DEFENDING A SEXUAL ASSAULT CASE

The area of sexual assault or aggravated sexual assault is new under the amendments to the Criminal Code. The old provisions dealing with rape have been repealed and the new sexual assault provisions put into place. Even though these changes have been made, little has changed in the area of tactics for cross-examining the Complainant or in handling and preparing the case for the Defence. The comments that follow are simply a personal opinion as to how a case may be prepared. Certainly all the aspects of defending sexual assault cases are not covered since it is impossible to anticipate all the variations that may occur in different fact situations but it is hoped that the next few pages will give an outline on how to defend a criminal case dealing with sexual assault.

An aggravated sexual assault case involves primarily one primary witness and a few ancillary witnesses who make up the case for the Crown. The primary witness is the Complainant who alleges that she was sexually assaulted. It is therefore important in preparing a case to centre around her evidence in determining how to discredit it, test it for inconsistencies and accuracy, nullify it.

To start with one must immediately contact the client whether in jail or not and get all the information possible from the client. It has always been my belief that it is important
to determine whether the client in fact had sexual intercourse with the Complainant and whether he had the intention to have sexual intercourse without her consent. This will certainly cause you to prepare the case in a certain manner and may immediately determine whether you call your client as a witness at trial. When you first interview get all the details leading up to the alleged offence including the relationship between the two parties that day and prior days. Also, examine the client to determine if he has any marks such as bruising, cuts, scrapes, scratches etc. I have upon interviewing a client in the cells asked the police to photograph him. It is important that on this interview you be frank with the client and have him reveal all information to you whether favourable to him or not favourable. If he is a married individual it is best that you discuss with him his admitting to his wife what has happened, if he has not done so, so that the matter can be dealt with between them prior to trial either in a reconciliation or a definite break-up. It is my opinion that it is important to show that both parties have reconciled their differences if you are going to call your client as a witness at the trial. I believe that a jury will look upon this favourably since they may consider that the detrimental effect on the family has been sufficient so that they will not disrupt the marriage any further and will thereby give the accused the benefit of the doubt in their deliberation.

The importance of obtaining the statement given by the Complainant to the police cannot be over-emphasized. It
is extremely important to have the statement of the Complainant and of all other Crown witnesses that will be called. The Crown is quite often reluctant to give you access to such statements or to give you copies of such statements. The most recent decision on this point is one of Mr. Justice Wimmer in an unreported decision of the Queen v Morinetal. A copy of such decision is attached for your information. Please note that in this decision, Mr. Justice Wimmer has indicated that if the statement is consistent with the evidence given at the Preliminary or trial, then the Crown has nothing to lose by revealing such statement to the Defence. Alternatively, if the statement is not consistent with the evidence given by the witness, then it is most important for Defence to have it for the purpose of cross-examination.

In discussing the facts with the client on the first occasion or soon thereafter discuss the election of mode of trial. It is my opinion that aggravated assault and sexual assault should be by Judge and Jury unless there is very good reason to establish why it should be otherwise. This is a personal opinion which is not substantiated by any other reason other than my belief that the public generally feels that it should be the judge and set the standards of morality in the Community which standards may be different from those of our judges. Also, all individuals who enter a Court of Law and are asked to deliberate on an aggravated sexual assault case
can see themselves in that position and are more likely to acquit an accused than convict. Judges may be more apt to convict since there has been in the last number of years substantial public outcry over the large number of acquittals in rape cases. Also, a jury of men and women therefore may be more than willing to give the benefit of a reasonable doubt to the accused especially if some hint of previous sexual conduct of the Complainant can be put to them either directly or by implication. Methods of doing this will be discussed later. Also, women may be more apt to acquit a male accused because of dislike for the Complainant, dislike for her moral standards, and an opinion that the Complainant should never have been in the predicament that she was in.

CROSS-EXAMINATION OF COMPLAINANT

It is important at the Preliminary Inquiry to cross-examine the Complainant on every detail since evidence given by her may be contradicted in some respect by other witnesses called. Such contradictions may be very important in establishing that she is not a credible witness. The following points should be cross-examined upon:

(i) Clothing - Was it torn, soiled, marked and how easily removable; Types of clothing, Were they sexually suggestive (not same as worn in court)?
2) Bruising - photos - What is the age of the bruises; Injuries of any sort caused by the sexual assault (note that the evidence of a medical examiner is important in either corroborating the evidence in this area or contracting it).

