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Judging Sexual Assault Cases Free of Myths and Stereotypes

By: Jennifer Koshan

Case Commented On: *R v Wagar*, 2015 ABCA 327 (CanLII)

I am spending the fall term at the University of Kent's Centre for Law, Gender and Sexuality, where I am working on a couple of projects related to the legal regulation of sexual assault. One of these projects has me immersed in the sexual assault laws of England and Wales, and in the course of doing some research in this area, I have learned that judges here routinely warn juries in sexual assault trials of the need to dispel any myths and stereotypes that they may bring in to the adjudication process. A recent judgment from the Alberta Court of Appeal in *R v Wagar*, 2015 ABCA 327 (CanLII), suggests that trial judges in Canada would do well to actively caution themselves in the same way. The trial decision of Judge Robin Camp in *Wagar*, overturned on appeal, is replete with sexual assault myths and stereotypes that influenced his decision to acquit the accused.

The Court of Appeal's reasons in *R v Wagar* are very brief. Justice Brian O'Ferrall (Justices Peter Martin and Frederica Schutz concurring) delivered the substance of the Court's decision in one paragraph:

> Having read the Crown's factum, portions of the trial transcript and having heard Crown counsel's arguments, we are satisfied that the trial judge's comments throughout the proceedings and in his reasons gave rise to doubts about the trial judge's understanding of the law governing sexual assaults and in particular, the meaning of consent and restrictions on evidence of the complainant's sexual activity imposed by section 276 of the *Criminal Code*. We are also persuaded that sexual stereotypes and stereotypical myths, which have long since been discredited, may have found their way into the trial judge's judgment. There were also instances where the trial judge misapprehended the evidence (at para 4).

The Court of Appeal therefore concluded that "the conduct of the trial and the trial judge's reasons disclose errors of law" and ordered a new trial (at para 5).

The trial decision is not available on-line, but I was able to secure a copy of the transcripts and the Crown appeal factum. (The accused did not appear at the appeal hearing and did not file a factum.) We cannot post the transcripts as a whole on ABlawg because they contain the name of the complainant and the usual publication ban for sexual assault matters applies. I will do my best to summarize the trial decision and its problematic aspects here.

On September 9, 2014, Judge Robin Camp of the Alberta Provincial Court acquitted Wagar on a charge of sexual assault (Docket: 130288731P1). The undisputed facts of the case, as summarized in the Crown's factum, were that:

> Nineteen year old J.M. ("the Complainant") first met Alexander Scott Wagar ("the Respondent") at a youth centre where she was picking up groceries. She was broke and homeless at the time. At the invitation of another, the Respondent returned to the residence where the Complainant was temporarily staying. The next morning, she reported to the youth centre staff that the Respondent had sexually assaulted her the night before (at para 1).

The complainant testified at trial, as did the accused and two defence witnesses. There was also forensic evidence showing some bruising on the complainant's back and the presence of DNA from the accused on her jeans. Without getting into details (which are available in the Crown factum), the alleged sexual assault occurred on December 13, 2011. The accused admitted to sexual activity with the complainant, but claimed it was consensual, or alternatively that he mistakenly believed it was consensual. The Crown argued that the accused failed to take reasonable steps to ensure the complainant was consenting, which he had a heightened duty to do because she was intoxicated at the time (see section 273.2(b) of the *Criminal Code)*.

Judge Camp commenced his judgment by notifying the accused that he was being acquitted, and went on to deliver a lecture to the accused:

> The law and the way that people approach sexual activity has changed in the last 30 years. I want you to tell your friends, your male friends, that they have to be far more gentle with women. They have to be far more patient. And they have to be very careful. To protect themselves, they have to be very careful.
>
> The law in Canada today is that you have to be very sure before you engage in any form of sexual activity with a woman. Not just sex, not just oral sex, not even just touching of a personal part of a girl's body, but just touching at all. You've got to be very sure that the girl wants you to do it. Please tell your friends so that they don't upset women and so that they don't get into trouble… (Appeal Record, at p 427).

This passage sets the tone for Judge Camp's reasons for decision: women (or "girls") are blameworthy, not to be trusted, and men must be protected from them.

