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Sexual Assault and Choking – Making Sense of the Legal Consequences

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Case Commented On: *R v White*, 2016 ABQB 24

The Jian Ghomeshi trial gets underway today and there is likely to be intense coverage of this event in the media and blogosphere (for earlier ABlawg posts on Ghomeshi see here and here). Ghomeshi is charged with 4 counts of sexual assault as well 1 count of overcoming resistance by choking. Choking is not uncommon in sexual assault cases, although its legal significance is still somewhat murky. For example, in *R v JA*, [2011] 2 SCR 440, 2011 SCC 28, the Supreme Court declined to rule on whether choking that leads to unconsciousness amounts to bodily harm so as to vitiate consent (at para 21). A recent Alberta case, *R v White*, 2016 ABQB 24, considered the relevancy of choking in the context of sentencing for sexual assault offences. As I will discuss in this post, *White* suggests that choking should be seen as equivalent to bodily harm in this context, which may have implications for sexual assault matters more broadly.

First, a few words on what the Supreme Court did and did not decide in *R v JA*. As I noted in my earlier post on that case, it stands for the proposition that advance consent to sexual activity that takes place while the complainant is unconscious or asleep is outside the scope of the consent provisions of the *Criminal Code* (see RSC 1985, c C-46, sections 273.1 and 273.2). The facts of *JA* involved the complainant KD being choked into unconsciousness by her partner. The trial judge found that KD consented to erotic asphyxiation, and that she did not experience bodily harm because the unconsciousness "was only transient" (2011 SCC 28 at para 11). Nevertheless, she convicted JA of sexual assault because she found that KD had not consented to the sexual activity that occurred while she was unconscious, nor could she as a matter of law. At the Ontario Court of Appeal, the majority rejected the Crown's argument that KD's consent was vitiated by the intentional infliction of bodily harm through choking. Although it found that the trial judge had committed an error of law in her analysis of bodily harm, JA had only been charged with sexual assault *simpliciter,* and thus bodily harm could not be relied upon to vitiate consent (2011 SCC 28 at para 17). The Crown did not appeal this holding, so the issue of whether choking amounts to bodily harm and whether it vitiates consent was not before the Supreme Court. According to Chief Justice McLachlin, writing for the majority:

> Since the issue of bodily harm is not before this Court, I take no position on whether or in which circumstances individuals may consent to bodily harm during sexual activity. In my view, it would be inappropriate to decide the matter without the benefit of submissions from interested groups (at para 21).

As a result, the issues of whether choking amounts to bodily harm, and whether choking should vitiate consent in sexual assault cases, are still outstanding. To put it another way, it is still an open question whether a person can consent to being choked into unconsciousness in the context of sexual activity. There have been other cases where lower courts have found that bodily harm in the sexual assault context vitiates consent (see e.g. *R v Welch*, 1995 CanLII 282 (ONCA)), and the Supreme Court itself has held that consent to sexual activity may be vitiated in cases

involving significant risk of serious bodily harm (*R v Cuerrier*, [1998] 2 SCR 371, 1998 CanLII 796; *R v Mabior*, [2012] 2 SCR 584, 2012 SCC 47, both dealing with non-disclosure of HIV).

Choking to overcome resistance to the commission of an offence is also a discrete offence in the *Criminal Code*, RSC 1985, c C-46, section 246(a) of which provides that:

> 246. Every one who, with intent to enable or assist himself or another person to commit an indictable offence,
>
> (*a*) attempts, by any means, to choke, suffocate or strangle another person, or by any means calculated to choke, suffocate or strangle, attempts to render another person insensible, unconscious or incapable of resistance …
>
> is guilty of an indictable offence and liable to imprisonment for life.

In *R v White*, 2016 ABQB 24, the accused was found guilty following a jury trial of 8 counts involving 3 complainants, all of whom were "young, drug-addicted prostitutes" working in Edmonton (at para 3). White was found guilty of robbery against SH, of sexual assault, unlawful confinement, and choking to overcome resistance against RH, and of robbery, choking, sexual assault, and unlawful confinement against TK. The offences followed a similar pattern: White picked up the victims, drove them to isolated areas, had them perform oral sex on him, choked them, and either demanded his money back and / or forced the victims into further sexual acts without their consent. As noted by Justice Robert A. Graesser, the victims "were clearly vulnerable to abuse by reason of their occupation and their drug-addicted states" (at para 3).

There were several interesting issues that arose during sentencing, including the credit that should be given for post-conviction / pre-sentence custody and restrictive pre-trial bail conditions, as well as the applicability of the maximum credit limits in the *Truth in Sentencing Act*, SC 2009, c 29. Also at issue was whether White's size – he weighed over 400 pounds – should be seen as an aggravating or mitigating factor. The Crown argued that size was aggravating, as it allowed White to intimidate and overcome his victims (at para 76); the defence argued that it was mitigating as correctional facilities would have difficulty accommodating his needs (at para 77). Justice Graesser ruled that White's size was a neutral factor, drawing an analogy to the irrelevance of skin colour that does not seem particularly apt here.

