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A Knight(mare) in Shining Armour: A Foucauldian-Feminist Analysis of Sexsomnia Defence in Swedish Courts

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This thesis is dedicated to Andreas
We miss you

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Abstract

In recent years, several men in Sweden have been acquitted of different sexual offences because the courts deemed that it could have occurred in their sleep. According to a leading expert, several of the Swedish acquitting cases are based on incorrect or irrelevant arguments and reasoning regarding sexsomnia. Therefore, it is important to gain a deeper understanding of how sexsomnia manifests within the legal context in Sweden, and more specifically in a courtroom. The aim of this thesis has been to investigate the defence of sexsomnia and how it can be understood according to Swedish courts judgements. I have posed the following research questions: *How can sexsomnia as a defence within the Swedish court system be understood based on court judgements?*, *How is sexsomnia, as a medico-legal phenomena, constituted through power and knowledge in Swedish courts?*, *How can gender influence the way sexsomnia, as a medico-legal phenomena, is constituted in Swedish courts?*, and *What are the possible implications of the constructions identified in the analysis?*.

In order to answer these questions, I have utilised a qualitative text analysis and have examined court cases of sexual violence, more specifically court cases in which the defendant has claimed sexsomnia as a defence, which implied a strategic sampling. The 30 court cases between 2017-2021 that constitute the data set has been analysed through two different methods: content analysis, which produced descriptive statistics, and thematic analysis, which produced a more interpretative analysis. The themes that constitute the thematic analysis are (1) *The battle of the powerful*, (2) *Rape is rape regardless of intent*, and (3) *The disqualifier of the defence*. The results illustrate a struggle between the medical and the legal in the medico-legal field over the exercise of power and knowledge, and that medical experts have the power to impact the court's final judgements. The results also show that the legal system excludes women's experiences and can place responsibility for the acquittal on them. Furthermore, this thesis argues for further feminist, socio-legal, sociological, medical, and legal research into the subject of sexsomnia.

Keywords: Sexsomnia, Sexual behaviour during sleep, Foucault, Swedish court system, Sexual violence, Medico-legal field, and Feminist socio-legal theory

Abbreviations

SBS	→	Sexual Behaviour during Sleep
SRV	→	Sleep Related Violence
ASBDS	→	Atypical Sexual Behaviour during Sleep
SSS	→	Sleep Sex Syndrome
OSA	→	Obstructive Sleep Apnea
PSG	→	Polysomnography
v-PSG	→	video-Polysomnography
CPAP	→	Continuous Positive Airway Pressure
ICSD-3	→	International Classification of Sleep Disorders (Third edition)
DSM 5	→	Diagnostic and Statistical Manual of Mental Disorders (Fifth edition)
NREM	→	Non-Rapid Eye Movement
BRÅ	→	The Swedish National Council for Crime Prevention

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1. Introduction

> "His lawyer said he had, in fact, been 'a knight in shining armour' to the victim." /.../ "There have always been two victims in this case." (Bentley, 2013)

In 2013, a man in the UK was charged with rape and admitted to having had sex with a woman without her consent. Regardless, he was acquitted after claiming he was asleep and therefore could not be held accountable for actions beyond his control. The defence lawyer stated that the man in many ways was a "knight in shining armour" to the woman since he had helped her during the night in question. The accused further stated that he was a victim too. (Bentley, 2013). In 2011, the Scottish police investigated a man accused of rape, however, after the man argued that he had been asleep during the attack the case was not brought to court. In 2016, the same man was sentenced in England to 11 years in prison after raping one woman and sexually attacking another following a rejection of his medical claim from the jury. (Mega, 2016). After this judgement, the woman assaulted in 2011 asked: "How do the experts know, even if they can prove he has the condition, that he isn't just doing what he wants and using it as an excuse?", "Does having sexsomnia give you licence to rape women?" (Mega, 2016).

In 2021, a Swedish newspaper investigated sexsomnia and reported a case where a man, a few years earlier, was convicted of raping a woman and was sentenced to prison (Göteborgs-Posten, 2021). Three years after the conviction, the case was brought up again after the man claimed to have been asleep during the assault. The case was retried, and the man was acquitted. The woman stated: "The court just accepted that he might have done this to me in his sleep - and that's that." (ibid., my own translation). Moreover, the woman had to pay back the amount, plus interest, that he had previously been sentenced to pay her, which resulted in 150 000 Swedish kronor. The woman also stated: "they say that there is no perpetrator, or rather, no perpetrator with intent. But they are forgetting that there is still a victim." (ibid., my own translation).

Although substantial legal reforms have been implemented worldwide in the past 50 years, there are huge challenges remaining regarding justice for rape victims within the criminal justice system. Feminists often criticise the "justice gap" which points to the difference

between the number of reported cases of sexual assault and the low rate of prosecution and conviction. This gap is seen as an institutional failure in providing justice for rape victims. This "justice gap" is exceptionally large in Sweden where there is a high percentage of cases dropped in the investigatory stage or not taken to trial. (Carroll, 2022:2). Thus, the problem remains that men are able to commit rape with impunity. According to BRÅ (2022), 27 639 sexual offences was reported during 2021, which was an increase with 10 % from the previous year. Furthermore, during 2021, 9 962 cases of rape (including rape by negligence) was reported. The number of reported cases of rape by negligence was 294, which implied an increase with 35 % compared to 2020. (ibid.). Since the implementation of the 2018 Consent Law in Sweden, convictions of rape increased with 75 % between 2017-2019 (BRÅ, 2020). However, only a small part of this increase referred to rape by negligence and one explanation to this could be that courts in general does not find this offence applicable and instead either acquit the defendant or convict them of (intentional) rape (ibid.). Against this background, this thesis examines Swedish court judgements involving sexual violence where the defendants claimed they had sexual behaviour during sleep (SBS), also known as sexsomnia. Sexsomnia, a form of somnambulism, was in 2014 officially categorised as a subtype of NREM-parasomnia and implies different sexual behaviours during sleep (Schenck & Mahowald, 2019:1061).

1.2. Problem Formulation

In recent years, several men in Sweden have been acquitted of different sexual offences because the courts deemed that it could have occurred in their sleep. In order to help guide criminal investigators through the subject of sexsomnia, the Prosecution Authority produced a report (ÅM-A 2015/1229). However, it has been met with criticism since the report is largely based on one interview with a sleep expert, who has himself not published any research about sexsomnia. The same sleep expert has furthermore regularly been called to testify as an expert witness in court which impugn the reliability. (Ekot granskar, 2016c). Worth noting here is that it also is the same medical expert that occurs in the material at hand. Moreover, the Swedish courts have to rely a lot on the knowledge of the experts since the knowledge among the legal professionals is too small (Ekot granskar, 2016a). Whenever experts are called to testify, their opinion is reviewed, not only on what competence the expert has, but also on what research the opinion is based on. However, these kinds of reasoning is often missing in Swedish court judgements where sexsomnia has been used as a

defence, but the expert knowledge has nonetheless had crucial importance. (Ekot granskar, 2016e). According to the leading expert on sexsomnia, there has been little to nothing that actually supports sexsomnia in several of the Swedish court cases, where a few even resulted in acquittal (Ekot granskar, 2016d). If there are remaining uncertainties in Swedish court cases, it basically always benefits the defendant, whereby courts preferably acquit rather than convict, according to a President court of appeal (Ekot granskar, 2016b).

The leading researcher on sexsomnia is the professor of psychiatry at the University of Minnesota, Carlos Schenck (who appears later on in the literature review). He states that several of the Swedish acquitting cases are based on incorrect or irrelevant arguments and reasoning regarding sexsomnia (Ekot granskar, 2016a; Ekot granskar, 2016e). Schenck also stated in the interview with Ekot that 99 % of all adult sleepwalkers do *not* in fact engage in sexsomnia (Ekot granskar, 2016c). Moreover, several of the Swedish cases regarding sexsomnia involve complete intercourse, and not uncommonly with someone that the defendant is in a partner relationship with. However, the few cases of full intercourse that have been researched medically, and published, have all been with a partner (Ekot granskar, 2016a). The fact that several men in Sweden has been acquitted of rape based on the possibility of sexsomnia stands out for another sexsomnia researcher in the US, Mark Mahowald (who also will appear later on). According to Mahowald, full intercourse is highly uncommon in sexsomnia. (ibid.).

1.3. Aim

As mentioned above, sexsomnia is increasingly being used as a defence in cases of sexual violence in Sweden, while there is still no research published. Therefore, it is important to gain a deeper understanding of how sexsomnia manifests within the legal context, and more specifically in a courtroom. The aim of this thesis is to investigate how a defence of sexsomnia can be understood according to Swedish courts judgements, how the defence is utilised, and what relations of power and knowledge can be identified from it through a Foucauldian and feminist socio-legal theoretical perspective.

1.4. Research questions

This thesis will answer the following three research questions, and a fourth more analytically grounded one:

- How can sexsomnia as a defence within the Swedish court system be understood based on court judgements?
    - How is sexsomnia, as a medico-legal phenomena, constituted through power and knowledge in Swedish courts?
    - How can gender[1] influence the way sexsomnia, as a medico-legal phenomena, is constituted in Swedish courts?
- What are the possible implications of the constructions identified in the analysis?

2. Background

This section will discuss the report from the Prosecution Authority, an overview of Swedish courts together with discussion on culpability and intent, and a description of the offence rape by negligence.

2.1. Somnambulism: The state of knowledge in Sweden

The Centre for Development in Gothenburg, which operates under the Swedish Prosecution Authority, produced a report in 2016 [ÅM-A 2015/1229] at the request of the Prosecution General regarding the subject of somnambulism, or sexsomnia (Utvecklingscentrum Göteborg, 2016). The report was written after an increase of sexsomnia defence cases in court had been noticed (ibid.). The report is approximately 8 pages long and includes general information regarding sexsomnia within the legal system in Sweden.

According to this report, there is no research on sexsomnia published in Sweden (Utvecklingscentrum Göteborg, 2016:3), and according to the investigation by GP, this was still accurate in 2021. The report also stated that the leading expert in Sweden has not yet published anything either, albeit currently conducting research which is mainly based on case studies (Utvecklingscentrum Göteborg, 2016:6).

[1] The term ‘gender’ is referring to a feminist perspective and the experiences of the plaintiffs

When a suspect claims to have committed a crime during sleep, the testifying sleep expert shall conclude regarding probability of somnambulism being present based on the preliminary investigation and the court investigation. Regarding rape cases, the sleep expert featured in the report states that he normally bases his conclusions on several circumstances such as prior history of similar sleep behaviour, presence of other sleep disorders, what happened before and after the event, what kind of awakening did the suspect has, did the claimed amnesia seem genuine, and what kind of triggering factors can be identified (sleep deprivation, medication, alcohol/drug use). He also ground his judgement on a thorough description of the event with information pointing for, or against, the suspect being aware of the behaviour, and potential communication during the event. (Utvecklingscentrum Göteborg, 2016:7-8). The expert acknowledges the difficulties in evaluating sexsomnia in the presence of alcohol, and that it becomes difficult for him to identify what behaviour is due to sexsomnia versus alcohol (Utvecklingscentrum Göteborg, 2016:8).

However, this report has met international critique. Schenck stated in the interview with Ekot that although he found the initiative to be positive, there were substantial shortages and simplifications in it (Ekot granskar, 2016c).

2.2. Swedish Courts - Culpability and Intent

The Swedish courts are divided into three different entities: General courts, Administrative courts, and other courts (such as labour court and rent/tenancy tribunal). The general courts are divided into the district courts, courts of appeal, and the Supreme court (Sveriges Domstolar, 2020). It is within the general courts that criminal cases are settled which is the focus of this essay. More specifically, it will concentrate on several different district courts and courts of appeal. The district court consists of one legal judge and three lay judges, and the appeal court consists of three legal judges and two lay ones (Sveriges Domstolar, 2021).

Under the Swedish penal law, there are two forms of guilt or culpability: intent and negligence. Intent refers to the offender being aware of, and understands, the risks and consequences of an action, or that they have acted with the intention of making the consequence reality. (Asp & Ulväng, 2013:270). As for negligence, the offender does not intend to, understand, or accept the consequential damages or harm that follows a certain act.

The question of culpability is, in that case, that the offender *ought* to have understood the harm or result of an act and that they therefore should have acted differently. (Asp & Ulväng, 2013:270-271). The issue of culpability and the requirement for the offender to have acted either by intent or negligence can be derived from the Principle of Conformity. According to this principle: "A person should not be considered responsible for a crime, if they could not conform themself in line with the law" (Asp & Ulväng, 2013:271, my own translation). For someone not to be able to comply with the law is for example if they were to commit a crime during unconsciousness, or sleep, in which they are not considered liable (Asp & Ulväng, 2013:272). Furthermore, there are three different forms of intent; (1) premeditated intention, (2) oblique intention, and (3) intentional indifference, or reckless intent (Asp & Ulväng, 2013:286). The most relevant form for this thesis is intentional indifference, or reckless intent, which implies that the offender acted with a level of uncertainty to the consequences and can be categorised as a combination of the offender´s apprehension and indifference before the consequences. Here, it must be determined whether the offender had a cognitive understanding or suspicion of the possible consequences or if they were indifferent before the risks. Furthermore, it has to be determined whether the offender acted regardless of the risks, meaning that the possible risks, and harm for others, did not constitute a sufficient reason for abstaining from committing the act. In that case, one can be found guilty with reckless intent. (Asp & Ulväng, 2013:290-291).

2.3. Rape by negligence

The offence rape by negligence took effect on July 1st, 2018, as part of the sexual legislation in Sweden. For someone to be convicted of rape by negligence, they must have partaken, or continued, in a sexual act although they should have suspected, or concluded themselves, that the other person did not engage voluntarily. (Åklagarmyndigheten, 2022a). It means that you can be convicted of rape if you have been severely negligent in whether the other party is participating voluntarily or not (Åklagarmyndigheten, 2022b). According to BRÅ (2022), 139 men and one woman was during 2021 suspected of rape by negligence.

3. Literature review

This literature review will be illustrated from an international point of view and begin with research within the medical context followed by the legal context. Although the research features other legal systems, the discussions still remain relevant. The database LubSearch was used in order to locate the different articles and case studies, which are all peer-reviewed. Search words such as “legal”, ”law”, “sexsomnia”, “sexsomni”, “SBS”, “sexual behaviour in sleep”, “medicine”, “medical”, “medico-legal”, and more was used in combination of advanced searches. The most relevant articles were also used to find further research on the topic.

This literature review has been developed according to a systematic strategy positioned between a meta-ethnographic and thematic synthetical structural design (Xiao & Watson, 2019:100-101). After the relevant studies were identified, I started reading and noticed several similarities and themes which then were used to create a schedule for what to include in the literature review. The relevant parts of the articles were extracted into a separate document. The themes were overall definition and classification, symptoms, prevalence, male predominance, triggers, diagnostic aspects, and treatment. All of the themes were given a number which was marked beside the extracts of the articles. Thereafter, I wrote the text using the numerical order of the scheduled themes. However, this was done more extensively with the medical context since the legal discussions and analyses differed more.

3.1. Medical context

The different terms used to describe sexual activities during sleep is “sexsomnia”, “Sexual Behaviour during Sleep” (SBS), “Atypical Sexual Behaviour during Sleep” (ASBDS, and “Sleep Sex Syndrome” (SSS) (Organ & Federoff, 2015:2).

