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Blurred Lines: The Need for Clear Criteria in the Sentencing of Sexual Assaults

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Case commented on: *R v Sam*, 2013 ABCA 174

What is a "major sexual assault" for the purposes of applying sentencing guidelines in sexual assault cases? Its current definition is unclear. The Alberta Court of Appeal missed an opportunity to provide a concrete definition for major sexual assault in *R v Sam*, 2013 ABCA 174. This comment will begin by providing background on *Sam*, and describing how the Court of Appeal did not directly address the issue of major sexual assault in that case. Then, I will discuss how the Court of Appeal should clarify the relevance of violence and *de facto* consent to sexual assault at the stage of sentencing. Finally, I will argue that factors that are irrelevant to legal culpability for sexual assault may still be relevant at the stage of sentencing.

Background

In *Sam*, an 18 year old offender fondled and had sexual intercourse with a 13 year old girl. The complainant was statutorily incapable of consenting to the sexual activity with Sam because of their age difference (see *Criminal Code*, RSC 1985, c C-46 s 150.1). However, their sexual interactions appear to have been *de facto* consensual. The complainant, who initially objected to sexual fondling, discussed it further with Sam and ultimately agreed to it. Similarly, the complainant was initially hesitant about sexual intercourse because of the concern of her mother coming home, but ultimately agreed to intercourse following further discussion with Sam. Though the complainant demonstrated apprehension about sexual activity with Sam, the trial judge found that "[t]here [was] no suggestion or evidence of predation, specifically no evidence that in achieving the complainant's agreement [Sam] used any specific plan or form of manipulation" (2012 ABPC 112 at para 65).

At trial, Judge Jerry LeGrandeur considered Sam's conduct to fall outside the scope of major sexual assault (at para 43). As a consequence, Sam was sentenced to 5 months of imprisonment followed by 18 months of probation. On appeal, Chief Justice Catherine Fraser and Justices Constance Hunt and Jack Watson criticized the reasoning at trial, "[chose] not to resolve" whether Sam committed a "major" sexual assault, and instead concluded that Sam committed a "serious" sexual assault that should have been met with a longer sentence (2013 ABCA 174 at para 33). Ultimately, the majority judgment did not extend Sam's period of incarceration because it concluded (with the insights from a *Gladue* report) that reversing Sam's course of rehabilitation would be counter-productive (at paras 34-36). Still, the Court of Appeal made it clear that the outcome in *Sam* "should in no manner be treated as any statement of guidance in relation to the range of sentence for the crime of sexual assault committed in this case" (at para 2).

In *Sam*, the Court of Appeal missed an opportunity to clarify the meaning of major sexual assaults. Asserting that Sam's conduct is a "serious sexual assault" (at para 33) without any explanation of what a "serious sexual assault" is, or how it relates to major sexual assaults provides minimal guidance. If Judge LeGrandeur's sentence was too lenient, then it would have been helpful for the Court of Appeal to provide analysis beyond the assertion that Sam's conduct was sufficiently "serious" to merit a longer sentence.

Defining Major Sexual Assaults: Inconsistent Consideration of Violence and *De Facto* Consent

Judicial sentencing categories must be clearly defined to be useful (see *R v Stone*, [1999] 2 SCR 290 at para 245). In Alberta, a clear definition for major sexual assaults, and a clear approach to sentencing sexual assaults in general has remained elusive because the Court of Appeal has been unclear about whether factors such as violence or *de facto* consent are relevant to sentencing.

Violence and *de facto* consent are related concepts. Violence (the use of force to compel submission) implies the absence of *de facto* consent (the complainant's agreement to the sexual activity). For example, in *Sam*, the complainant's voluntary participation and the absence of violence are discussed synonymously (see 2012 ABPC 112 at paras 14 and 43). However, despite the relationship between violence and *de facto* consent, each concept has generally been considered separately in the jurisprudence. I will discuss violence first because it is central to the key controversy in the definition of major sexual assault. Then I will briefly discuss the Court's inconsistent treatment of *de facto* consent. Though *de facto* consent may seem less relevant to the topic of major sexual assault because it has typically been considered in the context of sentence mitigation rather than the context of starting-points sentences, it too has received inconsistent treatment from the Court of Appeal and further illustrates the lack of clarity in the Court's approach to sentencing sexual assaults.

