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NEWSLETTER: Sexual Assault Law Update

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The Use Of Common Sense Assumptions At Trial

Common Sense Rules

In the recent decision *R. v. Kruk*, 2024 SCC 7, the Supreme Court of Canada declined to recognize the proposed "rule against ungrounded common-sense assumptions" as giving rise to an error of law. The decision addressed trial judges' reliance on common-sense generalisations in the fact-finding process. Though such assumptions may still disclose reversible errors on appeal, they will be subject to the stricter appellate standard of palpable and overriding error. *Kruk* was heard in tangent with another case, *R. v. Tsang*, also from the BC Court of Appeal. Restoring the convictions in both cases, the decision reversed a string of appellate case law and has set a higher hurdle for appellate review.

Myths and Stereotypes vs Ungrounded Assumptions

Canadian law has long prohibited reliance on myths and stereotypes for assessing the credibility of sexual assault complainants. Such myths are wide-ranging and include the discredited view that a woman with multiple sexual partners is more likely to have consented to sex or less worthy of belief. Myths and stereotypes like these constitute errors of law, reviewable on appeal by a standard of correctness. A finding that a trial judge erroneously relied on a myth or stereotype in assessing a complainant's testimony is grounds for overturning a ruling.

Appellate courts in recent years have drawn parallels between myths and stereotypes about sexual assault complainants and ungrounded assumptions in general. The Supreme Court in Kruk has dismissed this "false symmetry", characterising the prohibition against myths and stereotypes as a response to systemic discrimination against female sexual assault complainants, since enshrined in protective legislation. There "is no comparable legislative recognition of a pattern of improper reliance [on] generalizations to incorrectly assess the testimony of accused person in sexual assault cases", the Supreme Court observed. The legal

principles blocking myths and stereotypes are "in a separate category and are fundamentally different from a blanket prohibition on generalizations when assessing testimony at large". *R. v. Kruk*, 2024 SCC 7 at para 47.

Under Kruk, many ungrounded common sense assumptions may still amount to reversible errors; some may even disclose an error of law if based, say, on a myth or stereotype. But in distinguishing myths and stereotypes, the Court observed that common sense assumptions were inevitable at trial, not discretionary in the fact-finding process but integral to it:

> …common-sense assumptions necessarily underlie all credibility and reliability assessments. Credibility can only be assessed against a general understanding of "the way things can and do happen"; it is by applying common sense and generalizing based on their accumulated knowledge about human behaviour that trial judges assess whether a narrative is plausible or "inherently improbable". *R. v. Kruk*, 2024 SCC 7 at para 73.

Since Judges must rely on common-sense assumptions to make their credibility assessments, the Court warned that a broad bar on such assumptions will lead to mischief, denying courts a benchmark for deciding between proper and erroneous findings. The resulting approach would be "interventionist, cumbersome, and almost entirely unpredictable." *R. v. Kruk*, 2024 SCC 7 at para 85.

Protections for the Assessment of the Accused's Testimony

Anticipating accusations of an unequal advantage for complainants, the Court confirmed that the accused's testimony would still enjoy robust constitutional protections – most importantly, the presumption of innocence – and clarified that not all inferences aligned to a myth will be prejudicial. So, while it is a myth that women routinely fabricate sexual assaults, it is not an error to consider whether evidence at trial supports a motive to fabricate. Indeed, where the defence adduces evidence of a false allegation, "a trial judge is obliged to consider it to give full effect to the presumption of innocence, and a failure to do so constitutes reversible error." R. v. Kruk, 2024 SCC 7 at para 65.

A Higher Hurdle

Still, by placing myths and stereotypes in its own category, Kruk has raised the bar for appellate review. Appeal courts must now treat common-sense assumptions as akin to questions of fact, reviewable not on a standard of correctness, but on the higher standard of palpable and overriding error.

On this new standard, a reviewing court must first determine whether the reliance on the assumption is "palpable", meaning obvious or plainly seen. Palpable errors will include assumptions that are untrue in light other evidence or just clearly illogical. Upon finding a palpable error, the court must then determine if the error is "overriding", such that it "affected the result" or went "to the very

core of the outcome of the case." Both hurdles must be met. If not, the trial judge's credibility assessment holds. There will be no grounds for overturning the conviction.

