Rape: good and bad women and judges

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Our judges are out of touch with changing community attitudes to rape

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The case of *R v Hakopian*[1] is remarkable for several reasons. The first is that Hakopian, having been found guilty of raping and kidnapping a sex industry worker, was sentenced by the County Court of Victoria to a three-year, four-month gaol term. The second remarkable thing is that the Supreme Court increased this sentence to four and a half years with a minimum sentence of two and a half years. But perhaps the most remarkable aspect is the storm of public protest aroused by comments of the judges and the defence barrister, to the effect that the victim's employment in the sex industry was a factor relevant to mitigation of sentence. There has obviously been a dramatic change in community attitudes to rape in general and to the rights of workers in the sex industry, a change which has not been reflected in the attitudes expressed by the sentencing judges.

Comments made by both courts in sentencing Hakopian indicate that it is yet another sexual assault case where the attitudes of the judiciary (and of other members of the legal profession) are at odds with those of the general community. The trial judge's assessment that the psychological effect of the assault on the victim was likely to be diminished because she was a prostitute raises serious questions about judicial attitudes and assumptions made during sentencing and the need for judicial education in issues of gender bias. It also leads into the more general debate about the relevance of victim impact as a factor to be taken into account and the use of victim impact statements.

The facts

Hakopian engaged the services of a 28-year-old woman who had worked for a number of months as a street prostitute. She got into Hakopian's van and an agreement was reached that she would provide oral and vaginal sex for $90 which Hakopian paid her. The judge determined that Hakopian had indicated they would go to his brother's place in Carlton and although she was reluctant to leave the St Kilda area the woman agreed to go with him. Hakopian took her to the back of his workshop in East Kew. She was uncomfortable about this but provided oral intercourse for some 15 to 20 minutes, following which she

stopped, telling him it had gone on too long. At this point he became angry and she agreed to repay him $40 and said she wanted to leave. He then produced a knife and threatened her with it, forcing her to continue the oral intercourse. This constituted the offence of rape with aggravating circumstances.

He then accused her of stealing his Mastercard and further indecent assaults took place on the pretext of him searching her for the Mastercard. He still had the knife and also said there was a gun in the back of the van. These acts constituted indecent assault with aggravating circumstances. A struggle ensued during which time he continued to hold the knife and she was screaming and trying to get out of the van. He drove off shoving her head into her lap and into the console. His van collided with another vehicle but he continued to drive on. He eventually let her out of the van at Heidelberg and then drove off.

A taxi driver picked the woman up and described her as 'looking like a mess and very distressed'. He took her to Heidelberg police station where she was described as 'very distressed and also aggressive'. Examination by the Police Surgeon found scratches on her left forearm, not inconsistent with being caused by broken glass, scratches around her ear and a small abrasion within the entrance of the vagina. These physical injuries, according to the court, 'were not of great significance'. About three quarters of an hour had elapsed from when they arrived at East Kew until she was released in Heidelberg.

The sentence: County Court

The jury found Hakopian guilty of one count of rape with aggravating circumstances, one count of indecent assault with aggravating circumstances and one count of kidnapping. Judge Jones delivered sentence in the County Court on 8 August 1991. The legislation then provided for two separate categories of rape and indecent assault, and the maximum sentence fixed for rape with aggravating circumstances was 20 years imprisonment, and ten years for indecent assault with aggravating circumstances.

For the rape with aggravating circumstances Judge Jones sentenced Hakopian to three years; for the indecent assault with aggravating circumstances, 18 months; and for kidnapping, 15 months. Because the offences were concurrent, the sentences were generally or largely to be served concurrently resulting in an actual sentence of three years, four months. A minimum term, lower than that which might otherwise be fixed, was considered justified and was set at 16 months.

The judge found the task of sentencing in this case to be 'a difficult one'. He cited, with approval, the unreported case of *R v Harris* (11 August 1981) in which the Court of Criminal Appeal said that the fact that a victim of a sexual assault is a prostitute is a relevant consideration in sentencing. Judge Jones said that an important consideration is the effect of the crime on the victim. Whereas the act of sexual intercourse very often has a serious psychological effect on victims, following *Harris* he said:

> I do not think that applies to the same degree here. As a prostitute [she] would have been involved in sexual activities on many occasions with men she had not met before, in a wide range of situations . . . On my assessment, the likely psychological effect on the victim of the forced oral intercourse and indecent assault, is much less a factor in this case and lessens the gravity of the offence.