3) How long did the incident take;
   The length the incident took may indicate that there was consent and only a change of mind after the intercourse has led to the complaint of rape.

4) Behavior prior to alleged assault;
   This is extremely important in determining whether there was consent.
   This was raised in the case of Carrier Veilleux Gimon & O'Neil v The Queen (1972), 23 C.R.N.S. 243, a decision of The Quebec Court of Appeal, the defence raised was "implied consent". It was argued on the appeal that the trial Judge failed to put the defence of consent to the jury. The facts supporting the defence can be set out as follows:

   "The principal facts upon which the defence's theory of implied consent was based are the following:

   1. This was not the young girl's first
sexual experience: they both admitted that they had already had sexual intercourse prior to 12th April 1970.

2. Before going to Lac Beauport on 12th April, the young girls had smoked hashish at a friend's house.

3. Both girls habitually hitch-hiked, and despite their youth, had for some time been frequent visitors to discotheques at which alcoholic beverages were served.

4. During the afternoon of 12th April, both young girls had been dancing in a very lewd manner in a discotheque at Lac Beauport, demonstrating a great deal of abandon and enthusiasm.

5. When Michael Carrier, whom they did not know, approached them at the discotheque, they began to drink beer with him (which they denied), and they accepted his invitation to dinner, without hesitation.

6. At one of the restaurants, they were drinking beer (which they denied), and they were not at all surprised when the appellant Veilleux, whom they did not know, joined the group.

7. During the course of the conversation which ensued, they mentioned that they had been smoking hashish since early afternoon, and they agreed to go to the club La Grange, knowing that they could in all probability smoke drugs there.

8. When they arrived at the club La Grange, they were very happy, and lightly excited, according to the appellants and to certain defence witnesses.

9. They were not at all upset when the appellants O'Neill and Cimon rejoined the
10. According to the defence, the girls danced in an excessively lewd manner at this club, and had no objection whatever to being caressed and to caressing certain of the appellants.

11. They enthusiastically agreed to smoke three marihuana cigarettes with the group at the club La Grange.

Insofar as Yolande Villeneuve was concerned, it was proved that several months prior to 12th April 1970, she had accepted the invitation of one Gagne, a 36-year old married man whom she did not know, and that she had gone to a restaurant with him and had drunk beer while there. Upon returning to his car, she had permitted him to kiss and to caress her, and had accepted a gift from him.

The Quebec Court of Appeal found that in the circumstances the learned trial Judge erred in failing to put the defence of consent to the jury.

5) Was the complainant upset or angry prior to the alleged rape i.e. upset at her male friend, husband or father? Exploring this factor may help in determining whether the Complainant is in fact complaining about being sexually assaulted in order to attract the attention and arouse the sympathies of this significant male and ultimately to suggest that it was his behavior which drove her into the circumstances which led to the incident in question.

6) Knowledge of Accused - In this area, the evidence of the Complainant may be either helpful or extremely detrimental. If she has had previous sexual relations with the
Accused, it may show that she had consented on this occasion or that the Accused believed she had consented.

7) What Witnesses were present. This may help you obtain names of witnesses that were not called at the Preliminary and which you may want interviewed prior to going to trial.

8) Alcohol and Drug Consumption. It is quite obvious that such evidence may show that the Complainant's recollection may be affected by the consumption of alcohol and/or drugs.

9) Emotional state of Complainant. This is usually brought forward by the Crown since they try to show that the Complainant was emotionally upset at the time of the alleged incident. It should be noted that this is not always the case and that the Complainant many times does not become as emotionally upset as one would think would be normal in the circumstances.

10) Complaint to others about the sexual assault. This factor is important if the Complainant did not raise the matter with other people
shortly after her assault.

11) Physical state of the room or area where the assault occurred. Establish the condition of the premises prior to the alleged assault. It should be noted that a certain state of disarray in a room may have existed prior to the assault and therefore the assault did not cause the messy condition of a room. Also, if the room is in good condition and was in good condition after the assault, this tends to support the accused's defence that no struggle or violence occurred leading to the conclusion that there may have been consent.

12) What did the Complainant do after the intercourse? This is important in determining whether she immediately complained to the police or whether she took time in determining whether she would complain and whether she in fact considered that she was raped.

