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Alberta Court of Appeal Stages a Judicial Intervention on Judicial Interventions

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Case Commented On: *R v Quintero-Gelvez*, 2019 ABCA 17

In January, the Alberta Court of Appeal (the Court) allowed an appeal from a sexual assault conviction in *R v Quintero-Gelvez*, involving an issue of judicial intervention. The matter before the Court was whether repeated comments and interventions by the trial judge inhibited defence counsel from cross-examining the complainant as he was entitled, preventing the accused from making full answer and defence. The Court, in ordering a new trial, declined to take up the question of bias but agreed trial fairness was compromised.

The case applies reasoning from *R v Schmaltz*, 2015 ABCA 4 (CanLII), a split decision of the Court, whose controversial majority and significant dissent also addressed judicial interventions during cross-examination in sexual assault trials. The majority judgment of then-Justice Russell Brown and Justice Thomas Wakeling turned on how the trial judge constrained questions aimed at impugning a complainant's credibility based on her clothing, alleged flirtatious behaviour, and her previous statements about those. The *Schmaltz* majority was criticized for its consideration of "rape myths" by both Justice Marina Paperny's dissent and commentary (see e.g. Jennifer Koshan's post).

Quintero-Gelvez offers clearer circumstances to assess adverse effects of judicial intervention at trial, where the trial judge pre-empted and amended the meaning of otherwise valid questions put forth by the defence at trial. The case adds to jurisprudence that treats judicial intervention as a matter of trial fairness rather than bias, but fails to clarify lingering doubt on how the Court might assess close cases more similar to *Schmaltz*. This latter point is particularly curious given that the *Quintero-Gelvez* judgment included Justice Wakeling.

Background

After a night of drinking that concluded at the appellant's home, the complainant became ill and fell over. The next thing she remembered was being naked in a dark room on a bed with the appellant kneeling between her legs, penetrating her vagina with his penis. A second man, the co-accused, lay beside her, holding her arms and speaking to the appellant in Spanish (at para 2). She could not see the faces of the two men while in the dark room. As she escaped, she saw the co-accused when the door opened, and only saw the appellant outside the room as she fled the residence. The appellant denied assaulting the complainant. He testified that he entered a bedroom that night to sleep on one bed and the co-accused and the complainant were already asleep on another bed. He awoke to find the two arguing before the complainant left.

Given the disparity between the narratives, cross-examination was a crucial element in the presentation of the defence. At trial, however, the judge made several interjections during defence counsel's cross-examination of the complainant on prior statements she had made to authorities.

The Decision

The Court begins its analysis by distinguishing trial fairness from bias by reference to *Schmaltz* (at para 10) and proceeds to assess the judicial interventions on the basis of trial fairness. The Court actually adopts the framework from *Schmaltz* (see *Schmaltz* at paras 19-20) and canvasses Supreme Court of Canada jurisprudence to arrive at the principles for assessing judicial transgression:

(1) The right of an accused to present full answer and defence by challenging the Crown's witnesses on cross-examination flows from the presumption of innocence and the right of the innocent not to be convicted;
(2) The trial judge may intervene in certain instances, including to clarify an unclear answer, to resolve misunderstanding of the evidence, or to correct inappropriate conduct by counsel or witnesses. This would extend to protecting complainant witnesses—especially complainants to a sexual assault—from questions tendered for an illegitimate and irrelevant purpose including "rape myths";
(3) When the trial judge does intervene, he or she must not do so in a manner which undermines the function of counsel, that frustrates counsel's strategy, or that otherwise makes it impossible for defence to present the defence or test the evidence of Crown witnesses;
(4) If a trial judge "enters the fray" and appears to be acting as an advocate for one side, this may create the appearance of an unfair trial;
(5) In determining whether the trial judge's interventions deprived the accused of a fair trial, the interventions should not be considered separately and in isolation from each other, but cumulatively. (at para 11, citations omitted)

Looking to the trial transcript, the Court identified several instances of problematic judicial intervention (at paras 15-21). As in *Schmaltz*, the interventions prevented defence counsel from asking certain questions, while other questions were rephrased such that the judge's version was answered but defence counsel's was not (at para 14). In one instance, defence counsel asked the complainant how she felt after she woke up on the bed, having testified earlier that she was sick and eventually fell over. The trial judge objected to that question, immediately responding "[d]id she use that word [sick]?" and that "[i]t is not fair to put something to her that she did not say" (at para 15). In another instance, the trial judge prevented questioning on potentially inconsistent statements made by the complainant to the examining doctor at the hospital (at paras 21-22), which the Court considered an error of law. The Court highlighted several other interjections that raised questions in the trial process (at paras 23-25).

Defence counsel did not object at any point to the judge's interjections, but the Court notes that this is not determinative, even if preferred in the appellate context (at para 27). The panel also pointed out the overarching context appeared to be counsel's uncertainty on how to properly cross-examine a complainant (at para 10). Based on the nature and number of interventions, however, the Court decided a reasonably minded person would have concluded that the trial was unfair (at para 31), just as it was in *Schmaltz*.

Analysis

With *Schmaltz* and now *Quintero-Gelvez*, the Court is leading the development of the law defining the scope for judges to engage with counsel and witnesses—particularly sexual assault complainants—at trial. The analytical framework emphasizes the fundamental importance of cross-examination in the trial process and the presumption of innocence as expressed in the *Canadian Charter of Rights and Freedoms* (at paras 7-9). This formulation, however, does not fully resolve the tensions between the competing interests at stake, and raises two questions: (1) how does a trial judge reconcile the rights of an accused while protecting witnesses' dignity and safeguarding the integrity of trial through judicial interventions; and, (2) when should a reviewing court assess judicial interventions for bias rather than trial fairness?

