

Can a Prostitute be Raped? Sex Workers, Women and the Politics of Rape Law Reform

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It is widely acknowledged in the literature that sex workers suffer a high incidence of sexual assault particularly in the course of practising their occupation (Miller & Jayasundra 2001, Day 1994, Hoigard & Finstad 1992, Lowman and Fraser 1995, Church et al 2001). Street workers – those who solicit and/or work in public places - are most at risk although sex workers who work in brothels, as escorts, privately from home and in massage parlours are also vulnerable. The main perpetrators of these sexual assaults are the male clients of sex workers, other men, pimps, and spouses and partners.

Empirical research suggests that sexual assault – in general - is one of the most under-reported crimes (Easteal 1998:6) and that sex workers are particularly likely not to report sexual assault (Boyle et al 1997, Banach 1999). There is also evidence that sex workers complaints of rape run a significantly greater risk of not being taken seriously by the police (Pheterson 1996:82). Sex workers who do attempt to lodge complaints risk being charged with prostitution offences or of being arrested on other grounds (Banach 1999) – for example, in relation to a warrant for unpaid traffic fines.

Until recently, there were other major barriers that prevented sex workers using the legal system to achieve redress for sexual assault. In common law jurisdictions like the United Kingdom – and consequently in Australia, New Zealand and Canada - evidentiary rules severely limited the likelihood of a sexual assault prosecution where the complainant was a prostitute, had been a prostitute, was rumoured to be a prostitute or was otherwise behaving 'like a prostitute' (Edwards 1981; Strange 1995:66). Women in these categories were widely regarded as 'commonly available' to men, as always consenting to sexual activity, and thus as incapable of being raped. They were also regarded as inherently untrustworthy women who posed a real danger both to individual men and the social order (Sullivan 1997). These social beliefs about prostitutes (and other sexually promiscuous women) entered the law

via evidentiary rules that determined the type of evidence that could be admitted into a rape prosecution. Evidentiary rules made it possible for even vague evidence of a woman's activity in prostitution (or of behaviour that looked like prostitution) to be admitted to court proceedings. Consequently, men accused of sexual assault were able to use this evidence of prostitution to defend themselves, to successfully undermine the credibility of the rape complainants and to avoid conviction.

This paper examines more than twenty legal reports where evidence of prostitution was presented in rape trials in the United Kingdom, Australia, Canada and New Zealand between 1829 and 1999. In the first part of this paper I examine the development of the evidentiary rules already noted and discuss their implications. The major implication, of course, was that prostitutes could not be seen in law as rape victims. In the second part of the paper I examine several recent cases where sex workers have successfully prosecuted their rapists. I discuss the implications of this, in particular the construction of sex workers as women with consensual capacity. This means that sex workers have become re-made as women vulnerable to rape. However, the terms of this are quite limited; it is only the very young and those subjected to significant (visible) violence – as well as to sexual assault – who are able to successfully pursue rape complaints in the legal system. This means that sex workers are approximating the situation of other women. I argue that rape law and the criminal justice system continues to compromise the citizenship of sex workers and all women.

Background – Prostitutes, Rape and the Law

In eighteenth century British law it was recognized that a prostitute could be the victim of rape. Writing in 1769, Blackstone suggested that even prostitutes and 'common harlots' were protected under the enlightened common law of England (Henning and Bronnit 1998:76). In practice, however, it was very unlikely that a man

would be convicted of rape on a woman known to be a prostitute (see Edwards 1981:62-65). As Henning and Bronnit (1998:76) argue:

In practice, the reputation and prior sexual experience of the complainant was a crucial factor in securing a conviction for rape. Rape trials, then as now, focussed to an unusual degree on the moral character of the complainant. Respectable women who had physically resisted their attackers and promptly complained of their abuse could seek the protection of the criminal law. But women who did not conform to this norm invariably forfeited this protection.