The new standard deliberately sets in place a much higher hurdle. As the Court explained, trial judges are uniquely placed to assess credibility and make factual findings. They are present through an entire proceeding, observing witnesses and reviewing evidence firsthand. Appellate courts, by contrast, deal predominantly with transcripts – and must then show deference to lower courts' factual determinations. Since findings of fact are accorded this greater deference, they are harder to overturn on appeal, meaning the probable long-term effect of Kruk will be to honour the Supreme Court's likely intention: a reduction in the number of successful appeals against sexual assault.

Summary

R v Kruk raises the bar for demonstrating reversible errors at trial based on ungrounded common-sense assumptions. Appeal courts must now subject such assumptions to a standard of palpable and overriding error. Despite preserving crucial protections for the assessments of an accused's evidence at trial, the decision shifts the scales against the accused and reduces the likelihood of appeals succeeding on the basis of ungrounded assumptions.

Uses of Stereotypes as a Ground of Appeal

R. v. A.J., 2024 ONCA 31 and *R. v. E.D.J-C.*, 2024 ONCA 48 are two recent appeals heard in Ontario, each alleging prohibited stereotypical reasoning.

The Court in *R. v. A.J.*, 2024 ONCA 31 dismissed a claim that the trial judge had relied on ungrounded assumptions in weighing the evidence of the accused. The appellant faced one charge of sexual assault. He testified at trial where the main issue was consent. The trial judge flagged several "unusual" and "implausible" assertions in his testimony, including the appellant's claim that he had clearly sought and received consent from the complainant at least three times.

The accused claimed prejudicial generalisations, but the Court of Appeal disagreed. The trial judge had properly assessed the appellant's credibility and reliability, and the mere frequency of words in reasons for judgement like "unusual" or "implausible" cannot establish a stereotypical inference. Despite being decided prior to Kruk, *R. v. A.J.* is broadly consistent with the recent

Supreme Court decision, with the Court of Appeal observing that triers of fact are "entitled to draw common sense inferences from the evidence, and to interpret the evidence by relying on their own experience."

By contrast, the Court in *E.D.J-C.* allowed an appeal based on prohibited stereotypical reasoning. The appellant had been convicted of sexually assaulting his senior co-worker after driving her home from work. The alleged assault took place in the appellant's parked car on a public street in the evening. The appellant denied he had touched the complainant without consent, testifying that he had been particularly cautious given her senior status at work.

The trial judge found the appellant's testimony "somewhat incredible", in particular the claim an established employee would consent to public sex with a junior colleague. Yet the complainant had not been asked at trial about her willingness to engage in high-risk sexual activity in public. Nor was she asked about her willingness to engage in sexual activity while menstruating. Yet the trial judge did not "find it credible that [the complainant] would agree to any type of sex in the confines of a car when she was having her period. This, in my view, defies logic."

The Court of Appeal ruled that the assumption the complainant would refuse public sex due to her employment status was not based on prohibited reasoning. But the trial judge had gone further. During a discussion with defence counsel, he stated that only a "fetish freak" would consent to public sex. He also suggested the complainant was "not the type of person" to have sex publicly, from which the Court of Appeal inferred the assumption that a woman who would engage in public sex would be comfortable testifying about it, where this complainant had been reluctant.

The Court of Appeal overturned the conviction for its "unquestionably stereotypical reasoning." The case is curious since the gendered stereotypes at play worked initially to the complainant's advantage. But given the trial judge's underlying assumptions about which "types" of women are comfortable testifying based on their sexual preferences, even the current Supreme Court would have granted the appeal.

Trial Judges must Address Motive to Fabricate

In *R. v. J.L.,* 2024 ONCA 36, the Ontario Court of Appeal overturned a conviction for two counts of sexual assault, one count of choking, and one count of uttering death threats due to insufficiencies in the trial judge's reasons. Despite credibility being "the central issue at trial", the judge failed even to recognize inconsistencies in the complainant's evidence and ignored defence counsel's proposed motive to fabricate. This is a rare case "in

which the trial judge's reasons do not permit appellate review."

