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Celibate, Awake, and Alone: The Hallmarks of a Credible Sexual Assault Victim?

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Case commented on: *R v FY*, 2013 ABQB 694

This post discusses a recent decision from the Alberta Court of Queen's Bench which acquitted the accused of an alleged sexual assault. In that decision, the court adopts a problematic approach to assessing consent which creates unrealistic standards that women must satisfy to maintain credibility in a sexual assault trial.

1. Background

In *R v FY*, 2013 ABQB 694 [*FY*], the accused (Mr. FY) was charged with sexually assaulting the complainant (Ms. EP), his first cousin, in contravention of the *Criminal Code*, RSC 1985, c C-46, s 271 (at para 1). EP resided at an undisclosed First Nation (undisclosed, because of an identification ban) with her five children (at para 13).

At trial, the only evidence was the testimony of the complainant adduced by the Crown (at paras 11-12). EP testified to the following:

On the evening of April 20, 2001, EP went on a "bar run" with others to purchase liquor and bring it back to her home. They returned within a half hour (at para 15). While on this bar run, Mr. KL (who was present during EP's later assault) arrived at her home. KL is a former husband of EP. He is also, like FY, one of her first cousins (at paras 1 and 16).

Between the afternoon/evening of April 20 and 5:00 a.m. on April 21, EP consumed 14 beers. She testified that both she and KL were drunk (at para 18).

Then, at 10:30 a.m. on April 21, EP and KL went to a bar where they joined a group of acquaintances including the accused, FY (at paras 19-20). At the bar, EP consumed approximately 8 more drinks (at para 21). Between 2:30 p.m. and 2:45 p.m. EP left the bar with KL and FY. At this point, all 3 were intoxicated. They were driven back to the reserve by an acquaintance (at para 22).

EP was dropped off first. When entering her home, she was unaccompanied by KL and FY. She immediately went to bed after using the washroom. She was fully clothed in bed and pulled the sheets up over her head (at para 23). Five hours later she awoke, completely naked, and with the accused, FY, having sex with her. Seated on a nearby chair, KL was consuming crack. EP remained silent for the following five minutes as FY finished having sex with her. Then, EP asked KL "if he wanted a chance too," inhaled some crack, and had sex with him (at paras 23-29). Both men left the house about thirty minutes after EP first awoke (at para 31).

2. The Key Facts

Justice TW Wakeling provides a comprehensive timeline summarizing EP's testimony regarding the events surrounding her alleged assault ranging from the day before to 7 years later (at paras 13-39). However, before discussing the forest, I begin with the trees – a few key paragraphs from the complainant's testimony which, if true, undoubtedly substantiate a sexual assault of EP:

> [24] Ms. EP woke up at dusk the same day. The sun was setting. There was still some daylight.
>
> [25] She noticed that Messrs. FY and KL were in her bedroom.
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> [26] The complainant was shocked to discover that the accused was having sexual intercourse with her. She had no clothes on and had no recollection of having removed her clothes.
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> (Emphasis added)

This is a sexual assault. The absence of consent is an element of that offence, and under the *Criminal Code*, s 273.1(2)(*b*), no consent is obtained where "the complainant is incapable of consenting to the activity." According to the complainant, she awoke to the accused having sexual intercourse with her. She therefore lacked capacity to consent to the sexual activity that occurred before she awoke. As a majority of the Supreme Court ruled in *R v JA*, 2011 SCC 28:

> [66] It is not possible for an unconscious person to satisfy this requirement, even if she expresses her consent in advance. Any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the *Criminal Code*.
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> (Emphasis added)

Consequently, unless there is a reasonable doubt about the complainant's account, there is no room for claiming that she consented to being sexually touched while unconscious. Put differently, Justice Wakeling's finding of a reasonable doubt about the absence of consent requires first that he had a reasonable doubt about her claim of being unconscious while sexually touched and second that he had a reasonable doubt about her claim of not consenting to that (purportedly conscious) sexual touching.