3.1.1 Definition and classification

According to the third edition of the International Classification of Sleep Disorders (ICSD-3), sexsomnia, or SBS, is classified as a NREM-parasomnia (Cankardas & Schenck, 2021:29; Contreras, Richardson & Kotagal, 2019:505; Dubessy, Leu-Semenscu, Attali, Maranci & Arnulf, 2017:1; Cramer Bornemann, Schenck & Mahowald, 2019:1061; Holoyda, Sorrentino, Mohebbi, Fernando & Friedman, 2021:203; Irfan & Schenck, 2018:141). Sexsomnia has furthermore been classified as a subtype of disorder of arousal, or confusional arousal, within

the category of NREM-parasomnias (Cankardas & Schenck, 2021:29; Contreras, Richardson & Kotagal, 2019:505; Dubessy et al., 2017:1; Holoyda et al., 2021:203; Irfan & Schenck, 2018:141; Irfan, Schenck & Howell, 2021:125; Toscanini, Hatagami Marques, Hasan & Schenck, 2021:176).

The NREM-parasomnias are sub-categorised into different disorders of arousal, including confusional arousals, sleepwalking, sleep terrors, and sleep-related eating disorder, and where sexsomnia is positioned as a clinical subtype of confusional arousal or sleepwalking depending on the observed behaviour (Grøndahl, Hrubos-Ström & Ekeberg, 2017:502). Sexsomnia predominantly emerges from a longstanding and complex history of other NREM-parasomnias where it is the latest parasomnia to be developed, or from OSA concerning breathing difficulties (Cramer Bornemann, Schenck & Mahowald, 2019:1061). The majority of patients have current or prior behaviour of sleepwalking, sleep talking or sleep terrors (Holoyda et al., 2021:203).

3.1.2. Symptoms

During an episode of sexsomnia, the activities most commonly reported are masturbation, sexual vocalisations, sexual fondling, and attempted/completed sexual intercourse (Andersen, Poyares, Alves, Skomro & Tufik, 2007:276; Béjot, Juenet, Garrouty, Maltaverne, Nicolleau, Giroud & Didi-Roy, 2010:74; Cankardas & Schenck, 2021:29; Contreras, Richardson, & Kotagal, 2019:505; Dubessy et al., 2017:1; Irfan & Schenck, 2018:143; Schenck, 2019:10; Schenck, Arnulf & Mahowald, 2007:683; Irfan, Schenck & Howell, 2021:125-126; Toscanini et al., 2021:176; Cramer Bornemann, Schenck & Mahowald, 2019:1061; Ebrahim, 2006:219; Fernandez & Soca, 2021:1; Holoyda et al., 2021:203; Schenck, 2015:518). It has also been reported to include orgasms (Irfan & Schenck, 2018:143; Fernandez & Soca, 2021:1), spontaneous orgasms (Cankardas & Schenck, 2021:29; Cramer Bornemann, Schenck & Mahowald, 2019:1061; Holoyda et al., 2021:203), coital-like pelvic movements (Contreras, Richardson, & Kotagal, 2019:505; Irfan & Schenck, 2018:143), and sexual assaults (Schenck, 2019:10; Schenck, Arnulf & Mahowald, 2007:683; Grøndahl, Hrubos-Ström & Ekeberg, 2017:499; Organ & Federoff, 2015:3). Furthermore, complete or partial amnesia of the sexsomnia episodes is also present (Dubessy et al., 2017:1; Irfan, Schenck & Howell, 2021:125-126; Toscanini et al., 2021:176; Cankardas & Schenck, 2021:29).

3.1.3. Prevalence

In 2006, Ebrahim (2006:223) stated that the prevalence of SBS is unknown. In 2021, there is still little knowledge regarding the epidemiology of sexsomnia in the general population (Toscanini et al., 2021:176). According to Contreras, Richardson, & Kotagal (2019:505-506), sexsomnia has been reported in 115 cases in the literature. In 2017, Dubessy and colleagues reported 95 total published cases of clinical descriptions of sexsomnia which was based on the first extensive review of the literature by Schenck, Arnulf, & Mahowald (2007) where 31 cases were identified, an updated review by Schenck (2015) identifying additional 22 cases, and 41 cases of evaluated sexsomnia at a sleep centre in the UK (Dubessy et al., 2017:1). These numbers compile to a total of 94 cases, which supports the total number of cases reported in the world literature by Schenck (2015:518). Furthermore, a total 95 clinical cases of sexsomnia were supported by Mioc and colleagues in 2017 (Mioc, Antelmi, Filardi, Pizza, Ingravallo, Nobili, Tassinari, Schenck & Plazzi, 2017:1). Fernandez & Soca (2021:1) reported that the total number of cases in the medical literature worldwide in 2016 was 63.

As illustrated above, the epidemiology of sexsomnia in the general public is somewhat scattered. According to Schenck (2015:538), “the epidemiology of sexsomnia is at present poorly known and needs to be systematically and comprehensively studied”. Furthermore, it has been reported that the prevalence declines with age and an existence of familial clustering (Grøndahl, Hrubos-Ström & Ekeberg, 2017:502). This stands in agreement with Cramer Bornemann, Schenck & Mahowald (2019:1061) who states that sexsomnia mostly occurs for young-adult males, but in contrast to another study stating that it is mostly middle-aged men who reportedly have sexsomnia (Toscanini et al., 2021). As for geographical location, most reported cases of sexsomnia have been in the US and Western Europe (Schenck, 2015:534). Although the prevalence is unclear, the diagnosis of sexsomnia is seemingly a highly rare condition worldwide.

3.1.4. Male predominance

In the existing literature, it is shown that sexsomnia, or SBS, is predominantly a male disorder and therefore illustrate a distinct gender difference (Schenck, Arnulf & Mahowald, 2007:698; Andersen et al., 2007:279; Cankardas & Schenck, 2021:30, 35, 37; Dubessy et al., 2017:1, 4; Irfan, Schenck & Howell, 2021:126; Toscanini et al., 2021:178; Cramer Bornemann, Schenck & Mahowald, 2019:1061; Schenck, 2015:518, 534). According to

Toscanini and colleagues (2021:178), the majority of prior reported sexsomnia cases are middle-aged men with a history of other NREM-parasomnias and where the events occurred in bed or within the sleep accommodations. Although some cases also reported events in other rooms which might be related to sleepwalking (ibid.). Furthermore, in some studies it has been reported that women mainly exhibit SBS as masturbation and sexual vocalisations, while men more commonly engage in sexual fondling and intercourse with women (Andersen et al., 2007:279; Béjot et al., 2010:74, Schenck, Arnulf & Mahowald, 2007; Dubessy et al., 2017:3). However, the reason behind this gender difference and male predominance in the reported cases is still unknown (Schenck, Arnulf & Mahowald, 2007; Toscanini et al., 2021:178).

3.1.5. Triggers

In the study by Cankardas & Schenck (2021:35), it was reported that the most frequent SBS trigger, for both men and women, was contact with the bed partner. The presence of a bed partner as a trigger is also established by Bejót and colleagues (2010:74). Other types of reported triggers are alcohol/drug use, stress, and sleep deprivation (Andersen et al., 2007:277; Bejót et al., 2010:74; Fernandez & Soca, 2021:1; Dubessy et al., 2017:3-4; Irfan & Schenck, 2018:143; Holoyda et al., 2021:203). It can also be triggered by other sleep disorders such as snoring, periodic limb movement (Grøndahl, Hrubos-Strøm & Ekeberg, 2017:502), restless leg syndrome and OSA (Holoyda et al., 2021:203).

3.1.6. Diagnostic aspects

Thorough neurological and psychiatric evaluations are needed when diagnosing sexsomnia. These evaluations are important in order to detect other explanations for SBS such as dissociative disorders or early dementia. (Bejót et al., 2010:74; Andersen et al., 2007:279). When diagnosing sexsomnia, polysomnography (PSG) and video-polysomnography (v-PSG) is utilised, which monitors motions and movements during sleep (Andersen et al., 2007:279; Bejót et al., 2010:73; Cankardas & Schenck, 2021:30; Schenck, 2019:12; Schenck, Arnulf & Mahowald, 2007:699; Mioc et al., 2017:1-2; Toscanini et al., 2021:177; Holoyda et al., 2021:204; Organ & Federoff, 2015:3). PSG measures different physiological aspects such as EEG brain waves, eye movement, cardiac rhythms, and respiratory parameters (Organ & Federoff, 2015:3).

However, there is some debate about the positive versus negative effects of the sensitivity and specificity of v-PSG especially in the legal context when the monitoring occurs several months after the criminal offence (Dubessy et al., 2017:7). It has also been discussed that it is unusual to detect parasomnic events and sexual behaviours during PSG studies and in laboratory environments (Fernandez & Soca, 2021:1; Andersen et al., 2007:279; Holoyda et al., 2021:204; Organ & Federoff, 2015:4). Failure to document SBS during a sleep study does not exclude the probability of sexsomnia during an alleged criminal event. In contrast, successfully documenting sexual behaviour during a sleep study, albeit useful in diagnostic purposes, does not automatically determine that an already occurred criminal event is the result of sexsomnia. v-PSG has nonetheless been recommended to be a routine method in assessing NREM-parasomnias due to their potential diagnostic yield and the possible identification of additional underlying sleep pathologies. (Holoyda et al., 2021:204).

Besides PSG/v-PSG, it is also important to evaluate personal history of other sleep disorders such as other parasomnias, sleepwalking, sleep talking, night terror, OSA, and restless leg syndrome when diagnosing a person with parasomnia such as sexsomnia (Holoyda et al., 2021:204; Bejót et al., 2010:74; Organ & Federoff, 2015:3). Research also indicates that family history of sleep disorders, stress- and fatigue levels, and alcohol/drug use are necessary elements when diagnosing sexsomnia (Holoyda et al., 2021:203-204; Organ & Federoff, 2015:3). Furthermore, and as mentioned above, some research indicates that the main trigger for a sexsomnic episode is the presence of a bed partner. Paradoxically, according to Toscanini and colleagues (2021:178), a bed partner is essential in order to detect sexsomnia at all since one of the main symptoms of the condition is amnesia.

3.1.7. Treatment

When treating sexsomnia, an approach to all physical, psychological, relational, and potentially legal aspects that can have an effect on the patient or the bed partner is essential (Toscanini et al., 2021:178). Having the bed partner present at a consultation with a physician is important since they are the one witnessing and experiencing the sexsomnic episodes (ibid.). According to existing literature, there are different forms of treatment. A pharmacological form of treatment that many reported cases of parasomnias and disorders of arousal, including sexsomnia, responds well to is benzodiazepines, and more specifically clonazepam (Andersen et al., 2007:279; Bejót et al., 2010:74; Cankardas & Schenck, 2021:31; Dubessy et al., 2017:7; Schenck, Arnulf & Mahowald, 2007:698; Irfan, Schenck &

Howell, 2021:134; Fernandez & Soca, 2021:1; Holoyda et al., 2021:205; Organ & Federoff, 2015:5). In contrast, there is research indicating that clonazepam in some reported cases has not rendered any successful results or change in parasomnic or sexsomnic behaviour (Mioc et al., 2017:1; Toscanini et al., 2021:177; Yeh & Schenck, 2016:66-67).

Another form of treatment that has reportedly positive effects is CPAP-therapy, which aims at controlling sexsomnia induced by OSA (Cankardas & Schenck, 2021:31; Schenck, Arnulf & Mahowald, 2007:698; Fernandez & Soca, 2021:2). Furthermore, an improved sleep hygiene and modified sleep schedule in order to avoid sleep deprivation, reduced stress levels and avoidance of potential triggers such as alcohol, drugs and other factors that may disturb the sleep-wake schedule is also important in the treatment of sexsomnia (Fernandez & Soca, 2021:1; Holoyda et al., 2021:204-205; Organ & Federoff, 2015:4-5; Andersen et al., 2007:279).

3.2. Legal context

The following part of the literature review discusses legal cases of sexsomnia in the US, Canada, the UK, and Norway. Grøndahl and colleagues (2017) examined a Norwegian case (Swedish cases was briefly mentioned) where a man was charged with rape and claimed sexsomnia was the cause of his actions. He further claimed to have no memory of the event, but not until after several interrogations, and after a withdrawal of his first testimony that accounted for parts of the event (Grøndahl, Hrubos-Ström & Ekeberg, 2017:506-507). The man was found guilty after the court ruled in accordance with the medical experts. However, the final judgement was not made until after three court proceedings and the involvement of five different medical experts due to uncertainties in the case. (Grøndahl, Hrubos-Ström & Ekeberg, 2017:506-507, 510). It was also argued that two of the triggers were present for the defendant; alcohol intake and sleep deprivation (Grøndahl, Hrubos-Ström & Ekeberg, 2017:509).

In another study, by Cramer Bornemann, Schenck & Mahowald (2019:1061), 9 US medico-legal cases of SBS were reviewed in which the charges ranged from sexual touching to rape and where all of the defendants were young males and all of the victims unrelated young girls or adolescents. This gender and age disparity is similar to a study from 2014 by Ingravello and colleagues (in Holoyda et al., 2021:205) where they identified 9 medico-legal

cases between 1980-2012 involving SRV and SBS. In all of those cases, the defendants were adult men, and the plaintiffs were either adult women or juvenile girls (ibid.). Similarly, in the Canadian study by Organ & Federoff (2015), which reviewed 10 medico-legal sexsomnia cases from 1994-2013, all defendants were men and all victims women or young girls. Lastly, in a study by Mohebbi and colleagues (2018) examining legal cases where sexsomnia had been used as a defence between 2004-2012 in the US, all defendants were male and all, but one plaintiff were under-aged girls. Organ & Federoff (2015) showed in their study that half of the cases resulted in acquittals, whereas the cases reviewed by Mohebbi and colleagues (2018) ended in convictions in all cases but one.

There are several concerns regarding sexsomnia in a legal context. It can for example create a rather convenient defence for individuals attempting to avoid taking responsibility for intentional sexual crimes, as well as the question of reliability and validity in diagnosing sexsomnia. (Organ & Federoff, 2015:2). An individual standing accused of a sexual offence, and are facing criminal prosecution, may have a strong incentive to feign a mental health disorder to avoid punishment (Holoyda et al., 2021:207). Criminal or inappropriate sexual behaviour often provide the defendant with both motivation and an end goal to reduce intention or criminal responsibility, and there are few conditions that can sufficiently alter this. The inclusion of sexsomnia in DSM-5 could lead to an increase in sexsomnia evaluation referrals for individuals accused of sexual offences. Moreover, a disregard to safety precautions and risk reduction after learning one´s SBS indicates either indifference to the violent behaviour at risk, or potentially malingered sexsomnia. (ibid.). Another concern often mentioned in the existing literature is the difficulty in proving pathology in a past event (Organ & Federoff, 2015:2; Grøndahl, Hrubos-Ström & Ekeberg, 2017:509). As Mahowald stated in Idzikowski & Rumbold (2015:179):

> "[You] can prove someone is a sleepwalker … But that is only Part 1 of a two-part question. The second question is whether he was sleepwalking on the night of the murder. Only God can answer that."

This might be the reason why PSG tests and other structural instruments are not often used in court cases (Grøndahl, Hrubos-Ström & Ekeberg, 2017:510). According to Organ & Federoff (2015:4), PSG studies cannot determine the state of mind of the defendant at the time of the alleged offence and ought therefore not to be used alone to ascertain guilt or innocence.

Regardless of whether SBS is documented during a PSG study, it does not by itself prove sexsomnia at the time of the offence. However, successfully documenting a sexsomnic episode during such a study is strong evidence that the individual has a parasomnia disorder and increases the likelihood of an event being a result of sexsomnia but cannot be considered complete legal proof. (ibid.).