The complainant was 15 years old at the time of the allegations. She claimed the accused, her 16-year-old high school boyfriend, had sexually assaulted her twice during a three-month relationship in 2019. Defence raised multiple inconsistencies in her evidence as to the timing of the alleged assaults, the details of their disclosure, her interactions with the appellant's family, and the reasons she gave for breaking up with the appellant.

Defence also outlined a motive to fabricate based on the timing of the complainant's disclosures. She said she first disclosed the allegations to a friend following harassment on social media for a Snapchat "story" posted by the accused – he had claimed in the story he and the complainant had sexual relations. The complainant later disclosed the allegations to her mother during an argument, then in a separate conversation to her sister.

Defence counsel suggested, both in cross examination and closing submissions, that the allegations were fabricated reactions to social media harassment and to the mother's unwelcome questioning. Yet the trial judge's reasons made no mention of the proposed motive. Nor did they address the multiple inconsistencies in the complainant's testimony.

The Court of Appeal's analysis conceded that trial judges are not obliged to address all evidence at trial, but reasons must demonstrate a grappling with critical issues. And "where the complainant's truthfulness is a live issue and where there are significant inconsistencies in the complainant's testimony, trial judges must demonstrate that

they are alive to the issue and explain how they have reconciled these significant inconsistencies." Without trace of attempted reconciliation, the trial judge's reasons were "wholly insufficient."

On the motive to fabricate, the Court rejected the complainant's argument that the proposed motive was flawed because the friend had been ignorant of the Snapchat story: "this is beside the point. While there may be a valid explanation for rejecting the defence theory that the complainant had a motive to fabricate, the trial judge's reasons do not allow this court to assess whether and how the trial judge grappled with this issue". With no sign of grappling with the central issues, the reasons did not permit appellate review.

The case is consistent with the recent Supreme Court ruling in R v Kruk, which confirmed in obiter that a trial judge is obliged to consider evidence of a fabricated allegation to give full effect to the presumption of innocence. A failure to do so will constitute a reversible error of law.

Public Mischief and False Reporting

In the recent, unreported case of R. v. Lucas, Justice Calderwood sentenced a 28-year-old woman to five months in prison and two years' probation for falsely accusing a man of criminal harassment and violation of a no-contact order.

The woman had created fake texting accounts to trick police into believing the male complainant had sent her harassing messages. The man was arrested three times in connection with the texts and was at one point subject to a contested bail hearing. Police uncovered the ruse through diligent investigation, the man's girlfriend having provided him with a concrete alibi.

Faced with clear evidence linking her to the falsified texts, Ms. Lucas pled guilty. At sentencing, she attributed her actions to a past sexual assault that she believed police had failed to investigate. The judge noted that her efforts were "carefully thought out", as opposed to a "momentary lapse of judgement or a sudden passionate impulse", and their calculated, persistent nature was a prominent aggravating factor.

It is rare in Canada for a person making false reports of domestic or sexual violence to face a charge of public mischief. Though mandatory cautions remind all persons giving statements to the police that it is a crime to make a false allegation, the laying of charges for those who do is seen to have a chilling effect on legitimate reports of sexual violence.

But Justice Calderwood was adamant that offences which cast disrepute on the administration of justice require deterrence and denunciation. Citing *R. v. Ambrose*, 2000 ABCA 264, he reiterated: "If the integrity of our criminal justice system, upon which all of society depends, through maintaining public order and safety, is allowed to be corrupted or is perceived to tolerate attempts at corruption, what do we have left?" He noted too that serious "psychological harm and stress would follow from being falsely accused of a criminal offence and the negative impacts would be substantially compounded when the accusations are combined with police arrests and the deprivation of liberty."

Again, the case is consistent with *R v Kruk*, which confirmed the obligation of a trial judge to consider evidence of a fabricated allegation. A failure to do so will compromise the presumption of innocence leading to a reversible error of law. The present case is also a reminder of the benefits of permitting the police full latitude to investigate, regardless of the nature of the alleged offence.

Other Cases To Watch

B.E.M. v. His Majesty the King SCC File# 40221
Lack of corrective instruction after the Crown used a personal anecdote in jury address.

Dustin Kinamore v. His Majesty the King SCC File# 40964
Whether or not Crown led sexual history required a pre-trial application or *voir dire*.

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