The only evidence at trial was EP's testimony, and Justice Wakeling's basis for discrediting that testimony is flawed in several ways.

3. The Illegitimate Basis for Discrediting the Complainant

Justice Wakeling presented three primary reasons for not believing the complainant's assertion of non-consent. I will address each of those reasons and demonstrate why his basis for discrediting the complainant imposes unreasonable expectations on victims of sexual assault.

(a) Celibate: The "sexual history" argument

Justice Wakeling summarizes his first reason for discrediting the complainant as follows:

> [7] First, when the accused finished having sex with the complainant, she said to KL, a person who was sitting on a chair in the complainant's bedroom while the accused and Ms. EP were having sex, "Do you want a chance too?". He did. Ms. EP's communication with Mr. KL can reasonably be characterized as an invitation from Ms. EP to Mr. KL to have sex with her. That she may have consented to having sex with Mr. KL minutes after having had sex with the accused, leaves the Court with a reasonable doubt as to whether Ms. EP consented to a sexual act with Mr. FY.
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> (Emphasis added)

This first reason for having a reasonable doubt about the absence of EP's consent is the fact that she subsequently had sex with KL. Presumably, the reasoning goes that her willingness to have sex with another person shortly after her alleged assault discredits the claim that she did not consent to sex with the accused.

The timeline here is somewhat unique since the "sexual history" evidence in question follows the alleged assault (unlike the more common scenario of sexual history evidence preceding the assault). Nevertheless, Justice Wakeling's reasoning still amounts to an inappropriate use of sexual history evidence to discredit the complainant.

Section 276 of the *Criminal Code* regulates the admission of sexual history evidence for certain improper inferences. It reads as follows:

> 276. (1) In proceedings in respect of an offence under section [...] 271 [...] evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
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> (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
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> (b) is less worthy of belief.

A plain reading of this provision makes it applicable to sexual history evidence relating to sexual activity either before an alleged sexual assault (pre-assault sexual activity) or after an alleged assault (post-assault sexual activity). The provision is silent with respect to the order of the sexual history evidence and "the sexual activity that forms the subject-matter of the charge." Consequently, there is no basis for reading in further qualifications that narrow the scope of the provision. To demonstrate the provision's application to post-assault sexual activity, Justice Wakeling's reasoning need only be transposed into the language of the provision. He is using "evidence that the complainant has engaged in sexual activity" (her post-assault sexual activity)

"with any other person" (KL) "to support an inference that [...] the complainant is more likely to have consented [...] or is less worthy of belief."

Furthermore, a purposive reading of the provision similarly recognizes that both pre- and post-assault sexual activity qualify as sexual history evidence. Regarding the purpose of s 276, Justice Russell opined the following in *R v Brothers* (1995), 30 Alta LR (3d) 300 (CA) (available on QL):

> [26] The section is intended to eradicate negative stereotyping associated with the myth that a person who has been sexually active is less virtuous, and more likely to consent to other sexual activity, or be less credible.

The purpose of the provision – counteracting stereotypes that discredit sexually active women – applies to both pre- and post-assault sexual activity. How could it be legitimate to discredit a woman because of her sexual activity after an assault, but not before, when the consent inquiry is only concerned with the assault itself: "the voluntary agreement of the complainant to engage in the sexual activity in question" (*Criminal Code*, s 273.1(1) [emphasis added]). In either case, the reasoning relies on myths about the ongoing state of consent that sexually active women purportedly operate within. While most cases considering s 276 of the *Criminal Code* address pre-assault sexual activity evidence, there are cases that have applied the provision to evidence of post-assault sexual activity as well (see e.g. *R v KO*, [2008] OJ No 4193 (SC) (QL)).

