



## A Perspective on Marital Rape



about her Perspective on Marital Rape.

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Marital rape has been a hot and widely discussed topic among Bahamians for many years. The question of whether a man can rape his wife within the marriage has put many individuals at odds with each other, as misinformation has formed the basis of many arguments. To wade through the myriad of misinformation and to make sense of this discussion, the writer will examine the issues from a historical perspective. It is hoped that this will add clarity and raise the level of debate when considering this topical subject.

Firstly, one should be aware that there is no legal definition of marriage in The Bahamas under the Matrimonial Causes Act, Chapter 125. However, Lord Penzance in delivering his ruling in the English Courts provided a common law definition in the landmark case of *Hyde v Hyde* (1866) where he defined marriage as *“the voluntary union for life of one man and one woman to the exclusion of all others”*.

Secondly, the Sexual Offences and Domestic Violence Act 1991 section 3 defines rape as *“the act of any person not under fourteen years of age having sexual intercourse with another person who is not his spouse — (a) without the consent of that other person; (b) without consent which has been extorted by threats or fear of bodily harm; (c) with consent*

*obtained by personating the spouse of that other person; or (d) with consent obtained by false and fraudulent representation as to the nature and quality of the act.”* The reverberating theme under Section 3 is “CONSENT”! And “not his spouse”.

However, there are exceptions to section 3 of the Act which speaks to sexual assault by a spouse. For instance, section s15 states, “(1) Any person who has sexual intercourse with his spouse without the consent of the spouse — (a) where there is in existence in relation to them — (i) a decree nisi of divorce; (ii) a decree of judicial separation; (iii) a separation agreement; or (iv) an order of a court for the person not to molest or co-habit with his spouse, or any other order made under Part II; or (b) where the person has notice that a petition for judicial separation, divorce or nullity of marriage has been presented to a court, is guilty of the offence of sexual assault by a spouse and liable to imprisonment for a term of fifteen years”.

Furthermore, section 35 of the Act gives power to the Magistrate Court to make an order to protect a spouse even if there is only a threat of violence towards a spouse.



In light of the foregoing, one is compelled to consider whether, within a marriage, one spouse must obtain consent to have sexual intercourse with the other. That question was addressed by Sir Matthew Hale in a 1736 treatise titled “History of the Pleas of the Crown” in

which he opined, *“the husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract.”* Interestingly, many still hold the same opinion today. One of the reasons behind the ruling was that a husband could exercise his conjugal rights towards his wife without being charged with an offence, as marriage is a contract so there is implied consent. This implied obligation for the wife meant that a husband does not require his wife’s consent to have sexual intercourse with her. This decision still prevails today in The Bahamas.

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However, the case of *R v R* (1991) changed all this when it was decided that both spouses were equal partners in the marriage and that being married no longer meant that there was implied consent by the wife. *R v R* removed the implied obligation and gave the wife the power to say no.

In the recent case of *AA and BB* (2022), the Petitioner, in her testimony during her divorce trial, testified to being raped by her husband during the marriage on numerous occasions. However, although the judge granted her petition based on cruelty, the Petitioner could not lay a charge for the

alleged rape, as the rape of a spouse is not an offence in The Bahamas.

In reviewing UK law from which most of our laws and precedents are derived, spousal rape, often known as marital rape, is considered a sexual assault under section 1 of the Sexual Offences Act 2003. The maximum punishment if convicted is life imprisonment. Further, in reviewing the laws of Trinidad and Tobago, marital rape is a criminal offence under section 4(4) (5) of the Sexual Offences (Amendment) Act, 2000, with the maximum punishment being life imprisonment.

If marital rape is criminalized, the spouse alleging rape is legally required to prove that the rape occurred. According to the Sexual Offences Act section 4, one must prove “(a) sexual connection occasioned by any degree of penetration of the vagina of any person or anus of any person, or by the stimulation of the vulva of any person or anus of any person, by or with —(i) any part of the body of another person; or (ii) any object used by another person, except where the penetration or stimulation is carried out for proper medical purposes; and (b) sexual connection occasioned by the introduction of any part of the penis of any person into the mouth of another person, and any reference in this Act to the act of having sexual intercourse includes a reference to any stage or continuation of that act.” Therefore, not only must the wife satisfy the court that the

intercourse was against her will, but she must also prove, based on the criteria indicated directly above, that either or all of the acts occurred.

Some have argued unconvincingly that this is much ado about nothing. Consider: An article in the Tribune dated October 12<sup>th</sup>, 2022, stated, “one in 12 or an estimated 4,000 married women have been raped by their husbands”. The article further noted that “6,000 wives claimed to be victims of sexual abuse” and that, based on research, “married women were more likely to be sexually abused than a single woman by an intimate partner.”

Moreover, according to estimates obtained from the World Health Organization’s (WHO) website dated 9<sup>th</sup> March 2021, in an article titled “Violence Against Women”, around one in three (30%) women worldwide have experienced physical and sexually intimate relationship abuse or non-partner sexual violence at some point in their lives. The article further states that most of this violence occurs between intimate partners. In addition, over one quarter (27%) of women aged 15 to 49 who have been in a relationship worldwide say their intimate partner has abused them physically or sexually in some way.

It is the writer’s opinion that the legislators were intentional in drafting sections 3 and 15 of the Sexual Offences and Domestic Violence Act 1991 by excluding marital rape in section 3 but acknowledging its occurrence in section 15. This speaks volumes.



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