The confusion regarding the relevance of violence to major sexual assault can be traced back to two key decisions of the Alberta Court of Appeal: *R v Sandercock*, 1985 ABCA 218 and *R v Arcand*, 2010 ABCA 363. *Sandercock* was the lead precedent on major sexual assaults until the Court of Appeal revisited the issue in *Arcand*. Moreover, since *Arcand*, the Court of Appeal has not issued a "Reasons for Judgment Reserved" regarding major sexual assault, making it the current lead precedent (see *Arcand* at paras 226-29).

The first definition of major sexual assault, which is from *Sandercock*, was the following: "where a person, by violence or threat of violence, forces an adult victim to submit to sexual activity of a sort or intensity such that a reasonable person would know beforehand that the victim likely would suffer lasting emotional or psychological injury" (at para 13, emphasis added). Then, a majority of the Court of Appeal in *Arcand*, consisting of Chief Justice Catherine Fraser and Justices Jean Côte and Jack Watson "restate[d]" the definition of major sexual assault as "where the sexual assault is of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm" (at paras 170-71). The definition in *Arcand* is similar to the definition from *Sandercock* except for the removal of an express reference to violent force. A minority of the Court of Appeal consisting of Justices Constance Hunt and Clifton O'Brien, who concurred in result, interpreted the majority's restatement as removing the requirement for violence from the definition for major sexual assault (at para 375). However, whether or not the majority intended to remove violence from the definition of major sexual assault is unclear.

After defining major sexual assault, the majority in *Arcand* addresses the issue of violence directly. First, the majority states that it is "unnecessary to include in the definition of major sexual assault an express reference to violence" because "[i]t goes without saying that a major sexual assault is an act of violence" (at para 172). In other words, violence is a requirement of major sexual assault, just one that is not mentioned because of its obviousness. Then, the majority goes on to provide an additional reason for why including violence in the definition of major sexual assault is unnecessary:

> [172] Under the present law, a sexual assault requires that force be applied or threatened without consent. Consent in this context means the voluntary agreement of the complainant to engage in the sexual activity in question. The focus is not on whether the complainant was overcome by force but rather whether the complainant consented to the sexual activity. In other words, the absence of consent is definitive regardless of whether overt force was threatened or used.
>
> (Emphasis added)

It is difficult to reconcile the above quote with an understanding that violence is a requirement of major sexual assault. If "the absence of consent is definitive" then other factors such as violence cannot be a requirement of major sexual assault. This apparent contradiction can be addressed by considering two ambiguities in the above quotation. However, no matter how those ambiguities are resolved, the meaning and significance of violence to major sexual assault remains unclear.

The first ambiguity is what the absence of consent is definitive of: major sexual assault or sexual assault in general? Both interpretations are possible. The first three sentences in the quote above, which refer merely to sexual assault, suggest that the Court of Appeal is stating that the absence of consent is definitive only of sexual assault. But the Court of Appeal in this paragraph is explaining why violence is being removed from the definition for major sexual assault. Given that context, stating that the "absence of consent is definitive" may also be referring to major sexual assault. Neither interpretation addresses the confusion.

Consider the first interpretation and assume that the Court of Appeal is stating that "the absence of consent is definitive" of sexual assault. How is that related to the removal of violence from the definition of major sexual assault? What is definitive of legal guilt for sexual assault is not necessarily definitive of sentencing once legal guilt is established. Sentencing considers, *inter alia*, the gravity of the offence, which may be influenced by factors that have no bearing on legal guilt (more on this in the next section). Thus, it is unclear for the Court of Appeal to claim that the absence of consent being definitive of sexual assault justifies the removal of violence from the definition of major sexual assault.

