Jian Ghomeshi News Focuses Attention On How Court Deals With Sexual Assault

written by vickyp | November 24, 2014

The Ontario police launched a criminal investigation into the allegations that Jian Ghomeshi sexually assaulted women. So far nine women have come forward with their stories. This week two liberal MPs were suspended from caucus with sexual harassment allegations.

Many people have speculated why complainants did not come forward until now. That is a complicated question which we can address, in part, by reviewing how a sexual assault charge proceeds through criminal court. To help explain the process, I spoke with a senior Crown Counsel and an advocate who attends court with sexual assault survivors.

Sexual assault is shockingly common. Most survivors are women or children. Approximately one in every three women in Canada has been sexually assaulted. Think about the gravity of that number. We're oversaturated with statistics, but that's about five women on a bus; two or three women in a grocery store lineup.

Winston Sayson, Q.C. is a Crown Counsel who has been prosecuting sexual assault charges for the past 25 years. He explains that a sexual assault is the application of force in a sexual nature without the consent of the person touched (in law some people are incapable of giving consent, such as children).

An accused person, when known to the complainant, has three main defences: 1) denying the assault happened at all – there is inadequate evidence to support the assault taking place or the complainant is lying; 2) the complainant consented; or, 3) the accused had an honest but mistaken belief that the complainant consented.

Sayson says that sexual assault charges usually begin with a witness coming forward and making a police complaint. The police then conduct an investigation: interview witnesses, take the survivor to be examined by a nurse or doctor for forensic evidence if the assault was recent, and perhaps track down telephone or Internet records to corroborate witnesses' stories. If a police officer does not believe that there is sufficient evidence to prove the assault happened, then the investigation

likely ends and no charges are laid.

The decision to lay charges

In British Columbia, police officers do not lay criminal charges. Police officers recommend charges to Crown Counsel who then decide whether to lay charges based on the police evidence.

Sayson explains that Crown Counsels must consider a two-part test when determining whether to lay charges.

First: is there a substantial likelihood of conviction based on the totality of the evidence? The Crown Counsel considers the totality of the evidence and determines whether a conviction is substantially likely.

Second: is it in the public interest to prosecute the offence? It is usually in the public interest to prosecute sexual assaults given the nature of the crime. But in other circumstances it may not be in the public interest; for example, if the assault happened decades ago, was less serious and the accused is now elderly spending his last years in the hospital.

Sayson says that it can be a delicate and difficult decision to lay charges in sexual assault cases. As important as it is to prosecute sexual assault, it is equally important not to lay charges against an innocent person or secure a wrongful conviction. If a charge proceeds to trial and there is no conviction, then both parties could be left with stigma: the complainant as not believed and the accused as a predator.

In order to determine whether a conviction is substantially likely, the Crown must consider the strength of the evidence and any available defences with an eye to the burden of proof they must meet to get a conviction. Put another way, the question is not “did the accused do it?” but “is there a substantial likelihood that we can prove it?”

The burden of proof and the weight of evidence

Criminal law is different than any other area of law. A criminal conviction can mean losing your freedom through incarceration. The stigma from a criminal conviction can follow people for the rest of their lives. The law has special protections to work against wrongful convictions. The Crown must prove each element of the crime beyond a reasonable doubt – meaning that no reasonable person could have a reasonable doubt about its truth – a high standard. Crown Counsel or the police cannot force the accused to give evidence (at trial or otherwise) – that is contrary to the principle against self-incrimination. In many sexual assault trials, the accused never takes the stand and the court never hears his version of events.

Not all evidence is given equal weight in court. For example, ‘he said, she said’ evidence is vulnerable to skilled cross-examination by defence lawyers and is generally considered a weaker form of evidence. Other types of evidence – like video of the assault or forensic evidence found by nurses, doctors or scientists – are more objective and stronger evidence to support a conviction.

Sayson explains that a large percentage of his sexual assault cases are historical assaults, meaning the complaint is raised well after the assault took place. In fact, most survivors who know their assaulter do not disclose until years after the assault. If the survivor does not report soon after the assault, then any forensic evidence from the assault might no longer exist or could be weak. Many sexual

assaults are also committed in private where the only compellable witness to bring to trial is the survivor. If the victim was intoxicated, drugged, mentally handicapped or a child, then it will be difficult for them to give a clear, comprehensive account of what happened.

The high burden of proof in sexual assault charges and the nature of the evidence, particularly when it is a 'he said, she said' scenario can make it difficult to secure a conviction.

I recall an evening during law school where I learned a small insight to the barriers of prosecuting sexual assault charges. I was walking home late at night from a pub. While walking down a deserted side street I walked by two people who appeared to be homeless lying down in a doorway. As I looked more closely, I realized that there was a woman lying down unconscious and a man with his pants down who was pulling her pants up. I froze – not quite understanding what I was seeing. I looked around to see if I was alone. There was a cop car parked a block away. I went to the police and told them what I saw. They at first seemed confused why I was bringing the issue to their attention until I remarked "well, if she is passed out then she can't consent, right?" They told me to go home and that they would check it out.

Later that night the police officer telephoned me. He told me that he would not be recommending charges but wanted my statement just in case. He told me that both parties were drunk and dating and that the women did not want anything to do with charges (the officer was apparently satisfied that she could make this decision while extremely intoxicated). Given the evidence available for trial, the officer was probably right that the man would not be convicted. The survivor had no memory of the assault. I had not witnessed the actual assault, only the aftermath. The evidence was lacking. Still, I was shocked.

Summary offence or indictable offence?