Rules of evidence reflected the widely held assumption that unchaste women were untrustworthy. Thus the complainants's sexual reputation and past sexual experiences were deemed to be relevant to her truthfulness and reliability as a witness including in rape trials (Henning and Bronnit 1998: 77). From at least 1829, evidence of the complainant's actual or rumoured occupation in prostitution was accepted by the courts as relevant evidence in a rape trial. Defendants could present testimony that the woman who accused them of rape was a known or 'common' prostitute, that she had in the past been a prostitute, that she associated with prostitutes or had simply indulged in behaviour which made her resemble a prostitute. At a rape trial, women could be extensively cross-examined about their sexual reputation and experience. Any evidence of prostitution was seen to be directly relevant to the issue of consent and to the complainant's credibility as a witness, including her denial of consent. The view of the courts would appear to be that evidence of prostitution made it more likely than not that a woman had *not* been raped but had consented to the sexual conduct under consideration. Clearly, once evidence of prostitution had been admitted to the proceedings, the complainants credibility was significantly compromised. Thus, a defendant was more likely to be found not guilty.

In British, Canadian and Australian case law there are numerous examples of this state of affairs. In the British case of *R v Barker* (1829), counsel for the accused was permitted to ask the complainant, Mary Anne Saunders, about her activities as a

prostitute. The judge said that – in general - evidence of acts of criminality by the complainant were *not* admissible in a rape trial. However, this did not include prostitution and:

evidence might be adduced by the prisoner to shew the general light character of the prosecutrix and that general evidence might be given of her being a street walker.

Consequently, counsel for the defence asked the complainant if ‘whether since the time of the alleged rape, she had not walked the High St at Oxford...to look out for men...and with a woman reputed to be a common prostitute’. Saunders denied these charges. Perhaps fortunately for Saunders the witness called to support the defence claim failed to show up; substantiated evidence of prostitution would have considerably weakened her case. Barker was eventually found guilty of rape but a clear precedent was also set for evidence of prostitution to be admitted as relevant in rape trials. This was to be the situation even if the evidence of prostitution was not recent; in the case of *R v Clay* (1851) a police officer was permitted to give evidence that he had seen a rape complainant soliciting in the streets of Shrewsbury twenty years earlier.

In another British case, *R v Greatbanks* (1959), the judge allowed evidence of behaviour that was simply ‘like prostitution’ to be presented. The defence in this case was that there was no rape because the woman had consented to sexual intercourse. During the trial the judge was asked by the defence to be allowed to present evidence that showed the complainant was a woman of bad sexual reputation. In allowing this evidence to be presented the judge said:

In a case other than rape such evidence would clearly not be admissible. In rape cases, however, special rules apply...evidence of intercourse with named (other) men could not be admissible in a rape case, but evidence showing that the woman was a prostitute or, as in this case, that she was a woman of loose character or notorious for want of chastity or indecency was...admissible.

The defendant was subsequently acquitted of the charge of rape.

A similar position was taken by the judge in *R v Bashir and Manzur* heard in the Leeds Assizes in 1969. The complainant, a woman called Maria Zahra, had accused two men of raping her. Their defence was that while sexual intercourse had occurred, this was consensual. During the defence cross-examination of Zahra, counsel put it to her

that she had been behaving as a prostitute, had had sexual intercourse with another named man, had accosted another man inviting him to have sexual intercourse with her for money and had made to two other men various statements to which the inference could be drawn that she was a common prostitute.

The complainant denied all these allegations but the defence counsel began to call witnesses to substantiate the allegations that Zahra was a prostitute. The judge was called upon at this point to rule in relation to the admissability of this evidence. Citing *R v Greatbanks*, he ruled the evidence admissable; while, in general, evidence of sexual intercourse with men other than the accused was not admissable, evidence of prostitution was because 'there is a difference between the woman who has acts of sexual intercourse with men and a prostitute who regularly sells her body'. Thus, a defence witness may give evidence of the complainants prostitution (eg 'she offered herself to me for money') but is not allowed to give evidence of 'mere sexual intercourse'.

A further case – involving evidence of prostitution or 'prostitute-like' behaviour – was heard by the British Court of Appeals in 1973. In *R v Krausz* the complainant was a twenty two year old woman who said she had been assaulted and raped by a man she met in a public house called the Ducks and Drakes. After drinking 'three gin and tonics and one beer' and dancing with Krausz, the woman said she left alone to go home. Krausz followed, helped her locate a taxi and then joined her in the taxi. She told the driver her address but Krausz instructed the driver to go to Shepherds Bush where he persuaded the woman to go to his flat for a coffee. She claimed that soon after they arrived, Krausz forced himself upon her; when she pushed him off, he struck her 'some hard blows on the face'. When she regained her senses, she was

naked, the lights had been turned off and the defendant was pushing her onto the bed. She said she allowed him to have sexual intercourse with her because she was terrified. Afterwards, when she tried to get away by going to the lavatory, he hit her in the face again.