Next, consider the second interpretation and assume that the Court of Appeal is stating that "the absence of consent is definitive" of major sexual assault. Then the Court of Appeal is contradicting itself. The Court of Appeal states earlier that violence is a requirement (albeit an obvious one) of major sexual assault. Thus, the absence of consent cannot be definitive. Neither of the two interpretations appears to result in a coherent statement from the Court of Appeal. However, the contradiction in the second interpretation can be resolved by considering the meaning of "violence." This leads to the second ambiguity in the quote above.

The second ambiguity is what the Court of Appeal means by "violence" and "overt force." To remove the contradiction in the second interpretation above assumes that when the Court of

Appeal says "violence" they are not referring to a narrow conception of violence (that is, the use of force to override another person's will), but rather a broad conception of violence (that is, unwanted touching or physical contact). On this broader interpretation of violence the contradiction from above is removed. Consent being definitive of major sexual assault can logically co-exist with unwanted (or, non-consensual) touching also being an obvious factor in major sexual assault. However, the paragraph is still unclear. How does the irrelevance of "overt force" to major sexual assault explain why "violence" (unwanted touching) should be removed from its definition? While a broader conception of violence resolves the contradiction discussed in the second interpretation above, it still results in unclear reasoning. Thus, every interpretation of the above quote leaves the relevance of violence (whatever that means) to major sexual assaults unresolved.

De facto consent has also received inconsistent treatment by the Court of Appeal. At one end of the spectrum, the Court of Appeal has rejected the relevance of *de facto* consent, stating that "a young girl's willing participation is not a mitigating factor" (see *R v Pritchard*, 2005 ABCA 240 at para 7). At the other end of the spectrum, the Court of Appeal has stated that the Crown "properly concedes" the relevance of factors such as the encouragement or requests of an underage complainant (see *R v Pudwell*, 2013 ABCA 88 at para 7). Finally, other decisions of the Court of Appeal have avoided the issue of *de facto* consent because of the concern that further evidence, including expert testimony, would be necessary to resolve whether or not it should be relevant to sentencing (see *R v Bjornson*, 2012 ABCA 230 at para 8; *R v King*, 2013 ABCA 3 at paras 14-18; *Sam* 2013 ABCA 174 at paras 24-25).

Both violence and *de facto* consent play a confusing role in Alberta jurisprudence. A clear and consistent approach to sentencing requires greater clarity regarding the meaning of violence and *de facto* consent and their relevance at the stage of sentencing. Admittedly, *Pudwell*, *King*, *Bjornson*, and *Sam* were "Memoranda of Judgment" that the Court of Appeal has stated in a practice note (at part A4) have "little weight" as precedent (see *Arcand* at paras 212-29). However, Memoranda of Judgment should not be issued in controversial areas of law that require appellate guidance. Furthermore, the practice of issuing Memoranda of Judgment itself has been subject to criticism (see an earlier blog post by Jennifer Koshan on that topic here).

What Should be Relevant when Sentencing Sexual Assaults?

This comment does not claim to provide the scientific research that may be necessary to determine how violence and *de facto* consent impact the victims of sexual assault. However, when such research is eventually considered by Alberta courts, it should be considered through the lens of sentencing and not through the lens of determining legal guilt. There is a difference between the elements of a criminal offence and the factors that are considered at the stage of sentencing, and that difference has been overlooked by the Court of Appeal when dealing with violence and *de facto* consent.

