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ANALYSING THE LIMITS OF CROSS-EXAMINATION IN SEXUAL OFFENCE TRIALS

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I. INTRODUCTION

In the recent case of *PP v Xu Jiadong* [1] ("*Xu Jiadong*"), the deplorable conduct of the defendant's counsel in the courtroom gave the Magistrate Court the opportunity to remind members of the legal profession of their responsibilities not only to their clients, but also to the justice system and the legal profession at large, when they discharge their professional duties. As set out in the Legal Profession Rules, [2] although a legal practitioner has an obligation to act in his client's best interests, this duty is subject to the practitioner's paramount duty to the court. He is expected to be fair and courteous towards every person in respect of his professional conduct.[3]

This article will examine the background behind the case and the implications it raises on how counsel should conduct their cross-examinations, in particular where victims of sexual offences are concerned. It submits that underhanded tactics such as insulting and making vulgar imputations at victims and witnesses is unacceptable in any setting, let alone within a court of justice, and our courts ought to be vigilant against such counsels which resort to such practices.

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[1] [2016] SGMC 38.

[2] Legal Profession (Professional Conduct) Rules 2015.

[3] *Ibid*.

II. BACKGROUND

In *Xu Jiadong,* the defendant, Mr Xu, faced 1 charge under s 354(1) of the *Penal Code,* [4] for allegedly outraging a woman's modesty by brushing against her breasts with his forearm while on a MRT train. During the trial, Mr Xu's lawyer ("defence counsel"), cross-examined the victim, and asked the victim to stand up, ostensibly to see how attractive the victim was. This request was challenged by both the victim and the Deputy Public Prosecutor (DPP) as offensive and insulting. Upon further probing by the DPP, the defence counsel explained to the court that he wanted to "show that if she (the victim) is wearing a very low cut with a very voluptuous breast protruding out", which may have created a temptation for his client (or anyone else) to molest the victim.

In his written judgement, District Judge Shawn Ho ('the judge") dedicated 6 pages to condemn the defence counsel's conduct as "completely unacceptable and deserves disapprobation". [5] The judge condemned the defence counsel for staring at the victim's chest as it made the victim re-live her experience of being molested on the train again, causing her considerable emotional distress. The judge also considered the offensive questions on her breast size was an abuse of the cross-examination process, and cautioned that such improper humiliation of sexual offence victims may deter future victims from coming forward. [6]

The defence counsel's contemptible conduct was also widely reported in print and online media, and prompted even the Law Minister K Shanmugam SC to criticize his conduct. The Attorney-General's Chambers filed a disciplinary complaint with the Law Society against him several days later (as of writing the outcome of the complaint is not yet decided). This is the second time in the year that a complaint has been lodged against the defence counsel – a previous

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[4] Cap 224, Rev Ed 2008.

[5] *Supra* 1 at [111].

[6] *Supra* 1 at [106] – [110].

complaint was filed against him in November 2015 for using expletives in the course of a criminal trial. [7]

[7] Attorney-General's Chambers (2016), Attorney General Chambers files Disciplinary Complaint to Law Society against Mr Edmund Wong Sin Yee, online: <https://www.agc.gov.sg/DATA/0/Docs/NewsFiles/[AGC%20Media%20Statement]%20AGC%20Files%20Disciplinary%20Complaint%20to%20Law%20Society%20Against%20Mr%20Edmund%20Wong%20Sin%20Yee.pd>

III. ANALYSIS

As the judge explained in his written grounds of decision, the defence counsel's repeated probing of the victim's breast size during the cross-examination was a flagrant breach of s 153 and s 154 of the Evidence Act.[8] s 153 prohibits questions or inquiries which the court regards as indecent and scandalous (unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed) and s 154 prohibits questions that are intended to insult or annoy, or which though proper in itself, appears to the court needlessly offensive in form. These 2 sections are encapsulated in Rule 12(5) of the Legal Profession (Professional Conduct) Rules 2015:

> **12(5).** A legal practitioner must not make any statement, or ask any question, which is scandalous, is intended or calculated to vilify, insult or annoy a witness or any other person, or is otherwise an abuse of the function of the legal practitioner.

Although defence counsels have a duty to their clients to defend them by challenging and discrediting the evidence against them (including the victim's testimony) during the cross-examination, this must be balanced against their duties owed to the court to ensure the administration of justice – for which further traumatizing the victim would be counter-productive. To maintain this delicate balance, lawyers must thus approach cross-examination of vulnerable parties (such as children or victims of sexual offences) with a requisite degree of sensitivity while trying to ascertain their testimony.

Lines of questioning that are irrelevant, scandalous, or insulting will be considered as an abuse of the cross-examination for collateral purposes, as it is obviously not an authorised purpose of cross-examination.[9] The defence counsel's conduct here was clearly a blatant breach of both

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[8] Cap 97, Rev Ed 1997.