Judge Jones acknowledged that it would have been a frightening experience for her, particularly as Hakopian had a knife, and said it went beyond what prostitutes such as she might be prepared to accept as conduct that is part and parcel of their occupation. However, he considered the offences to be at the low end of the range of seriousness for these types of offences although they were nonetheless serious matters and crimes of some gravity. He took Hakopian's personal circumstances into account. 'All in all', said the judge, 'I consider your personal circumstances carry substantial weight in mitigation'.

Not a violent man

Judge Jones found Hakopian to be a hardworking man whose wife and sons remained devoted to him. Judge Jones considered it to be 'quite tragic' that a person like Hakopian 'found himself in these circumstances' when he obviously had a great deal to contribute to the community and his family. He then made the surprising observation, 'I accept you are not a violent man . . .'!

Similarly in *Harris* the Court of Criminal Appeal said there were two reasons for resiling from imposing penalties of greater severity which on the face of it were merited by the convictions. They were the pre-sentence report on the accused and 'the character and antecedents' of the victim. The court accepted the probation and parole officer's report that Harris 'was a man who, although addicted to drink was not a violent man. Indeed he was described both in evidence and in the report as a gentle man'. It is surprising, to say the least, that the accused can be thus dissociated from the behaviour of which he was convicted, behaviour described by the same court as 'outrageous, and calculatedly so' involving a 'terrifying . . . pre-planned affair'.

Compare the court's attitude to the good character of the accused in an earlier case, *R v Webb*, dealing with the factors relevant to sentencing in rape cases. The court first affirmed the relevance of the victim's character stating in relation to the case before it:

> In the first place, the victim was a married woman . . . an ordinary decent housewife . . . A decent young married woman providing no advances or no provocation whatever . . . subjected to what can only be described as a completely unjustified and thoroughly outrageous experience. Then again we cannot overlook the fact that she was ill-treated physically, apart from the rape . . . suffering from bruises and abrasions . . .

But the court dismissed Webb's past good character although, like Hakopian and Harris, he was a 'good and reliable worker' and had a devoted wife and daughters. The court said:

> He is a man who must be possessed of redeeming features. Nonetheless beyond those circumstances, there is little, if anything, that we can see that points in extenuation of the commission of this offence.

It is difficult to explain the difference in the weight given in *Harris* and *Hakopian* from that in Webb — either to the victim's character or the accused's. The most likely explanation is redolent of judicial sexism and double standards.

It can be seen that the application of the double standard is given full flight in sentencing decisions in the guise of the relevance of the accused's and the victim's antecedents. Some commentators have suggested that the use of victim impact statements prepared in the same way as pre-sentence reports for convicted persons would result in more appropriate sentences. But the judicial attitudes exemplified in the discussion above give rise to concern that victim impact statements might simply provide yet another opportunity for dividing victims into those who are seen as worthy

of the law's full protection and those who deserve only a bit of protection. There is also concern that victims may be subjected to cross-examination where an impact statement is called into question. This goes against the trend of rape law reform which aims at reducing trauma to victims.

Sex industry workers and sentencing — the judicial attitude

Yet, Judge Jones was at pains to point out that courts do not apply one law for prostitutes and another for chaste women. 'Prostitutes', he said, 'are not second class citizens'. Quoting *Harris* he said, '[p]rostitutes are not, by reason of their vocation, any the less entitled to receive the protection of the law'. But he then said that offences such as those under consideration do not have the same impact on prostitutes. This is obviously contradictory.

Judge Jones also stated, 'They [prostitutes] have the right to decide whether they will engage in sexual activities, and to be protected from being forced to provide sexual favours against their will'. This rings somewhat hollow when one takes into account the comments that prostitutes are likely to suffer less than other women. The issue of consent is ignored, as is the fact that prostitutes work in a dangerous industry and might well be more affected than others. Although purporting to take into account the effects of the offence on the victim, Judge Jones does not consider the situation of the specific woman involved but gives his opinion on the impact of such crimes on prostitutes generally. The evidence that she was extremely distressed, which is hardly surprising in the circumstances, is discounted. Very little emphasis was placed on the actual nature of the offences themselves.

The double standard operating here is further amplified by the comments in *Harris* where the court recognised that rape of sex workers is rarely prosecuted and that:

> prostitutes are of course by their very trade . . . very subject to the crime of rape and indeed to murders. Such offences as the recent 'Ripper' offences in England are by no means unknown, and no doubt they walk in fear of those crimes. However they go into it, they embark on their trade knowing the dangers and accepting them, and in those circumstances . . . the crime . . . is not as heinous as when committed, say, on a happily married woman living in a flat in the absence of her husband when the miscreant breaks in and commits rape on her.