Proving that someone might have been unconscious during an alleged offence is difficult. Unconsciousness, or automatism as referred to in for example Canada, is both a challenge to comprehend and complicated to evaluate when involving criminal court cases (Grøndahl, Hrubos-Ström & Ekeberg, 2017:503). Amnesia is, according to existing literature, one of the symptoms of a sexsomnic episode, and according to Grøndahl and colleagues (2017:503), a claim of amnesia can be seen as a deliberate defence strategy since it is easy to fake and difficult to disprove. A medical expert involved in a court case must therefore assess whether the claim of amnesia is genuine and evaluate the causes of the alleged amnesia (ibid.).

3.2.1. Medical experts in court

The role of a medical expert is to provide the court with relevant knowledge of the complex behaviour of a sleep disorder that is outside of the legal experience. The experts give comments both on the mental state of the defendant at the time of the offence and also on causative factors in order to help the court make decisions regarding culpability. (Idzikowski & Rumbold, 2015:176-177). As discussed above, it is difficult to prove an individual's mental state at a given time in history (Grøndahl, Hrubos-Ström & Ekeberg, 2017:501). Therefore, courts often require testimony from medical or forensic psychiatric experts to assist them in their judgements. Since there is little research on sexsomnia and few previous cases, there is not much legal literature for the courts to lean on. (ibid.). This makes the knowledge of the medical experts particularly important for a court case involving sexsomnia. Furthermore, since courts have sovereignty in valuing the evidence, they are not required to agree with the medical experts (Grøndahl, Hrubos-Ström & Ekeberg, 2017:509).

Defendants may feign sexsomnia in criminal cases to avoid responsibility and punishment, but since there are no objective tests to prove this, medical experts must evaluate history and collateral data in order to identify potential inconsistencies in the defendant´s narrative suggestive of malingering. (Holoyda et al., 2021:207).

According to Cramer Bornemann, Schenck & Mahowald (2019:1062), legal referrals to sleep medicine and medical experts and their involvement in criminal court cases, has increased with regularity. Between 2006-2017, 351 consecutive medico-legal consultants from a single sleep centre in the US were requested to give opinions and testify in court cases. The most common complaint among the referrals was sexual assault. The complaints that were declined further investigation with medical experts involved either behaviour not compatible with a sleep-related condition, illicit drug use, or related to overt alcohol intoxication. (ibid.).

3.2.2. The implications of alcohol

The relationship between alcohol and sexsomnia is two-sided. Although there is consensus in the current literature about alcohol being one of the triggers, there is still debate whether alcohol intoxication excludes a proper diagnosis of sexsomnia, and if it should be considered in a courtroom if the defendant were intoxicated at the time of the event. It becomes difficult to establish whether a particular behaviour or episode was due to a sleep disorder, the alcohol intake, or a combination of the two (Idzikowski & Rumbold, 2015:177). It has also been discussed that whenever alcohol intoxication triggers a sleepwalking episode, it rules out the automatism defence (ibid:178), which is what the sexsomnia defence often comes down to. According to the ICSD-3, "disorders of arousal should not be diagnosed in the presence of alcohol intoxication…" (Munro, 2020:1240). Schenck (2015:537) agrees and states that the scientific evidence in the matter clearly illustrates unequivocally that the abuse of alcohol disqualifies the valid usage of the sexsomnia defence, and that even though alcohol is considered to be a trigger, it cannot be viewed as the *cause* of sexsomnia.

3.2.3. Victims/plaintiffs

There is little medico-legal research on sexsomnia with focus on victims/plaintiffs, but some discussions are brought up in a study reviewing sexsomnia cases in the UK. McRae (2019:135) briefly mentions cases from England, Scotland, Wales, Sweden, and Norway and states that all of the defendants share an overwhelming success in collective acquittal. Traumatised victims and parents of victimised children has expressed incredulity to the fact that a sexual offender can walk free and expose others to the same violent risk (ibid.). McRae (2019:136) also mentions the traumatising effects on victims being subjected to sexual violence that occurred merely from a unconscious impulse, and that this trauma will only intensify during a trial (McRae, 2019:138).

The trigger of a bed partner has been argued to be victim-blaming in legal cases regarding sexsomnia (McRae, 2019:142). Actors in SBS legal cases continues to insinuate the victim's responsibility in the matter (ibid.):

> "'[Ecott and his victim] were sleeping so close to each other, [she] could have kicked him or nudged him to precipitate an episode.' (Expert psychiatric witness; see Salkeld, above)."

> "'[S]he "woke" up him up to go to the toilet' (Defence counsel for Frederic L; see Mail Online, above)"

According to these excerpts, the victim should have behaved in another way, more modest or careful, in order not to have participated in triggering or precipitating the sexsomnic episode. In other words, placing responsibility of the offence on the victim. McRae (2019:136) states that unless individuals with SBS takes measures in order to prevent victimising others, they should not be absented from punishment, but rather considered guilty of rape.

3.3. Summary

As illustrated above, sexsomnia is an officially classified sleep disorder that is extremely rare worldwide. There is a clear male predominance and female victimisation of different forms of sexual violence. There are several inconsistencies in the existing literature. The main technical instrument used in detecting sexsomnia (PSG) is also argued to be too uncertain in aiding legal cases. Alcohol has been established to be one of the triggers of sexsomnia but also argued to disqualify a sexsomnia defence in legal cases. The main trigger of sexsomnia, contact with a bed partner, has also been used in blaming the victims for the sexual offence in question.

One of the concerns of sexsomnia being a medico-legal issue and a defence is the evidential difficulty and the limited use of PSG in determining criminal intent. Even though someone has a parasomnia, how can it be reliably proven that it was sexsomnia at the time of the offence? How reliable can final judgements be considering the main instrument when diagnosing cannot be used for legal purposes? This also brings to light the importance of the

knowledge of the medical experts, since it is the only "instrument" of medical proof in court cases involving sexsomnia.

3.4. Importance of this study

Sexsomnia poses a medico-legal challenge to the courts in terms of knowledge, evidential aspects, and intent. The majority of the existing literature testify that further research into this condition is necessary and encouraged. I would argue that more socio-legal and medico-legal research into sexsomnia is essential in order to avoid this defence becoming an increasing trend for sex offenders attempting to avoid prosecution or punishment. Sexsomnia research from a feminist perspective also shines in its absent in the existing literature, and given the extreme gender disparity to this condition, feminist medico-, and socio-legal research might need the most attention. This thesis aims to contribute to further knowledge into the socio-legal and feminist aspects of this medico-legal issue that has become part of the Swedish societal and legal climate.

4. Theoretical framework

This thesis has an overarching Foucauldian theoretical framework, in which feminist socio-legal theory and the concepts of field and cultural capital by Pierre Bourdieu will be occurring in reference to Foucault's theorisation of power and knowledge. First, I will discuss the overall theory of power-knowledge. Second, there will be a discussion on the medico-legal field followed by a discussion on the feminist socio-legal perspective.

4.1. Power-knowledge

Michel Foucault (1926-84) was Professor of History of Systems of Thought at the Collège de France in Paris and has had tremendous impact on fields such as sociology, philosophy, and history. Foucault (Gordon, 1994:xv) was keen to explore new and more effective political ways of thinking, and in particular new ways of looking at the relationship between power and knowledge. In an interview collected in *Dits et écrits* (1975:752, in Gordon, 1994:xv-xvi), Foucault said:

> "I have been trying to make visible the constant articulation I think there is of power on knowledge and of knowledge on power. We should not be content to say that

> power has a need for a certain discovery, a certain form of knowledge, but we should add that the exercise of power creates and causes to emerge new objects of knowledge and accumulates new bodies of information…. The exercise of power perpetually creates knowledge and, conversely, knowledge constantly induces effects of power."

The knowledge that Foucault in these instances was studying was human sciences such as sociology, criminology, and psychology, together with aspects of medicine (Gordon, 1994:xvi). From the above extract, we gather the understanding that power not only has a need for (new) knowledge and informational discoveries, but also that the practical exercise of power in the world functions as a form of knowledge production. Furthermore, this knowledge production in turn creates an exercise and effects of power.

Foucault (Gordon, 1994:xvi) was interested in how knowledge render itself useful and necessary in the exercise of power, and had, in that purpose, developed an analysis of "discourses";

> "…identifiable collections of utterances governed by rules of construction and evaluation which determine within some thematic area what may be said, by whom, in what context, and with what effect."

In other words, in examining the exercise of power and knowledge, and role of knowledge as useful, he analysed the meaning of discourses which determined who can say what in which context, and also how, and by whom, knowledge can be produced in specific contexts of time and space. In the thesis at hand, I will analyse the specific power-knowledge relationship in this medico-legal context.

Foucault (Gordon, 1994:xviii) did not believe that the ultimate reality can be known to us through knowledge, or that established means of verification which we know to be definite, can be used in order to determine the truth. Rather, he argued that truth is "a thing of this world", "meaning that truth exists or is given and recognized only in worldly forms through actual experiences and modes of verification;". (ibid.). In other words, truth is not ultimate or definite to reality, but rather that truth exists in our experiences and hence, can be different for different individuals.

According to Foucault (Gordon, 1994:xviii), the most interesting connection between power and knowledge is how knowledge is valued and effective due to their reliable instrumental efficacy. Foucault often used the French word *savoir* - "a term for knowledge with connotations of ´know-how´" (ibid.).

> "The reason the combining of power and knowledge in society is a redoubtable thing is not that power is apt to promote or exploit spurious knowledges (as the Marxist theory of ideology has argued) but, rather, that the rational exercise of power tends to make the fullest use of knowledges capable of the maximum instrumental efficacy." (Gordon, 1994:xix)

In other words, the reason behind why power-knowledge is seen as alarming in society is not that power is prone to exploit knowledges that might be false, but instead because the knowledges are utilised to its total instrumental efficacy by the rational exercise of power, and that power and the use of knowledge by power is not guaranteed to be safe, legitimate, or beneficial merely because the knowledge that guides the exercise of power is valid and scientific. "Nothing, including the exercise of power, is evil in itself - but everything is dangerous." (ibid.).

Foucault argues that power is productive (Gordon, 1994:xix, Wickham, 2013:226; Smart, 1989:7). It is not the negative aspects of power and the power of law that he was interested in, which focuses mostly on rules and prohibitions, but rather the productivity of power (Gordon, 1994:xix). He maintains that power is everywhere and that power relations are an integral part of the modern social productive apparatus in that it is producing social relations, subjects, and institutions. (ibid.; Wickham, 2013:218). Despite productivity, the concept of *power* in power-knowledge also involves a resistance to power (Wickham, 2013:226). Power and knowledge relate to each other in a different way in the theory of power-knowledge. Power is non-stratified, local, unstable, and flexible, while knowledge is stratified, stable, and segmented. According to Foucault, power would exist without knowledge, but knowledge could not exist without power, meaning that knowledge supports power in action. (ibid.). In this thesis, I will illustrate this relationship with the medical experts in court.

4.2. The medico-legal field

Tarryn Phillips (2009) is investigating Multiple Chemical Sensitivity (MCS) in the medico-legal field in a Western Australian context. She uses Foucault and Bourdieu in order to understand what happens when a contested illness meets medicine and law (Phillips, 2009:39). In her study, the plaintiffs are employees trying to get recognition of MCS in legal disputes with their employers (Phillips, 2009). Although this research involves reversed legal positions regarding plaintiff/defendant, it has nonetheless proven useful for the purpose of this thesis.

This section of the theoretical framework aims to illustrate the dynamics and interactions at play between medicine and law within the medico-legal field and how power, knowledge, and legitimacy can unfold using Phillips' (2009) dissertation. Phillips (2009) conceptualises the medical and legal systems, and the combined medico-legal system, as fields and writes in reference to Bourdieu that a field constitutes a structured social space of forces; a force field, in which both dominant and dominated people exist, creating constant relations of inequality (Phillips, 2009:40). At the same time, various actors are engaged in struggles over the transformation or preservation of the field. Every individual involved in the struggles of the field brings their specific amount and form of power, which will define their position in the field. (ibid.). That said, the medico-legal field becomes a domain of contestation where power is central to the rules of social life.

> "There are certainly 'permanent relationships of inequality' in the medico-legal field, between doctor and patient, worker and employer, client and solicitor, lawyer and judge." (Phillips, 2009:40)

Agents within both the medical and the legal field are bound to certain rules or structures, such as scientific conventions influencing the medical research, professional norms when determining a diagnosis, or evidentiary laws allowing various types of proof (Phillips, 2009:40). The individuals involved in Phillips (2009:41) study are trying to provoke a change in regulation regarding MCS in the medico-legal field, but, as argued in the text, a change within a field threatens the status quo and does not happen without a struggle. She further argues that the interaction of medicine and law can influence change in each other but also create restrictions in legitimising emergent illnesses. She states that her research demonstrates

that the restrictions to medical knowledge regarding MCS in turn restricts the legal field from recognising the condition. (ibid).

Phillips (2009:44) also discusses the involvement of medical and legal experts in court cases and how that equals a specific set of legitimised knowledge:

> "When awarded the licence to practice, medical and legal professionals have a monopoly over a specific knowledge set and field of expertise [...]; a social status which warrants prestige and public respect [...]; and solidarity between members in their professional communities [...]."

Phillips (2009:46) uses Bourdieu's concept of cultural capital when discussing the possession of culturally valued knowledge which can provide the holder with status and power (Phillips, 2009:46). Furthermore, what is accepted as knowledge and how individuals can acquire this knowledge through different opportunities can in turn reproduce inequalities. Phillips (ibid.) is here referring to Foucault who stated that knowledge both can be used for domination by the powerful and as a method of resistance for people with less power. Thus, the production of knowledge in the medico-legal field can result in both medical and legal authority. Foucault's notion of power/knowledge

> "…emphasised that knowledge is powerful (for example, a professions´ knowledge about citizens facilitates its ability to maintain administrative control of society) but power can also produce knowledge (due to their authority, the medical and legal professions define categories of people, which in turn influences what is categorised as knowledge.)" (Phillips, 2009:46)

This makes power and knowledge mutually generative (ibid.). Knowledge is also a form of cultural capital that can be used to challenge existing medico-scientific and legal norms (Phillips, 2009:47). The medical and legal field can thus shape and construct how social agents perceive and act towards sickness. The medico-legal field can define and reinforce knowledge of what is normal and legitimate regarding sickness and health which also renders crucial to the power struggle between the contested parts both in the public and private domain. (ibid.).

The medical and legal field also adhere to different standardised frameworks of evidential values and refer to different ways of reviewing proof and what constitutes as proof (Phillips, 2009:49), The medical field adheres to observable, measurable evidence, and proof of pathology and draws conclusions regarding diagnoses while law instead requires proof in the sphere of probabilities (Phillips, 2009:49, 153). Judicial officers tend to ground their judgements and decisions upon their interpretations of the medical evidence that has been presented (Phillips, 2009:229). The assessments of an illness or a disorder are both shaped and constrained by the medical and legal standards of proof (ibid.). According to the Swedish court system, it needs to be beyond reasonable doubts. Thus, what is regarded as valid or legitimate proof differs between medicine and law, which will be illustrated later on.

One could argue that the medico-legal field is the most appropriate space for legitimising an emergent illness or disorder since both systems hold institutionalised practises and professional experts equipped to deal with uncertain phenomenon to some extent (Phillips, 2009:231). However, it also delegitimises one side of the conflict by not regarding their experiences and recognising their suffering as valid (ibid). Thus, not receiving an understanding of their experiences (Phillips, 2009:232). Although Phillip´s (2009) argumentation regards plaintiffs seeking legal recognition for a medical condition, it can still be argued in a broader sense in different legal roles, which will be shown later on.

4.3. Feminist socio-legal perspective

Carol Smart (1989) is also analysing Foucault's concepts of power, truth, and knowledge but from a feminist legal perspective. According to Smart (1989:9), Foucault was interested in the rules that separated the true and false, and the specific power attached to the true. He was not so concerned with uncovering the truth, as the usual quest for science, but instead:

> "... discovering how certain discourses claim to speak the truth and thus can exercise power in a society that values this notion of truth." (ibid.)