[9] *Supra* 1 at [103], citing Professor Jeffrey Pinsler S.C. in *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015).

professional regulations and the Evidence Act, and the judge had acted correctly in bringing his boorish questioning of the victim to an abrupt end before she could be further traumatized, and condemning his behaviour subsequently.

In any case, the defence counsel's attempt to use the victim's breast size and attractiveness to explain his client's temptation to molest the victim is a misogynistic and outdated argument to try to push the blame for his client's outrage of modesty back to the victim herself. Such assertions have no place in the legal system of a modern egalitarian society like Singapore, and the judge rightly chose not to factor in any such "temptations" when deciding Mr Xu's sentence.

IV. ARE ADDITIONAL SAFEGUARDS NECESSARY?

Sadly, inappropriate questioning of sexual offence victims does not appear to be the exclusive province of lawyers. In a recent case, a Canadian provincial court judge had questioned a rape victim on why couldn't she "just keep her knees together" to avoid penetration.[10] These misogynistic questions created a huge outcry among the public, the mainstream media, and other law academics. The judge in question was eventually suspended, made to attend sensitivity training, and was recommended to be removed from his current position as a Federal Judge after a hearing by the Canadian Judicial Council. [11] However, this episode reveals that even in a supposedly progressive country such as Canada, the antiquated idea that a victim is partly to blame for his/her own assault because of her looks, actions, or dressing still exists.

Many Western countries have recognized that although the defendant must have the right to a fair trial, some measure of protection is needed for victims of sexual offence to encourage them to come forward to testify and help bring perpetuators to justice. As a result, these jurisdictions have developed "rape-shield laws", which prohibit defence counsels from using a sexual assault

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[10] AJ Willingham (2016), Judge to woman in rape case: 'Why couldn't you just keep your knees together?', CNN online: <http://edition.cnn.com/2016/09/12/world/robin-camp-rape-comments-trnd/>

[11] Report and Recommendation of the Inquiry Committee to the Canadian Judicial Council (2016), In the Matter of an Inquiry Pursuant to s. 63(1) of the *Judges Act* Regarding the Honourable Justice Robin Camp –https://www.cjc-ccm.gc.ca/cmslib/general/Camp_Docs/2016-11-29%20CJC%20Camp%20Inquiry%20Committee%20Report.pdf

victim's sexual history as evidence against them during cross-examination. These forms of legislation were intended to protect the victim from the stigma and humiliation of having her sex life publicized in court. However, such laws have been challenged by defendants in sex offence cases as unfairly denying them the opportunity to raise evidence on their past relationship with the victim to prove consent.[12] Any proposed rape shield law will have to balance between these policy concerns.

While Singapore has yet to implement similar rape shield laws, persistent lobbying by feminist activist groups such as AWARE[13] have led the government to move to repeal s 157(d) of the Evidence Act, which allows a man accused of rape to discredit his accuser by producing evidence of her "generally immoral behaviour" (which usually refers to her sexual history). This represents a large step forward, since under s 157(d)a victim of sexual assault would be unfairly prejudiced if the court casts judgment on her as unchaste or promiscuous, and her testimony deemed less credible.[14]

Our courts have not been blind to such developments. In the case of *Ng Jun Xian v Public Prosecutor*,[15] the High Court expressly rejected the defence counsel's attempt to attribute culpability for a sexual assault to the victim, on grounds that she was a club hostess and had sent "mixed signals" to the accused by agreeing to accompany him to a hotel, and reiterated that counsel should "refrain from making baseless submissions that disparage the character, integrity or morality of a victim in an attempt to shift blame to the latter". [16] Looking ahead, it remains an open question on whether the government will attempt to regulate the conduct of defending counsels in sexual offences trials in a similar manner as our Western counterparts, or whether it will rely on the legal profession to self-regulate itself.

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[12] *R v Darrach*, [2000] 2 S.C.R. 443.

[13] Association for Women for Action and Research – a major Singaporean non-governmental organization concerned with promoting gender equality.

[14] AWARE (2011), Section 157(d) of Evidence Act: Repeal it, online: <http://www.aware.org.sg/2011/11/section-157d-of-evidence-act-repeal-it/>

[15] [2016] SGHC 286.

[16] *Ibid* at [43].

V. CONCLUSION

Although lawyers undoubtedly have a duty to do their utmost when representing their clients, this must be balanced against their paramount duty to the justice system and their role in maintaining the integrity of a noble and well-respected profession. The defence counsel's regrettable conduct of the cross-examination in *Xu Jiadong* is unquestionably an egregious breach of his duty to act honourably, and did not appear to have helped his client much in any case.

Lawyers in Singapore are well-advised to take heed from this example, and refrain from making indecent or offensive remarks or making inquiries that are designed specifically to annoy, insult, or humiliate the other party. As seen in the above case, our courts are extremely unlikely to tolerate such underhanded strategies, and the ultimate victim of these tactics would be the lawyer's own professional reputation, and possibly even his position in the legal profession.