Policy implications also demand an expansive view of sexual history evidence that includes both pre- and post-assault sexual activity. Discrediting sexual assault complainants because of their subsequent sexual activity would have profound implications, in particular, for victims in ongoing relationships. If such evidence was considered relevant, women in committed relationships, once assaulted, would seal the fate of any sexual assault complaint where they engaged in any further sexual activity with their partners. Such a consequence is untenable, especially within the context of committed relationships in which it is entirely plausible for two partners to vary in a destructive cycle between consensual and non-consensual sexual activity long before the victim gains an appreciation of the assaults she has experienced and the courage to make a complaint. This is especially concerning given the prevalence of intimate partner sexual violence – a topic addressed by Jennifer Koshan in an earlier ABlawg post, here (for an example of post-assault sexual history evidence being used to undermine an intimate partner's credibility see *R v Tait*, 2008 ONCJ 629 at para 30 (QL)).

Justice Wakeling presents the sexual history evidence of EP as self-evidently conclusive of a reasonable doubt about the absence of consent notwithstanding a statutory mandate to the contrary. Such evidence may be admitted and considered under s 276(2) of the *Criminal Code*. However, its admission turns on a balanced consideration of multiple factors including "society's interest in encouraging the reporting of sexual assault offences" (s 276(3)(*b*)) and "the need to remove from the fact-finding process any discriminatory belief or bias" (s 276(3)(*d*)). Justice Wakeling's reliance on this evidence, with no discussion about his rationale for how it is legitimately related to the complainant's consent to sex with FY, suggests that he may have been relying on problematic reasoning that the *Criminal Code* is committed to counteracting. In so doing, his reasoning reinforces problematic myths about sexual consent and is incorrect in law.

Admittedly, this case is particularly unique because of the brief timeline over which the alleged assault and subsequent sexual activity took place. According to her own testimony, EP made what is ostensibly an invitation for sexual activity to KL shortly after her assault by FY (my hesitation to label EP's sexual activity with KL as genuinely consensual stems from the fact that she denied it to be. See para 30). While it may seem odd for EP to consent to sex with KL shortly after her assault by FY, it is important to recognize the speculative nature of this reasoning, and how speculation could just as easily explain how her conduct was consistent with having experienced a sexual assault.

Awaking to being sexually assaulted would be immensely traumatic. Even just awaking to two grown men in your bedroom would be traumatic. Consequently, EP's subsequent conduct could be explained as her attempt to cope with her trauma. For example, being sexually assaulted while unconscious is an extreme form of exploitation and lost control over one's body. Perhaps, by engaging in sexual activity with KL immediately after her assault, EP felt as though she was restoring her autonomy by taking control of her body and the traumatic situation she found herself in. Perhaps, by presenting herself as a woman exercising her consent, she was able to downplay the trauma she had just experienced which was predicated on her non-consent. Perhaps, in a state of confusion upon waking up to being sexually assaulted, EP was still processing the trauma she had experienced and acted inexplicably due to that confusion. This is all speculative, but so is Justice Wakeling's finding that EP's subsequent sexual activity with KL raises a reasonable doubt about her consent to sex with FY. Further, Justice Wakeling's speculation feeds into the myth that a women's consent with one partner increases her likelihood of consent with another, which the *Criminal Code* specifically opposes.

The fact that speculation can both support and oppose a finding of consent in this case does not prove beyond a reasonable doubt that EP was assaulted. Recall, though, that the evidence which is purportedly calling her credibility into question is itself presumptively inadmissible to support such inferences under s 276 of the *Criminal Code*. Thus, none of this speculation should be happening in the first place.

If judges continue to consider sexual history evidence as self-evidently conclusive of a reasonable doubt about the absence of consent, then it is imperative on the Crown to lead expert evidence on the experience of assaulted women to counteract such reasoning. With expert evidence, a complainant's testimony regarding her post-assault conduct could be characterized as reflective of her trauma, rather than conclusive of her lacking credibility. Other unfounded speculation about the post-assault conduct of credible sexual assault victims, such as the failure to immediately report the assault, has presented immense barriers to effective prosecution. Subsequent sexual activity may be yet another speculative myth to be disposed of.