The "proportionality principle" is "the governing sentencing principle" (see *Arcand* at para 46 (emphasis in QL version)). It states that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (*Criminal Code*, RSC 1985, c. C-46, s 718.1). The proportionality principle and sentencing may engage considerations that exist outside of the scope of the elements of an offence. For example, the Court of Appeal in *Sam* elected to not increase the period of incarceration primarily because of the findings in a *Gladue* report. The Court's consultation of a *Gladue* report demonstrates how a factor outside the elements of the offence (that is, the Aboriginality of the offender and the "unique systemic and

background factors" that may accompany that identity) may nonetheless influence the ultimate sentence (see *Criminal Code*, RSC 1985, c. C-46, s 718.2(e) and *R v Gladue*, [1999] 1 SCR 688 at para 77).

Still, the Court of Appeal has occasionally conflated the elements of an offence with the factors that should be consulted at the stage of sentencing. In *Sam*, the Court of Appeal states that factors such as violence are irrelevant to sentencing because Parliament has legislated that the 13 year old complainant could not legally consent (see para 31). Similarly, in *Pritchard*, the Court of Appeal states that:

> [7] [w]hile there may well be a difference in degree between a perpetrator who uses force, as opposed to persuasion, on an underage victim to accomplish his objective, the fact remains that the end result is the same - a sexual assault on someone who cannot, in law, give consent. Put simply, a young girl's willing participation is not a mitigating factor.

Both of the above quotes show that the Court of Appeal has disregarded how factors irrelevant to legal guilt may nonetheless be relevant to the proportionality of the ultimate sentence. Proportionality considers the "gravity of the offence" and the "degree of responsibility of the offender." Therefore, courts should not restrict themselves to the elements of an offence (such as the absence of legal consent) when determining which factors are relevant to sentencing. Instead, they should consider any factors that inform proportionality.

The current definition of sexual consent, "the voluntary agreement of the complainant to engage in the sexual activity in question," distills the true essence of a sexual assault: sexual touching without consent. It makes no mention of violence or other extraneous considerations when evaluating legal culpability for sexual assault. Canadian law has made progress in counteracting the myth that a "legitimate rape" only occurs in alleyways, is perpetrated by violent strangers, and is caused by a victim's manner of dress or degree of intoxication. But not all factors irrelevant to legal guilt are irrelevant to proportional sentencing. Certainly a victim's attire should have no bearing on the sentence an offender should receive. To argue otherwise would be to "blame the victim" for her assault and to legitimize the pernicious belief that a women's attire is suggestive of her promiscuity and reduces the harm she would experience from a sexual assault. But does the same apply to factors such as violence or *de facto* consent? If the sentencing for sexual assault should consider the "ordinarily foreseeable" harm resulting from such an assault (see *Arcand* at para 174), the use of overt force or the presence of *de facto* consent may be relevant to that evaluation.

Consider two scenarios. In the first scenario, a 20 year old male finds a 14 year old girl in a residential neighbourhood, forces her into his truck, and forces her to have sexual intercourse with him. In the second scenario, a 20 year old male meets a 14 year old girl at work and begins a relationship with her that eventually becomes sexual. Both instances are unequivocally sexual assaults under our laws, but would it be accurate to say that the gravity of both offences is equal? The foreseeable harm in both circumstances may be different. The young girl who felt she had agreed to all of the sexual interactions that occurred may not feel as violated, afraid, ashamed, or embarrassed. While such considerations should not preclude a conviction for sexual assault, they should arguably factor into sentencing insofar as they are related to factors such as foreseeable harm for the victim and the responsibility of the offender.

The Court of Appeal has conceded the difficulty of dealing with sentences in such cases. In *Pudwell*, a 13 year old girl instigated a threesome with a 20 year old male offender and his 15

year old male friend. The Court of Appeal stated that "all sexual acts were 'consensual', in the sense that the complainant was a willing participant throughout." Then, when addressing sentence for the 20 year old offender, the Court of Appeal conceded the complexity of the facts in the case:

> [7] Any judge having to sentence this offender would have a difficult time … Dangers of such sexual activity with girls this young are clear. But the actions of the wrongdoer and his moral responsibility can vary from case to case. Though Crown counsel stresses the need to avoid watering down or repealing the age of consent, or calling encouragement or requests by a young girl "consent", the Crown also properly concedes that such facts are relevant on sentencing. Not all sexual intercourse with 13-year old girls is equal for sentencing. Some is worse than others.

