

RAPE & INCEST IN THE CARIBBEAN
INSPIRING CHANGE WITH A GENDERED
PERSPECTIVE

THE LAW AND THE PROTECTION OF
WOMEN AND CHILDREN
"Save the Children"

CARIBBEAN ASSOCIATION OF WOMEN JUDGES
INAUGURAL CONFERENCE

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INSPIRING CHANGE WITH A GENDERED PERSPECTIVE

- **The theme for International Women's Day 2014
'Inspiring Change'**
- This presentation speaks to this theme in the context of challenges faced by women and children in accessing justice in cases of sexual violence.
- Rape and the threat of rape 'reflect and reinforce the imbalance in power between the sexes [and] seriously affect the quality of life of every woman.' (Joan Fitzpatrick, *Human Rights of Women* 534)
- As highlighted by L'Heureux-Dubé J:
 - 'Perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society. Sexual assault is not like any other crime.' *R v Seaboyer, R v Gayme* (83 DLR (4th) 193, 206)

THE SEXUAL OFFENCES ACT OF GUYANA 2010

- **Sexual Offences Act 2010** Guyana has radically modernised the law in relation to the offences and procedures to be followed in sexual offences cases.
- The Act seeks to provide a legislative environment that is more conducive to allowing victims of sexual violence to engage the justice system.
- **The age of consent has been confirmed as 16 years old**
- **Widened definition of rape**
- **Voyeurism**
- **Meeting a child under 16 years following sexual grooming**
- **Criminalises the exposure of children to pornography and sexual acts**
- **Prohibits sexual activity with a child by a person in a position of trust**
- **Widened definition of family relationships in relation to incest with children to include step parents and step siblings whether through marriage or cohabitation and foster parents**

THE SEXUAL OFFENCES ACT OF GUYANA 2010

- Prohibits care workers from engaging in sexual activity with persons with mental disorders
- Presumptions that rape cannot occur within the context of marriage and that males under age 14 years are incapable of sexual intercourse have been abolished
- There are new provisions regarding how recent complaints should be treated and interpreted
- Necessity for corroboration or a corroboration warning is abolished
- There are restrictions on the cross-examination and evidence that can be led of sexual activity & reputation of victims and the inferences that can be drawn

THE SEXUAL OFFENCES ACT OF GUYANA 2010

- The Act also provides for detailed presumptions about consent that the court must consider
- Special measures – the use of screens and videolinks, the use of intermediaries and anatomically correct dolls so that the evidence of children in particular is more accessible
- *In camera* hearing provisions in place since 1991 have been reinforced
- Use of paper committals instead of preliminary inquiries means that victims no longer testify twice but this can also result in a backlog of cases in the High Court because of the slow rate of trials

OUR RESPONSE AS JUDICIAL OFFICERS FOR THE PROTECTION OF WOMEN & CHILDREN

- Judicial officers as implementers of legislation must constantly ask –
 - how are we to inspire change in our justice systems so that victims of sexual violence have a fair opportunity of accessing justice?
 - what is gender sensitive judging and how will this impact on the fairness of sexual offences trials?
- **Judicial officers have a duty to understand the nature, extent and impact of violence, the threat of violence and sexual abuse of women and children.**
- Judges must commit to building an understanding of gender equality and equity among judicial officers.

OUR RESPONSE - RAPE MYTHS – Corroboration & Sexual history

- Rape myths foster the continued adherence (even if subconsciously) to views and beliefs that require corroboration of a victim's story and/or look at a woman's conduct or lifestyle.
- These 'rape myths disadvantage and oppress women ... and subtly encourage sexual violence' (Ward, *Attitudes toward Rape*, 22)
- It is arguable that in essence, 'the law was designed to afford primary protection to men who may be the victims of false accusations' (Ward, 25) while ignoring the rights of women and children as victims of violations of their person and dignity.

OUR RESPONSE – DECONSTRUCTING RAPE MYTHS – Corroboration & Sexual history

- Both at common law and by statute, corroboration and sexual history provisions have been abolished or modified.
- *Gilbert v R* (2002) 61 WIR 174: Privy Council held that the necessity for a corroboration warning is no longer absolute and it is ‘based on the discredited belief that regardless of the circumstances the evidence of female complainants must be regarded as particularly suspect and particularly likely to be fabricated.’
- In the South African case of *State v Jackson* (1998 1 SACR 470 (SCA)) the Supreme Court of Appeal held that the mandatory cautionary or corroboration rule be outlawed and stated that it is ‘based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable.’
 - In debunking the view that the rule was justified by the “collective wisdom and experience” of judges, Olivier J pertinently asked ‘whose wisdom? whose experience? what proof is there of the assumptions underlying the rule?’

