Schmaltz: The need for caution when limiting relevant defence cross-examination in sexual assault cases

Nathan Gorham*

In *R. v. Schmaltz*[1] the trial judge — apparently motivated by a desire to protect the sexual assault complainant from illegitimate and irrelevant questioning regarding "rape myths"[2] — intervened several times during cross-examination regarding drug use, flirting, whether the complainant was wearing a bra, and alcohol consumption. On appeal, the majority held that the trial judge's interventions were unwarranted and undermined the fairness of trial. As a result, the conviction was overturned and a new trial ordered.[3] The dissent, on the other hand, would have dismissed the appeal on the basis that the interventions did not undermine trial fairness.[4]

The decision is controversial. Professor E. Sheehy promptly called for it to be appealed to the Supreme Court in order to clarify the role and responsibility of trial judges to intervene during cross-examination, "for the benefit of women who experience sexual assault,"[5] Professor D. Tanovich argues in a forthcoming paper that the case displays the improper use of stereotypical assumptions regarding sexual assault and a "whack the complainant" strategy.[6] Professor J. Benedet notes that "[a]ll of the

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*Trial and Appeal counsel at Rusonik, O'Connor, Robbins, Ross, Gorham & Angelini LLP, Toronto, Ontario.

[1]2015 ABCA 4 (Alta. C.A.), reported above at p. 278 [*Schmaltz*].

[2]*Ibid* at para. 3.

[3]*Ibid* at paras. 47, 48, and 60.

[4]*Ibid* at paras. 86-87.

[5]Joseph Brean, "Sex-assault conviction erased, new trial ordered because Alberta judge too sensitive to rape culture" *National Post* (18 January 2015), online: <http://news.nationalpost.com/2015/01/18/sex-assault-conviction-erased-new-trial-ordered-because-alberta-judge-too-sensitive-to-rape-culture/>.

[6]D.M. Tanovich, "Whack No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases", forthcoming 45(3) [2015] Ottawa Law Review. See also Brean, *ibid*.

lines of questioning at issue in this case have the potential to trade on one or more of these rape myths."[7]

Professor D. Stuart, on the other hand, points out that "[w]hen a judge asserts that something is a myth or false stereotype the factual inquiry into relevance is pre-empted."[8] I would agree and add that caution is generally required before intervening in defence cross-examination that is relevant and otherwise admissible out of concern that the questioning might *incidentally* impact on rejected rape myths. Sexual assault complainants, of course, have a right to be treated with dignity, respect and fairness throughout the criminal process. They must not be demeaned, harassed, humiliated or subjected to illegitimate or irrelevant questioning during cross-examination.[9] That said, *Schmaltz* is an example of how trial fairness might be undermined through unwarranted concerns regarding rape myths. The defence right to cross-examine "without significant or unwarranted constraint" is protected by the right to full answer and defence and the presumption of innocence under sections 7 and 11(d) of the *Charter*.[10] The right to cross-examine is particularly important in cases like *Schmaltz* where credibility is the central issue at trial. Generally speaking, where credibility questions posed of a sexual assault complainant are relevant, but might incidentally and unintentionally impact on rape myths, the cross-examination is presumptively admissible. In *Shearing*, Justice Binnie, writing for the majority, explained that "[u]nder *Seaboyer* and *Osolin*, the default position is that the defence is allowed to proceed with its cross-examination."[11] Relevant and otherwise admissi-

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[7]Annotation to *Schmaltz*, above at p. 280.

[8]Annotation to *Schmaltz*, above at p. 281.

[9]*R. v. Seaboyer*, [1991] 2 S.C.R. 577, 7 C.R. (4th) 117 (S.C.C.) [*Seaboyer*]; *R. v. Osolin*, [1993] 4 S.C.R. 595, 26 C.R. (4th) 1 (S.C.C.) at paras. 166-170 [*Osolin*]; and *R. v. Shearing*, [2002] 3 S.C.R. 33, 2 C.R. (6th) 213 (S.C.C.) at paras. 107-109 [*Shearing*].

[10]*R. v. Lyttle*, [2004] 1 S.C.R. 193, 17 C.R. (6th) 1 (S.C.C.) at paras. 41-43 [*Lyttle*].

