection including: documenting and photographing injuries, examining the complainant and the crime scene/clothing for DNA samples to generate DNA profiles, gathering containers in which the drugs may have been placed, the actual drugs themselves, statements from individuals who may have been with the complainant prior to or after the alleged offence or who can testify to the relationship between the complainant and the accused, which are all examples of the type of evidence which should be searched for and gathered during the police investigation.

5.) Try to ensure the testing of samples is undertaken on a timely basis.

When an analysis is required on the evidence gathered by the police, one must be mindful of the time delays involved for an undue delay may in combination with other delays, result in the sexual assault charges being stayed. For example, **R. v. Singh**, [2004] O.J. No. 224 (Ont.S.J.) wherein the delay in testing was commented upon as follows;

3. Reasons for the delay

(a) inherent time requirements of the case

17 The Crown submits that this is not a routine case. Given the circumstances surrounding the charge, the Crown required that certain tests be undertaken through the CFS and that this increased the inherent time requirements of the case. This requirement lead to a delay of almost six months representing the period of time which passed between the submission of the items for testing at the CFS and the receipt by the defence of the test results. I note at this point that while the CFS reports are dated October 4 & 5, 2001, they were not given to the defence until November 1, 2001.

18 The Crown says that a decision had to be made whether to proceed by way of indictment or summarily and the presence or absence of a **date rape drug** was central to that decision. The receipt of the CFS test results was therefore critical to the Crown's determination as to how to proceed. The Crown submits that the delay of six months in getting the test results was reasonable and forms part of the time requirement that was inherent in this case. While the Crown accepts that it is responsible for this delay, it submits that it is not unreasonable delay. In support of this position, the Crown relies on the decision in *R. v. White*, [1997] O.J. No. 2820 (Gen. Div.) where Mr. Justice Trainor said, at para. 22:

- "The 11 months taken to produce the DNA report is time that was inherent to the requirements of this case. It is not unlike the time required to obtain a legal aid certificate [case reference omitted] or the time to obtain a transcript of evidence. [case reference omitted]
- It is unrealistic to assume that government has unlimited resources with which to find [sic] the Forensic Centre so that experts are available at all times to immediately test forensic evidence and report on it, no matter what the case load from time to time."

19 The Crown also submits that, since the onus on an application such as this lies on the defence, it was incumbent on the defence to lead evidence if it wished to assert that such a delay is unreasonable. While I accept that the defence bears the onus of establishing unreasonable delay when an application is brought under section 11(b) of the Charter, I do not accept that it is necessary for the defence to adduce evidence of unreasonable delay if the delay, without further explanation, would appear unreasonable on its face. I am also mindful in this context that there is an obvious mismatch in the resources normally available to the defence and to the Crown to produce such evidence.

20 While I hesitate to disagree with one of my colleagues, I do not agree with Mr. Justice Trainor that eleven months to produce a report from the CFS is patently reasonable. I reach the opposite conclusion, that is, that such a length of time in obtaining standard test results is manifestly unreasonable. For example, such a time frame exceeds, by a month, the entire time allowed to the court system to make the actual trial available. It would also mean, if accepted, that the reasonable time frame for any case where CFS tests are necessary would be nineteen to twenty-one months for a proceeding in the provincial courts - eleven months for the receipt of test results (thereby establishing the inherent time requirement for such cases) and eight to ten months for the administrative guideline. Such a result cannot be permissible for Charter purposes.

21 I acknowledge that, in this case, the delay was only six months, not eleven. However, I am not prepared to accept that on its surface a time frame of six months for the receipt of test results is per se reasonable. Again, we are dealing here with standard tests which the CFS undertakes every day and with which it is very familiar and which it specializes in performing. We are not dealing with unusual or novel or brand new forms of testing where a requirement for lengthier periods of time would be understandable. I would consider that two to three months would be a more reasonable time to allow for such testing to be done. However, if the Crown wished to place evidence before the court that, despite what might appear superficially to be an unreasonable period of time to get test results from the CFS, it was actually a reasonable period given the number of tests requested, the time necessary to undertake the tests, the amount of staff and testing equipment available, the time for results which other forensic centres in other jurisdictions generally require and so forth, then that would be a different matter. However, no such evidence was adduced in this case.

22 I would also observe that, in this case, the evidence is that two months after the items were submitted for testing, no testing had even been started. Almost two months after that, the testing had still not been started. A further month after that, the police were advised by the CFS that some machines were inoperable and were in need of repair, apparently as a way of explaining the continuing delay. Yet, notwithstanding that advice, one day later the CFS advised the police that the test results were available. Finally, on this point, I note that no explanation is offered as to why the test reports which are dated October 4 & 5, 2001 were not provided to the defence until November 1, 2001.

