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Myths, Stereotypes, and Credibility in Sexual Offence Trials

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Case Commented On: *R v CMG*, 2016 ABQB 368 (CanLII)

R v CMG, 2016 ABQB 368 (CanLII) is a Crown appeal of the acquittal of an accused of sexual offences. Justice Sheilah Martin ultimately ordered a new trial due to errors of law by the trial judge regarding self-incrimination, allowing myths and stereotypes to influence the judgment, and failing to make certain factual findings with sufficient clarity (at para 108). This post will review the errors of the trial judge, with a particular focus on the trial judge's comments regarding the credibility of the complainant. The post concludes with a suggestion on how decisions relating to the credibility of complainants in trials for sexual offences should be written.

Facts

The accused was charged with sexual assault and sexual interference (respectively sections 271 and 151 the *Criminal Code of Canada*). The accused (CG) was 16 at the relevant time; the complainant (RW) was 13. It was accepted at trial that ostensible consent was not a defence to the charge under section 151 (for an earlier post on ostensible consent see here). The complainant testified that the accused had pushed her to the ground in Kinsmen Park, removed her clothing and forced his penis into her vagina before she escaped and ran away (at para 7). In police statements and at trial, the accused repeatedly said that he had engaged only in consensual intercourse with the complainant though the location, number of occurrences and other details varied in his police statement, examination in chief, and cross-examination (at para 9-10). As is usual in a criminal trial, if the trial judge had accepted the testimony of the complainant without being left with any reasonable doubts based on the evidence of the accused, he would have convicted the accused. Oddly, if he had accepted the testimony of the accused, he also would have convicted the accused, because he admitted sexual activity with a person who was too young to consent. He acquitted the accused because he rejected the testimony of both (at para 12). Exactly what the trial judge concluded did occur was not altogether clear.

Self-Incrimination

The accused admitted that he had engaged in illegal sexual activity with the complainant during the summer in question. The trial judge considered that these admissions could not be used to convict the accused as they were protected "under section 13 of the *Charter* and under the provisions of the *Canada Evidence Act*…" (at para 29) As noted by Justice Martin, however, those protections are only for the testimony of an accused that was compelled at an earlier proceeding (at para 35). The accused's testimony in this case was "freely given in his own trial on the very charges before the court" (at para 37). The trial judge may or may not have relied on this reasoning to exclude the evidence – perhaps he simply found the accused totally unreliable (at para 39) – but "his failure to make an express finding about whether he believed the accused

had sex with the complainant amounts to the omission of a key legal issue and is itself a reviewable error." (at para 40)

The trial judge also appears to have considered that the illegal activity the accused admitted to was outside the scope of the charge (at para 30). Justice Martin found that the trial judge wrongly considered "that time was a crucial element of the offence." (at para 44) The date of the offence is not an essential element of the offences in question – the trial judge considered the timing issue too narrowly.

Myths and Stereotypes

Justice Martin reviewed the historical provisions relating to the credibility of complainants in trials for sexual offences, pointing out that "Many such myths have their foundation in the same set of beliefs that gave rise to the special and replaced set of provisions, principles and practices that characterized the prior law on sexual offences." (at para 65). The trial judge commented that the complainant did not scream or run for help (at para 68), potentially drawing upon the myth that a complainant could have resisted the rapist if they really wanted to (at paras 68-69). Furthermore, Justice Martin noted that the trial judge did not mention that the testimony of the complainant was that she actually did struggle, break free, and run away (at para 71).

The trial judge noted that the complainant did not immediately tell anyone about the sexual assault, and Justice Martin indicated that this appears to have drawn in the myth of recent complaint (at para 72). The recent complaint myth is that sexual assault will be reported immediately, and any delay is a reason to doubt the complainant. The trial judge also mentioned that the complainant's aunt did not notice any change in the complainant's behaviour following the assault – giving the appearance that he was considering the "myth that women who have really been raped will be hysterical and their terror and injuries will be plain to see" (at para 80).

Justice Martin ruled that these comments, without an explanation of their relevance, showed that the trial judge relied on prohibited assumptions and speculation amounting to an error of law (at paras 85-86). The trial judge's reasons also failed to specify what inferences he had made with respect to the complainant's testimony and her credibility more broadly (at para 103). These omissions, amongst others, led Justice Martin to conclude that the acquittal must be overturned, the necessary findings were not present to enter a verdict of guilty, and the appropriate remedy was to order a new trial (at para 51).

Commentary

A trial does not allow for uncritical acceptance of testimony from any party. What *R v CMG* reiterates is that "certain categories of complainants should not start from a deficit position or face the additional barriers of being discredited based on myths and stereotypes." (at para 58)

The trial judge did not explicitly state or apply the myths that Justice Martin identified. What he did was to state the facts that underpinned those myths, leave unexplained his inferences based on those facts, and conclude that the complainant was not credible. In this case, the omission of the discussion of the myths was an indication that the myths had been silently applied. However, this gap in his written reasons for judgment would be an issue (although likely not one reviewable on appeal) even if he had ultimately found the complainant credible. In line with the

principle that 'justice must be done and be seen to be done', complainants and the public should never be left in doubt about whether credibility assessments have been impaired by myths or stereotypes.

At first glance, it appears the trial judge said too much. While his judgment may have been overturned if the trial judge had not mentioned the facts that indicate his reasoning may have been based on myths and stereotypes, this clearly would not have resulted in a better judgment. The problem was that the trial judge wrote too little. In sexual assault cases where the underlying facts may support one or more rape myths, the trial judge would be better off not to shy away from mentioning those facts in the judgment (e.g. a delay in reporting the assault, a lack of evidence of struggle, or a less severe emotional reaction than a layperson would expect). A trial decision is improved by the inclusion of such facts, a review of the impermissible myths and stereotypes that such facts might lead to, and a clear statement that those inferences would be impermissible errors of law. The accused, complainant and public should be clear that the myths have no grounding in fact and no place in Canadian law. Such a statement serves both as a self-caution to the trial judge, and as an assurance to the parties and the public. Jennifer Koshan has previously written on *R v Wagar*, 2015 ABCA 327 (CanLII) here about the importance of jury cautions about rape myths and stereotypes and recommended trial judges administer self-cautions. *R v CMG* is another instance where such a self-caution may have been of assistance. Another recent example is *R v JR*, 2016 ABQB 414 (CanLII), where a trial decision tainted by rape myths was overturned on appeal, receiving much media coverage (see e.g. here and here). These decisions, even when corrected on appeal, damage public confidence in the justice system's ability to treat sexual assault complainants fairly.

Cautions rejecting the myths and stereotypes surrounding sexual assault should appear not only during trial, but also in the written decision following those trials. Silence about the myths risks leaving a complainant in doubt that they received a chance to be heard and have their credibility determined fairly, the accused believing that the trial judge overlooked relevant evidence, and the public in doubt about whether justice was done. Stereotypes thrive in silence and wither under scrutiny; if they are to be purged from sexual assault trials it is necessary to confront them, not to ignore them.