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Jiangho Unchained: A Discussion of the Narrative and Commentary Surrounding the Jian Ghomeshi Scandal

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The recent scandal surrounding Jian Ghomeshi's dismissal from the CBC, and the sexual assault allegations relating to that dismissal, have had a polarizing impact on Canadian discussion about sexual assault. First, this comment outlines the legal framework surrounding the sexual assault allegations against Mr. Ghomeshi to clarify what is relevant to the adjudication of those allegations, and what is not. Second, this comment seeks to respond to the polarizing conversation on this issue and argue for a middle ground which preserves the presumption of innocence while simultaneously demanding greater support for the victims of sexual assault.

Background

On October 26, 2014, the CBC announced that its relationship with Jian Ghomeshi – host of the popular radio show "Q" – had come to an end.

The factual background underlying this controversy (AKA World War Q, AKA Ghomeshigate) is heavily contested. Mr. Ghomeshi, in a note posted on Facebook, claims to be the victim of "a campaign of false allegations pursued by a jilted ex girlfriend and freelance writer." Shortly thereafter, an article in the Toronto Star reported that three anonymous women say that Mr. Ghomeshi "was physically violent to them without their consent during sexual encounters or in the lead-up to sexual encounters." Moreover, following the Toronto Star piece, many other women echoed these allegations, including actress Lucy DeCoutere, who has agreed to be identified.

In the aftermath of his dismissal, Mr. Ghomeshi filed a $55 million law suit against the CBC for breach of confidence and defamation (though, some have argued that the law suit serves ulterior motives). To date, no formal complaint or police investigation relating to the allegations against Mr. Ghomeshi has taken place.

This scandal is steeped in legal issues: employment and labour, sexual assault, privacy, and legal ethics (regarding the filing of a potentially disingenuous statement of claim). But I will limit my discussion to two discrete points: (1) how the narrative surrounding the Ghomeshi scandal illustrates the importance of distilling the relevant facts in sexual assault cases and (2) how the commentary on the Ghomeshi scandal creates a false dichotomy between supporting the presumption of innocence and empowering sexual assault victims.

(1) The Ghomeshi Narrative: Distilling the Relevant Facts in Sexual Assault Cases

The narrative surrounding Mr. Ghomeshi's alleged assaults is a mix of relevant and irrelevant facts relating to consent. In his Facebook note, Mr. Ghomeshi discusses a "jilted ex girlfriend," and their common interest in "adventurous forms of sex" like "BDSM" (bondage, dominance, sadism, and masochism). Effective PR, maybe, but such observations are minimally relevant to the adjudication of consent. Men can still assault their girlfriends, or wives, or ex-girlfriends. And people interested in BDSM can still experience sexual assault. Indeed, to argue that a woman must have consented to all of their rough sexual encounters because she was more likely to have consented given her interest in BSDM is expressly forbidden by the *Criminal Code*, RSC 1985, c C-46, s 276, which restricts reliance on evidence of a complainant's previous sexual activity.

A significant reason for Canada's woeful record in dealing with sexual assault prosecutions is the infiltration of irrelevant evidence into judicial reasoning. As I have written on ABlawg before, courts often impose unrealistic standards on sexual assault victims, and many of those unrealistic standards flow from irrelevant evidence that distracts from what is often the central issue at trial: consent. Did the complainant consent to the specific sexual activity in question? If not, did the accused have a reasonable but mistaken belief of that same specific consent? These are the questions that should guide the relevant legal inquiry (see *R v JA*, 2011 SCC 28 at paras 23-24, [2011] 2 SCR 440). Not that the complainant consented at another time. Or that the complainant must have consented because of her past relationship with the accused, or her style of dress, or how (purportedly) imprudent she was. Did she, or did she not, consent, this time. That is what matters.