In its factum, the Crown sets out several discredited myths and stereotypes about sexual assault and women complaining about sexual assault that were reflected in Judge Camp's decision, with illustrations of each:

- The myth that women cannot not be raped against their will
    - The trial judge asked the complainant questions such as "why didn't you just sink your bottom down into the basin so he couldn't penetrate you?" and "why couldn't you just keep your knees together?" He also indicated that she had not explained "why she allowed the sex to happen if she didn't want it" and noted that when she asked the accused if he had a condom that was "an inescapable conclusion [that] if you have one I'm happy to have sex with you" (Crown factum, at paras 59, 61, 94).

- The myth that the victim is to blame, and that women are fickle and full of spite
    - The trial judge repeatedly referred to the complainant as "the accused", and questioned why she hadn't reacted differently when someone locked the door to

the premises where the sexual activity occurred: "She doesn't have to say don't lock the door. She can take her chances. Foolishly she could do that. If she sees the door being locked, she's not a complete idiot, she knows what's coming next. In our law she doesn't have to say unlock the door I'm getting out. She can take her chances, perhaps in the hope of getting him into trouble" (Crown factum, at paras 62, 64).

- The myth that women who are raped react hysterically
    - The trial judge noted that the complainant only got angry after the alleged assault, and was far more upset when another person humiliated her that night (Crown factum, at para 65); for an excellent paper on the gendered nature of hysteria, see Jonnette Watson Hamilton, "The Use of Metaphor and Narrative to Construct Gendered Hysteria In the Courts" (2002) 1 Journal of Law 7 Equality 155.

- The myth that only good girls get raped
    - The trial judge remarked that the complainant, "as will appear from the evidence, had spent the day in question sneaking into the movies without paying… She'd also spent a considerable amount of time stealing clothes, and then went on to steal … a considerable amount of liquor. It didn't cross her mind that she should work to earn money to buy those things." And later, "she certainly had the ability, perhaps learnt from her experiences on the street, to tell [him] to fuck off" (Crown factum, at paras 66-7; Appeal Record at pp 431, 450).

The Crown pointed to other inappropriate comments by the trial judge:

- He commented that "sex and pain sometimes go together … that's not necessarily a bad thing" (Crown factum, at para 72).
- He referred to the accused's testimony as reflecting "consensual, indeed even tender, sex" (Crown factum, at para 49, Appeal Record at p 451).

Judge Camp also suggested that section 276 of the *Criminal Code,* which constrains the use of sexual history evidence, "hamstring[s] the defence" and is "very, very incursive legislation" (Crown factum, at para 73). He allowed the accused to introduce evidence of the complainant's previous sexual activities with someone else – more specifically her efforts to rebuff that person's sexual advances – without conducting the required application under section 276.1 of the *Criminal Code*. In response to objections by the Crown, the trial judge stated that this was not evidence of sexual activity, rather evidence of a lack thereof, and saw this as relevant to whether the complainant "had the moral or physical strength to rebuff men if she felt like it" (Crown factum, at para 81). As argued by the Crown, Judge Camp's comments reflect impermissible uses of sexual history evidence, which is recognized as irrelevant to issues of consent and credibility (see section 276(1) of the *Criminal Code)*. Moreover, his comments further reinforce the myth that a woman cannot be raped against her will (Crown factum, at paras 84, 86). Judge Camp also permitted the accused to introduce evidence of the complainant's sexual activity with someone else following the alleged offence, again without an application, which furthered the defence position that she had "enjoyed a weekend of promiscuous activity" (Crown factum, at para 88).

Overall, Judge Camp found that the complainant lacked credibility in claiming not to have consented, and this was the basis for his acquittal of the accused.

It is worthwhile to repeat Justice Claire L'Heureux Dubé's comments in *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at 654, 1991 CanLII 76 on how these sorts of myths and stereotypes may influence the determinations of legal actors in sexual assault matters:

> 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.

The Crown factum in *Wagar* illustrates how the myths and stereotypes invoked by Judge Camp were not just offensive, but also influenced his decision to acquit the accused based on his findings regarding the complainant's consent and credibility. The Court of Appeal agreed.

This is where the UK practice of warning juries in sexual offence trials about the need to disabuse themselves of such myths and stereotypes comes into play. The *Crown Court Benchbook* was published in 2010 by the Judicial Studies Board to assist judges in crafting jury directions. Chapter 17 deals specifically with directions for sexual offences, and was included at the behest of the Solicitor General following research calling into question the impact of the *Sexual Offences Act 2003*, c 42 (UK), legislation overhauling this area of law with a view to decreasing wrongful acquittals in such cases. Chapter 17 describes the need for jury directions on improper stereotyping in cases involving sexual offences (at 353):

> The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice.