He argued that claiming scientificity is in itself an exercise of power since other knowledges such as faith, experience, or biography, are ranked as lesser knowledges and therefore are accorded less status and value and can exercise less influence than a scientific knowledge. Defining knowledge as science is to claim that it speaks a truth and therefore becomes

favourable in comparison to other non-scientific knowledge or discourses. (ibid.). Law does not fit into Foucault's argument of scientific claim to truth since he identities that as another form of power. However, as Smart (1989:9) points out, law does not need to claim scientificity considering it already has its own method, language, and system of results. Law´s field of knowledge might have a lower status than those considered to be 'real' sciences, "none the less it sets itself apart from other discourses in the same way that science does." (ibid.).

Law positions itself over other knowledges such as sociology, psychology, or common sense, and claims to establish the truth of events. One version of these claims is the criminal trial which is thought to be a secure way of uncovering guilt or innocence. (Smart, 1989:10). The claim of scientificity is ultimately an exercise of power since it is irrelevant whether all experiments work or that medicine is unable to find a cure for all illnesses; the point is that science has already been appointed so much status that its truth overrules other truths. Law is not given as much status, even though we act as if the legal system grants justice through for example judgements. (Smart, 1989:11).

> "If we accept that law, like science, makes a claim to truth and that this is invisible from the exercise of power, we can see that law exercises power not simply in its material effects (judgements) but also in its ability to disqualify other knowledges and experiences." (ibid.).

Thus, both legal and scientific knowledge has been granted legitimacy although differently but nonetheless in ways that constitutes an exercise of power in our society and which can be used to overrule other forms of knowledge such as individual experiences.

Smart (1989:2) argues that law, and law´s exercise of power, disqualifies women's experiences and has a resistance to women's concerns. She discusses this in reference to rape trials and is pressing on the importance of challenging masculine power and the patriarchal society. Smart (1989:32-33) is here referring to a relational correlation with a binary system of logic which refers to oppositional thinking and argumentation. These binary opposites are for example active/passive, man/woman, truth/untruth, consent/non-consent, and guilty/innocence (Smart, 1989:33). They do not however hold equal value since one is subordinate to the other, which tends to be associated with the female. Rape trials are

furthermore hinged upon whether non-consent can be proven, but since the experience of a rape would be the same regardless of if the legal criterion of non-consent is met or not, it can be irrelevant for the sake of the experience. (Smart, 1989:33-34). In order to make this binary system more relevant for this thesis, I would include intent/non-intent since it can be argued that regarding the experiences of a rape, intent is irrelevant. Consent is of course present, but the most central judgement lies nevertheless in intent/non-intent in these sexsomnia cases. Later on, I will discuss how the judgements place great importance in the intent/non-intent binary and in turn excluding women´s experiences illustrating legal rulings from a male dominated perspective and patriarchal point of view.

Lastly, in *Feminist Legal Theory*, Harriet Samuels (2013) is focusing her discussion on the exclusion of women´s experiences and realities within the legal context, which is one of the main themes of this thesis as well. Samuels (2013:132) is referring to Catharine McKinnon who argues, in accordance with her dominance theory, that the world is dominated by the male perspective and that in order for laws of inequality to change the gender hierarchy, inequalities must be seen from the perspective of women rather than men. Furthermore, Smart (1989:2) argues for the importance of law to take in feminist perspectives, not merely for the purpose of law reforms, but also to challenge the power of masculinity.

5. Methodology

In this study, text analysis with two different methods is utilised: content analysis and thematic analysis. The content analysis will produce descriptive statistics, and the thematic analysis will generate a more in-depth qualitative understanding of recurring patterns identified in the material. These two parts will result in a comprehensive overview and understanding of the data from a socio-legal perspective.

5.1. Qualitative approach

This thesis has a top-down qualitative approach as it is best aligned with the overall aim of this research. Furthermore, since qualitative research for the most part focuses on interpretation, contexts, and social behaviour, this approach can be argued to be the most suitable for my purpose (Mason, 2018).

Text analysis constitutes the overarching method of this thesis where documents are analysed and read interpretively in order to construct a representation of what the texts may signify (Mason, 2018:191). Although there is a quantitative component to the methodology, the content analysis will serve as a background for the thematic analysis which will constitute the main part of the results and analysis. Since I have not gathered two different data sets, I have not utilised a mixed method strategy (Creswell & Creswell, 2018). The quantitative element will enrich the thesis and position it in a larger set of observations (Mason, 2018:39). Moreover, this thesis illustrates a socially constructed and contextual reality created in the interaction between individuals and their struggles, and therefore cannot be considered definite or generalisable (Bryman, 2018:58; Creswell & Creswell, 2018:8). Besides a social constructivist perspective, this thesis also has an inductive approach, meaning that the data guided the choice of theory (Bryman, 2018:50).

5.2. Part 1: Content Analysis

Content analysis refers to the study and analysis of texts and documents where the material is codified and quantified through predetermined categories (Bryman, 2018:357). Content analysis is not always viewed as a research method due to its focus on the analysis of the documents rather than the actual collection of the data (ibid.). The definition most suitable for my thesis is by Holsti, and includes techniques of objectification and systematisation (Bryman, 2018:358). The objective description refers to the predetermined categories from which the researcher is dividing the material according to a coding schedule. Furthermore, there is also a component of systematisation to content analysis where the material is codified. According to Holsti´s approach, content analysis opens up for an analysis of the underlying content and not merely the most apparent or obvious ones. In other words, interpreting and analysing the meaning underneath the surface of the text behind the direct content. (ibid.). Therefore, Holsti´s definition is the most suitable since my aim is to analyse, not only the obvious text of the court judgements, but the underlying meanings in order to interpret and draw conclusions about the understanding of the sexsomnia defence in Swedish courts.

A strength with content analysis is that the researcher can analyse and draw conclusions about social groups or institutions that normally might be difficult to get in contact with (Bryman, 2018:378). This is one of the main motivations for the choice of content analysis

for two reasons: (1) since the knowledge on sexsomnia in Sweden is small and scattered, there are not many sources of information other than the court judgements to collect in order to answer my research questions, and (2) it would have been difficult to locate the individuals involved in the sexsomnia court cases, or the required number of people to interview with knowledge on the subject. This resulted in court judgements being the most suitable material. When conducting the content analysis, I began by reviewing the judgements and identifying different themes. Although I found most of the themes when reading the material, I also had some predetermined categories to insert in the codification schedule, such as gender ratio, criminal offences, final judgements, dates, and if any of the defendants had been diagnosed with sexsomnia. When I got familiar enough with the material, I began the codification process.

5.2.1 Coding

Bryman (2018:372) stresses the importance of thought and planning behind the codification of the data, and it has also been a priority for me. During the codification process, the predetermined categories were inserted in an Excel-file where the case numbers were aligned in the direction of a Y-axis and the different (predetermined) categories were structured along X-axes. Once the predetermined categories and case numbers were registered, I inserted additional categories which were identified in the material during further reading. Finally, the codification schedule included additional categories such as involvement of a medical expert (yes/no), intoxication (yes/no), criminal offence proven (yes/no), and criminal offence proven in combination with an acquittal (yes/no). This codification schedule produced the quantitative results in the form of descriptive statistics and became the background for the thematic analysis.

5.3. Part 2: Thematic analysis

In a thematic analysis the researcher identifies themes in a text which is interpreted and analysed in line with the theoretical foci of the study (Bryman, 2018:702-703). When searching for commonalities in a text, it is important to consider factors such as repetitions, similarities, differences, and perhaps missing data in the material (Bryman, 2018:705). According to Braun & Clarke (2012:3), the main reasons to utilise a thematic analysis is its accessibility and flexibility. It also offers the researcher systematic techniques in coding and analysing qualitative data. Thematic analysis is only a *method* of data analysis, in regard to being an *approach* to conduct qualitative research. This however can be viewed as a strength

since it brings greater flexibility in that it can be used in several different ways and gives the researcher more creative room. (ibid.).

I utilised Braun & Clarke´s (2012) six phases to conduct a thematic analysis. The first and second phase began when I conducted the content analysis. Here, I familiarised myself with the data by reading and re-reading the court judgement and making initial notes on relevant features and commonalities (phase 1) (Braun & Clarke, 2012:6). After that, I started generating initial codes and began the systematic analysis of the data (phase 2) (Braun & Clarke, 2012:7-8). This involved the codification schedule in which the descriptive statistics were produced. In phase 3, the codes were generated into initial themes which was done by linking the codes to the research questions and thereafter creating relevant themes accordingly (Braun & Clarke, 2012:8-9). This was also connected to the codification schedule since the initial themes relevant for the thesis were included there as well. It provided me with a structured map of codes and themes when continuing the analysis process. The fourth phase implied quality-checking the collected themes against the data to see if it works in relation to the aim of the study (Braun & Clarke, 2012:9). Here, I also connected the themes to see if they were consistent and had a "red thread". In the fifth phase, the different themes were defined and named (Braun & Clarke, 2012:10). This phase provided me with further clarity in how the themes were connected on a theoretical level and to the previous literature. It was during this phase that I defined my three themes, (1) *The battle of the powerful*, (2) *Rape is rape regardless of intent*, and (3) *The disqualifier of the defence*, in connection to my theoretical framework. Finally, the sixth phase involved the production of the report where the theoretical framework and previous research was applied to the results and produced the analysis of the data (Braun & Clarke, 2012:11). According to Braun & Clarke (2012:11-12), producing the report when utilising qualitative data is not like quantitative research in which the analysis of the data is first completed and thereafter the report is written. In qualitative research, writing and analysing is thoroughly interwoven and is produced simultaneously, which was also the case in my writing process (ibid.).

5.4. Strategic sampling

I utilised a strategic sampling which means that the data was selected specifically for the purpose of the research, rather than randomly chosen (Mason, 2018:57-58). Since my aim is to examine the defence of sexsomnia in Swedish courts, the most relevant data for that

purpose has therefore been court judgements. Other court judgements, or other official documents about sexsomnia would not have been as relevant for my purpose. Thus, the most relevant sampling approach was strategic. Worth noting here is also that since research on sexsomnia is non-existent in Sweden, and since it has not been "used" in a similar way besides in the court system, it quickly became evident that I would get the most generated data from the court judgements.

5.5. Data collection

Prior to collecting the data, I contacted a journalist at a Swedish newspaper who had investigated the issue of sexsomnia. He provided me with the 30 case numbers that he had used, and according to his investigation these were all the sexsomnia court cases between January 2017 and June 2021. Since it is difficult to locate court case numbers, I contacted him and decided to use those 30 cases. They were also within an appropriate and current time frame. However, I tried to access different forums in order to find another way to locate the case numbers and verify an exhaustive data set, but this was unsuccessful. Once I had the case numbers, I contacted the administration at the Juridical Faculty at Lund University who assisted me with a login to the webpage InfoTorg. I searched all the case numbers on InfoTorg and was able to collect 15/30 judgements there. Furthermore, 14 were collected by the respective district or appeal courts, and in those cases I called the courts and requested the documents. The court judgements were thereafter sent to me via email. I was not able to locate the last one through either InfoTorg or the courts, so it was sent to me directly from the journalist who provided me with the case numbers.

5.5.1. Empirical material

The material consists of 30 Swedish court cases, all of which involves sexual violence, and where the defendant has claimed sexsomnia as a defence. I have chosen not to disclaim the specific case numbers of the judgements due to the sensitive nature of the crimes and because of the victims' low age in a few of the cases. Furthermore, court systems generally hold an important role in society. How courts define and constitute equality influence the world outside of this particular field, and legal cases and judgements continue to be central in the public debate regarding matters of equality. That said, analysing court judgements is not only important within the legal arena, but also in regard to the impact it has on individuals, social structures, norms, and unequal power relations in society as a whole.

In Table 5.1, all the cases are numbered 1-30 with information of the district and appeal courts together with the offence. This table was created from the aforementioned codification schedule.

Table 5.1. (See Appendix 1)

Case	**District court**	**Appeal court**	**Offence**
1.	Södertörn District Court	Svea Court of Appeal	Rape
2.	Solna District Court	Svea Court of Appeal	Rape
3.	Gävle District Court	Court of Appeal for Lower Northern Sweden	Rape
4.	Attunda District Court	Svea Court of Appeal	Rape
5.	Stockholm District Court	*No appeal*	Sexual coercion
6.	Gällivare District Court	Court of Appeal for Upper Northern Sweden	Attempted rape
7.	Borås District Court	*No appeal*	Child rape
8.	Solna District Court	Svea Court of Appeal	Rape
9.	Örebro District Court	Göta Court of Appeal	Rape
10.	Halmstad District Court	Court of Appeal for Western Sweden	Child rape
11.	Falu District Court	Svea Court of Appeal	Aggravated child rape and more
12.	Sundsvall District Court	Court of Appeal for Lower Northern Sweden	Child rape
13.	Malmö District Court	Scania and Blekinge Court of Appeal	Rape
14.	Linköping District Court	*No appeal*	Rape
15.	Linköping District Court	Göta Court of Appeal	Rape, sexual molestation and more
16.	Luleå District Court	*Appeal pending*	Rape
17.	Umeå District Court	Court of Appeal for Upper Northern Sweden	Rape
18.	Södertörn District Court	Svea Court of Appeal	Child rape

19.	Nacka District Court	*No appeal*	Child rape
20.	Gothenburg District Court	Court of Appeal for Western Sweden	Rape
21.	Halmstad District Court	Court of Appeal for Western Sweden	Rape
22.	Alingsås District Court	Court of Appeal for Western Sweden	Rape
23.	Gothenburg District Court	Court of Appeal for Western Sweden	Rape
24.	Gothenburg District Court	*No appeal*	Child rape
25.	Umeå District Court	Court of Appeal for Upper Northern Sweden	Rape
26.	Attunda District Court	Svea Court of Appeal	Sexual assault
27.	Attunda District Court	*Appeal pending*	Rape
28.	Vänersborgs District Court	Court of Appeal for Western Sweden	Rape
29.	Attunda District Court	Svea Court of Appeal	Rape
30.	Sundsvall District Court	*Appeal pending*	Child rape

5.6. Reliability and validity

Reliability regards the accuracy of the research methods, and how reliably these methods produce data (Mason, 2018:35). Reliability tends to be weaker within qualitative studies than with quantitative since it is more difficult to replicate individual interpretations than calculated numerical factors (Bryman, 2016:465). As mentioned above, this thesis involves both a quantitative and qualitative form of textual analysis. The level of reliability regarding the content analysis is therefore higher due to its quantitative aspects than with the thematic analysis. The interpretations made and conclusions drawn with the thematic analysis will be more difficult to replicate since other researchers might not make the same interpretations with the same material. However, since I followed a six-phase model for thematic analyses, it provided the thesis with transparency and therefore an increased reliability. Validity involves identifying or measuring what you intend to measure in your research (Mason, 2018:35). My choice of utilising more than one method covered more grounds on what the research set out

to measure which effectively benefited the validity of the research (Bryman, 2018:466-467). However, utilising specific court cases can create problems with generalising the results and analysis to other data, such as other forms of judgements and events. In contrast, having a quantitative analytical part, as I do, increases the level of generalisability, however only to an extent.