With regard to the first question, the decision seems to apply some principles of balancing the rights and interests of both complainant and accused, though does so mostly implicitly. The Court acknowledged that the trial judge's interventions were related to counsel's trepidation when questioning the complainant. Indeed, the manner of the interventions reflected sensitivity around lines of questioning concerning alcohol consumption and statements given by the complainant to police and doctors in the wake of the alleged assault (at paras 17-22). In this case though, rather than merely clarifying answers given by the complainant that may have been deficient, the judge reformulated them on several occasions. In another instance, the trial judge pre-empted crucial questioning on the complainant's prior statements. These interventions, in and of themselves, are reflective of how judges ought to perceive their 'protective' function; however, their nature and execution substantially and adversely impacted the appellant's ability to present a defence.

The Court's framework was apparently adequate in this case, but the decision does not offer guidance on future ambiguity. It largely focuses on safeguarding protections of the accused, rationalized through the principles of fundamental justice under the *Charter* (at paras 7-9). However, "fundamental justice embraces more than the rights of the accused" (*R v Mills*, [1999] 3 SCR 668 at para 72, [1999 CanLII 637 (SCC)]) such that trial fairness should be assessed "from the point of view of fairness in the eyes of the community and the complainant" (*R v E (AW)*, [1993] 3 SCR 155 at 198, [1993 CanLII 65 (SCC)]). In *Mills*, the Supreme Court of Canada also directed that with respect to the criminal law:

> Parliament also sought to recognize the prevalence of sexual violence against women…and its disadvantageous impact on their rights, to encourage the reporting of incidents of sexual violence…and to reconcile fairness to complainants with the rights of the accused. (*Mills* at para 59, emphasis added)

The Court's third criterion sanctions (and may even oblige) a trial judge to intervene to protect a complainant from inappropriate questioning, which recognizes the spirit of *Mills*. How the Court actually adjudicated this principle was what attracted controversy in the *Schmaltz* context. So, it is curious the Court declined to delineate how this principle should balance the interests of parties to a trial, especially in a case where the line was crossed both repeatedly and on less controversial grounds than in *Schmaltz*. This is particularly true since the panel included Justice Wakeling, a member of the *Schmaltz* majority. Instead, the framework offers only the limitations against advocacy and the frustration of defence enunciated in the other criteria.

The decision engages little with the question of when a court should assess judicial interventions for bias rather than trial fairness, steering its inquiry toward the latter by mere similarity to *Schmaltz* (at para 10), and declining to address bias altogether. The Court's minimal treatment of this issue, however, reflects its own jurisprudence. In setting out the guiding principles from *Schmaltz*, the Court acknowledged that, in general, judicial interventions are reviewed for trial fairness rather than bias (see *R v Switzer*, 2014 ABCA 129 (CanLII) at paras 4-6).

The recent decision of *R v Said*, 2019 ONCA 378 provides support for the Court's classification. Said was convicted of assault causing bodily harm where he used a screwdriver to punch one person and stab another with the trial judge rejecting Said's claim of self-defence. The judge, however, persistently intervened during defence counsel's examination-in-chief such that "[t]he trial judge found the appellant stabbed the employee in the initial encounter without allowing the appellant to testify otherwise" (*Said* at para 11). The Ontario Court of Appeal acknowledged that criminal convictions may be quashed where "[i]nterventions…effectively made it impossible for defence counsel to perform his or her duty in advancing the defence" (*Said* at para 5), and implicated trial fairness (*Said* at para 12).

Judicial interventions have, however, triggered courts' notions of bias. The Supreme Court of Canada in *R v S (RD)*, [1997] 3 SCR 484, 1997 CanLII 324 (SCC) suggested bias is concerned with the idiosyncrasies of the trier of fact (*S(RD)* at paras 39-40). In *R v Barton*, 2017 ABCA 216 (CanLII), the Court itself was critical of a trial judge who failed to intervene as a complainant was repeatedly referred to as a "native girl" and "prostitute" (see *Barton* at para 127).These characterizations treaded into rape mythology and played to notions of (personal) bias by all participants in the trial process. In *Quintero-Gelvez*, the Court made no mention of any personal circumstances of the trial judge, and rape myths were not an active issue in the questioning in *Quintero-Gelvez*. In one of the noted interventions, however, the trial judge chastised defence counsel for questioning that was interpreted to play on the complainant's sense of shame (at para 17).

Conclusions

Quintero-Gelvez confirms that the principles enunciated in *Schmaltz* remain intact for assessing trial fairness in light of problematic judicial interventions in cross-examination. The Court was quick to draw on *Schmaltz* for guidance based on similarities between the two cases. Indeed, *Quintero-Gelvez* engaged the same judicial function that was at stake in *Schmaltz*, though on less controversial terms, namely, judicial intervention for the protection of a witness from inappropriate questioning.

While finding that such intervention upset trial fairness in this case, the Court missed the opportunity to clarify how judges ought to balance the interests of complainants and accused persons in cross-examination through the use of protective intervention under the *Schmaltz* principles. Moreover, by following *Schmaltz* and *Switzer*, the Court has established its preference for considering judicial intervention as a matter of trial fairness rather than bias.

In the absence of judicial guidance on how to best use the tools at trial judges' disposal, legislative measures help may begin to fill the gap. Bill C-337, *An Act to amend the Judges Act and the Criminal Code (sexual assault)* is currently before the Senate. The Bill's principle aim is to enhance judicial knowledge and education in sexual assault law and social context. While the bill does not direct judges on the use of their discretion, more education in this area may result in judicial practice that better recognizes the competing interests between complainants and accused persons in light of both the law and social realities. The case shows that, in light of the Court's decision in *Schmaltz* (or perhaps in spite of it), judges are emboldened to intervene in assistance of witnesses—especially sexual assault complainants.

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