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Judicial Interventions and Rape Myths: Differing Approaches at the Alberta Court of Appeal

By: Jennifer Koshan

Case Commented On: *R v Schmaltz*, 2015 ABCA 4

A decision from the Alberta Court of Appeal has garnered attention from the media (see here and here) for its contribution to recent debates about rape culture and rape myths. In the context of discussions about Ghomeshi (see here and here), Cosby, Dalhousie and the ongoing challenges that prevent many women from coming forward with complaints about sexual assault and harassment, the Court of Appeal has weighed in on the role that judges can play in curtailing the perpetuation of rape myths in the courtroom. In *R v Schmaltz*, 2015 ABCA 4, the majority (Justices Russell Brown and Thomas Wakeling) ordered a new trial based on their view that the trial judge had gone too far in limiting cross-examination of the complainant. Justice Marina Paperny, writing in dissent, would have dismissed the appeal and upheld the conviction of the accused.

The Decision

The alleged facts are sparse in the majority judgment, and it is only in the dissenting judgment where we learn that the accused digitally penetrated the complainant in her daughter's home. Media reports indicate that he was a friend of her daughter's boyfriend. The complainant testified that she woke up to find this assault underway and that she did not consent. The accused also testified, and while he did not deny the sexual activity, he claimed that the complainant consented to it. The key issue at trial was therefore whether the complainant consented to the sexual activity in question. Following a preliminary inquiry, the trial proceeded before a judge alone. After rejecting an application for a mistrial made by the defence, Judge D.J. Greaves convicted the accused of sexual assault, contrary to s 271 of the *Criminal Code*, RSC 1985, c C-46.

At the Alberta Court of Appeal, the appellant framed the issues as follows: (1) whether the trial judge's conduct created the appearance of an unfair trial, and (2) whether the trial judge's conduct raised a reasonable apprehension of bias and thus resulted in a miscarriage of justice (at para 12). The conduct of the trial judge that was alleged to give rise to these issues was a series of interventions he made during the cross-examination of the complainant by defence counsel.

On the first issue, the majority articulated the following test: "whether the appellant's right to make full answer and defence was breached by significant and unwarranted constraints imposed

by the trial judge upon defence counsel's cross examination of the complainant" (at para 20, citing *R v Lyttle*, 2004 SCC 5 (CanLII), [2004] 1 SCR 193 at 196). This question is to be answered from an objective perspective, namely "whether the accused or an observer present throughout the trial might reasonably consider that the accused had not had a fair trial" (at para 21). Put another way, trial fairness should be looked at in terms of whether justice was seen to be done, again assessed from the perspective of a reasonable, "well-informed and right-minded observer" (at para 23). The majority rejected the Crown's argument that there should be a presumption in favour of trial fairness, with a declaration of trial unfairness reserved for the clearest of cases. They indicated that this higher standard was applicable only to allegations of reasonable apprehension of bias, and not to allegations of unfairness based on judicial interventions in cross-examination (at paras 21, 24), noting however that there was authority to the contrary (see *R v Hamilton*, 2011 ONCA 399 (CanLII)). The majority's reasoning was that the fairness of judicial interventions can be "objectively viewed and assessed" on appeal, while allegations of bias cannot be similarly tested due to the difficulty of knowing a trial judge's "mind or motivations" (at para 24).

Justice Paperny indicated that while she agreed generally with this approach, the reasonable observer (and the reviewing court) "must look beyond mere appearances and consider whether, in fact and in law, interventions by the trial judge deprived the appellant of his right to make full answer and defence" (at para 62). She noted that the right of an accused to cross-examine witnesses, while essential, is not absolute, and must comply with the rules of evidence and avoid "harassment, misrepresentation … [and] questions whose prejudicial effect outweighs their probative value" (at para 63, citing *Lyttle* at para 44). In the sexual assault context, legislation and case law places further restrictions on cross-examination related to the complainant's sexual history / reputation and discredited "rape myths". Unlike the majority, Justice Paperny accepted the existence of a presumption "that a trial judge has not unduly intervened in a trial" and indicated that trial unfairness based on interventions should be found "only in the clearest of cases" (at paras 64, 66, citing *Hamilton*). She reasoned that a reviewing court should be deferential to the trial judge's decisions given the advantageous position of the trial judge in assessing the demeanour of witnesses and the conduct of cross-examining counsel (at para 64), and emphasized that ensuring a fair trial is intended to protect the rights of both the accused and the complainant (at para 68).

The appellant contended that there were four instances of judicial intervention in cross-examination that had the effect of impairing the defence strategy of showing inconsistencies in the complainant's testimony and testing her credibility. The majority and dissenting justices applied their approaches to trial unfairness to each of these allegations individually as well as cumulatively.