5.7. Reflexivity

There are several aspects during a research process that can influence the perceived social reality and knowledge production (Bryman, 2018:471). I have to the best of my abilities tried to demonstrate transparency during this research process. I have previously conducted a thesis involving Swedish court judgements and thematic analysis, which could have had a presumptive impact on how I conducted the research at hand. However, this has also been an advantage for me since I already had knowledge on how to read court judgements. I have also previously worked investigatively with criminal cases involving domestic (including sexual) violence where I have conducted interrogations with both plaintiffs and suspects. I acknowledge that it has influenced how I perceive and interpret the data at hand. Due to the severity of the offences, it has been difficult reading the material at times and it took a long time getting through it. At the same time, it has also motivated me in finishing this thesis since the knowledge produced here could possibly be of importance to both the legal system regarding policy reforms and for victims of sexual violence in getting recognition and justice for their experiences. Lastly, applying a feminist perspective in research implies some degree of critical standpoint to unequal societal power relations (Bryman, 2018:66). Having the pre-existing feminist values and opinions has greatly impacted my analyses and interpretations. Although it has been mostly beneficial for the sake of this study, I realise that it also meant a risk of some presumptive opinions, interpretations, and analyses borne out of affection rather than scientific theory for me.

5.8. Ethical considerations

When utilising a method of text analysis, or having documents as the primary source of data, the ethical considerations are not as strict as with methods involving participants or direct personal contact. Since there are no participants in this study, the *requirement of information* (that the correct information shall be given to the participants regarding the purpose of the research, that their participation is voluntary and that it may be interrupted at any time of

their choosing) and the *requirement of consent* (that they control their own participation) are not relevant to consider in this research (Bryman, 2018:170). However, the *requirement of confidentiality* which concerns the anonymity of the individuals involved in the material and that their personal information is handled with as much confidentiality as possible, has been an important consideration (Bryman, 2018:170-171). Although court judgements are public documents and accessible to everyone, it has been important for me to respect the privacy of the individuals involved in these cases, partly since several of the plaintiffs are children or minors. Due to this, I have chosen not to reveal names, cities/municipalities, or case numbers and instead only the district or appeal courts and offences involved in the cases. As illustrated in Table 5.1, the court judgements are categorised (1-30) and will be referred to as these numbers in the following analysis.

5.9. Limitations

Since the knowledge and previous research on sexsomnia is very limited, it has sometimes made it difficult for me to produce a thesis on a subject with no similar research or study to compare to. Due to the small, and relatively new research area on sexsomnia, there is also a risk that existing research or knowledge on the subject (and which has been used in this thesis) may change the more attention the subject gets. However, the arguments and conclusions that I draw in this thesis have been made based on the current contextual information and knowledge available at the moment. Furthermore, since there is no current research on sexsomnia in Sweden, let alone within a legal context, I have not been able to properly lean on any previous studies regarding my specific context or a similar perspective. This has made the research process difficult at times.

Another limitation is regarding the question of an exhaustive data set. As stated above, I could not locate all of the sexsomnia court cases on the search engine that I used during the collection of the material. Therefore, the case numbers were given to me by an investigative journalist. Since I could not verify the information myself, I cannot guarantee that the material constitutes exhaustive data. That said, the material that is presented in this thesis have still been sufficient in answering the posed research questions. Even if there is a risk of a missed court judgement within my time frame and context, I am still confident with the material I have had, and which constitutes the foundation of the analysis and conclusions.

6. Results and Analysis

This chapter is divided into two parts, Part 1: Content analysis, and Part 2: Thematic analysis. The first part will give an overview of the entire data set as descriptive statistics, and part two will function as a continuation of the first part where some features will be analysed more in-depth and in connection to the theoretical framework and previous literature.

6.1. Part 1: Content Analysis

The empirical material in this thesis consists of 30 court judgements in which 33 % ended in acquittals and 67 % in convictions. In 22/30 cases, an appeal court ruled on the final ruling (making the judgement legally binding). Furthermore, in 5 of the cases, a district court ruled on the final judgement, and in 3 of the cases a district court has produced a judgement but has an appeal pending. The gender ratio is all male defendants and all female plaintiffs, which supports previous research regarding male predominance (Irfan, Schenck & Howell, 2021:126). The most common offence is rape which involved 63 % of the cases. Rape against a child (one aggravated) was the offence in 27 %, and the remaining involved sexual coercion, attempted rape, and sexual assault. In 70 % of the cases, the defendant had been under the influence of alcohol and/or drugs/medication, and in 80 % of the acquittals, the defendant was intoxicated. Furthermore, in all but one of the cases where the offence had been proven and which resulted in an acquittal had the defendant been under the influence of alcohol.

As illustrated in *Figure 6.1.*, the majority of the cases (18/30, 60 %) has a medical expert[2] testifying in court or given an opinion, and all of those cases involve the same expert, a professor emeritus. However, in 2 of these cases, there have also been other experts/doctors involved.

[2] The term 'medical expert' in this thesis refers to different sleep experts and doctors. The most commonly occurring medical expert in these court cases (professor emeritus) is a sleep expert.

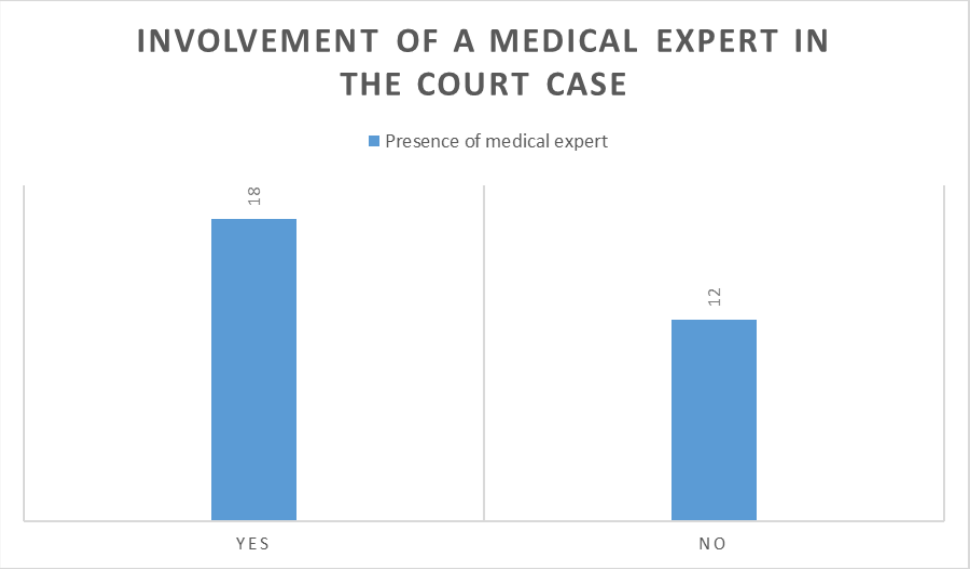

Figure 6.1. (See Appendix 2)

In 16/18 cases involving a medical expert the judgement has been legally binding; meaning that either the district court (in case of no appeal) or the appeal court has had the final ruling. The remaining 2 cases had an appeal pending at the time of the data collection. All of the appeal court judgments have affirmed the ruling of the district court, meaning that the appeal court did not change the judgement of the district court. Furthermore, in 12/18 cases (67 %) with a medical expert, the court ruled in accordance with the expert's testimony (see *Figure 6.2.*), and in 4/18 judgements, the court ruled against the expert. In the remaining 2 cases it was unclear whether the court ruled with or against: in one of them the medical experts were arguing for both 'sides' and in the last one the testimony of the medical expert was not included in the judgement. However, that defendant was acquitted due to other reasons than the probability of SBS. Interestingly, in 3 of those 4 cases, the rape was proven and although the medical expert stated that it was not probable that sexsomnia was present, the defendant was acquitted on the premises that it still cannot be ruled out that he was asleep and not aware of their actions.

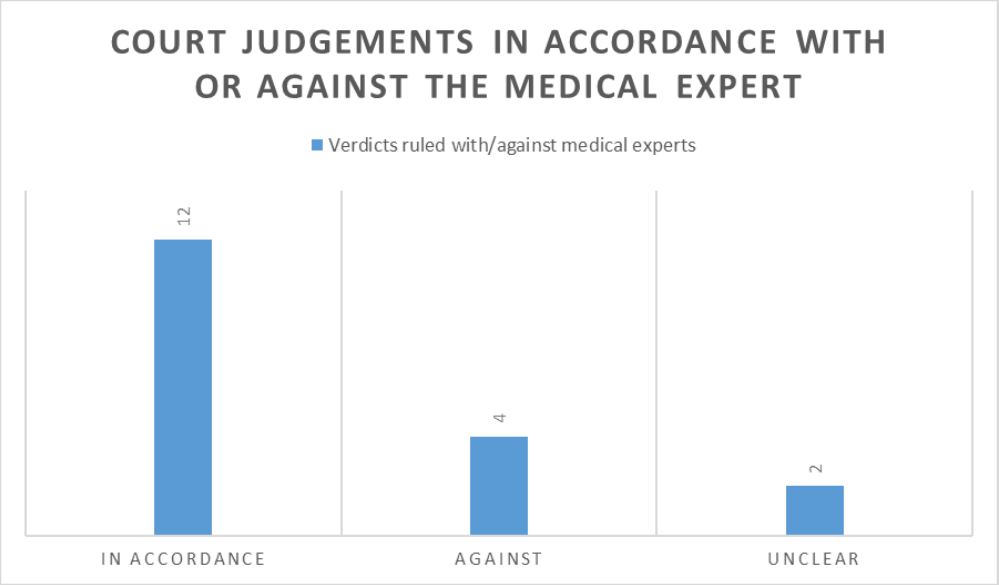

Figure 6.2. (See Appendix 3)

None of the defendants had the diagnosis of sexsomnia. However, one defendant had been diagnosed with NREM-parasomnia in which sexsomnia is categorised, but as stated above, sexsomnia is still rare even among individuals with NREM-parasomnias. In all but one of the cases, the plaintiff/defendant relationship was not a partner relationship, but rather friends, acquaintances, familial- or relative ties, or strangers. As mentioned above, over 30 % of the cases resulted in an acquittal and as illustrated in *Figure 6.3*, in 70 % of those cases the court concluded that the offence was proven (by DNA-traces in 3 cases). Regardless, it resulted in an acquittal because the court judged that the defendant could have been asleep.

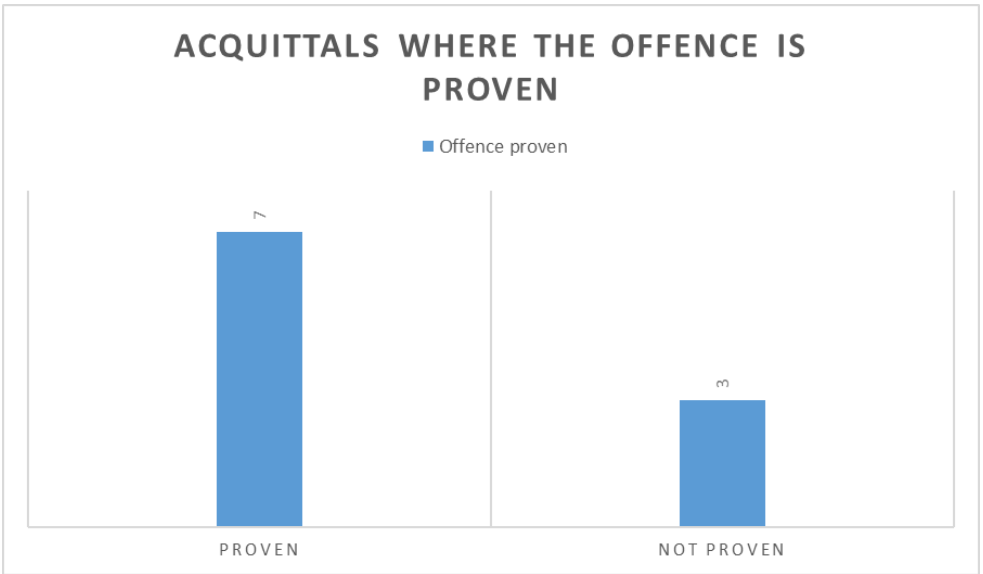

Figure 6.3. (See Appendix 4)

The data set also shows that 83 % of the plaintiffs were asleep and had been woken by the assault in question, positioning them in a particularly vulnerable situation at the time of the offence.

6.1.1. Summary

The majority of the cases had a medical expert present as an expert witness, and in the majority of those cases the courts ruled in accordance with the medical expert. However, in a few cases the court acquitted the defendant despite that the medical expert's testimony did not support the possibility of sexsomnia. In the majority of the cases the defendant had been intoxicated by either alcohol and/or drugs, as well as in almost all the acquitting cases. None of the defendants had the diagnosis sexsomnia and only one had been diagnosed with a sleep disorder (NREM-parasomnia). Furthermore, in 70 % of the acquitting cases, the offence had been proven.

6.2. Part 2: Thematic Analysis

The thematic analysis consists of three themes: *The battle of the powerful*, which has a focus on medical experts in court, *Rape is rape regardless of intent*, which discusses law´s exclusion of women´s experience and the question of responsibility and impunity, and *The disqualifier of the defence* which is an analysis of the intersection of alcohol and sexsomnia.

6.2.1. The battle of the powerful

As illustrated in the content analysis, a medical expert has been involved in 60 % of the cases. Furthermore, in 67 % of those cases, the court has ruled in accordance with the medical expert. The medico-legal field, and their respective components, can be argued to be a powerful cog in the wheel that is society. Both medicine and law exercise a powerful force and hold positions to produce knowledge that society values as valid and legitimate. As such, an analysis of power and knowledge becomes even more interesting within this particular context.

I will begin this first theme with a case that in two ways is different from the others. Case 23 is the only one in which the Supreme court approved a petition for a new trial, and the only one involving a defendant diagnosed with NREM-parasomnia. The defendant had previously been convicted of rape by the district court, the appeal court, and later also denied an application for a new trial by the Supreme court. Thus, the judgement of the appeal court

became final. (Case 23, 2020:3). In these trials, the defendant did not claim a defence of sexsomnia. According to the previous appeal court case, the defendant merely stated (during the appeal court hearing) that he must have been asleep. He did not state this during any of the police interrogations, or during the district court hearing. The appeal court at the time found this curious. After completing the prison time, he underwent a sleep investigation (on a self-referral) in which he was diagnosed with parasomnia whereby he applied for a new trial with the Supreme court again. However, this time with a referral to a medical expert opinion (Case 23, 2020:3). The prosecutor general made the judgement that the new information created doubts whether he had intent, so the Supreme court approved a new trial (ibid.). The appeal court for Western Sweden decided to annul the previously made judgements by the district and the appeal court, and two new court hearings were carried out (Case 23, 2020:4).

In this case, there were two medical experts (besides the doctor who made the diagnosis) that testified in court. They both based their opinion on the court case material. One of them [ME1] came to the following conclusion:

> "[ME1] has in his expert opinion, and from the interrogation in the district court, come to the conclusion that there are several factors to why [the defendant] could have been unaware of his actions due to sleep when he had sexual intercourse with the plaintiff. Such a circumstance is that he has the diagnosis NREM-parasomnia, and of which the doctor is certain. Another factor is heredity which also emerged in the case, as well as prior sleepwalking behaviour." (Case 23, 2020:17, my own translation)

The medical expert brought up several factors supporting the defence of sexsomnia, such as the NREM-parasomnia, prior sleepwalking behaviour, and the fact that his father had the same behaviour. This also supports previous research on sexsomnia which states that sexsomnia is classified as an NREM-parasomnia, and that prior sleepwalking behaviour and disposition are important factors (Holoyda et al., 2021). Both the district and appeal court ruled in favour of the defendant and acquitted him, arguably due to the testimony of the medical experts alone since he previously had been convicted in all court instances without their involvement.