Once the Crown decides to lay charges, they must decide whether to charge the accused with a summary offence or an indictable offence. Summary offences are less serious and have a maximum penalty of 18 months incarceration in regards to sexual assault. The Crown must also lay the charge within six months of the offence.

Indictable offences are more serious and allow for longer incarceration. There is no time limit for when the Crown can lay charges. The accused can also elect to have the case tried by a Supreme Court judge and jury or a Supreme Court judge alone.

Charges are laid, now what?

Crown Counsel and victim services will work with complainants to help prepare and support them throughout the court procedures and in particular to give evidence at trial. The survivor will need that support.

Our adversarial legal system comes to full form in criminal law. The accused has an opportunity to face their accuser and meet the allegations head on. The defence lawyer is paid to undermine the complainant and expose the weaknesses in the Crown's case. If the accused has access to money, then they will be able to afford a skilled lawyer or even a team of lawyers. The defence lawyer will stringently test the complainant's credibility and reliability. Cross-examinations can be long, rough experiences for any witness, let alone a witness who survived sexual assault and is being forced to re-live the experience on the stand.

Once charges are laid, the accused is entitled to far-reaching disclosure rights, meaning the Crown must disclose all evidence that could be relevant to the case

regardless of whether they plan to call the evidence at trial and even when it is hurtful to their case. In some cases, the accused will seek production of the complainant's personal records, like counseling records. The law has evolved to protect complainant's privacy rights and limit disclosure of their personal records, but such disclosure demands still happens. When disclosure demands happen, complainants are entitled to their own lawyer – often paid for by legal aid – to fight against disclosure.

If the accused is charged with an indictable offence, then he has the option to have a "preliminary inquiry". A preliminary inquiry is a hearing where the Crown must show the court that they have enough evidence for the charge to proceed to trial. The Crown's key witnesses testify, which often includes the survivor. The defence lawyer has an opportunity to cross-examine all witnesses – an excellent opportunity to test the Crown's evidence. For survivors, it means an extra cross-examination on top of what will happen at trial.

Crown Counsel chooses to stay charges, offer a plea or push the case to trial. This means that survivors do not decide whether a charge goes to trial or when and how it resolves.

The social context of sexual assault

I spoke with Dalya Israel, a manager with Women against Violence Against Women who accompanies survivors throughout hospital and court processes. From her point of view, the key problem with our criminal justice system as it pertains to sexual assault is not the law. The laws are actually quite progressive. The courts have repeatedly recognized that sexual assault against women is a form of sexism and a heavily gendered form of violence. The Supreme Court of Canada has repeatedly ruled that sexual assault myths should not be used to defend sexual assault cases. The Criminal Code recognizes that people have to take reasonable steps to ensure that the sexual activity is consensual.

Israel says that the problem is that our legal system is run by people – Crown, police officers, judges and juries – who, like all of us, are steeped in a culture full of myths about sexual assault and biases against women. It is still common for people not to believe survivors despite the fact that there is no evidence to support high rates of false reporting. It is still common to blame women for the assault – by flirting, dressing a particular way or going home with someone they were 'asking for it'. It is still common to think of assaulters as shady people who lurk in alleys waiting for unsuspecting victims to happen by when the reality is that most survivors know their assaulters well and might be in some sort of relationship of trust, dependency or love with them. Just because someone is an otherwise decent person does not mean that they did not assault someone.

Given the social context of sexual assault, Israel says that it is not surprising that most women do not report:

The barriers to reporting sexual assault are [supported] by how we are socialized to think about sexual assault. It is still common for society to blame victims and question what women did to prevent their own rape. Women internalize these barriers [that then] become obstacles to getting support from the people they love let alone speaking to the police … women internalize shame from living in a culture that blames victims.

Women are even less likely to report sexual assault when the accused is an authority

figure, for example a religious leader, a supervisor or a celebrity:

Power and prestige plays into creating more privilege and credibility for the perpetrator. People do not want to believe that people like Jian Ghomeshi have the capacity to do horrible things. If people refuse to believe that a celebrity is wrong, then they necessarily question what is wrong with the woman.

One protection put in place for complainants is a publication ban in regards to the complainant's identity in order to protect her privacy. But that does not stop people from coming into the courtroom to watch the trial. Courts are open to the public.

Survivors may also be confronted with their fear of not being believed if the police determine there is not enough evidence to recommend charges or the Crown Counsel determines there is not enough evidence to lay charges or proceed to trial.

The results of our current social environment and legal processes are that a miniscule number of assaulters are convicted of sexual assault. The YWCA reports that of the roughly 460,000 sexual assaults that occur every year in Canada, 3.3% are reported, 1.2% lead to criminal charges and 0.3% lead to a conviction.

Israel ensures that she discusses the reality of court and the potential outcomes of reporting an assault with the women she works with. She finds that focusing on what the survivor can get out of the experience rather than focusing on the outcome can be helpful. For many women, being able to tell their story to a judge and face their attacker can be a healing experience. Israel ultimately encourages women to make their own decisions.

If nothing else, the Jian Ghomeshi case has provided an opportunity for a nationwide discussion on how commonplace sexual assault is and the social myths and biases that make prosecution so difficult for survivors. The most important thing we can do, says Israel, is change our culture so that women are equally valued. We would have far less sexual assaults. Men would not feel entitled to women's bodies or to asserting power over them. The public would not be quick to question survivors' truthfulness. We would stop asking questions about what survivors could have done to prevent the sexual assault. Women would be more likely to report. Convictions would be more common than our current 0.3% of assaults.

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Article by Joseph Fearon