[11]*Ibid* at para. 104.

ble[12] defence evidence is only excluded where the prejudice *substantially* outweighs the probative value.[13]

In *Shearing*, the defence sought to cross-examine the complainant on her failure to record alleged sexual assaults in a diary.[14] At first blush this strategy potentially invoked the stereotypical assumption that true victims of sexual assault will complain promptly — an assumption that has long been discredited.[15] Justice Binnie held that the defence nonetheless ought to have been permitted to cross-examine on the diary in an attempt to establish probative value in the absence of entries:

> Firstly, the absence of any entries relating to physical or sexual abuse was a live issue with respect to the credibility of KWG that was potentially of probative value, depending on her response...
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> Secondly, the probative value to the defence depended on establishing the premise that if the physical and sexual abuse occurred, it would have been recorded. The defence was rightly precluded from assuming the truth of that premise, but it did not follow that the defence should also be precluded from attempting to demonstrate it with this particular diary on the particular facts of a case.
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> Thirdly, the court ought not to have assumed what her responses to those questions would be...[16]

Shearing highlights some of the difficulties of assessing the probative value of credibility cross-examination in advance of the questioning. In cases where credibility is the sole issue at trial, the probative value of cross-examination often cannot be assessed before the questioning takes place, since a witness's answers cannot be assumed. When confronted with a difficult question a witness might promptly and with confidence deliver a cogent and compelling answer. Or they might stumble, equivocate and attempt to avoid the question. Worse still they might tell a de-

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[12]Meaning not subject to an exclusionary rule. See *R. v. Morris*, [1983] 2 S.C.R. 190, 36 C.R. (3d) 1 (S.C.C.).

[13]*Shearing*, *supra* note 9 at paras. 104 and 107. See also: *Seaboyer*, *Osolin*, and *Lyttle*.

[14]*Ibid* at paras. 1 and 115.

[15]*Ibid* at para. 120. See *R. v. D. (D.)* (2000), 148 C.C.C. (3d) 41, 36 C.R. (5th) 261 (S.C.C.). Delayed complaint, standing alone, will never justify an adverse inference against the complainant's credibility.

[16]*Shearing*, *supra* note 9 at paras. 145-147.

monstrable lie. For better or for worse, the witness's explanations will demonstrate their reliability and credibility, or lack thereof. Further, a witness's credibility cannot be properly assessed in a vacuum without consideration of the other evidence in a case.[17] It is an error in principle for a trial judge to assess a piece of evidence in isolation. In other words, "it is wrong to use a piecemeal approach, extracting individual items from their evidentiary surroundings."[18] As a result, the significance of evidence that impacts on credibility cannot be properly assessed until all the evidence in a case is admitted. Finally, as noted in *Shearing*, the cross-examination itself might establish the foundation that provides further relevance to questioning.[19] In short, the true significance or probative value of credibility cross-examination is often only apparent after the witness's evidence is completed and assessed as a whole along with the other evidence in the case.

The decision in *Shearing* provides a clear example of where cross-examination should not have been curtailed based on assumptions about the witness's answers or out of concerns that the cross-examination would incidentally impact on rejected rape myths. *Schmaltz* provides another example reflecting the same concerns.

Both the majority and the dissent in *Schmaltz* acknowledged that the cross-examination regarding drug use, flirting, and alcohol consumption had a proper purpose,[20] and that the trial judge's interventions were not necessary to curtail questioning that invoked or employed discredited "rape myths." In particular, the majority held that the questioning was designed to establish prior inconsistent statements or contradictions between witnesses and that "defence counsel was not propagating rape myths."[21] The dissenting opinion held that the defence was able to ad-

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[17]*R. v. B. (G.)*, [1990] 2 S.C.R. 57, 77 C.R. (3d) 370 (S.C.C.).

[18]*Ibid* at p. 77. See also: *R. v. H. (J.M.)* (2009), 249 C.C.C. (3d) 140, 72 C.R. (6th) 154 (Ont. C.A.) at para. 37; reversed (2011), 87 C.R. (6th) 213 (S.C.C.).

[19]*Shearing*, *supra* note 9 at para. 146.

[20]*Schmaltz*, *supra* note 1 at paras. 32 (re: marijuana), 38 (re: flirting), 46 (re: sobriety), 47-48 (cumulative relevance of each area of cross-examination), 77-78 (re: drug use), 80-83 (re: flirting), and 85 (re: sobriety).

[21]*Ibid* at para. 47. The majority held that the intervention regarding whether the complainant was wearing a bra was justified because defence counsel had not established the accuracy of the transcript of the complainant's statement.

vance its position in spite of the interventions by the trial judge and, therefore, trial fairness was not undermined.[22] As a result, the dissent implicitly acknowledged the relevance of the cross-examination, but went on to discount the significance of the "flirting" evidence on the basis that it was only "tangentially" related to the complainant's credibility, did "not go to the ultimate issue at trial" and "was collateral at best and irrelevant to the ultimate issue of consent."[23]