Sexual history evidence can, on rare occasion, be relevant (as an alternative explanation of physical evidence of sexual activity, for example. See *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at para 52 (cited to QL)). Regardless, Justice Wakeling's reasoning is inadequate and should have extended beyond the bare assertion that sexual history evidence was conclusive of a reasonable doubt about the absence of consent in this case.

(b) Awake: The "poor memory" argument

Justice Wakeling's second reason for discrediting the complainant is summarized as follows:

> [8] Second, Ms. EP testified that she went to bed sometime in the afternoon on April 21, 2001 fully clothed. She swore at trial that when she woke up she was completely naked. She was unable to recall when, why or how she shed her clothes. Her inability to recall these events, which occurred before the accused had sex with Ms. EP, causes the Court to ask if she might have consented to have sex with the accused in this same time frame? This fact, combined with her invitation to Mr. KL to have sex with her, causes the Court to entertain a reasonable doubt on the consent issue.
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> (Emphasis added)

In essence, Justice Wakeling's second reason for having a reasonable doubt about the absence of EP's consent is her limited memory from the time she went to bed to the beginning of her assault – which should be unsurprising, given that she stated that she was unconscious during this time.

The ability for a sexual predator to exploit a vulnerable individual while she is unconscious is hardly a legitimate basis for finding a reasonable doubt about consent. Again, s 273.1(2)(*b*) of the *Criminal Code* states that no consent is obtained where "the complainant is incapable of consenting to the activity." If an accused credibly claims to have been assaulted while unconscious, having no memory of that assault by virtue of unconsciousness (whether from intoxication or otherwise) should in no way exculpate the accused. This too has implications for victims of intimate partner violence who may be more likely to be assaulted while unconscious. If a complainant cohabits with her partner, she is presumably unconscious each night next to them and therefore vulnerable to both unconscious assaults and problematic credibility findings such as this.

Even if EP were conscious before the sexual activity in question, the evidence that she consented to sex is questionable. Put more precisely, Justice Wakeling's timeline – based on EP being intoxicated from when she left the bar "up until the time Messrs. FY and KL had sex with her" (at para 40) – seems inordinately convenient for the accused. This finding bears the unfortunate consequence of using EP's state of intoxication against her throughout her assault. Before her assault, she is purportedly too intoxicated to remember both removing her clothes and consenting to sex with FY. Then, at the moment sex with FY begins, she is no longer intoxicated, which eliminates any concerns about her incapacity to consent while also explaining her sudden ability to only now recall what was happening. It would seem far more likely that she was unconscious prior to her assault, which would most plausibly reconcile her lack of memory at the beginning of her assault with her ability to recall what occurred once she awoke.

Again, it being "more likely than not" that EP was unconscious during part of her assault falls below the standard of proof beyond a reasonable doubt. It is open to Justice Wakeling to doubt EP's claim of being unconscious for a variety of reasons: her demeanour on the stand, inconsistencies in her testimony, etc. But to doubt her claim of being asleep when initially assaulted because she cannot recall the beginning of her assault (a fact that necessarily follows

from being asleep) is unsupportable. Not believing that a complainant was asleep because she cannot remember what happened during sleep is equivalent to not believing that a complainant had 10 drinks because she was drunk.

(c) Alone: The "still friends" argument

Finally, Justice Wakeling's third reason for discrediting the complainant was summarized as follows:

> [9] Third, some of Ms. EP's post April 21, 2001 conduct is inconsistent with her evidence that she wanted to have as little to do with the accused as possible because of their non-consensual sex. She initiated contact with him in a number of occasions over an extended period of time. For example, in 2005 she gave him a painting and in 2008 she asked him to forgive her.
>
> (Emphasis added)

In essence, Justice Wakeling's third reason for having a reasonable doubt about the absence of EP's consent is the fact the she failed to completely cut ties with FY, a family member, following her assault.