The need for a proper focus on relevant facts is particularly important in sexual assault cases relating to BDSM practices because unconventional forms of sexual expression are more liable to misinterpretation by a trier of fact that is unfamiliar with them. As an added layer of complexity, the state of Canadian law is opaque in the context of BDSM. Even further, the Supreme Court has not shied away from establishing bright line rules that threaten to infringe on the meaningful expression of sexual autonomy between partners (see: Joshua Sealy-Harrington, "Tied Hands? The Doctrinal and Policy Argument for Advance Consent," 18 Can Crim L Rev 119 ("Tied Hands")). While convicting Mr. Ghomeshi might be easier if all BDSM were illegal, such an overbroad reach would also threaten the legitimate sexual expression of many Canadians.

Regardless, with a proper focus on consent, irrelevant facts can be cast aside. For example, Mr. Ghomeshi claims that his exes agreed to rough sex. That may or may not be true, but agreeing to rough sex, in a general sense, is not a *carte blanche* to disregard a partner's contemporary and specific wishes. More specifically, in his note, Mr. Ghomeshi writes:

> CBC execs confirmed that the information provided showed that there was consent. In fact, they later said to me and my team that there is no question in their minds that there has always been consent.

From a legal perspective, this nebulous "information," which is purportedly conclusive of consent, is difficult to conceive of. Is it a series of text messages confirming specific sexual preferences? Or a desire to remain friends after the alleged assault? Neither is conclusive of consent. Worse, this type of evidence, if anything, distracts from the adjudication of consent. A woman who communicates a desire for rough sex, or any sex, is not bound to her word. She is,

quite rightly, open to promising all sorts of sexual adventures and ultimately following through with none of them. Again, the focus must be on her consent at the time of the activity, not some information that purports to "prove" her subjective consent from now to eternity.

Even a video recording of ostensibly consensual sex would be inconclusive. Actual testimony from a complainant is so often critical in sexual assault cases because consent turns on the complainant's subjective interests, which documentary evidence would struggle to fully establish (*R v Ewanchuk*, [1999] 1 SCR 330 at para 48). For example, a victim could actively participate in sexual activity out of fear that denying her partner will result in a worse fate than suffering a sexual assault (see e.g. *R v Sansregret*, [1985] 1 SCR 570). Indeed, one of the more recent victims to share her story states that she performed oral sex on Mr. Ghomeshi to escape his hotel room after he was overly forceful with her. With that in mind, a video recording of such a victim performing ostensibly consensual oral sex would not prove consent at all.

Admittedly, a video recording could more readily support an argument of mistaken belief in consent regarding that specific encounter, in so far as mistaken belief in consent turns on the accused's reasonable interpretation of the complainant's communication of consent, a partially objective assessment (Tied Hands, at 123). But still, evidence of reasonable steps taken to ascertain consent to all sexual activities is required (*Criminal Code*, s 273.2), and evidence of consensual sexual encounters does not preclude the occurrence of other non-consensual sexual encounters. To hold otherwise would make it impossible for complainants to ever pursue charges against ongoing intimate partners (though, in any event, such partners continue to struggle with pursuing their claims in court). Surely Mr. Ghomeshi's information is not a little black box of DVDs documenting every sexual encounter he has ever participated in. Accordingly, to claim he has conclusive proof that he never sexually assaulted anyone seems far-fetched.

In sum, the treatment of sexual assault would vastly improve if our courts more consistently limited their analysis to the legally relevant facts before them (see especially Lucinda Vandervort, "Sexual Consent as Voluntary Agreement: Tales of 'Seduction' or Questions of Law?" (2013) 16 NCLR 143). While it may sound trite to argue that courts should focus on relevant facts, this has been a significant struggle in sexual assault jurisprudence, and it appears to be a problem in the narrative surrounding the Ghomeshi scandal as well.