Expert evidence may shed light on the relevance of violence or *de facto* consent to the impact of a sexual assault on a victim. A non-violent sexual assault is still deeply problematic. But if a violent sexual assault (that falls short of sexual assault causing bodily harm) should foreseeably result in greater psychological harm, and certainly greater physical harm, that violence ought to be taken into consideration for sentencing. Similarly, an adult having sexual relations with a minor is irresponsible and likely to cause psychological trauma to that child. For example, the Court of Appeal in *Bjornson* was right to hold the offender accountable for his irresponsible conduct "no matter how willing [the minor] was to engage in the activity" (2012 ABCA 230 at para 11). Still, a child who agrees to sexual contact with an adult, and feels as though she has a genuine relationship, may be less likely to experience the same degree of trauma as a child who is forced to submit to sexual intercourse against her will. Cases such as *R v Feng*, 2011 ABCA 172, where a complainant willingly participates with an adult partner in sexual intercourse, and where the trial judge found that she suffered no physical or emotional trauma (at para 9), suggest as much (though I am apprehensive about such a finding because of how long the negative effects of a sexual assault may lay dormant in a victim). Both scenarios should be condemned by our law given the vulnerability of children and the likely harm they may experience from sexual relationships with adults. However, the determination of whether or not a crime has been committed should not limit a court's access to the spectrum of sentences that our guidelines should embrace to ensure that all sexual assaults are met with a proportional sentence.

As a final note, the overall context of any sexual assault must be taken into account when evaluating factors such as violence and *de facto* consent. If an offender threatens his victim to compel submission, while physical "force" may not have technically been used, I would posit that the experience would be no less traumatic than if physical force had been used. This was recognized in *Sandercock*, which defined a major sexual assault as involving force or threats of force. Similarly, *de facto* consent gained through more innocent circumstances (see e.g. *R v Feng*) should not be viewed as similar to *de facto* consent gained through manipulation and "staging" with the specific purpose to take advantage of an underage victim (see e.g. *King*). Context would also require a consideration of other factors, such as the age difference and any relationship of trust between the accused and victim. A recent Montana case involving a 54 year old teacher who sexually assaulted a 14 year old student shows that cases of *de facto* consent may also result in great harm to victims. Relying on the basic principles of proportional sentencing for sexual assaults need not be accompanied with simplistic analysis that disregards the substance of those underlying principles. Considering factors such as violence and *de facto* consent with the nuance necessary to properly inform proportionality should nourish the sentencing regime for sexual assaults in Alberta.

Conclusion

The concept of major sexual assault needs a clear definition so that both trial and appellate courts have a clear set of criteria to apply in future cases. The Court of Appeal must do more than characterize sexual assaults as "serious" without any explanation of what that means or how it relates to the more familiar sentencing regime based on "major" sexual assaults. It may be that the Court of Appeal was aware of that problem by labelling its decision a Memorandum of Judgment, but that practice has been criticized and should be revisited, particularly in unclear areas of the law. What violence and *de facto* consent mean, and how they relate to sentencing for sexual assault, must be clarified for a consistent approach to sentencing sexual assaults in Alberta.

When deciding which factors should be relevant to sentencing for sexual assault, the proportionality of a sentence to the conduct of the accused, and not the elements of an offence, should dictate what is considered. Sam discussed specific sexual acts with the complainant and she agreed to them. While their age difference makes his conduct illegal, forcing her to submit to sexual activity may have had greater foreseeable physical and psychological harm that would more easily characterize it as a major sexual assault. The progress that our justice system has made in rejecting misleading myths should not prevent our courts from considering the context that properly informs the harms of criminal conduct and guides the legal system to proportionate sentences.

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