The defendant claimed the woman had consented to sex, demanded money after the intercourse and then refused to leave the flat until she had been paid, saying she would make trouble for him. He had then slapped her face. She had gone to the lavatory and fallen downstairs causing her nose to bleed. In cross examination, however, Krausz admitted that he had been angry and had hit her in the face.

Krausz's conviction for rape was subsequently quashed by the British Court of Appeals although his conviction for 'assault occasioning bodily harm' was upheld. The Court found that certain evidence – which 'tended to show that the prosecutrix was a prostitute' – had wrongly been deemed inadmissible by the original judge. This evidence was that the Ducks and Drakes was a public-house where prostitutes met customers and that the complainant had previously engaged in sex for money. While it was accepted that a woman could not be cross-examined about sexual acts unrelated to the one under judgement (for example, with other men at other times), evidence that she had engaged in prostitution in the past constituted an exception to this rule. The Court of Appeal found that the prosecutrix in this case was 'not a prostitute in the strict sense' but was still 'a woman who is in the habit of submitting her body to different men, whether for payment or not'. The conviction was quashed, therefore, because:

The prosecutrix was a woman of loose morals, in that she was not merely promiscuous, but was further in the habit of having sexual intercourse with first acquaintances for money and that her practice included a first demand for payment after intercourse had taken place; that (this) evidence was, accordingly, relevant as tending to prove not merely consent, but consent in special circumstances and as being probative of the defendant's account of what had taken place.

The Canadian case of *R v Moulton* (1979) is similar and demonstrates the tendency for British case law to be 'imported' into other jurisdictions. The complainant said that she met two men at a tavern in Calgary in 1977 and went to their apartment with them. However, on her arrival, the men then forced her to remove her clothing, had non-consensual sexual intercourse with her, burnt her several times using a spoon heated over a gas stove, punched and bit her, threatened to kill her with a knife and attempted to drown her in a bathtub. The male defendants claimed that the sexual intercourse was consensual and that her injuries were a result of an accidental fall down the stairs and of a 'head butt' delivered by one of the men. During cross-examination the complainant admitted she had a history of prostitution. However, she claimed that at the time of the rape she had not been a prostitute for five months. Evidence was presented to the court by the Royal Canadian Mounted Police and the Calgary City police that the defendant was a 'known' prostitute. The trial judge admitted this evidence.

The defendants were subsequently found not guilty of rape but were convicted of causing bodily harm. The Appeal judge commented on the strangeness of the jury accepting the victim's story about bodily harm but rejecting her story about the rape. 'Certainly it demonstrates the difficulty of convincing a jury that a prostitute may be raped' (p.15). It also demonstrates the injustice of evidentiary rules that permitted evidence of prostitution to be presented – as if prostitution was clearly relevant to the charge of rape.

The Present Situation

This situation has changed in the last twenty years. In the United Kingdom, Australia, New Zealand and Canada rape law reform has at least limited the admissibility of evidence relating to a complainant's sexual reputation and past sexual history (Henning & Bronnitt 1998) including in relation to prostitution and sexually promiscuous behaviour simply deemed to be 'like prostitution'.

It is now the case that prostitutes and those with a history in the sex industry are, under some circumstances, able to prosecute their rapists. While some obvious problems remain (see below), there are a growing number of cases where men have been convicted of raping sex workers and ex-prostitutes. Evidence of a complainant's history in prostitution is no longer automatically seen as admissible evidence.¹ In the Australian case of *R v Lear* (1996) for example, the Supreme Court of Victoria Court of Appeal disallowed evidence that the complainant in a rape trial had a prior conviction for prostitution (public soliciting for the purposes of prostitution). Lear was subsequently sentenced to nine years imprisonment (with a non-parole period of seven and a half years) on nine counts of rape.