23 I consider therefore that the period of six months that it took for the CFS test results to be received which resulted in the decision being made to proceed summarily, and therefore the making of the case ready for trial, was unreasonable. Rather than allowing a period of six to seven months as the time requirement inherent for this case, I conclude that a period of three to four months is more reasonable.

6.) Engage the right expert for your case.

The identifying and retaining of an expert to provide opinion evidence may be critical to a successful prosecution. As drugs can often be associated with alcohol consumption, an expert who can provide opinions with respect to the absorption and elimination of alcohol in the human body, the effects of alcohol on the human body, the chemical composition of the date rape family of drugs, the effects of date rape drugs on the human body and the effect of date rape drugs taken in combination with alcohol are the probable areas that expert evidence will need to be provided. The RCMP Forensic laboratory or similar private laboratory would obviously be a starting point to locate an expert and to ensure that an appropriate expert is identified. An individual with a pharmacological background would be the type of individual one would seek. As one can anticipate that the defence may engage an expert as well, your expert will not only be able to provide assistance on determining the strengths and weaknesses of your case, but as well, offer advice as you prepare to cross examine the opposing expert.

7.) Consent will usually be a live issue in the prosecution, be prepared for it.

Consent will obviously be an area that needs to be addressed by the Crown. The issue of consent was dealt with by the Court of appeal in **R. v. Bell**, supra., as follows:

45 Therefore, it can be understood from this passage that the trial judge did not accept that alcohol caused the complainants to lose their inhibitions and engage in consensual sexual activity with the appellant. Because it is accepted that sexual activity did take place during the night in question, the inference can then be drawn that the complainants' drugged state rendered them incapable of consenting.

46 Pursuant to s. 273.1 of the *Criminal Code*, consent to sex must be voluntary and the complainant must be capable of consenting. The Supreme Court of Canada stated in *R. v. Ewanchuk* (1999), 131 C.C.C. (3d) 481 at para. 36, "[t]o be legally effective, consent must be freely given." In *R. v. Daigle* (1998), 127 C.C.C. (3d) 130 (Que. C.A.), aff'd (1998), 127 C.C.C. (3d) 129 (S.C.C.), the Quebec Court of Appeal held that the complainant who had been drugged was not capable of giving valid consent. In so holding, the court relied on the reasons of Fish J.A. in *R. v. Saint-Laurent* (1993), 90 C.C.C. (3d) 291 (Que. C.A.) at 311:

- As a matter both of language and of law, consent implies a reasonably informed choice, freely exercised. No such choice has been exercised where a person engages in sexual activity as a result of fraud, force, fear, or violence. Nor is the consent requirement satisfied if, because of his or her mental state, one of the parties is incapable of understanding the sexual nature of the act, or of realizing that he or she may choose to decline participation.
- "Consent" is, thus, stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will.

47 It is also worth noting the decision of this court in *R. v. Humphrey* (2001), 143 O.A.C. 151, where the appeal was allowed on the basis that the jury was not properly instructed on the issue of consent. Despite this, Charron J.A. approved of the trial judge's instruction regarding the voluntary and continuous nature of consent at para. 38:

- For the sake of completeness, I also note, on the issue of consent, that the trial judge read for the jury part of s. 273.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. He

correctly instructed them that consent means the voluntary agreement of the complainant to engage in the sexual activity in question and that no consent is obtained if the complainant is incapable of consenting to the activity. To "clarify things," he told the jury that "you cannot consent if you are unconscious. The law requires consent that is conscious and continuous, i.e., during all acts. The consciousness must be continuous." No objection is taken to this part of the instruction.

48 In the present appeal, because the trial judge accepted that the stupefying substance caused the complainants to go in and out of consciousness while the sexual activity was taking place, it follows that the complainants would have been incapable of providing the necessary consent.

See also, **R. v. Fleming**, supra., at para. 7;

7 Finally, the appellant's contention that the trial judge erred by failing to consider the defence of honest but mistaken belief in consent is unsustainable. The appellant's counsel acknowledged before this court, properly in our view, that once the trial judge found as a fact, as he did, that the appellant drugged the complainant without her knowledge as a precursor to sexual activity, this defence had no air of reality and was foreclosed.

8.) Other considerations:

If an expert witness is to be called, the requirements of s. 657.3(3) of the **Criminal Code** must be complied with.

Given the growth of the immigration population to Canada, consideration should be given to using a translator to prepare both the complainant and the witness(s) as to what to expect in the courtroom and to develop a 'comfort zone' for the witnesses requiring translation services. Preparation of a list of available resource persons prior to their being called upon is advantageous.

Victim Services should be utilized whenever possible to ensure the victim/witness has a thorough understanding of the court process prior to their testifying.