For the purposes of this post, the more germane sentencing issue is how Justice Graesser handled the fact that White choked each of the victims. Essentially, he treated the choking as an aggravating factor in relation to the sentencing for the other offences committed against each victim. For RH and TK, he applied the *Kienapple* principle and stayed the convictions for choking (as well as unlawful confinement) as a result of this approach. His reasoning was that "Imposing separate sentences seems artificial, although if I were to do so it would then be appropriate to impose consecutive sentences and then potentially reduce the sum of them appropriately under the totality principle" (at para 97). The focus was therefore on the robberies committed against SH and TK, and the sexual assaults committed against RH and TK.

As for the significance of choking as an aggravating factor, Justice Graesser noted that as a separate offence, it is subject to a maximum sentence of life imprisonment under section 246(a) of the *Criminal Code*. He compared this maximum to that which applies for sexual assault with a weapon, which is 14 years imprisonment. These maximum sentences suggest that sexual assaults including choking should be seen as being at least as serious as sexual assault with a weapon,

"although of course each situation must be assessed on its own circumstances and having regard to the nature and extent of the choking and the nature and involvement of the weapon" (at para 96).

Justice Graesser also quoted from an Alberta Court of Appeal decision, *R v Robinson*, 1993 ABCA 91, at para 8, as to the gendered nature of choking:

> [Choking] is a very serious offence. It is one to which women are particularly vulnerable, whether on the street or elsewhere, whether the intent of the offender was to commit a sexual assault or, as in this case, some other crime. Women must feel confident that this Court requires the trial courts in Alberta to impose sentences for such an offence which will deter other men from taking advantage of women in such a fashion, putting their lives in peril.

Justice Graesser found it appropriate to consider sentencing precedents from cases involving sexual assault with a weapon (at para 92). It is curious that he did not note that sexual assault causing bodily harm also carries a maximum penalty of 14 years (see *Criminal Code* section 272), and is thus equivalent to sexual assault with a weapon when it comes to the relevancy of precedents. Indeed, *Robinson* suggests that choking is more akin to aggravated sexual assault in terms of its seriousness, given that the maximum sentence for both offences is life imprisonment (at para 9; see also the arguments of LEAF in *R v JA* (at paras 18, 20)). Aggravated sexual assault is that which includes wounding, maiming, disfiguring, or endangering the life of the complainant (*Criminal Code* section 273). In any event, the implication of *White* is that sexual assault involving choking is analogous in its severity to sexual assault with a weapon (or causing bodily harm), at least for sentencing purposes.

Justice Graesser sentenced White to 5 years for the sexual assaults against RH and TK, and to 2 years for the robberies against SH and TK, all consecutive, taking choking into account as aggravating in each instance. He noted the vulnerability of the victims numerous times (at paras 75, 78, 106, 109, 149), but also found that White – in spite of being a "dangerous predator" – was "not beyond redemption" as a 34 year old single father with a good work history (at paras 75, 150). The 14 year sentence was reduced to a global sentence of 10 years pursuant to the totality principle, minus almost 2 years of credit for pre-sentence custody and bail restrictions (at para 151).

The decision in *White* makes it difficult to imagine that choking would be seen as anything but bodily harm. At the same time, the victims in *White* clearly did not consent to the choking, so the question of whether choking can vitiate consent was not relevant. This is likely to be what Ghomeshi argues, which brings us back to the *Welch* case, cited above. In *Welch*, the Ontario Court of Appeal rejected the defence argument of consensual sado-masochistic (SM) sex, holding that in the sexual assault context, "a victim cannot consent to the infliction of bodily harm upon himself or herself … unless the accused is acting in the course of a generally approved social purpose when inflicting the harm." Following *R v Jobidon*, [1991] 2 SCR 714, 1991 CanLII 77 (SCC), socially acceptable instances of bodily harm included "rough sporting activities, medical treatment, social interventions, and "daredevil activities" performed by

stuntmen" (*Welch* at para 87). This position has been critiqued on the basis that the courts' views of approved social purposes are often heteronormative or otherwise majoritarian (see e.g. Ummni Khan, *Vicarious Kinks: S/M in the Socio-legal Imaginary* (University of Toronto Press, 2014). However, even those advocating in favour of a more expansive approach to consent to SM practices allow for some limits to legality, for example in cases involving grievous bodily harm (see e.g. Sharon Cowan, "The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochistic Assaults", in *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, 2010), 135).

It is also the current position in England and Wales that one cannot consent to sexual activities that cause bodily harm (see *R v Brown*, [1993] 2 All ER 75). There, cases involving consensual SM sex have tended to come to the attention of the authorities via the complaints of persons other than the parties themselves (see e.g. *Brown; R v Emmett,* [1999] EWCA Crim 1710). This differs from the situation in Canada, where Karen Busby's research shows that complaints in cases of so-called "rough sex" are normally made by a party to the sexual activity who did not consent in fact ("Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions" (2012) 24(2) *Canadian Journal of Women and the Law*, 328 at 346-347). Given that the Ghomeshi complainants came forward themselves, whether there was consent in fact will clearly be at issue in the case, in addition to the possible issue of whether one can consent to choking as a matter of law. The complainants will face intense questioning about issues of consent on the witness stand; to conclude on the same note as Joshua Sealy-Harrington did when this matter first came to light, "let's hope that the courageous women coming forward … can blaze a trail for the many silenced voices that remain unheard."

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