OUR RESPONSE – DECONSTRUCTING RAPE MYTHS – Corroboration & Sexual history

- Similarly, sexual history rules which allow evidence to be led or referred to about the ‘immoral character’ or sexual reputation and sexual conduct of a woman in rape cases, and which allow the cross-examination of a woman on her sexual history, suggest that ‘women are essentially responsible for male sexual behaviour.’ (Ward, 25).
- It is women’s conduct – placing themselves in dangerous situations, consuming alcohol, their mode of dress, the place(s) they frequent or what they say - in sum not being seemingly chaste and pure – which is used against them to prove that they caused the sexual assault on their person. There is often a view that it is the woman’s fault that she was raped.
- So e.g. there is the perception that commercial sex workers should not be believed where they make allegations of sexual assault.

OUR RESPONSE – DECONSTRUCTING RAPE MYTHS – Corroboration & Sexual history

- The fact that a woman has had sexual intercourse previously has no relevance to and cannot lead to a logical conclusion that she consented to intercourse with an accused
- Permitting sexual history evidence perpetuates stereotypical views of women in society making it difficult for a woman to tell her story and for the prosecution to establish the truth and prove a case of rape
- Even though there are restrictions on permitting such evidence, the provisions in Guyana give a judge a discretion regarding whether to allow in such evidence
- As judges we must be extremely careful to deter cross-examination that is gender stereotypical and discriminatory

OUR RESPONSE – A RIGHTS BASED APPROACH – The Constitution

- Many of our Constitutions provide for equality and non-discrimination and in Guyana there are specific women's equality provisions – all of which lend scope for the judiciary to rule that perpetuating these rules are unconstitutional. (arts 29, 149, 149D, 149 F)
- Judges must focus on the impact of laws on women in terms of the disadvantages they face 'in the real world and ... confront the reality that the systemic abuse and deprivations of power women experience is because of their place in the sexual hierarchy.' (Mahoney, 445)
- The continued application of the corroboration and sexual history rules are a disadvantage to women and children in the real world and are discriminatory in terms of their impact on victims of rape and incest.

OUR RESPONSE – A RIGHTS BASED APPROACH – The Constitution

- The judiciary must ensure that, as the guardian of the Constitution, it does not in effect violate the provisions of the Constitution by utilising and/or upholding laws which are discriminatory. (Mahoney 445)
- The judiciary must recognise the need to foster a paradigm shift in the interpretation and application of our Constitutions to ensure both *de facto* and *de jure* equality for women and children.
- Therefore, '[c]onsideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application.' *Andrews v Law Society of British Columbia* 56 DLR (4th) 1, 13.

OUR RESPONSE – A RIGHTS BASED APPROACH – International human rights law

- Judicial officers can also rely on international human rights treaties, more particularly the **Convention on the Elimination of All Forms of Discrimination Against Women**, the **Convention on the Rights of the Child** and **The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belem do Para)** in determining whether evidentiary or procedural rules are discriminatory in relation to women and children
- **Knowledge of General Comments of the Treaty Bodies would be helpful** in giving insight into what is happening at the international level -
- E.g. comments in General Recommendation No. 19 on violence against women and girls made by the CEDAW Committee
- CRC General Comments e.g. General measures on the implementation of the Convention on the Rights of the Child

OUR RESPONSE – A RIGHTS BASED APPROACH – International human rights law

- **Georgetown Recommendations and Strategies for Action on the Human Rights of Women and the Girl Child of the 1997** of the Caribbean Judicial Colloquium recognised that the fundamental duty of judges to ensure the fair and due administration of justice requires judges to be alert to manifestations of gender discrimination in the law and the administration of justice, and to take such measures as lay within their power to redress or eliminate any such discrimination.
- Caribbean judges committed to mainstreaming international human rights norms into domestic law noting that in general there was no constitutional or other bar to referring to international human rights treaties.