The analysis in the dissent arguably understates the relevance of the flirting evidence. The Crown had put flirting in issue during examination-in-chief of the complainant when they asked, "Had there been any flirting going on?" and the complainant responded, "No."[24] During a statement to the police the complainant had been asked, "And was, um — was there flirting happening?" to which she answered, "Yeah. Yeah, he's a young guy."[25] As a general legal principle, where one party puts a fact in issue, the opposing party is entitled to disprove the fact in issue, even if it means introducing evidence that would not otherwise have been admissible.[26] Evidence undermining the complainant's assertion of no flirting therefore became relevant to rebut the suggestion made by the complainant during examination-in-chief. Further, the issue of flirting was relevant, as the accused was going to testify that the complainant had been flirting with him. The flirting was part of the accused's narrative — his explanation of the circumstances and progression of the events that led to

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[22]*Ibid* at para. 71-87.

[23]*Ibid* at para. 82.

[24]*Ibid* at para. 33.

[25]*Ibid* at para. 34.

[26]There are many examples of this principle in Canadian criminal law. See for example: *R. v. Parsons* (1993), 84 C.C.C. (3d) 226 (Ont. C.A.); *R. v. McMillan* (1975), 23 C.C.C. (2d) 160 (Ont. C.A.), regarding an accused putting his good character/disposition in issue; *R. v. Stirling* (2008), 229 C.C.C. (3d) 257, 54 C.R. (6th) 228 (S.C.C.), explaining introduction of prior consistent statements to rebut an inference of recent fabrication; *R. v. Corbett* (1998), 41 C.C.C. (3d) 385, 64 C.R. (3d) 1 (S.C.C.); and *R. v. Dhillon* (2002), 166 C.C.C. (3d) 262, 5 C.R. (6th) 317 (Ont. C.A.), regarding introduction of investigative hearsay where the defence has put the adequacy of the police investigation.

the alleged sexual assault.[27] As a result, the flirting issue was not tangential, since it was a disputed fact between the parties. At the end of the case, the trial judge was required to assess the credibility of both witnesses in the context of the whole of the evidence. When assessing the accused's evidence concerning flirting, the trial judge would be obliged to consider it along with the complainant's evidence that there was no flirting. In that regard, the complainant's evidence could have negatively impacted on the trial judge's assessment of the accused's credibility. A piece of evidence that could tend to undermine the accused's evidence is certainly not tangential in significance.

The approach taken by the dissent in *Schmaltz* also tends to assume what the complainant's answers would have been. Apparently there was no dispute that the trial judge interjected his own interpretation regarding the flirting before the complainant answered.[28] Paperny J.A. reasons, in dissent, that neither the ambiguity nor the significance of the ambiguity is borne out in the record. This assumes that the trial judge's interpretation of the prior statement is correct. Had the trial judge not intervened to suggest his interpretation, the complainant might well have acknowledged that she was flirting with the accused. Or she might have attempted an unconvincing, vague or demonstrably untrue explanation. Or she might have given the answer that the trial judge anticipated. The answer would only have been insignificant if she gave the response that the trial judge assumed to be true. If she admitted, on the other hand, that she was flirting, then the answer would have been consistent with the accused's narrative. If she provided an implausible, vague or untrue response, then the answer would have impacted on her credibility. Surely in a case that rises or falls on credibility, answers that impact on a witness's credibility or tend to confirm the accused's evidence are significant. There was no way to predict her answer, and guidance from the Supreme Court in *Shearing* made clear that her answer should not have been assumed.

In summary, sexual assault complainants must undeniably be treated with dignity, respect and fairness throughout the criminal process, in-

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[27]Narrative evidence has been described as evidence that assists in the understanding and progression of the events. See for example among many: *R. v. Dowding* (2004), 191 C.C.C. (3d) 1 (B.C. C.A.).

[28]*Schmaltz*, *supra* note 1 at para. 35.

cluding during cross-examination. This includes curtailing questioning that relies solely on rejected assumptions concerning sexual assault. On the other hand, there is generally nothing unfair about cross-examination that is relevant, but that might incidentally and unintentionally raise the specter of stereotypical rape myths.[29] The presumption of innocence and the right to full answer and defence include a right to attempt — through proper cross-examination — to establish probative evidence impacting on the sexual assault complainant's credibility. Where cross-examination is curtailed based on assumptions as to what the complainant's answer will be, or out of *unwarranted* concern for avoiding rape myths, trial fairness could well be undermined. For those reasons I would suggest that the decision to curtail relevant and otherwise admissible defence cross-examination must be approached with caution, even where the objective is to avoid discredited rape myths.

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[29]Obviously different rules apply where the evidence is presumptively inadmissible, as in the case of prior sexual activity or private records. See *Shearing*, *supra* note 9 at paras. 103-104.