The relationship of power and knowledge in this specific medico-legal context can be analysed in different ways. Foucault (1975:752, in Gordon, 1994:xv-xvi) argued that "...the

exercise of power creates and causes to emerge new objects of knowledge and accumulates new bodies of information… The exercise of power perpetually creates knowledge and, conversely, knowledge constantly induces effects of power." Applied here, we can see that the exercise of power by the medical knowledge, which the defendant provided to the Supreme court, created new information and changed the way the legal system perceived the previous final judgements. This exercise of power through knowledge rippled through the highest court instance there is, the Supreme court, and caused all three previously made final judgements to be annulled. Medical knowledge also has a scientific claim which in itself is an exercise of power since it outranks other forms of knowledge such as experience or biography (Smart, 1989:9). It can be argued that the medical knowledge used held more power than that of the legal judgements when it managed to overturn the previous made ones. This becomes evident when considering that the first appeal court considered the defendant's statement of being asleep as illegitimate before convicting him. However, with the opinion of medical experts, the exact same circumstances were interpreted differently by the courts and rendered a completely different outcome, and the only difference was the involvement of medical experts and the new knowledge they brought forth. This can also be connected to Foucault´s (Gordon, 1994:xix; Wickham, 2013:218, 226) argument that power is productive and an integral part in the production of social relations, subjects, and institutions. The productivity here, I would argue, lies within its ability to somewhat change the climate of the legal system in this case. The usage of the medical knowledge about sexsomnia illustrates how much power and authority it de facto holds within the legal system in order to be able to produce new judgements. This goes to show, as Phillips (2009:46) stated, that knowledge and power is mutually generative. It is the interplay of knowledge and power of the medical field and claim of scientificity (Smart, 1989) that together produced the outcome of these overturned legal judgements.

In case 24, the defendant was charged with child rape and was acquitted in the district court (the appeal was revoked by the plaintiff) (Case 24, 2020). The defendant claimed to have had a sexsomnic episode and objected to any culpability or intent (Case 24, 2020:4-5). The district court concluded that the rape was proven, and therefore only had to answer the question of intent. For that, a chief medical officer (CMO) in forensic psychiatry was called to testify in court on behalf of the prosecution. His evaluation was based on different criteria according to a theoretical model (Case 24, 2020:5).

> "Based on this, he concluded that the defendant does not meet enough criteria in order to invoke that the crime occurred in his sleep, or in the presence of sexsomnia." (Case 24, 2020:5, my own translation)

The court also stated the following regarding his testimony:

> "[CMO] have not met or examined [the defendant] for any diagnoses. /…/ The district court see no reason to question [CMO´s] statement, nor have the appropriate knowledge to. However, they are noting that this testimony is merely based on the preliminary investigation." (Case 24, 2020:6, my own translation)

Despite the testimony of the medical expert, the district court went against it and found the defendant not guilty because the rape occurred in close proximity to a third person whereby the risk of getting caught increased which he would have understood had he been awake. The judgement was further based on the fact that the defendant was cooperative with law enforcement, that the police had to wake him up, and that he was worn-out and tired at the time. (Case 24, 2020:6).

Phillips (2009:39-40) is discussing the interactions between law and medicine within this particular field and the constant struggles between medical and legal agents over for example power, legitimacy, and knowledge, and where permanent relations of inequality exist. Case 24 is an example of such a struggle in the medico-legal field. The court did not rule in accordance with the conclusion of the medical expert, and can be argued, tried to diminish the medical knowledge by clarifying that he did not meet with the defendant when coming to this conclusion. At the same time, the court acknowledged that they see no reason to question the medical expert, nor did they have the knowledge to. The legal field hereby recognised the power of this scientific knowledge by placing it above their own. However, the legal field simultaneously disregards the medical knowledge with their own rules of evidence and interpretations of truth by acquitting the defendant on the basis that sexsomnia still cannot be ruled out despite the fact that the medical expert thought otherwise. In other words, as the medical knowledge is acknowledged by the court for its scientificity and legitimacy, it can be interpreted as if the court still does not fully accept it and therefore wields its legal power to overrule it. Thus, becoming an example of a battle of the powerful forces existing within the medico-legal field in these cases. Another part of the ongoing battle is what Phillips

(2009:40) is referring to as the ‘permanent relations of inequalities’ between for instance doctor/patient, lawyer/judge, or worker/employer. However, in this particular case, the most palpable struggle and relation of inequality is between plaintiff/defendant. The plaintiff is first gaining the field's recognition of her experience by having the offence considered proven, but later finding out that the defendant nonetheless was acquitted. This creates a significant unequal power relation between plaintiff/defendant, where one is subjected to sexual violence, and the other one is able to subject it with impunity.

Regarding case 25, the defendant was charged with rape and in contrast to defendant 24, was convicted in both the district and appeal court after the courts judged in accordance with the medical expert. The defendant claimed that he did not have any criminal intent since he had been asleep at the time of the rape. However, his behaviour was considered too targeted to have been performed during a sexsomnic state. (Case 25, 2021). The medical expert stated the following:

> “Individuals who sleepwalk lacks any planning abilities, and the movements described in this case, such as removing clothes [from the victim] and performing different sexual acts, is not compatible with somnambulism.” (Case 25, 2021:4, my own translation)

In the above extract, the medical expert states that complex behaviour is not compatible with sexsomnia. Furthermore, in the appeal court's final judgement, the testimony of the medical expert beard importance:

> “…the complexity of the behaviour however strongly supports the fact that he was awake, or at least, woke up after a short period of time. It is also perceived as strange that [the defendant] tucked the plaintiff in afterwards if he in fact had acted in his sleep. Furthermore, the medical expert did not find anything that supports that his behaviour would have been sexsomnia.” (Case 25, 2021:5, my own translation)

In continuing the discussion of the power-knowledge struggles within the medico-legal field, it can in this case be interpreted as if the legal field viewed the medical knowledge as legitimate or valid enough to accept its importance for the final judgement. Foucault (Gordon, 1994:xviii) argued that the most interesting link between power and knowledge is

how knowledge is valued and effective from their instrumental efficacy. Meaning, how knowledge is utilised to its full instrumental efficacy by the rational exercise of power, and this case is an example of that. The medical knowledge in case 25 was utilised by the rational exercise of power (the law) to its full instrumental efficiency possible in the context, which here is influencing the final judgement. When the courts acknowledged, and used, the knowledge provided by the expert in deciding the final judgement, they simultaneously utilised its full instrumental efficacy. This can also be connected to Phillips (2009:44) argument of legitimised knowledge, and that, when awarded the licence to practice, professionals such as medical experts, have a monopoly over a specific set of knowledge, field of expertise and a social status which warrants prestige. Here, Bourdieu's concept of cultural capital also becomes relevant. Cultural capital involves the possession of culturally valued knowledge which can provide the owner with status and power (Phillips, 2009:46). It can be argued that when the knowledge of the medical expert was legitimately acknowledged through the final judgement, the expert gained cultural capital in the form of social status, authority, and power in both the medical and the legal field. Thus, the production of knowledge in the medico-legal field can result in both medical and legal authority. This illustrates that medical experts have something to gain by testifying in court and by participating in the battle of the medico-legal field. But what does this mean for the victims? Yes, the victims also have something to gain in a sense, but it is far from anything similar to prestige, power, or authority.

As illustrated in case 25, the level of determination in the defendant´s behaviour was an important factor in the final judgement. The courts ruled in accordance with the medical expert, and valued the medical knowledge presented. Foucault (Gordon, 1994:xvi) wanted to know how knowledge itself could be useful and necessary in the exercise of power, and developed an analysis of discourse in which he argued that these rules of construction would determine who can say what and when. In this specific case and discourse, it becomes clear that the knowledge provided by the medical expert rendered useful, legitimate, and authoritative. Foucault also argued for the importance of contextual aspects of knowledge and power, and that if (and how much) power something has, or how a particular piece of knowledge can be used, depends on which context it exists in (Gordon, 1994). In case 25, the medical expert gained authority, social status, and power through their given knowledge, but that knowledge and power is contextual. The same knowledge might not have gained power in another context, or if given by someone with less cultural capital. Thus, depending on the

contextuality of time, space, and individuality the power is flexible, local, and unstable, which Foucault argued in the theory of power-knowledge (Wickham, 2013:226). In contrast to power, knowledge (in power-knowledge) is instead stable and segmented (ibid.).

I agree with Foucault that knowledge can be stable and that it is the power that shifts when the same knowledge is utilised by different people. Although (and as Foucault was aware of given his work on epistemé), knowledge can also be contextual and somewhat flexible in its production when a knowledge base can be described to be 'in motion'. Meaning that new and different knowledge emerging in a small field becomes more noticeable and can quickly alter the climate of that field, such as with sexsomnia. Furthermore, this analysis of power-knowledge can also be interpreted in another way regarding sexsomnia. According to Foucault (Wickham, 2013:226) power in power-knowledge is non-stratified, unstable, and flexible, while knowledge is stratified, stable, and segmented. Power would exist without knowledge, but knowledge would not exist without power because knowledge supports power in action (ibid.). In these sexsomnia cases, it can be argued that knowledge about sexsomnia supports the power of the medical experts in court by for example providing them with increased cultural capital. The power of the medical experts would exist and persist without the particular knowledge of sexsomnia, but the knowledge of sexsomnia does not have any meaning without the recognition and power of the medical experts. The knowledge here is stable and will not be changed in regard to who is using it. The power however, which is creative and flexible, can change from different individuals depending on who is using the knowledge by power. Paradoxically, this means that the knowledge gets its power from the utilisation of the medical experts, but simultaneously provides the medical experts with power through the utilisation of the knowledge. Basically, it can become a question of who came first, the hen or the egg? Nevertheless, I would argue that this goes to show that power and knowledge are in this sense hinged together and produce the medico-legal power attached to them together.

When discussing the medico-legal field, Phillips (2009:41) argues that the interactions between medicine and law has an impact on each other, and can provoke change but also restrictions regarding legitimising emergent illnesses. Applied to the cases at hand, it can be interpreted similarly, but rather in the sense that the body of medical and general knowledge affects how the law conceptualises and understands sexsomnia. As stated above, there is no published research in Sweden on sexsomnia which binds the medical knowledge to a rather

small (international) research field that acknowledges the existence of the diagnosis. However, in doing that the disorder of sexsomnia gains legitimacy in the medico-legal field through the exercise of power, and knowledge by power (as illustrated above). What I mean is that by the classification of an NREM-parasomnia in the ICSD-3 (Cankardas & Schenck, 2021:29), sexsomnia gains legitimacy by definition, and through that, apparent power in the legal field which has contributed to several acquittals. The lack of extensive previous research and knowledge for the court to lean on makes the testimonies of medical experts particularly important (Grøndahl, Hrubos-Ström & Ekeberg, 2017:501), especially in the Swedish context which case 23 and 25 illustrated. When considering that there are no other "tests" to prove potential malingered sexsomnia than the opinions of the medical experts (Holoyda et al., 2021:207), it becomes evident how much the courts rely on these testimonies, and how much legal authority is given to the medical experts in the cases. This raises some important questions. How does one become an 'expert'? Who can be acknowledged as an expert, and by whom? How is this measured regarding legal cases? In these cases of sexsomnia, the medical experts are both acknowledged as such by their title given to them by the medical field, and by the legal system when they are brought in as expert witnesses to testify or give an expert opinion. But can someone be an 'expert' on such a specific subject as sexsomnia if their knowledge on it cannot be measured, valued, or peer-reviewed? In other words, has not published any research on it. This is not to say that the medical experts involved are not experts on sleep disorders. I am merely arguing that one ought to be aware of the level of importance that is placed on medical experts in these particular court cases where there are no other evidential 'tests' and no current research on sexsomnia within the Swedish legal context.

6.2.2. Rape is rape regardless of intent

The content analysis demonstrated that the defendant was acquitted in over 30 % of the cases. Moreover, in 70 % of those acquittals, the offence had been proven. Thus, proving intent is arguably more important than a proven rape or sexual assault. In several of the cases in the material (case 3, 5, 6, 22, 23, 24, and 28), the defendant had been acquitted despite the fact that the rape, attempted rape, or otherwise sexual offence had been proven. The acquittals were based on the court's inability to rule out a sexsomnic episode at the time of the event. I will begin by describing case 5 and 3, and thereafter analyse these cases together. They will illustrate how the legal system in their exercise of power is excluding women's experiences,

how the experiences are used against them to their disadvantage, and in that placing responsibility onto them.

In case 5, the defendant was charged with sexual coercion and was acquitted. The defendant had masturbated with the plaintiff´s hand, but he claimed to have been asleep during the event and therefore lacked intent. (Case 5, 2018:3-4). Due to evidential aspects such as reliable narrative by the plaintiff and text messages from the defendant (where he apologised to the plaintiff and stated that he acted half in his sleep, in combination with a long night from his part), it was concluded by the district court that the offence was proven:

> "With the plaintiff´s reliable narrative, it is proven that [the defendant] has brought her hand to his genitalia and rubbed or pressed her hand over the genitalia when he still had his trousers on. He had his own hand over the back of her hand. Thereafter, he opened the fly on his trousers, took out his penis, brought the plaintiff´s hand to it and made two-four moves with it." (Case 5, 2018:6, my own translation)

However, due to an intake of alcohol prior to the event, the medical expert concluded that it on medical grounds cannot be determined whether the defendant acted in a sexsomnic episode. The court still had to determine whether the defendant had intent or not. In doing so, the court turned to the plaintiff's own statements. When she was asked whether she thought that the defendant was aware of his actions, she could not answer with certainty since she had been in a position where she could not see his face. She had further stated that he was rather clumsy when he grabbed her hand, and that he looked confused afterwards. Furthermore, the court stated that the defendant has had sleepwalking behaviour on two prior occasions. (Case 5, 2018:6).

> "The plaintiff's statement enables the judgement that [the defendant] did not act completely consciously. Therefore, there is a doubt whether he was sufficiently aware of his actions. Furthermore, sleepwalking behaviour cannot be ruled out, although such a diagnosis cannot be made according to medical criteria." (Case 5, 2018:8, my own translation)

In case 3, the defendant had been charged with rape and according to the appeal court the offence had been proven:

> “Like the district court, the appeal court considers it investigated that [the defendant] has done the act for which he is charged at a time when [the plaintiff] was in a helpless condition due to intoxication and sleep. Thus, [the defendant] is, objectively speaking, guilty of rape. For criminal liability, [the defendant´s] actions must therefore have been intentional.” (Case 3, 2018:3, my own translation)

The medical expert stated that a high level of alcohol excludes a diagnosis of somnambulism and that his opinion is that the event occurred in a state of intoxication, and not sexsomnia (Case 3, 2018:4). In the final judgement, the appeal court stated:

> “The information provided regarding [the defendant´s] behaviour in connection to the event somewhat supports that he was unaware of his actions. This, together with the history of sleeping disorders, and that he to some extent still has, implicate to the court that there is an uncertainty to whether [the defendant] acted in his sleep, and that it therefore cannot be sufficiently ruled out.” (Case 3, 2018:5, my own translation)

Despite the medical expert´s conclusion that it was probably due to intoxication, and not sexsomnia, and the fact that the rape was proven, the defendant was nonetheless acquitted in both court hearings.