OUR RESPONSE– A Rights Based Approach – for the Protection of our children

- We must adopt a rights-based approach to our adjudication in cases where children are involved because our decisions will ultimately determine whether they are able to tell their stories.
- We must be cognisant of the language we use in court – what we say and how we say it. We must control how children are treated in court.
- Gender sensitivity is now mandatory.
- We must be flexible in relation to the time we allocate to matters involving children and what we expect of them in terms of testifying for a period.

OUR RESPONSE – BALANCING JUSTICE

- A focus on the human rights of as victims of rape and incest may suggest that the rights of the accused are to be eroded and that he would be in jeopardy of losing his constitutional right to a fair trial.
- ‘The principles of a fair trial also require that in appropriate cases the interests of the defendant are balanced against those of witnesses or victims called on to testify.’ Editorial ‘The Role of the Victim in Criminal Justice’ [1998] Crim L Rev 601, 604.
- ‘The defendant’s birthright ... is to a fair trial ... [but] enabling witnesses to give the best evidence of which they are capable not only does not collide with the defendant’s rights, but it is ... compatible with them.’ (Hoyano 2001)
- **So the court will be called upon to balance the general interests of the community and the victim with those of an accused.**

OUR RESPONSE – BALANCING JUSTICE

- *Gilbert* the Privy Council held that the mandatory common law corroboration warning does not add to the fairness of the trial nor aid in achieving safe verdicts and that the issuing of a warning is discretionary and should only be given where the judge considers it appropriate.
- In the *State v K*, ([2000] 4 LRC 129) the Namibian Supreme Court came to a similar conclusion when it held that the cautionary or corroboration warning ‘might adversely infringe the fundamental rights of the victims, which included a fair trial also in regard to such victims’ rights and interests.’
- In *Seaboyer*, in unanimously upholding the constitutionality of statutory restrictions on the sexual reputation rules, the Court recognised the need for balance in protecting the complainant while securing the accused’s right to a fair trial.
- *Goodridge v. R* (Crim App No. 13 of 1997, 12 Jan 1998) Chief Justice Byron (as he then was) ruled in this rape case (where delay of the trial was in issue) that ‘in determining the scope of the constitutionally protected rights of the individual, the court is obliged to balance the rights and interests of the girl child against domestic violence and abuse.’

OUR RESPONSE – BALANCING JUSTICE

- In ensuring judicial accountability and balancing justice judges must recognise -
 - that the rights of victims of rape and incest to access to justice and equality are fundamental
 - that “women have barely been visible in systems that create, interpret, and apply laws.”*
 - that “strategies must be developed to ensure that women’s voices are heard, that gender-biased myths that buttress the law are removed, that principles applied to the law involve and support women in the legal system, and that judges and other actors in the administration of justice respond to women’s needs.”*
 - that “if women’s rights are to be recognised and protected and if women are to achieve equality, existing models and values must be questioned and traditional theories, foundations, and boundaries challenged.”*
- * Mahoney, *Human Rights of Women: National and International Perspectives*, 438 & 441

OUR RESPONSE – Judges human rights obligations as state actors

- Judicial officers, as members of an integral, though independent, arm of the State, must uphold the international human rights obligations of our States which have signed on to a number of international human rights treaties
- **We have an obligation to respect, protect, fulfil and ensure the human rights of all who come before us, and in the case of rape and incest – the victims who testify**
- If we, as judicial officers, violate the rights of persons who come before us, the State would be liable for our actions or inaction even to the extent of being liable to pay compensation

OUR RESPONSE – Judicial activism to inspire change

- Judicial activism to inspire change is necessary to address the human rights of victims in innovative ways. As Justice Desiree Bernard, CCJ has said (Lecture ,1995):
- **‘There is always a timidity to launch out into the deep of international waters particularly if there is no precedent for it. Judges are also usually hesitant to adopt a liberal rather than a conservative interpretation of legal provisions. Judicial activism must be encouraged if we are to enforce and protect the human rights of citizens. ... We must strive to develop our jurisprudence and a culture of resorting to international treaties even if there are specific domestic laws based on international principles.’**
- **We must inspire change because the ‘judiciary forms an indispensable part of that national and international commitment to making our societies safe for all, including women and children.’** (Robinson, The Bahamas Judicial Colloquium 2004, 10).

THANK YOU

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**Justice Roxane George
High Court, Guyana**

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