It goes on to provide several illustrative jury directions, including the following one on "avoiding judgements based on stereotypes" (at 357):

> It would be understandable if one or more of you came to this trial with assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach the case dispassionately, putting aside any view as to what you might or might not have

> expected to hear, and make your judgement strictly on the evidence you have heard from the witnesses.

Other sample directions include those related to situations where the complainant and defendant were known to one another or had a previous sexual relationship, and cases involving "provocative dress, hard drinking and flirtation", lack of resistance, and absence of a recent complaint.

The Crown Prosecution Service guidelines on Rape and Sexual Offences also contain a chapter on societal myths around sexual assault, which reminds trial advocates "to suggest appropriate directions from the Bench Book to the trial judge for inclusion in his/ her summing up to the jury."

Writing just after the introduction of the *Benchbook* in 2010, Jennifer Temkin, a leading expert on sexual assault law in the UK, characterized chapter 17 as "unequivocal and welcome recognition of the malign impact that stereotypes and myths can have in this area of the law." However, she also questioned the impact it might have given that judges are not obliged to use these directions at all or as worded, and in light of research detailing problems with juries' comprehension of instructions more broadly. Of more concern, there is "considerable risk that a direction will have the opposite effect to that intended and serve to entrench rather than overcome stereotypes and myths in the minds of the jury" (Jennifer Temkin, ""And Always Keep A-hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom" (2010) 13 New Criminal Law Review 710 at 720-721, 725). Temkin recommended that the *Benchbook* be followed up with education of legal actors and the public, as well as the introduction of expert evidence in some cases where the issues tend to give rise to rape myths that are particularly entrenched.

Louise Ellison and Vanessa Munro have been at the forefront of research involving simulated jury trials for sexual offences in the UK, and one of their most recent papers examines the extent to which mock jurors were willing and able to understand and apply judicial directions from chapter 17 of the 2010 *Benchbook*. However, they used instructions focused on issues of consent and mistaken belief in consent rather than the instructions on "avoiding judgements based on stereotypes" (see "Telling Tales: Exploring Narratives of Life and Law within the (Mock) Jury Room" (2015) 35(2) Legal Studies 201). There do not yet appear to be any studies examining the impact of these specific instructions.

With these caveats in mind, the initiatives in the UK nevertheless remind us that it is crucial to the ongoing project of endeavouring to achieve justice in sexual assault trials that adjudicators (as well as other legal actors) disabuse themselves of discredited myths and stereotypes and apply sexual assault laws free from "ignorance, prejudice, and/or misconception about rape" (see Ellison & Munro, "A Stranger in the Bushes or an Elephant in the Room?: Critical Reflections on Received Rape Myth Wisdom in the Context of a Mock Jury Study" (2010) 13(4) New Criminal Law Review 781 at 788).

In Canada, there have been efforts by the National Judicial Institute (NJI) to offer judicial education on sexual assault and violence against women more broadly. The Canadian Judicial Council has also developed model jury instructions, including those for sexual offences (see chapter VII, available on the NJI website here). However, these instructions are organized around categories of sexual offences (sexual interference, incest, sexual assault, etc) and do not contain any specific directions cautioning juries about the operation of myths and stereotypes in trials of sexual offences. A separate direction is provided for cases where sexual history evidence was allowed under section 276 of the *Criminal Code* (see chapter II.7.20 and chapter III.11.20) and it merely requires judges to instruct juries that "You must not use that evidence [of the complainant's sexual history] to infer that [s/he] is more likely to have consented to the sexual activity that forms the subject matter of the charge or to infer that s/he is less worthy of belief as a witness." Given that sexual history evidence is one of the primary sites for the operation of rape myths, as recognized in *Seaboyer* (and as illustrated in *Wagar*), one would have thought that a more fulsome caution about inappropriate use of this evidence was warranted, in addition to cautions about the application of myths and stereotypes more broadly.

It is true that *Wagar* involved a judge sitting alone rather than a jury trial. But surely the foregoing discussion applies in this context as well. Indeed, judges sitting alone – although they are human and susceptible to the same predispositions and beliefs as the ordinary person – have a professional duty to actively disabuse themselves of rape myths. Let us hope that the judge hearing the new trial in this case takes seriously his or her duty in this regard.