It is unfortunate that ten years after *Harris* these views re-surface unchanged despite changes in the legal status of prostitution and the work of community groups in convincing the Law Reform Commission of Victoria and others of the need for changes which emphasise that the crime of rape is not an offence against moral virtue. Rather, as the Law Reform Commission puts it, the first principle is that the law should seek to protect the sexual integrity and personal autonomy of *all* members of the community.

The inappropriateness of generalised assumptions was pointed out to the Court of Criminal Appeal in *Harris* by the Solicitor-General. In that case, far from experiencing little psychological trauma, one of the victims had suffered a nervous breakdown. On appeal the defence barrister argued that the breakdown was only as a result of her drug addiction and the court accepted this, fitting neatly as it did with the prejudices of the presiding justices.

The barrister's attitude

In *Hakopian* the defence barrister argued for a non-custodial sentence. Counsel, George Traczyk, reportedly drew an analogy between the rape of a prostitute and the rape of 'a woman wandering through a housing commission car park wearing make up, mascara and a seductive mini-skirt'. Mr Traczyk allegedly told the court that the community standard would be 'what did she expect?' It is clear that his assessment of community standards could not have been more wrong.

Community attitudes

An enormous amount of community disapproval followed press coverage of the comments of judge and counsel. This was apparent in media coverage, letters to newspapers, editorials, and we believe the Prostitutes' Collective received an enormous number of unsolicited messages of support. The public reaction indicates a major shift in community attitudes since the days when the rape of a prostitute rarely resulted in a prosecution in the absence of serious additional violence. When a conviction did occur the jury verdict was likely to be rape with mitigating circumstances.

Prominent figures such as the President of the Victorian Council for Civil Liberties, legal academics and the Premier of Victoria distanced themselves from the judge's remarks. Andrew McCutcheon, Minister for Housing, also objected to the barrister's 'incredible stigmatisation of public housing and public housing tenants' and in a letter to *the Age* (13.8.91) rejected the notion that the gravity of a crime is reduced because the victim happens to be a prostitute. One letter to *the Age* described the barrister's comments as 'redolent with misogyny and righteousness'. The Feminist Lawyers Collective considers that such comments are all too common and has lodged a complaint with the Bar Council.

The appeal

Hakopian initially sought leave to appeal against both his conviction and sentence. His application for leave to appeal against sentence was abandoned and the Court of Criminal Appeal heard argument limited to leave to appeal against conviction and an appeal against the inadequacy of the sentence, the latter being filed by the Director of Public Prosecutions (DPP).

The appeal against the conviction was based on the argument that the verdicts were unsafe and unsatisfactory but it was conceded that there was evidence before the jury which was capable of supporting each of the convictions. The argument was that the Court of Appeal should find that the jury ought nonetheless to have entertained a reasonable doubt as to the guilt of the accused. The court was asked to make an independent assessment of the sufficiency and quality of the evidence and particularly that given by the complainant over an (extraordinary) span of two to three days. The court found that her evidence carried considerable conviction and persuasiveness and a jury could treat her as credible and place complete reliance on those parts of her evidence which formed the foundation for the various counts. The application for leave to appeal against conviction was dismissed.

The DPP argued that the sentences imposed by the County Court were manifestly inadequate. The court referred to only three of the grounds relied on in deciding that the trial judge's sentencing discretion had miscarried and the sentences should be set aside. The three grounds were:

- the judge erred in that he gave insufficient weight to the nature and gravity of the offences and to the fact that the offences were committed in circumstances of aggravation and that Hakopian threatened the complainant with a knife;

- the judge wrongly took into account the effect that the sentence may have had on the respondent's parents;

the minimum sentence fixed before eligibility for parole was inadequate.

As to the second ground, the effect on the parents, the Appeal Court noted that this is a correct sentencing principle but the effect of a penalty on an offender's relatives must be exceptional and in this case more than minimal weight was incorrectly given to it by the trial judge. The third ground also succeeded in that with pre-release and remissions Hakopian could have been eligible for release after serving only four and a half months. This, the court held, was in the circumstances, manifestly inadequate.