In cases 5 and 3 the court ruled to acquit the defendant despite the fact that the offence was proven. As discussed above, Smart (1989:2) argues that the exercise of power by law tends to disqualify women's experiences and knowledge, and thus has a resistance to the concerns of women. In accordance, Samuels (2013:132) focused her analysis on the exclusion of women's experiences and realities in court hearings and judgements. Cases 5 and 3 exemplifies this argument in that the court excludes the experiences and realities of the plaintiff´s when acquitting the defendants due to a (very) small possibility of sexsomnia, even though the medical expert opposed such a theory and after establishing that the sexual offence de facto had been proven. Regarding case 5, the court may have acknowledged the plaintiff when stating that her reliable narrative together with other evidence prove the sexual coercion. However, that becomes meaningless when it is disregarded in the final judgement. In their final judgement, the court stated that it was the plaintiff's testimony that enabled the possibility that the defendant did not act consciously. Thereby, the court did not only exclude

her experience by acquitting the defendant, they also used her own experience against her as a motivation for the same judgement of acquittal. The legal system can here be seen exercising its power by placing responsibility on the plaintiff and indirectly stating that it is due to her own narrative that the defendant walked free. What does this mean for future victims telling their stories in court? It could mean an additional fear of sharing an experience of sexual violence in legal processes or having to review one´s own experience in fear of it being used against them in court. Rape trials, and trials regarding sexual violence or men´s violence against women is an extremely contested matter. One which for centuries has tried to pin the blame on women and has been marked by a search for explanations for the violence with the women and their behaviour. These cases are no exception. Here, too, we can see that the legal system is searching for answers with the woman in order to justify the defendant´s discharge from liability and exemption from punishment. Would it be the same in trials regarding other offences than sexual violence? Would the legal system try to find an explanation to acquit a defendant that was charged with fraud against an elderly citizen? Or a defendant charged with armed robbery? Or merely an offence against a male plaintiff? How come this keeps recurring in cases of sexual violence and men´s violence against women?

It becomes even more problematic when the sexual offence is proven, and the court simultaneously does not hold the defendant responsible. Who becomes responsible when the proven aggressor receives impunity? As shown above, part of the responsibility risks falling on the plaintiff. These cases illustrate that law´s inclination to exclude women's experiences or diminish the validity in her story is present whether it is a rape trial where her sexual history is questioned and the man´s is not (Smart, 1989:33), or whether the legal system is trying to determine whether he could have been asleep during the rape or not. In comparing these two arguments of rape trials, the focus may have shifted from the (sexual history of the) woman to the (potential intent of the) man, but the result is nevertheless the same: the defendant can be acquitted although a rape has happened or been proven. It also becomes applicable to MacKinnon's dominance theory, since it can be argued that the exclusion of women´s experience is an example that the legal system is dominated by the male perspective, and that in order for it to change, inequalities must be seen through the perspective of women instead (Samuels, 2013:132). The importance of law to take in feminist perspectives, not merely for the purpose of law reforms, but also to challenge the power of masculinity, as Smart (1989:2) argued, becomes palpably evident in these cases of sexsomnia.

Here, I would like to revisit case 23 which is mentioned in the first theme. As stated above, the defendant had been convicted of rape in both the district and appeal court and had been denied further appeal by the Supreme Court. The rape was also proven with forensic evidence such as DNA from the defendant. Despite this, it was possible for the defendant to claim sexsomnia and re-do all of the court hearings. Although the defendant had been diagnosed with NREM-parasomnia after the first court hearings, there is only a small percentage of individuals with NREM-parasomnia that also have sexsomnia. Smart (1989:32-33) analysed rape cases and illustrated how courts can disqualify women's experiences by referring to a binary system of logic. These opposites were for example truth/untruth, consent/non-consent, man/woman, and guilty/innocence. She explains that these opposites do not hold equal value since one is subordinate and tends to be associated with the female. Furthermore, she argues that rape trials are hinged upon whether the woman can prove non-consent. However, meeting the legal criteria of consent is irrelevant for the specific experience of a rape or sexual assault. (Smart, 1989:33-34). When applying this binary system of logic to the data in this thesis, I would add the intent/non-intent binary, because, as the above cases illustrates, being able to prove intent becomes just as crucial as proving non-consent. It seems that if there are any signs of non-intent detected by the courts in these cases, the defendant will be acquitted and therefore be able to commit a crime with impunity. Whether intent/non-intent meet the correct legal criteria in court, it does not change the experience of the victim. As well as if the plaintiff can prove non-consent in Smart´s argumentation, the experience will remain the same regardless. The rape or sexual offence has still happened, and whether the aggressor had intent or not (according to law) becomes irrelevant. The binary of intent/non-intent therefore encapsulates the sexsomnia court cases in a distinct way. I would argue that the binary of intent/non-intent is one of the most central regarding the defence of sexsomnia. The question of intent is what dictates the outcome in all of these cases. Evidentially, it does not matter whether the rape or sexual offence happened or not. If there are uncertainties regarding intent, the defendant will be acquitted. But rape is rape regardless of intent. The experience of a rape is the same regardless of intent. And the defendants in these cases ought to be held accountable for a committed rape regardless of intent. How can it be acceptable that no one, according to the legal system, is responsible for a legally proven rape?

Lastly, being subjected to sexual violence can be an extremely traumatic experience. One which could take a long time to recover from if one ever does. In addition to having this

experience, these women must also experience the indecisive behaviour of the legal system which first acknowledges the offence, but nevertheless acquit the defendant. Part of the experiences of the plaintiffs was shared by them in court. In case 6, the defendant was acquitted of attempted rape after it was proven in court. The district court stated the following regarding the plaintiff fear and anxiety following the event:

> "It feels very difficult, shameful, and humiliating for her that [the defendant] touched her most private parts when she did not want it, nor had given him permission to do so. To her it does not matter whether she is in a safe place, things like this happen anyway. She has a constant concern, is afraid to be outside alone, and a fear that something is going to happen to her if she is not careful with what she does and who she's with." (Case 6, 2017:7, my own translation)

The plaintiff in case 23 is also described, by her friend, to have been greatly affected by the defendant's actions:

> "When they arrived [gynaecological emergency room] the plaintiff was absent, shaking and crying. She felt very bad after what happened and she could not continue living at home. Instead she moved in with [her friend and mother] until the summer when she found another place to live. She occasionally had nightmares during this time and was screaming in her sleep." (Case 23, 2020:11-12, my own translation)

The plaintiff´s mother also testified that:

> "She felt really bad that night and for a long time after with problems sleeping, anxiety- and panic attacks, and self-injurious behaviour." (Case 23, 2020:12, my own translation)

Furthermore, the legal system does seem to have a set perception of what an "appropriate" reaction is to such an experience. In case 17, the defendant was convicted of rape in both the district and appeal court after the final judgement was made in accordance with the medical expert. In the judgement, the court described the plaintiff´s reaction the following:

> “Regarding how [the plaintiff] acted after the event; right after she came out of the paralysed state, she left [the defendant´s] apartment, and early in the morning contacted [witness 1 and 2] to tell them what had happened. She had yelled at, and rejected, [the defendant] when he tried to contact her at the train station. She isolated herself in a bathroom at the hospital. She was sad and upset. After a few hours she decided to report it to the police. She has been feeling bad on her trip, and after she got back to Sweden she has been in contact with a psychologist. She has slowly recovered.” (Case 17, 2019:9-10, my own translation)

However, in connection to this description, the court also stated:

> “The district court regards [the plaintiff´s] reactions after the event as compatible with how a woman is expected to react after a rape.” (Case 17, 2019:10, my own translation)

In other words, the legal system seems to have an expectation of what an appropriate reaction looks like after experiencing a sexual assault. If there is a correct way to react, there must be an incorrect way as well. The dangerous thing is, how do one know what is correct and what is incorrect? Will the correct way help plaintiffs in court? And will the incorrect way instead help the defendant? As shown here, the legal system does not only exclude women´s experiences, but also values if she reacts as she is supposed to afterwards according to law.

Foucault (Smart, 1989:9) was interested in how different discourses claimed the truth and thus can exercise power in a society that values that same notion of truth. He also argued that claiming scientificity is an exercise of power in itself and that it is viewed as more valid and powerful than other knowledges such as experiences or faith. Law does not fit into Foucault's argument of this but according to Smart (1989), it could be. Smart (1989:9) pointed out that law does not have to claim scientificity in order to exercise power over other knowledges and truths because it already has its own method, language, and system. Now, law may be considered to have lower status than ‘real’ sciences, but it nonetheless differentiates itself from other discourses just like science does, and it furthermore has the power to claim truth to certain events through the process of a criminal trial (Smart, 1989:9-10). Against this background it becomes apparent that the knowledge in form of experience of the women in these cases are overruled by the exercise of power of law and science, despite that her

experience and narrative is supported by other evidence such as DNA and a proven offence. It becomes highly evident that the narratives of the women are not considered as important as medical or legal knowledge. Although law has a lower status than the medical field, and thus cannot claim knowledge by power to the same extent, it clearly has the power to create knowledge regarding past events in forms of judgements in court and supposable correct reactions after such an offence. This means that law also has the power to produce certain views of reality on a greater societal scale.

Foucault (Gordon, 1994:xix) also argued that power and the use of knowledge by power can be dangerous since it is not guaranteed to be safe, legitimate, or beneficial merely because the exercise of power is guided by knowledge perceived to be valid and scientific. The above discussions are examples of this argument. The medical and legal fields are both exercising their own form of power and have, respectively, their own knowledge as guidance in different situations and decision-making. Both of these fields, and the joint medico-legal field, exercise different forms of power, however both are considered more powerful than knowledges such as experiences or common sense. The exercise of power and knowledge by power might be safe, legitimate, and beneficial for the legal actors who made their professional judgements, or for the medical experts who gained cultural capital in providing their expertise in court, but for the plaintiffs it can be the opposite from safe and beneficial. It can become dangerous, not only because the men who sexually assaulted them are walking free and becomes a risk for them and others, but also because it sends a message to them, and everybody else, that a *proven* sexual assault is not guaranteed to end in a conviction, and that a sexsomnia defence will significantly lower the possibilities of being convicted of a proven offence.

These aforementioned cases clearly illustrate the need for further feminist research into the subject of sexsomnia in Swedish courts. It becomes evident how women's experiences are excluded and how they can become responsible for the acquitting judgements according to the court. But it is not only their experiences and narratives that are disregarded in these cases, it is also their right to justice, equal treatment, and the feeling of rectification and acknowledgement knowing that the person responsible has been punished. Smart (1989:2) argued for the importance of feminist perspectives within law both for the purpose of law reforms and in challenging the power of masculinity. The legal rulings in these sexsomnia cases are arguably stemming from a male dominated perspective and patriarchal point of

view. That said, and as shown in this thesis, these court cases are clear examples of how important feminist perspectives within law really is.

6.2.3. The disqualifier of the defence

Alcohol intoxication in connection to sexsomnia is a contested matter. As mentioned in the content analysis, the defendants had been intoxicated by alcohol and/or drugs/medication in 70 % of all the cases, and in 80 % of the acquittals. Moreover, in all (but one) of the cases where the offence was proven, and which resulted in acquittal, had the defendant been intoxicated.

Let's again revisit case 23. What is interesting about this case is that the two medical experts that testified disagreed regarding a central factor. Now, they agreed on almost all of the general information regarding sexsomnia that was brought up, such as the importance of heredity, prior sleepwalking behaviour, and amnesia (Case 23, 2020). As stated in the first theme, [ME1] testified several factors to why the defendant could have been asleep during the rape. He also testified that the defendant had been intoxicated at the time which can increase the risk of an episode (Case 23, 2020:14). This is also supported by previous research stating alcohol as a trigger (Fernandez & Soca, 2021:1). [ME1] testified the following:

> "What speaks against sexsomnia in this case is the low behavioural frequency for [the defendant]. Additionally, the intake of alcohol makes it more difficult to evaluate. It is mostly the diagnosis of parasomnia and the heredity that speaks for it being a sexsomnic episode." (Case 23, 2020:14, my own translation)

However, [ME2] had another view on the factor of alcohol. Here is what the district court stated regarding the conclusions from both [ME1] and [ME2]:

> "[ME2] has concluded in his expert opinion that there is not enough evidence to support sexsomnia in this case and that the intake of alcohol is a sufficient explanation for the defendant´s behaviour. [ME1] has stated that an influence of alcohol makes it difficult to evaluate and that there is an ongoing [scientific] discussion regarding the implications of alcohol, but that alcohol is not an impediment factor for sexsomnia. [ME2] has confirmed that there are different perceptions regarding the importance of

> alcohol and its effects. The district court has found, against this background, that the prosecutor has not disproved the defendant's objection regarding a lack of intent." (Case 23, 2020:18, my own translation)

Furthermore, in case 5, the medical expert stated that it cannot be determined on any medical grounds whether the defendant was in a somnambulistic state because of the alcohol intoxication. Regardless, he was acquitted of sexual coercion after the district court stated that sexsomnia nevertheless cannot be ruled out. The court stated the following regarding the expert's testimony:

> "[The medical expert] has based his evaluation on the preliminary investigation and has concluded that [the defendant] cannot, on any medical grounds, said to have been in a somnambulistic state at the time of the event because such a diagnosis is impossible when a person also has been under the influence of alcohol. It is in those cases difficult to establish whether the behaviour is due to intoxication or a somnambulistic state. Alcohol affects the brain and causes an impact on the memory as well as lowers the inhibitions, which is also the case in a somnambulistic state." (Case 5, 2018:6-7, my own translation)

The medical expert also testified that:

> "…there are witness statements that alcohol has induced sleepwalking behaviour. However, it has not been scientifically possible to prove this and that is why the matter is still disputed in the scientific literature." (Case 5, 2018:7, my own translation)

Thus, the court did not rule in accordance with the medical expert. The implications of alcohol have evidently been problematic both scientifically and legally. Neither science, nor the legal system seem to know how to view alcohol in these cases, which is why it can differ from case to case, and scientific opinion to another. To date, it has not been possible to scientifically determine what role alcohol de facto has for sexsomnia, and therefore the legal system has not either been able to be consistent in the matter. For example, the defendant in case 25, in contrast to the defendant in case 5, was convicted of rape in both the district and appeal court, and although the final judgement by the appeal court was not solely based on

the factor of alcohol, it was nonetheless part of it. In the appeal court, the medical expert stated:

> "The judgement in this case can be affected by the influence of alcohol, which theoretically can create a mixed state where it becomes difficult to distinguish the brain impact due to alcohol and somnambulism, since both can cause similar behaviour and following amnesia. [The medical expert] concludes that the previous behaviour by [the defendant], such as falling asleep in odd places, is most likely conditioned by alcohol rather than episodes of somnambulism." (Case 25, 2021:4, my own translation)

Throughout almost all of the cases, there have been uncertainties regarding the factor of alcohol. The defendants have almost exclusively been under the influence of alcohol during the offences and the medical expert have several times stated that it cannot be determined whether sexsomnia was present or not since the implications of sexsomnia and that of intoxication cannot be differentiated. This also supports the previous research which argues that sexsomnia cannot be determined in the presence of alcohol (Idzikowski & Rumbold, 2015:177). According to Cramer Bornemann, Schenck & Mahowald (2019:1062), the majority of legal referrals, mentioned in their study, were declined further evaluation partly due to alcohol or drug use. Even the ICSD-3, where the diagnosis of sexsomnia is officially classified and defined, argues that "*disorders of arousal should not be diagnosed in the presence of alcohol intoxication…*" (Munro, 2020:1240). So, how come Swedish courts keep ignoring this in cases with intoxicated defendants and still argue that the defendant could have been asleep even after the medical expert informs them about the controversies of alcohol? The medical and legal fields do have different standardised frameworks of evidential values, and what constitutes as valid proof (Phillips, 2009:49), in which courts argue that they do not need to positively diagnose someone with sexsomnia but rather look at the probabilities. It also becomes interesting considering the most probable cause in almost all of the acquittal cases is not sexsomnia, but rather an alcohol induced behaviour that the defendant may or may not remember the next day. Schenck (2015:537) argues that whenever alcohol is present, it effectively disqualifies the valid use of the defence of sexsomnia in court. Nevertheless, Swedish courts continue to acquit proven rapists that have been intoxicated during the crime in question, and who have not been actually diagnosed with sexsomnia.