The following Criminal Code provisions should be reviewed to determine if they are appropriate and/or applicable to the circumstances of your case especially if the victim/survivor is under the age of 18 years or suffers from a mental or physical disability:

- 486(1) exclusion of the public from the courtroom
- 486.1 use of a support person.
- 486.2 testimony outside the courtroom
- 486.3 appointment of counsel to conduct cross examination
- 486.4 non-publication of information that could identify the complainant or a witness
- 278.2 disclosure of a record relating to a complainant or a witness.

9.) Post trial meeting

Following the trial, the complainant should, if she/he agrees, be met with to explain and discuss what has taken place and what the outcome means to them. If a victim service worker has been involved, they should be in attendance, as should the investigating police officer if at all possible.

“DATE RAPE” DRUGS : A DRUG GUIDELINE

By Wayne Jeffery, B.Sc., M.Sc (Pharm), Toxicology/Drug Consultant with contributions from Lothar Czech, Drug Recognition Expert, and K.E. Janzen, Forensic Toxicologist, RCMP Forensic Laboratory Edmonton

The recent media attention to the topic of drug use in sexual assault has greatly increased the number of cases submitted for the analysis of blood and urine samples from victims. Accompanying the samples have been many questions from investigators and the doctors who examine the victims. Some of the most frequent questions; how long can you detect a drug? Do you prefer blood or urine? Is there any point in taking a sample after x hours?, prompted the research which is summarized in the table below.

The data is distributed with some words of caution. Investigators using this material for reference should have a basic understanding of drug metabolism and the concept of a half-life. The notes at the end of the table require careful consideration. All benzodiazepines have the ability to interfere with memory acquisition, but the ones asterisked are particularly noted for causing amnesia. The duration of effects of the drugs and the length of time they can be detected in blood and urine are based on single dose studies. Larger doses will extend these times. It must be stressed that the effects of a drug will vary with the individual's metabolism, experience, general health, the presence or absence of other drugs, etc. The length of time any substance can be detected in blood and urine is also very dependant on the sensitivity and specificity of the analytical methods employed by the laboratory. Some data was inferred from related information. Given these cautions, the table can serve as a useful guideline for sexual assault investigators.

Drug Symptom Matrix

	CNS Depressants	Inhalants	Dissociative Anesthetics	Cannabis	CNS Stimulants	Hallucinogens	Narcotic Analgesics
HGN	Present	Present	Present	None	None	None	None
VERTICAL NYSTAGMUS	Present* (High Dose)	Present* (High Dose)	Present	None	None	None	None
LACK OF CONVERGENCE	Present	Present	Present	Present	None	None	None
PUPIL SIZE	Normal (1)	Normal (4)	Normal	Dilated (6)	Dilated	Dilated	Constricted
REACTION TO LIGHT	Slow	Slow	Normal	Normal	Slow	Normal (3)	Little to none visible
PULSE RATE	Down (2)	Up	Up	Up	Up	Up	Down
BLOOD PRESSURE	Down	Up/Down (5)	Up	Up	Up	Up	Down
BODY TEMPERATURE	Normal	Up/Down/ Normal	Up	Normal	Up	Up	Down
MUSCLE TONE	Flaccid	Flaccid	Rigid	Normal	Rigid	Rigid	Flaccid
GENERAL INDICATORS	Uncoordinated Disoriented Sluggish Thick, slurred speech Drunk-like behavior and appearance Gait ataxia Drowsiness Droopy eyes Fumbling	Residue of substance around nose and mouth Odor of substance Possible nausea Slurred speech Disorientation Confusion Bloodshot, watery eyes Lack of muscle control Flushed face Non- communicative Intense headaches Dizziness	Perspiring Warm to the touch Blank Stare Difficulty in speech Incomplete verbal responses Repetitive speech Increased pain threshold Cyclic behavior Confused and agitated Possibly violent and combative Chemical odor "Moon walking"	Marked reddening of conjunctivae Odor of marijuana Marijuana debris in mouth Body tremors Eyelid tremors Relaxed inhibitions Increased appetite Impaired perception of time and distance Disorientation Short-term memory impairment Rebound Dilation	Restlessness Body tremors Excited Euphoric Talkative Exaggerated reflexes Fidgety Anxiety Bruxism Redness to nasal area Runny nose Loss of appetite Insomnia Increased alertness Dry mouth Irritability Hippus	Dazed appearance Body tremors Synesthesia Hallucinations Paranoia Uncoordinated Nausea Disoriented Difficulty in speech Perspiring Poor perception of time and distance Memory loss Disorientation Flashbacks (NOTE: With LSD, piloerection may be observed)	Droopy eyelids (ptosis) "On the nod" Drowsiness Depressed reflexes Low, raspy, slow speech Dry mouth Facial itching Euphoria Fresh puncture marks Nausea Track marks
DRUG EXAMPLES	alcohol barbiturates GHB, Valium Rohypnol Prozac, Paxil	model glue gasoline, paint toluene aerosols nitrous oxide	PCP Ketamine	marijuana hashish hashish oil marinol	cocaine crack Benzedrine meth, ice Khat, Ritalin	peyote, psilocybin LSD MDA MDMA (ecstasy)	heroin morphine Talwin Demerol methadone
USUAL METHODS OF ADMINISTRATION	Oral Injected	Insufflated	Smoked Oral Insufflated Injected Eye drops	Smoked Oral	Insufflated Smoked Injected Oral	Oral Insufflated Smoked Injected Transdermal	Injected Oral Smoked Insufflated
DURATION OF EFFECTS	1-8 hours (depending on the substance)	5 minutes to 8 hours (depending on the substance)	4-6 hours	2-3 hours	Cocaine 5-90 minutes Meth- amphetamine 4 - 8 hours	Varies depending on the type of hallucinogen, up to 12 hours	Heroin 3-6 hrs Others depends on substance
OVERDOSE SIGNS	Drowsiness, may pass out Heartbeat slows Shallow breathing Cold, clammy skin	Nausea Vomiting Heart failure Respiration can cease Coma	Bizarre, violent, self- destructive behavior Seizures Convulsions Deep coma	Fatigue Paranoia	Panic Confusion Aggression Convulsions Arrhythmia Hallucinations Coma	Long, intense, bad trip	Slow, shallow breathing Clammy skin Convulsions Coma

