

Sexual assault and MDMA: the distinction between consciousness and awareness when it comes to consent

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Abstract In France, the term chemical or drug-assisted submission is usually defined as the rendering of a person vulnerable by the surreptitious administration of an active substance with the purpose of prejudicing the person or his/her possessions. If the harm is sexual assault, establishing the victim's submission involves both proving that a dangerous substance was administered, providing material evidence of the infraction (the assault), i.e. the detection of traces in a physical examination and samples, and proving the absence of consent. We report the case of a woman who was sexually assaulted after having been surreptitiously administered methylenedioxymethamphetamine. In this special case, the woman remained in a state of vigilance (conscious) throughout, so there is doubt about whether or not she consented. In other words, the ability to consent is debatable.

Keywords Drug-assisted submission · MDMA · Sexual assault

Introduction

In France, the term chemical or drug-assisted submission is defined as the “rendering of a person vulnerable by the surreptitious administration of an active substance with the purpose of harming him or her in some way other than causing death or poisoning” [1]. Chemical submission is therefore the means by which the aggressor realises the goal, be it theft or—more commonly—sexual assault. A number of legal substances can be used for this purpose, e.g. ethyl alcohol, benzodiazepines (flunitrazepam, triazolam), hypnotic drugs, anxiolytic drugs, general anaesthetics (ketamine, gamma hydroxybutyrate) and sedative anti-histamines. Illegal substances (heroin, cocaine, cannabis, lysergic acid diethylamide, amphetamines, etc.) can also be used. In general, a distinction can be made between two different clinical pictures: on the one hand, sedation or impaired consciousness [2]; on the other hand, the victim may be kept conscious because “participation” is essential [3].

Chemical submission is legally sanctioned as “minor poisoning”, with the qualification “the administration of a dangerous substance which has physically harmed another person's physical or psychological condition” [4]. This offence is added to that of the sexual assault.

The legal qualification of chemical submission means demonstrating two things: that a dangerous substance has been administered by the analysis of medical evidence (symptoms, toxicology results) and also that it caused harm. When the case is one of sexual aggression, this involves examining the genital region and the anus and searching for foreign biological materials on the victim.

In this paper, we report the case of a woman who remained aware throughout a sexual assault committed by an acquaintance after he had surreptitiously given her

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MDMA. This case poses the problem of the victim's consent, an essential part of the definitions of both sexual assault and of the goal of administering a toxic substance.

Case history

A 35-year-old woman invited a man she knew slightly to her house to carry out some minor building jobs. They drank a cup of tea, which she found particularly bitter tasting. She also drank two glasses of wine. They drank several times. She had partial amnesia of the evening. She felt unwell and experienced tachycardia, stiffness of the jaw and neck and an impression of swollen feet. She remembers having felt very "excited". She experienced pain in the lower back and groin as well as exaggerated sensibility (taste, touch and smell). Twenty-four hours after the tea, she remembered having had sexual intercourse in "flashes". The Police commissioned a forensic physician to carry out a genito-anal examination and look for foreign biological materials on her person. The physician recorded the presence of damage to the vaginal mucosa and bruises on the inner thighs. Toxicological tests on urine, blood, the remains of a cup of tea, a beer bottle and hair (sampled 1 month later) detected MDMA. The presence of MDMA in a single section of a hair shaft indicates one-off MDMA use. No alcohol was found. In the vaginal fluid, spermatozoa and male DNA were detected.

Discussion

This case illustrates the problem of the legal qualification of facts related to a case of chemical submission. In practice, chemical submission usually combines two felonious acts: the intentional administration of a dangerous substance and an infraction that was the ultimate goal of administering the substance, in this case sexual assault. In France, this constitutes two distinct legal qualifications and both of them have to be proven.

In this case, the toxicological tests proved that the substance had been administered and the aggressor confessed. That there had been sexual contact was physically established by the forensic medical examination and also by the presence of spermatozoa and male DNA. However, proof of sexual contact is not proof of sexual assault. The French Penal Code defines sexual assault as any sexual act of any nature, committed with violence, force, threatening behaviour or surprise (Article 222-22). These conditions emphasise the absence of the victim's consent. The absence

of consent should logically result from the context of the sexual contact, in this case, the admitted surreptitious administration of a dangerous substance. However, doubt may persist given that the victim remained conscious throughout. Does sustained consciousness (or even enhanced consciousness) correspond to uncompromised awareness and therefore the ability to give consent [5]?

Effects of MDMA, an entactogène, are known: It induces euphoria, increases sociability, accentuates sensory perceptions and lifts psychological and behavioural inhibitions [6]. These neurological and psychological effects compromise volition, judgement and discernment. The victim may consent and "actively participate" in an act that she would not have normally accepted. Thus, MDMA restricts freedom of choice and compromises the validity of consent. This is why administering it could affect the capacity to withhold consent, an essential element in the legal definition of sexual assault.

Conclusion

Although this case fulfils the criteria defining chemical submission, it illustrates the complexity of the penal aspects. At least two distinct acts are combined, and the commission of both of them has to be proven. However, it is difficult to evaluate the reality of the consent of a victim who remains conscious. The question therefore arises as follows: What is the differentiation between awareness and consciousness? Identification of the administered substance and knowledge of its pharmacological and toxic properties are therefore fundamental and justify an examination by a physician with expertise in forensic medicine and toxicology as soon after the events as possible.

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