The Preliminary Inquiry and cross-examination of the Complainant gives counsel a fairly good idea on how to conduct the cross examination at the trial. This is important because
if the Complainant is a sensitive person, then one should not treat her in a manner that she would become emotionally upset on the stand. If she is a hostile individual, then this may be an area that could be expanded on at the trial to one's advantage. The following is an excerpt from a book called Successful Techniques for Criminal Trials by F.Lee Bailey and Henry B. Rothblatt. At page 190, they indicate the following about female witnesses.

"Jurors may become annoyed with counsel who markedly alters his manner when examining girls or women. Your demeanor should remain constant throughout the trial. Do not act in a condescending manner to female witnesses and avoid becoming overly solicitous of their feelings. Conversely, if a female witness becomes highly emotional in an attempt to appeal to the jury, remain unmoved. She may become angry and upset, and thereby more susceptible to penetrating cross-examination by your stoic rejection of her emotional outbursts.

Always be fair and courteous when questioning a girl or woman. If you press her too hard, she may break down and cry. A crying woman does your case no good. However, if you have the ammunition to destroy her character, and such destruction is necessary to your case, do not hesitate to go through with it. But do it effectively. An ineffective destruction will do your case more harm than good.

Woman are contrary witnesses. They hate to say yes. This makes them susceptible to traps. Point
your questions to an obvious purpose. A woman's
desire to avoid the obvious answer will lead
her right into your real objective-contradicting
the testimony of previous prosecution witnesses.

Woman, like children, are prone to exaggeration;
they generally have poor memories as to previous
fabrications and exaggerations. They are also
stubborn. You will have difficulty trying to
induce them to qualify their testimony. Rather,
it might be easier to induce them to exaggerate
and cause their testimony to appear incredible.

An intelligent woman will very often be evasive.
She will avoid making a direct answer to a damaging
question. Keep after her until you get a direct
answer—but always be the gentleman."

They also indicate that the Prosecutrix in a sex crime should
be dealt with in the following manner:

"Try to treat the prosecutrix in a sex crime as you
would any other woman witness. However, expect her
to be more emotional.

The complainant in a rape case will sometimes
turn out to be a person caught in a compromising
situation who is trying to brazen her way out of
it or she may be a rejected woman seeking revenge,
often upon any male and not necessarily upon the
one who rejected her. In such cases, develop the
facts which led up to the supposed rape. Try to
show the lack of force through the complainant's
voluntary relationship with your client. Stress
any opportunities which the complainant might have
had for escape, resistance, or outcry. The careful
development of these elements may well convince the
jury that your client, rather than the complainant, is the "wronged" party.

If the gravamen of the crime is forcible sexual intercourse, develop in your cross-examination that there were no signs of bleeding or laceration; that there were no physical indications of force having been applied; that there was no physical evidence of the act, such as stains, semen, torn clothing, missing buttons, signs of struggle, or any similar signs that would corroborate a forcible sex crime. Ascertain when the alleged attack was reported to the police; was it right after the attack or did she delay going to the police? Did she reveal the attack to others? Develop any other facts that might indicate the attack was an afterthought on her part.

Previous sexual conduct may be shown primarily through implication. In many cases the medical evidence will establish either in bruising or lack thereof to the victim. The Crown usually calls such a witness to establish that the alleged victim had sexual intercourse. My experience has shown that quite often one can establish through cross-examination in this area, that the sperm found by the doctor is evidence of sexual intercourse that occurred prior to the alleged rape. In other words, the doctor can indicate whether the sperm is motile or not motile sperm. Motile sperm has a certain life span before becoming non-motile. Then the non-motile sperm will start disintegrating after a further extended
period of time. A doctor can give an opinion as to the time when he believes the intercourse occurred by simply giving his opinion as to the life span of the sperm itself.

Complainants also will comment at times on the physical act of intercourse itself indicating whether it is normal or not. Unless they have had previous sexual activity it may be not possible for them to comment on whether the performance of the accused was normal or not. Also, lack of emotion by the Complainant may be a further sign of previous sexual activity.