(2) The Ghomeshi Commentary: Reconciling the Presumption of Innocence with Greater Support for Sexual Assault Victims

The national discourse following the Ghomeshi scandal has been polarized. On one extreme, some #teamjian supporters (a friend of mine aptly observed that the likening of sexual assault allegations to a sporting competition is, to put things lightly, offside) are certain that the charismatic Jian Ghomeshi could never have committed sexual assault and decry the anonymity of his accusers. On the other extreme, some opponents of Jian Ghomeshi speak with certainty that the allegations against him are true and consider the presumption of innocence to be a mere buzz phrase of rape apologists. In my view, neither position is sound. Rather, cases as public as the Ghomeshi scandal test our collective resolve to both preserve the presumption of innocence while simultaneously empowering the victims of sexual assault to seek justice. Though these two goals may seem at tension, they can meaningfully co-exist.

First off, let me be very clear about what I mean by the presumption of innocence. Or rather, what I do not mean. Presuming innocence, in law, does not mean presuming innocence, in fact. Statistically speaking, women are extremely unlikely to falsely report a sexual assault. As a

consequence, when a sexual assault allegation is made (or 8, for that matter) standing by the presumption of innocence does not mean turning a blind eye to those allegations. It does mean, however, demanding due process from our justice system. Due process is just as important for the victims of sexual assault as it is for the accused. If the over 100,000 likes on Jian Ghomeshi's Facebook note mean anything, they illustrate how the court of public opinion can be just as damaging to the victims of sexual assault as it can to the accused.

The meaningful coexistence between the presumption of innocence and empowering the victims of sexual assault is best illustrated by definition. The presumption of innocence holds that, in a legal setting, the onus rests upon the Crown to prove the guilt of the accused beyond a reasonable doubt (*R v Lifchus*, [1997] 3 SCR 320 at para 13). In other words, the legal burden that must be met for the powerful force of the state to be exercised against individual citizens is a high one – and for good reason. In a free society, a high bar should be set before fundamental freedoms are stripped from citizens. That same bar, however, need not apply to our personal judgments. It also, similarly, need not apply in the employment law context, in which private parties are permitted to make employment decisions pursuant to contract and without reference to the presumption of innocence.

Therein lies where the presumption of innocence coexists with empowering victims of sexual assault. There is nothing inconsistent with holding the state to a different standard than we do ourselves. Indeed, the application of the *Charter* as a limit on state conduct directly reflects how we, as a society, place the state under stricter scrutiny. Every day we reach important personal conclusions based on limited evidence and are happy to apply a standard of proof lower than beyond a reasonable doubt. That said, it is also legitimate to reserve our judgments in criminal matters. The presumption of innocence has an important rationale behind it which carries weight outside the realm of the courts. While false allegations of sexual assault are extremely rare, relying on that statistic to presume guilt in all sexual assault cases places an immense stigma on everyone accused of sexual assault – even those who are truly innocent.

Armed with the knowledge that supporting victims does not deteriorate the presumption of innocence, the need for greater support of sexual assault victims becomes painfully clear. There are myriad reasons that prevent victims from speaking out about their assaults. From shame, to fear, to the genuine belief that nothing productive will come from the allegation. These pressures are intense, and while I could never fault a victim for not going public with their experience, we must support victims to speak out and combat the incredible injustice of sexual crimes going unpunished. Indeed, no matter what side you take in the Ghomeshi scandal, it is hard to deny how it has shone a spotlight on the need to confront and actively invest in amplifying the voices of sexual assault victims.

Conclusion

The scandal surrounding Jian Ghomeshi highlights two significant struggles in the Canadian treatment of sexual assault. First, our courts need to focus on consent in the adjudication of sexual assault, and that focus must be reinforced through clearly articulated legal tests that orient judges towards truth and away from myths of ideal victims. Second, our society needs to recognize that we do not have to choose between presuming the innocence of the accused and empowering victims of sexual assault. Rather, they are both important and promote a balance in our society that preserves justice in all its forms.

While we must continue to demand proof beyond a reasonable doubt from the Crown, we must stop demanding too much from the victims of sexual assault. Whether or not Jian Ghomeshi committed the crimes he is accused of, let's hope that the courageous women coming forward in the past week can blaze a trail for the many silenced voices that remain unheard.

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