Significantly, there are also a growing number of cases where prostitutes - raped while working as prostitutes - have successfully prosecuted their attackers.² This can occur even where the sex worker has already had consensual sexual activity with the client. For example, in the English case of *R v Audrius Pakula* the complainant met her attackers while she was engaged in soliciting for prostitution clients on the street. She agreed to have sex with the two men for 80 pounds and went to their flat. She claimed that, at first, there was consenting sexual intercourse. But when she dressed and attempted to leave she was held against her will, physically assaulted and raped. In another English case, *R v Thomas Brolly*, the victim was a street prostitute who had consensual intercourse with her client before he anally raped her. He was subsequently sentenced to four years imprisonment. In the Canadian case of *R v Resendes* the victim was a Toronto street prostitute who had agreed to have sex with the defendant. However, the defendant drew a knife on the woman forced her to perform oral sex and robbed her. At trial the judge said:

¹ In Australia see *R v Lear*

² In Australia see *R v Leary*; *R v Myers and Ward*; *R v Heros Hakopian*. In the United Kingdom see *R v Charles Grenville Shaw*; *R v Arjumand Hussein*; *R v Audrius Pakala*; *R v Cuma Ates*; *R v Ian Bridgeman*; *R v Kevin Davis*; *R v Asif Masood*; *R v Thomas Brolly*; *R v*

The victim in this case was prepared for money to engage in sexual activity with this respondent. However, she was not prepared to perform a sex act against her will and at knifepoint.

Sex workers who agreed to sex with a condom have also successfully prosecuted clients who then forced them to have sex without a condom or who surreptitiously removed the condom during intercourse (see *R v Kevin Davis* and *R v Grenville Charles Shaw*).

A successful rape prosecution can now occur even where the sex worker is a drug addicted street prostitute (and thus prone to stigmatization and reduced credibility as a witness on at least two counts). The Canadian case of *R v Martens*, heard by the Ontario Court in 1992, is an example of this. The complainant in this case was a cocaine-addicted street prostitute in Toronto who charged one of her clients (Martens) with rape. The complainant said that while working on the street, she was approached by Martens and agreed to provide oral sex for him for \$100. They got in Martens' car and the complainant agreed to take him to her home to provide the sexual service. At a certain point, she said, Martens stopped the car and someone concealed in the backseat started choking her from behind. She was punched in the face (which resulted in two black eyes, swollen lips and cheeks), driven to a deserted garage and raped. Martens was found guilty of rape (with 'aggravating factors', that is physical violence) and was given a sentence of three years. In sentencing there was no mitigation for the prostitution, or for the fact that the defendant had no previous convictions and had an exemplary work record. In dismissing the appeal against this sentence, Judge Corbett said:

Prostitutes and drug addicts are entitled to the same protection of the criminal law as any other person in society. Sexual assault is a crime no matter who the victim is. It is not up to one fellow citizen in a community to seek vengeance on others who are less fortunate or to impose their views or moral views on people who are less fortunate in society, no matter how distasteful their lifestyle may be. Prostitutes are especially

Trevor Wells; Spencer James Mellor v R. In New Zealand see *R v Clark*. In Canada see *R v Resendes; R v Dhak; R v Buteau*.

vulnerable. to assault and must have the same protections that are given other women in society. Prostitutes find themselves in situations where it is difficult to bring forward charges of sexual assault. The law owes them a duty to ensure that they receive the same protection as other women.

A similar Australian case - *R v Heros Hakopian* – was heard in the Supreme Court of Victoria Court of Criminal Appeal in 1992. The defendant, Hakopian, was charged with rape with aggravating circumstances, indecent assault with aggravating circumstances and kidnapping. The complainant was a twenty eight year old woman, a drug addict who worked as a street prostitute in Melbourne. On the evening of the assault, she said she had serviced two previous clients before meeting the defendant. She then met Hakopian and a discussion ensued about the sexual services he was seeking. The complainant quoted the defendant a price of \$50 for oral sex and a further \$40 for vaginal sex. He handed her \$90 and they went in his van to a secluded laneway. The appeal decision notes that ‘consenting intercourse took place at first’. Then, after 15-20 minutes of providing oral sex, the complainant suggested the activity had gone on long enough and that it was apparent the defendant was not going to ejaculate. The defendant then forced her head back onto his penis and she resumed her actions for a short time. When she again discontinued and claimed that she had fulfilled her end of the bargain, he insisted that he was still ‘owed’ vaginal sex. The defendant then became aggressive and the complainant offered to return \$50 of his money. She attempted to leave the van but he produced a knife and prevented this. The defendant then forced her to resume the oral sex. He later accused her of stealing his credit card and, when she lifted her clothes to indicate that she was not hiding his credit card, he indecently assaulted her. When the complainant again attempted to leave the van, the defendant drove off with her still in the vehicle. He drove dangerously fast around suburban streets, collided with another car and eventually ordered the complainant to get out of the car.