The first ground related to the trial judge's assessment that the psychological impact on the victim in this case was less because she was a prostitute. However, after argument this ground was abandoned. The DPP conceded that the judge was entitled to make such a comment and that he correctly applied *Harris* when he dealt with the matter on the basis that the victim was a prostitute. However, the Appeal Court found Judge Jones did not adequately take into account the degree of fear and terror that the nature of the offences would have caused.

It seems likely that the decision to drop this ground of appeal was influenced by the fact that one of the justices on the appeal bench, Crockett J, was also part of the Court of Criminal Appeal which decided *Harris*. It is also unfortunate that the Supreme Court did not take this opportunity to overturn *Harris*.

As Justice Elizabeth Evatt, President of the Australian Law Reform Commission, in criticising the decision has pointed out, the social landscape regarding women, rape and violence has changed markedly since 1981. Legislation covering equal opportunity and affirmative action has been passed, domestic violence is now a mainstream issue, there is greater community awareness of human rights and the High Court has confirmed that rape in marriage is a crime.

The Supreme Court increased the sentence to an effective four and a half years gaol with a minimum of two and a half to be served before Hakopian becomes eligible for parole. The current average sentence for rape is about four years and, with aggravating circumstances, about five years.

The reaction

The failure of the court to overturn the principle that prostitutes (and other 'sexually active' women) form a less vulnerable class of victim has only served to inflame the initial controversy over Judge Jones' decision.

While the Victorian Bar Council wails that criticisms of the *Hakopian* case 'display a fundamental misunderstanding of the legal process', many other lawyers have endorsed community concerns. Professor Arie Frieberg, who was involved in the formulation of the *Sentencing Act* 1991 (Vic.) points out 'there is a great difference between finding that this particular victim was less "harmed" by the offence, and finding that a class of persons, by its nature, suffers less harm'. The Women Lawyers Association has called for immediate legislative amendments to give firm guidance to the exercise of judicial discretion in sentencing in sexual assault cases. The Attorney-General, Mr Kennan, has referred the whole issue to the Law Reform Commission of Victoria. Justice Elizabeth Evatt, who is also a member of the United Nations Committee on Discrimination Against Women, is so concerned that she is referring the Supreme Court's ruling to the United Nations. She believes it may breach the United Nations convention on the Elimination of All Forms of Discrimination Against Women to which Australia is a signatory.

In addition Justice Evatt suggests a female judge would be unlikely to have made the same decision, and called for the appointment of women to the judiciary. Victoria has no women judges although our Chief Magistrate is a woman. Disappointingly, the Attorney-General indicated that women judges for Victoria are not on the immediate horizon, speculating that in about five years there might be a broad enough field of women suitable for appointment. This delay is unwarranted, given his view that the present 'all male benches are by definition unrepresentative'.

In the meantime, it is painfully evident that the present Victorian judiciary could do with some education to help incorporate the 'ideas, attitudes and outlooks of women in the development of legal concepts'.

Judicial education about issues of gender bias is being taken very seriously in other countries. In Canada, for example, the Minister for Justice, Kim Campbell, is negotiating with Canadian judges for mandatory education for judges on the topics of violence against women, and other gender equality issues. This follows the 1991 cases of *R v Paul* and *R v Seaboyer and Game*.[2] These cases have meant that it is now up to individual judges to decide when a sexual assault complainant should be forced to testify about her past sexual history. Ms Campbell has said that individual judges are simply not equipped to make decisions anticipated by the ruling in those cases.

The situation in Australia is similar. The extraordinary community concern expressed as a result of the *Hakopian* case clearly demonstrates that our judges are unaware of, or at least willing to ignore, the important social changes which have occurred concerning the status of women. We agree that it is important for individual judges to retain sentencing discretions but it is also necessary that they be equipped to take account of changing social circumstances. This does not mean a blind adherence to any popular idea of the time and does not involve a 'mob rule' attitude.

In Canada, the Executive Director of the Judicial Centre is prepared to begin courses in gender equality issues immediately and notes that judges there are already attending voluntary courses. Australian judges must also take up the challenge and the appropriate body to co-ordinate such an education campaign may be the Australian Institute of Judicial Administration. Feminist Lawyers and other women's organisations will be only too happy to assist the Institute in this task and indeed, without this input, the exercise may be seen as mere tokenism.

References

1. County Court of Victoria, August 1991; *R v Hakopian* 9, 10 and 11 December 1991, Supreme Court of Victoria, Appeal Division, Court of Criminal Appeal. Crockett, Southwell and Teague JJ.
2. *Lawyer's Weekly* (Canada) 27.9.91