A defendant´s alcohol intoxication is normally not something that would result in mitigating circumstances in court. If compared to trials of sexual violence without a defence of sexsomnia, would a level of intoxication help the defendant? Would the fact that the defendant claimed to have been drunk at the time help him get acquitted? Would it help the defendant in any offence, sexual or otherwise? The answer is no. So, why is it helping the defendants in cases of sexsomnia? How come men receive impunity for committed sexual offences even after the medical expert testified that it is most likely an alcohol induced behaviour rather than a sexsomnic episode? Or that they cannot even conclude on the presence of sexsomnia because of the alcohol? As shown in all of the above analyses, these sexsomnia cases involve several contradicting elements that require further attention.

6.2.4. Summary

The above discussions have analysed the struggles over power, authority, and legitimacy within the medico-legal field. It has been shown that the medical experts and knowledge exercise power within this field resulting in both status and authority. Medical knowledge holds enough power to overturn final judgements by the highest court instance, and therefore can be said to be more powerful than the legal field. However, the legal field can in this struggle also exercise its own power and ignore the medical knowledge, expertise, and scientificity all together in their final judgement. Nevertheless, both these fields evidently possess more power than the women in these cases and it has been analysed how the court system excludes women´s experiences and how they can use their narrative against them in order to acquit the defendant, even though the offence has been proven. It has also been shown how the medical and legal fields adhere to different standards of evidential values through their respective reasoning regarding alcohol and sexsomnia, and how the Swedish court system disregards the medical knowledge of the relationship between alcohol and sexsomnia.

7. Conclusions

In the beginning of this thesis, I asked how sexsomnia, as a medico-legal phenomena, is constituted through power and knowledge in Swedish courts, and furthermore, how gender can influence the way sexsomnia, as a medico-legal phenomena, is constituted in Swedish courts. This thesis has shown that sexsomnia constitutes an ongoing struggle in the medico-legal field over power, knowledge, legitimacy, and authority, and that it is positioned between two respectively powerful entities both capable of producing knowledge perceived as valuable and true regarding sexsomnia. Furthermore, this thesis has illustrated that gender constitutes a highly important factor regarding sexsomnia as a medico-legal phenomena and that gender in these court cases can dictate whether you are disregarded or able to commit a crime with impunity.

My main research question was how sexsomnia can be understood from court judgements within the Swedish court system. So, what do we know about sexsomnia in Swedish courts from these judgements? What knowledge regarding sexsomnia is produced in Swedish courts? I would argue that there is a major discrepancy between sexsomnia according to international research and leading experts, and sexsomnia according to, and understood by, the Swedish court system. From the court judgements, sexsomnia can be understood and interpreted as (a) an uncommon, albeit potential, disorder to have which (b) can cause someone to engage in full intercourse with another (most commonly not a partner) (c) without any prior diagnosis of parasomnias but rather after having sleepwalked less than a handful of times in the past or during childhood, (d) have parents who has prior sleep-walking behaviour, (e) that it is a condition that commonly occurs after intoxication, and (f) that it is a valid defence when a defendant claims to not remember or when looking confused when confronted with the criminal sexual behaviour.

However, the above understanding of sexsomnia is not the same that can be interpreted according to international scientific research, non-scientific investigations, and leading experts. According to those, sexsomnia is (a) an extremely rare condition that has been reported in approximately 115 people worldwide, (b) where 99 % of all sleepwalkers do not engage in sexsomnia, (c) a condition that almost always affect the partner to the diagnosed, (d) where there always is another parasomnia present, (e) where the behaviour is frequently occurring, and (f) a disorder that is not so simply applied to cases of rape where the defendant

cannot remember the event after also been under the influence of alcohol. Why is there such a difference here? Has the Swedish court system created its own rules and limitations for sexsomnia? What effects could this have on the rule of law? I would argue that the several acquittals (some of which leading experts on sexsomnia have stated are not compatible with the disorder at all), and the reasoning and judgements around alcohol in these cases, are clear examples of a weak rule of law.

As said, according to the leading expert on sexsomnia, 99 % of all adult sleepwalkers do not engage in sexual behaviour. This is not compatible with the fact that 7 men the last 5-6 years has been acquitted despite the fact that the sexual assault has been proven. The evidential burden on these cases is in many ways problematic, to the extent that one can ask if it is even possible to fully prove a sexsomnic episode in court. Even though the defendant, against all odds, is diagnosed with sexsomnia, how can a court of law prove that he is not merely using his condition as a convenience for impunity? Should it be allowed to use a defence in court that cannot be proven or refuted? As discussed in the literature review, it is impossible to establish whether a past event was due to sexsomnia, regardless of a diagnosis. That means that it is not possible to exclude it either. It therefore always will be an uncertainty regarding the defence of sexsomnia. According to the aforementioned president court of appeal, almost always when there are uncertainties in court, the defendant benefits since the courts rather acquit than convict in those cases. This means that the defence of sexsomnia arguably is set up for a failure for the victims from the beginning.

This brings me to my fourth and last research question regarding the possible implications of the constitutions of sexsomnia identified in the analyses. As illustrated, there is a level of evidential uncertainty and contradictions in these cases which weakens the rule of law: medical experts being the only evidence that either confirms or denies sexsomnia through testimony, the same expert is involved in all the Swedish cases (involving an expert), and a range of different legal outcomes due to the ignorance on the subject. This weak rule of law risks impairing the public's trust in the legal system, the safety and wellbeing of the victims, and the social standing of the medico-legal field as a whole. How can a defence be allowed that cannot fully be refuted and that simultaneously plays out a proven rape? What will happen if an acquitted defendant is claiming sexsomnia in court again after being charged with a second rape? Or a third? Will the court system acquit every time since they already established the first time that he could have sexsomnia even in the absence of a diagnosis?

Will he be able to continue to commit rape and be acquitted? How will the courts reason around habitual offenders in these cases? And more importantly, how will the courts reason around the plaintiffs that continue losing their right to justice? These possible implications to how sexsomnia currently is constituted in Swedish courts is at risk of becoming reality if not a change is made.

7.1. Policy recommendations: Rape by sexsomnia

How can '*rape by sexsomnia*' be constituted as a criminal offence? According to the Principle of Conformity, an individual cannot be considered criminally liable if they are not in a state possible to conform to the law, which includes sleep. However, if an exception of this rule would be possible in these cases where the sexual offence is proven, '*rape by sexsomnia*' could be implemented as a rape by negligence (that the defendant was severely negligent of the risks and consequences), or rape by indifferent, or reckless intention (that the defendant acted with a level of uncertainty of the consequences). Moreover, this would mean that cases in which the sexual offence is proven would not result in acquittals, and the risk of sexsomnia being used as a malingered defence would be mitigated. It could also aid in the rehabilitation of the plaintiffs and strengthen the rule of law. If one is aware of their sleeping behaviour, or sleeping disorders (sleepwalking, SBS, or SRV), and still sleeps intoxicated in the same room/bed as other people (women), it can be argued that a level of indifference to harming others is present, and therefore they ought to be found guilty by a court of law. Although 7 acquittals in the last 5-6 years might not constitute a reform in the Penal Code, the defence of sexsomnia is nevertheless an alarming trend, and one which is at risk of being used even more when it renders successful in court.

7.2. Future research

Future international research is needed, but more importantly, there is a need for future studies within a Swedish context since it seems to have set root in our legal system in a dangerous way. As shown in this thesis, sexsomnia within the legal context needs more attention since there is no current research available. Future socio-legal research utilising a bottom-up approach with interviews with victims, perpetrators, prosecutors and/or medical experts could create a deeper understanding of sexsomnia, its implications, and existence in our current society. Moreover, other top-down studies on how the legal system such as courts,

police, and prosecutors treat sexsomnia as a defence could contribute to a better management of how it is dealt with and processed.

Another aspect of sexsomnia that I believe ought to be further researched is why this medical disorder worldwide mainly seems to be regarding men assaulting women. How come the vast majority of the victims in sexsomnia cases are underaged girls, or women, and almost exclusively adult men as defendants? What socio-legal, sociological, physiological, legal, or cultural explanations could be behind this difference? Other recommendations for future research are the difference in symptoms between men and women according to some studies. How come women mainly exhibit SBS as masturbation and sexual vocalisations while men more commonly engage in sexual fondling and intercourse with women? Why are the most reported cases located in the US and Western Europe? What socio-legal reasons could there be for this prevalence? There are also contested opinions regarding triggers, symptoms, treatment, and legal utilisation, which all needs more research.

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Appendix 1

Table 5.1.

Case	District court	Appeal court	Offence
1.	Södertörn District Court	Svea Court of Appeal	Rape
2.	Solna District Court	Svea Court of Appeal	Rape
3.	Gävle District Court	Court of Appeal for Lower Northern Sweden	Rape
4.	Attunda District Court	Svea Court of Appeal	Rape
5.	Stockholm District Court	*No appeal*	Sexual coercion
6.	Gällivare District Court	Court of Appeal for Upper Northern Sweden	Attempted rape
7.	Borås District Court	*No appeal*	Child rape
8.	Solna District Court	Svea Court of Appeal	Rape
9.	Örebro District Court	Göta Court of Appeal	Rape
10.	Halmstad District Court	Court of Appeal for Western Sweden	Child rape
11.	Falu District Court	Svea Court of Appeal	Aggravated child rape and more
12.	Sundsvall District Court	Court of Appeal for Lower Northern Sweden	Child rape
13.	Malmö District Court	Scania and Blekinge Court of Appeal	Rape
14.	Linköping District Court	*No appeal*	Rape
15.	Linköping District Court	Göta Court of Appeal	Rape, sexual molestation and more
16.	Luleå District Court	*Appeal pending*	Rape
17.	Umeå District Court	Court of Appeal for Upper Northern Sweden	Rape
18.	Södertörn District Court	Svea Court of Appeal	Child rape
19.	Nacka District Court	*No appeal*	Child rape

20.	Gothenburg District Court	Court of Appeal for Western Sweden	Rape
21.	Halmstad District Court	Court of Appeal for Western Sweden	Rape
22.	Alingsås District Court	Court of Appeal for Western Sweden	Rape
23.	Gothenburg District Court	Court of Appeal for Western Sweden	Rape
24.	Gothenburg District Court	*No appeal*	Child rape
25.	Umeå District Court	Court of Appeal for Upper Northern Sweden	Rape
26.	Attunda District Court	Svea Court of Appeal	Sexual assault
27.	Attunda District Court	*Appeal pending*	Rape
28.	Vänersborgs District Court	Court of Appeal for Western Sweden	Rape
29.	Attunda District Court	Svea Court of Appeal	Rape
30.	Sundsvall District Court	*Appeal pending*	Child rape

Appendix 2

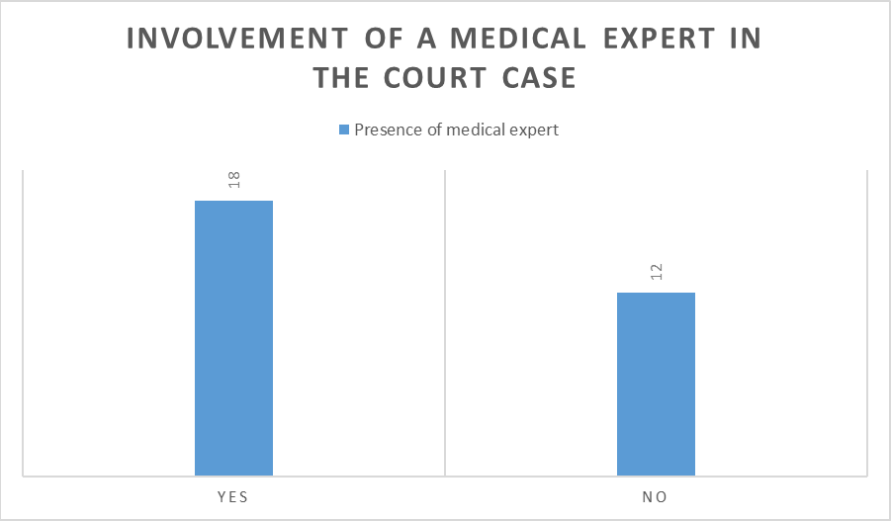

Figure 6.1.

Appendix 3

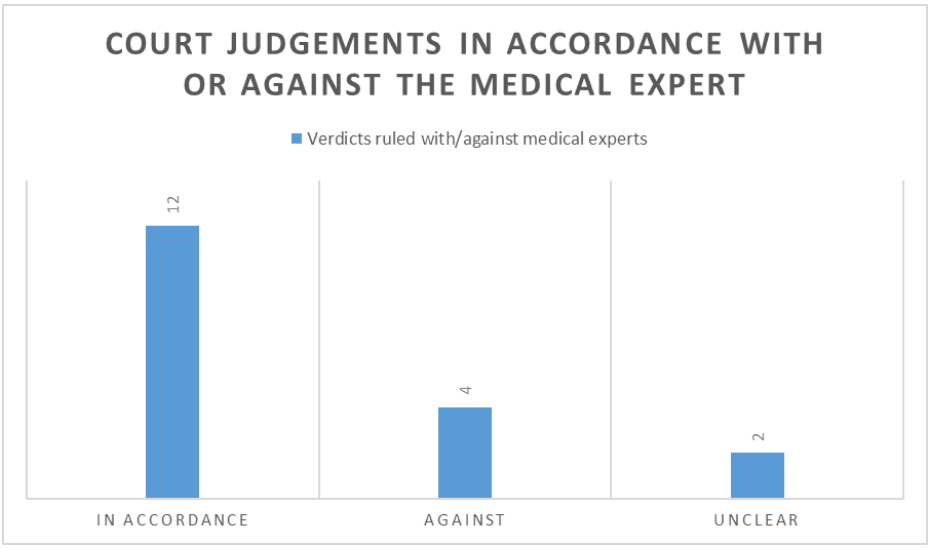

Figure 6.2.

Appendix 4

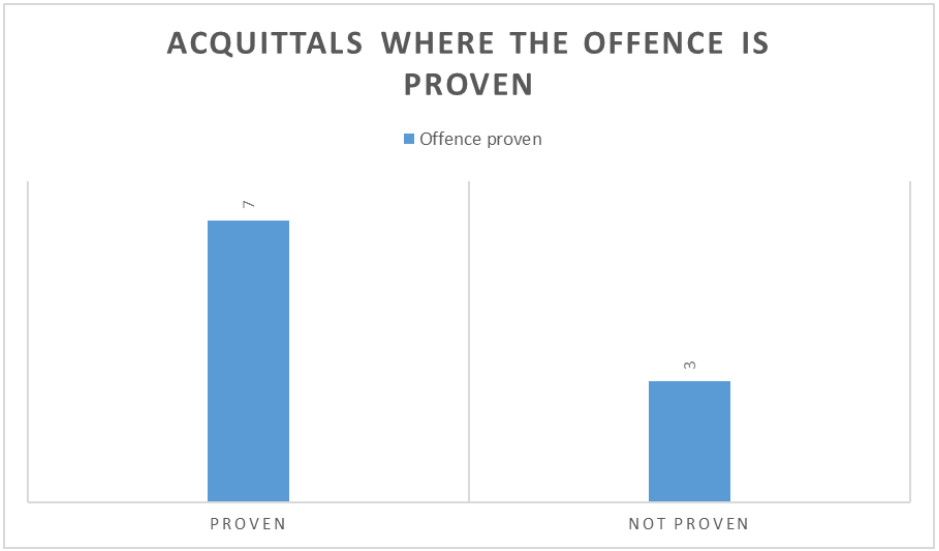

Figure 6.3.