Hakopian was found guilty on all three counts and given a lighter than normal sentence of three years and four months by the trial judge *because* his crime was

directed at a prostitute. The judge argued that this original trial judge gave him a lighter sentence than normal *because* his crime was directed at a prostitute. The judge argued that this was justified because the victim was a prostitute. The likely impact of the crime on the victim was therefore 'much less a factor in this case and lessens the gravity of the offences'. The Director of Public Prosecutions in Victoria later filed an appeal against the inadequacy of this sentence suggesting 'that the judge had erred in placing too much weight on the fact that the complainant was a prostitute'. Consequently, the Victorian Supreme Court increased Hakopian's sentence to four and a half years with a two and a half year minimum term. However, the lower court judge was not found to be 'in breach of any sentencing principle when he dealt with the matter as he did on the basis that the complainant was a prostitute' (because his decision was seen to be in line with a previous judgement - *R v Harris*). A significant debate then ensued about the correctness of this sentencing decision and, in a recent case in the neighbouring state of New South Wales, the Hakopian/Harris principle was explicitly rejected. The case of *R v Leary* involved the sexual assault of a street prostitute by three men in Kings Cross, Sydney. The victim was soliciting in the street when approached, abducted and raped by the men. Both the original judge in this case and the New South Wales Supreme Court specifically rejected the Hakopian/Harris principle in the sentencing of the men. Judge Kirby said; 'prostitutes, male or female, were entitled to the same protection of the law as any other citizen. They have their human dignity and their privacy and ought not unconsensually to have that invaded by fellow citizens, and that is what occurred in this case'. The Victorian Law Reform Commission has also recently rejected the sentencing principle in *Hakopian* and *Harris*. They argued that:

If sentences are to be differentiated on the basis of the psychological effect of the crime on the victim, these assessments must be based on information about the actual impact of the offence on that particular victim, not simply on the fact that the victim comes from a particular social or occupational group... a court must not make any assumption about that impact that is based on the fact that the complainant was, or had been, a prostitute (LRCV 1992:5-8)

Implications

This examination of reported rape cases involving evidence of prostitution suggests some important changes have occurred in the law's treatment of women who are raped, have a history in the sex industry or who are seen to be behaving like prostitutes. As a result of feminist-inspired rape law reform over the last two decades, evidentiary rules have been modified (Henning and Bronnit 1998) and direct evidence of prostitution is no longer automatically admissible in a rape trial. Moreover, judges and juries are now more likely to be able to distinguish between consensual and non-consensual sex even in cases involving prostitution. This suggests significant changes in social attitudes towards rape have taken place over the last two decades. A woman engaged in prostitution can now sometimes succeed in prosecuting a rapist if she has originally solicited him as a client, if she has engaged in prior consensual intercourse with him, if she is raped anally or orally³, or if she is raped while under the influence of drugs. Where sex workers were originally seen as women who were always consenting and therefore, incapable of being raped, there is now at least the possibility that they will be seen in a court as fully human beings with the capacity to say 'yes' or 'no' to sexual intercourse. In fact, we can say that over the last decade, sex workers have been (re)constructed in law as agentic subjects with consensual capacity.

In other publications I have canvassed some of the broader implications of this finding (Sullivan 2003 and Sullivan, forthcoming). For a start, it calls attention to the constructed nature of both 'consent' and of the consenting/non-consenting subject. Feminists need to take this process of construction very seriously and to work to ensure that all women, including sex workers, are 'made' in law as agentic subjects. So, for example, prostitution law reform needs to maximize the freedom and

³ An important aspect of rape law reforms enacted in the 1980s and 1990s in Australia and elsewhere was the addition of other bodily sites for the enactment of rape. Rape law was also de-gendered. Thus, while none of the reports examined in this study involved male prostitutes, there is no reason why male prostitutes should not also be able to successfully pursue complaints of rape.

consensual capacity of sex workers. This might involve the provision of a range of different contexts for *legal sex work*, the establishment of formal avenues for appeal by employed sex workers, anti-discrimination laws addressed to 'occupation', and the training of health and legal workers to ensure both safer working conditions for sex workers and access to avenues of legal redress in cases of sexual assault.