The first argument was that the trial judge had improperly interfered in defence questioning about the complainant's consumption of marijuana. The defence had been trying to expose a possible contradiction between the complainant's testimony, where she indicated that she had not consumed drugs on the occasion in question, and a medical report which showed THC in her blood. The trial judge had intervened in the cross-examination to express concerns about the lack of expert evidence, and took judicial notice that traces of THC can remain in a person's blood for some time. The appellant argued that this intervention "amounted to advocacy on the part of the Crown" and "provided the witness with an answer to counsel's questions", thus preventing effective cross-examination (at para 31).

The majority agreed with this argument, finding that the trial judge's conduct had deprived the accused of an opportunity to test the complainant's credibility (at para 32). Justice Paperny disagreed. She noted that the trial judge's questions were directed at ensuring that proper legal procedures for introducing the medical report were followed, that his intervention had not influenced the complainant's response, and that the defence strategy of showing a possible inconsistency in the complainant's testimony had been accomplished (at paras 75-78).

The second allegation of inappropriate interference in cross-examination went to the trial judge's intervention in defence questions about flirting. Defence counsel was trying to suggest a contradiction between the complainant's evidence in chief, where she denied any flirting having taken place, and her statement to the police, which suggested there had been flirting. The trial judge intervened to indicate that the police statement made it clear the complainant had said it was the accused who had been flirting with her, and the defence then abandoned that line of questioning. The Crown returned to this issue in its re-examination of the complainant, where she confirmed that the accused had been flirting with her, not vice versa.

The majority found that this intervention was also inappropriate, suggesting that the passive language used by both the Crown and police "left open the question of who was flirting" (at para 36). They believed that the trial judge's conduct "not only effectively shut down cross-examination by defence counsel on a potentially critical ambiguity in the complainant's statement to police, it suggested a resolution to that ambiguity that Crown counsel was able to exploit" (at para 38). Justice Paperny disagreed , indicating that defence counsel could have, and in fact later did continue with cross-examination on this issue, and that the accused had given a different account in his testimony, making it possible to find a contradiction in the complainant's testimony about flirting (at paras 80-81). More importantly, she questioned the relevance of this line of questioning, as any flirting was irrelevant to the issue of consent, and was only "tangentially" relevant to the complainant's credibility (at para 82).

The third argument concerned the trial judge's intervention in defence questions about whether the complainant was wearing a bra. Again, this line of questioning was said to be intended to expose possible inconsistencies between the complainant's evidence at trial and her statement to the police. The majority found this intervention to be appropriate, as the complainant had not accepted the police transcript as an accurate reflection of what she told police, and the judge's intervention was merely to indicate that the defence would need to prove the veracity of the transcript (at para 40). Justice Paperny did not deal with this issue in her reasons, perhaps because the majority had already dismissed its relevance to trial fairness. But her point about the flirting line of questioning is also pertinent here – evidence about the complainant's clothing was irrelevant to the issue of consent, and only tangentially relevant to credibility at best.

The fourth area of concern related to evidence of the complainant's sobriety. The defence strategy was to show contradictions between the complainant's testimony and that of her daughter as to whether she was drunk at the time of the alleged incident, and between the complainant's testimony at trial and at the preliminary inquiry in terms of how many beers she had consumed. The trial judge intervened to indicate that defence counsel's questions were unclear, that there appeared to be no contradiction, and that she should move on.

The majority found that the trial judge had improperly interfered with the ability of the defence to cross-examine the complainant on the inconsistencies in evidence regarding her sobriety, which went to her credibility (at paras 44-46). The dissent disagreed, indicating that the trial judge had properly sought to have defence counsel conform to evidentiary procedures for

introducing contradictory statements, and that he was alive to the contradiction between the evidence of the complainant and her daughter (at paras 84-85).

Overall, the majority found that the cumulative impact of the trial judge's interventions rendered the trial unfair: "he frustrated, to a significant and unwarranted degree, defence counsel's strategy to test the complainant's credibility. This would lead a reasonable, well-informed and right-minded observer to conclude that the appellant was not able to make full answer and defence" (at para 48). The majority did acknowledge the important role to be played by trial judges in sexual assault cases to protect complainants "from questions tendered for the purpose of demeaning and pointing to discredited, illegitimate and irrelevant factors personal to the complainant" (at para 47). However, their view was that the defence strategy was to test the complainant's credibility rather than to suggest she had consented, and that this strategy did not propagate rape myths. A new trial was therefore required.

In contrast, Justice Paperny concluded that the trial judge's interventions were either proper or immaterial, and she found that the interventions did not deprive the appellant of his right to make full answer and defence. She found that the defence had been able to make its position clear "that the complainant was a liar, a possible drug user, was drunk at the time of the assault, and consented to the sexual activity" (at para 86). Overall, "the high threshold required to establish an injustice warranting a new trial has not been met" (at para 87).