1.Soma and Methaqualone usually dilate pupils 2. Methaqualone and ETOH may elevate 3.Certain psychedelic amphetamines may cause slowing 4. Normal but may be dilated 5. Down with anesthetic gases, up with volatile solvents and aerosols 6.Pupil size possibly *High dose for that particular individual

DRUGS USED IN DRUG FACILITATED SEXUAL ASSAULTS - DATA SUMMARY TABLE

Data provided is for use as a general guideline only. See notes.

Drug/Generic name	Drug/ Trade Name	Appearance	Dose [mg]	Duration †	Half Life	Blood ‡	Urine
GHB * [gamma-hydroxybutyrate]		white powder or tablet or clear liquid	2500	15 min - 3 hrs	1 hr	4-6 hrs	10-12 hrs
Flunitrazepam *	Rohypnol	white tablets [round] [now with blue dye]	1, 2	30 min - 12 hrs	9 - 25 hrs	18 hrs	3-5 days
Triazolam *	Halcion	violet or blue oval tablet	0.125 0.25	30 min - 6 hrs	1.5 - 4 hrs	6 hrs	48 hrs
Lorazepam *	Ativan	white tablet [round, oblong or oval]	0.5, 1 or 2	1 - 8 hrs	9 - 16 hrs	36 hrs	3-4 days
Alprazolam *	Xanax	white, peach or lavender tablet	0.25, 0.5, 1	30 min - 7 hrs	6 - 27 hrs	30 hrs	3-5 days
Diazepam, Diastat	Valium	yellow or blue round tablet	5 - 10	20 min - 7 hrs	20 - 40 hrs	72 hrs	7-10 days
Chlordiazepoxide	Librium, Librax	white/green capsule black/green capsule	10 - 25	1 - 8 hrs	5 - 30 hrs	24 hrs +	5-7 days
Temazepam	Restoril	maroon/flesh capsule maroon/blue capsule	15 - 30	1 - 8 hrs	3 - 13 hrs	72 hrs	2-3 days
Clonazepam	Rivotril	orange or white cylindrical tablets	.5, 2	1 - 12 hrs	19 - 60 hrs	96 hrs	7-10 days
Bromazepam	Lectopam	white, pink or green cylindrical tablets	1.5, 3, 6	1 - 8 hrs	8 - 19 hrs	48 hrs	72 hrs
Nitrazepam	Mogadon, Nitrazadon,	white cylindrical tablets	5 - 10	1 - 19 hrs	17-48 hrs	72 hrs +	7-10 days
Flurazepam	Dalmane, Apo- Flurazepam	orange/ivory capsule red/ivory capsule	15 - 30	1 - 6 hrs	50 - 100 hrs	140 hrs	7-10 days
Diphenhydramine	Gravol, Nytol, Benadryl	numerous tablets and capsules	50 - 100	1 - 7 hrs	3 - 8 hrs	24 hrs	3-4 days

* Documented incidents of amnesia

† Based on a single dose. The length of time effects are experienced will vary depending on the actual dose administered, the metabolism of the individual, and with the presence or absence of other drugs.

‡ The length of time a drug or its metabolites can be detected in blood or urine will vary with the method of analysis, dose administered, metabolism of the individual, etc. Assume analytical techniques capable of detecting as little as 1 ng drug/ml blood/plasma.

± Drugs appear in the urine primarily as metabolites. The times indicated reflect the length of time metabolites are excreted in the urine, but do not necessarily imply that they can be routinely detected to that length of time.