The findings of this paper also call into question the radical feminist assertion (Barry 1995, Jeffreys 1997) that prostitution always involves an act of rape. This is clearly a reversal of the adage that a prostitute cannot be raped. Consequently, radical feminists argue for domestic and international law that makes no distinction between forced and 'free' prostitution, between rape and consensual sex work in return for money. This has been an influential stance in many arenas, including in the recent United Nations Protocol on Trafficking (see Sullivan 2003) and changes in 1999 to Sweden's domestic laws addressed to prostitution. This paper points to the need for feminists to reject this sort of position and to engage in a feminist struggle with the issue of consent in relation to prostitution⁴. This *is* a difficult issue; economic and social power clearly play an important role in sex work (as they do in other forms work). But these power relations both coerce sex workers *and* construct their consensual capacities (cf Foucault 1982). If sex workers are seen as always already the victims of rape then their stated claims that there is a distinction between sex work and rape (Davidson 1998:6), as well as the grounds for any individual rape conviction, will be undermined.

In this paper, I am not suggesting that all or even most of the problems faced by prostitutes pursuing complaints of rape have been solved. Clearly, social attitudes towards prostitutes are a significant problem; these are probably the main reasons why sex workers are so vulnerable to violence. Law and policy makers need to ensure that their efforts to 'clean up' the streets or 'restore public amenity' do not also reinforce the attitudes that result in the violence (and murder) sustained by sex

workers. Clearly, too, under-reporting and the attitudes of some police and health workers remain a significant obstacle to sex workers achieving equal treatment before the law. Even in the arena of reported offences, problems remain. For sex workers, like other rape complainants (see CMC 2003), there is a high attrition rate before trial as police and public defenders make decisions about the credibility of witnesses and evidence, the likelihood of a conviction and both the cost and the public interest in pursuing less likely to end in a conviction.

It is notable that many of the reported cases involving prostitutes who were raped also involved very young complainants. Where complainants were under the legal age of consent or close to it, the defendant's ability to claim consent as a defence to the charge of rape was severely compromised. Younger women were clearly perceived by police and juries as more innocent and credible witnesses. Older sex workers, like older women in general, are less likely to have these advantages and more likely to have their attackers found not guilty.

It is notable, as well, that most of the cases involving successful rape prosecutions by sex workers involved high levels of violence and/or other evidence supporting the claim of rape. In the case of *R v Heros Hakopian*, for example, there were eye-witnesses who saw Hakopian driving in a dangerous manner.⁵ The victim also sustained extensive, visible, injuries that helped corroborate her account of the sexual and physical assault. For most women and men presenting with complaints of rape, the issue of corroboration is often a significant obstacle; as eyewitnesses will be few and far between, most successful complainants will also have physical injuries. Without these, stereotypical beliefs about women and their trustworthiness are often mobilized in court rooms to cast 'unwarranted doubt' on those testifying about sexual assault (Mack 1998:59) in a way that does not occur with other crimes. This

⁴ As feminists already do in relation to other areas of sexuality and power.

⁵ There is also another Australian case where the sex worker was raped in an city alley way – one that contained a surveillance camera. This enabled the victim to corroborate her story (and the case may not have gone to trial without this camera evidence).

means, as Schulhofer (1998) has argued, that rape laws (and rape prosecutions) continue to require evidence of abnormal violence *in addition* to that imposed by an act of non-consensual sex. This is an important problem for women in general in liberal-democratic polities like Australia, Britain, Canada and New Zealand.

The difficulties in making sexual assault both visible and open to legal redress have been widely canvassed by feminists over the last thirty years (see for example, Pateman 1989, Mackinnon 1989, Marcus 1992, Roberts and Mohr 1994, Pineau 1996, Francis 1996). While, over the last decade, sex workers have become more like other women in their capacity to make and sustain complaints of sexual assault in the criminal justice system, some significant problems remain. These compromise the safety and citizenship of all women.

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