On the second issue, whether there was a reasonable apprehension of bias, the majority found that a more onerous standard was appropriate, with a "strong presumption that judges discharge faithfully their oath to deliver justice impartially" (at para 50), such that a new trial should be ordered only in the clearest of cases. The majority held that the appellant could not meet this threshold on the facts presented (at paras 52-59), and Justice Paperny agreed with this outcome (at para 61).

Commentary

It is interesting that the majority refers to rape myths several times, but without defining the term, explaining its origins, or offering relevant examples. The only elaboration of rape myths in their judgment appears at para 19, where they indicate that trial judges in sexual assault cases may intervene to protect complainant witnesses from "random shots at the complainant's reputation or groundless questions directed to discredited "rape myths" to the effect that the complainant's unchaste or aroused state made it more likely that she would have consented to the sexual activity in question."

But rape myths are about much more than reputation and consent. In the Supreme Court of Canada's first decision recognizing rape myths, *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577, 1991 CanLII 76 (SCC), McLachlin J (as she then was), writing for the majority, stated that rape myths include the discredited beliefs "that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief" (at 604). Justice L'Heureux Dubé's dissenting reasons went further, providing a non-exhaustive list of rape myths including the following:

- "a woman cannot be raped against her will, that if she really wants to prevent a rape she can"
- "rapists are strangers who leap out of bushes to attack their victims"; "the existence of a relationship between the parties [is used] to blame the victim"

- women “are madonnas or they are whores”
- “being on welfare or drinking or drug use … are used to imply that the woman consented to sex with the defendant or that she contracted to have sex for money”
- “if a woman is raped, she will get hysterical during the event and she will be visibly upset afterward”
- “if a woman is raped she will be too upset and ashamed to report it, … [or] she will be so upset that she will report it”
- “the feminine character is especially filled with malice. Woman is seen as fickle and as seeking revenge on past lovers.”
- “the female's sexual behavior, depending on her age, is under the surveillance of her parents or her husband, and also more generally of the community…. if a woman says she was raped it must be because she consented to sex that she was not supposed to have”
- “females fantasize rape”
- “rapists are not “normal” and are “mentally ill””

(at 651-654, citing L. Holmstrom and A. Burgess, *The Victim of Rape: Institutional Reactions* (New Brunswick, N.J.: Transaction Books, 1983) at 174-199)

Justice L’Heureux Dubé also explained the operation of rape myths in the criminal justice system (at 654):

> Like most stereotypes, they operate as a way, however flawed, of understanding the world and, like most such constructs, operate at a level of consciousness that makes it difficult to root them out and confront them directly. This mythology finds its way into the decisions of the police regarding their “founded”/“unfounded” categorization, operates in the mind of the Crown when deciding whether or not to prosecute, influences a judge's or juror's perception of guilt or innocence of the accused and the “goodness” or “badness” of the victim, and finally, has carved out a niche in both the evidentiary and substantive law governing the trial of the matter.

Another Supreme Court decision which includes a lengthy discussion of rape myths is *R v Ewanchuk*, [1999] 1 SCR 330, 1999 CanLII 711 (SCC), where Justice L’Heureux Dubé, in concurring reasons, added to her list from *Seaboyer* the following (at paras 82, 87):

- “women often deserve to be raped on account of their conduct, dress, and demeanour”
- “when a woman says “no” she is really saying “yes”, “try again”, or “persuade me””

In *Schmaltz*, to the extent that the trial judge’s interventions reined in questions targeted at undermining the complainant’s credibility based on her clothing and her alleged flirtatious behavior, or what she said about these matters earlier, he was appropriately rejecting the perpetuation of rape myths. As recognized by Justice Paperny, these matters were immaterial to the issues at trial. Potential inconsistencies in the complainant’s testimony about them should not have been exploited by the defence in the name of credibility testing. Questions about drinking and drug use are a bit more complicated, as they may go to the complainant’s ability to recall the events in question, but caution must also be taken to ensure that such questions do not lead to inappropriate inferences about the likelihood of consent or the overall trustworthiness of the complainant. The trial judge’s interventions in cross-examination on these issues, while not clearly linked to the rejection of rape myths, were still appropriate.

Justice Paperny's judgment is also to be preferred because of the high threshold she recognized for overturning a trial decision based on allegations of unfairness in limiting cross-examination. Inappropriate cross-examination of the complainant that perpetuates rape myths remains an issue in many sexual assault cases, and the Crown and trial judges should be encouraged to object to and limit such questioning, with appropriate deference shown to such interventions on appeal (for more on this topic see the excellent essays in Elizabeth Sheehy's collection *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) and a review of the book by Doris Buss and myself here). The competing views of the proper threshold offered by the majority and dissent, and the contradictory decision of the Ontario Court of Appeal in *Hamilton*, suggest that this may be an appropriate case for an appeal to the Supreme Court of Canada.