The encounters Justice Wakeling relies upon are the following:

1. In June 2001, EP saw FY at a Sundance celebration (at para 38).
2. In July 2005, EP visited FY's home and gave him a painting she had done (at para 50).
3. Sometime before 2006, EP encountered FY at her parents' home. At the time, EP was living at her parents' home and FY was doing chores there. She asked him to do a task in her bedroom, and may have requested some cigarettes (at para 53).
4. Sometime after 2006, EP had called FY on behalf of others and (while possibly driving her children) stopped and gave him a ride while he was walking along the same road (at paras 38 and 51).
5. In 2008, while working at the reserve's daycare centre, EP asked FY to forgive her (at para 38).
6. In the 12 years since her assault, EP "saw the accused infrequently at family celebrations" (at para 38).

In light of these encounters, Justice Wakeling opines the following:

> [49] In spite of her apparent dislike for Mr. FY, an emotion which would be completely understandable if he forced himself upon her, she willingly initiated contact with him on several occasions over an extended period of time under circumstances which belie her evidence that she has a strong antipathy to the accused.

Using the above examples as a basis for discrediting the complainant's claim of being sexually assaulted is questionable.

Some of the examples are surely mischaracterized as EP "willingly initiat[ing] contact" with FY. EP's presence at Aboriginal ceremonies, her work, family celebrations, and her own home are

flawed grounds to discredit her assertion of non-consent when cultural pressures, familial ties, and necessity demand (or at least, strongly favour) her presence at these locations and events independent of her views on FY.

With those particularly flawed examples disposed of, all that remains is the exchange of a painting, a ride in her car, and some phone calls on behalf of others: a couple of in-person meetings and rare contact over the phone in the 12 years since her assault. Apparently, "strong antipathy" would demand even less contact with a family member who lives on the same reserve.

Notably, most of the examples would be difficult for EP to avoid without disclosing her assault to others. The difficulties in explaining her absence from significant religious or family celebrations is self-evident. Those same difficulties apply to the phone calls and picking up FY in her car when her kids may have been present because both involve third parties seemingly unaware of her assault. If a friend asked her to call FY, or if her kids saw FY on the road walking in the same direction as they were driving, it is probable that it would be perceived as odd, even rude, to not make the call or offer the ride. Caught between disclosing her traumatic experience to her children or friends and tolerating a brief exchange with FY, it is not surprising that she took what was likely the path of least resistance.

Finally, it bears repeating that this line of reasoning, like Justice Wakeling's sexual history and poor memory arguments, has profound implications for victims of intimate partner sexual violence. Women who suffer from domestic sexual violence often live in terror – to demand that they abandon their home and families to prove it is unjustifiable.

4. Conclusion

Credibility is a finding of fact over which a trial judge deserves deference. But their findings are not immune to scrutiny. In particular, findings of consent in sexual assault cases – which have often failed to treat women fairly, inordinately rely on myths about ideal victims, and continue to contribute to underreporting – demand proper treatment from trial courts. Furthermore, all three of the arguments raised by Justice Wakeling in *FY* disproportionately undermine the ability for intimate partners to seek justice when they experience sexual assaults because intimate partners are more often sexually active with, asleep next to, and in ongoing relationships with, those who assaulted them.

An alternative lens through which to critique the reasoning presented by Justice Wakeling asks the question: in light of *FY*, what strategies must a woman employ to maintain her credibility in a sexual assault trial? Abstain from sex with others, for fear of undermining your purported trauma; remain awake, for fear of being assaulted while unconscious and not remembering when you may have consented; avoid further interaction with the man who assaulted you, for fear of undermining your claimed antipathy towards him. In other words: *be celibate, awake, and alone* – otherwise, who could possibly believe you?