JURY ADDRESS

Many cases are won on the Jury Address and it is therefore most important to prepare a logical presentation to the Jury that leads to conclusions that can reasonably be drawn on the facts. It is also important to do a good jury presentation since there are facts that the jury may not be able to put into perspective without your help. Never under-emphasize the importance of stressing to the jury the importance of reasonable doubt. This can be supplemented by asking the jurors to place themselves in the position of the accused. Such a method may cause the jury to treat the case more seriously and be more willing to give the benefit of the reasonable doubt to the accused.

Anticipating the charge to the Jury is also important.
If you are aware of what the trial judge is going to tell the Jury, then you can, without getting into the area of law, comment to the jury certain general principles such as the following:

1. If the Complainant consented and then during intercourse withdrew her consent, such is not sufficient for the conviction of the accused.

2. If the Complainant does not consent and her passions are aroused and then consents, then she cannot say that she did not consent prior.

A good way of anticipating what the Judge may say to the Jury is by reading J.de N. Kennedy's book called *Aids to Jury Charges Criminal*. This text gives outlines of Jury charges that Judges may use in preparation. This certainly is a very big help in anticipating what wording may be used by the Judge to the Jury. If one can get some wording similar to what the Judge is going to charge the Jury into the jury address, then the Jury may consider that the argument of the accused may have more bearing since it appears that the Judge is in effect repeating what counsel for the accused has indicated.

Jury Addresses are simply personal matters that have been developed by Counsel. Counsel should not try to mimic the Jury addresses of other counsel because this tends to lead to an unrealistic presentation that loses its forcefulness. It is therefore important to spend considerable time in
preparation of Jury addresses and preparation of a personal style.

It is hoped that the above Outline will aid in preparation of defence work in the area of sexual assault. As earlier indicated, the list is certainly not exhausted but simply an Outline and hopefully starting point for preparation in this area.
IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
JUDICIAL CENTRE OF BATTLEFORD

BETWEEN:

HER MAJESTY THE QUEEN

- and -

LAWRENCE BAPTISTE MORIN et al

JUDGE'S RULING ON WHETHER WITNESSES' STATEMENTS SHOULD BE GIVEN TO DEFENCE COUNSEL, given on MONDAY, the ELEVENTH day of APRIL, A.D. 1983, at 1:35 p.m.

Mr. R.G. KIRKHAM and Mr. D.R. CANN (Battlefords Prosecution Unit) North Battleford, Saskatchewan COUNSEL FOR THE CROWN

Mr. M. BODNAR, Mr. R.A. GIBBONS, Mr. R.J. LANE, Mr. M. BRAYFORD, Mr. R. BORDEN, Mr. J. HILL, Mr. M. SHAW and Mr. L.M. BALICKI COUNSEL FOR THE ACCUSED

BEFORE: The Honourable Mr. Justice C.R. Wimmer

From a Transcript of Evidence taken in stenograph notes by:

Janice E. Jahner (Ms.)
Official Queen's Bench Court Reporter
Court House
Battleford, Saskatchewan
THE COURT: I'll deal with this matter we discussed just before lunch. Defence counsel seek to have produced for inspection the statements given by two Crown witnesses to the police during the course of the investigation leading to the present charge. The statements were reduced to writing and signed by the witnesses. Counsel are suspicious from the general tenure of the evidence given by the witnesses at the Preliminary Inquiry that the testimony of these two might be materially different than the statements, and, if that's the case, counsel wish to exercise their right to cross-examine the witnesses on the prior statements. Crown counsel objects to their production. The objection is not based upon any ground of public policy, privilege or impracticability. Counsel simply states that the defence has no right to such inspection. There is, undeniably, some authoritative support for the Crown's position. More recent judicial opinion, however, tends toward a general policy of full disclosure by the Crown. An accused can not fully exercise his right of cross-examination without knowledge of what a witness may have said on a prior occasion concerning the facts in issue. If the Crown is aware of a prior inconsistent statement then fairness and justice require that it be disclosed to the defence. If the prior statement is not inconsistent with the testimony anticipated at the trial, there will rarely be any reason to
keep it a secret. In my view, the Crown, as a matter of fair play, should produce such statements to the defence unless some strong reason is advanced for not doing so. No such reason is advanced here. I have read the statements in question and am of the view that the trial might be expedited if they were shown to defence counsel before the witnesses were called. I direct that this be done so that it can not later be argued that the accuseds' right of cross-examination was in any way frustrated and their ability to make full answer in defence of the charge impeded.