Getting Real at the SJC

Viewpoints

Massachusetts Lawyers Weekly, May 30, 2005

By Harvey A. Silverglate and Dan Poulson

At first glance, the lives of prostitutes, johns and lying cops couldn't be more different from the daily affairs of the justices of the Supreme Judicial Court.

Walking into the SJC's towering, cathedral-like confines in the magnificent newly renovated John Adams Courthouse, one would hardly expect to find any hint of grime.

And like appellate courts everywhere, the SJC's opinions have often been shrouded in abstract legal theories that strain to banish the messy complications of the real world from the deceptively tidy business of law.

At the SJC, the oldest appellate court in continuous existence in the Western Hemisphere, determinations of guilt or innocence have been largely governed by ancient rules developed over hundreds of years — no "activist court" is this, just a follower of ancient legal principles. Yet, while there are often deep insights to be found in such doctrines, there are also many confusing and outmoded legal theories that ignore the truths and complexities of human behavior and of modern life.

Examples of this clash between outdated doctrines and modern realities are easy to find. The court has used obscure logic to turn a blind eye to the question of whether juries should learn about a victim's sexual history in rape cases where the defendant asserts that the accuser consented to sex, or a victim's propensity for violence in murder cases where the accused claims self-defense.

Similarly, the court has avoided opportunities to reprimand corrupt or lying police, as well as criticize the Boston police union contracts that sometimes protect even crooked cops with arbitration agreements that assure no more than a slap on the wrist.

But this long-standing problem in the criminal justice system — the gap between the real, often gritty world of crime and law enforcement, and the refined lives of appellate court judges — appears to be narrowing.

The justices have been demonstrating lately a proclivity to elevate the realities of the street over dysfunctional legal theories that are more likely to frustrate than to achieve true justice. A trio of decisions passed down recently — involving, respectively, a convicted rapist, a prostitute convicted of murder, and a cop charged with intimidation and lying — may have dramatically altered the circumstances by which justice is meted out.

'Adjutant'

The first case, decided March 14, involved the question of whether a defendant in a murder trial may introduce evidence of the victim's prior violent acts and reputation in order to support an argument of self-defense.

In the past, the SJC insisted that the jury was entitled to learn of a victim's reputation for violence only if the defendant knew about it at the time.

According to that rule, evidence of a victim's violent history was relevant at the assailant's trial only in the very limited context of establishing the defendant's motivation for using lethal force. If the defendant was not aware that the victim had a proclivity for violence, the logic goes, then such evidence can't justify the defendant's actions.

Missing entirely from this logic was the commonsense notion that a victim's prior history of violence can add credibility to the defendant's claim that it was the victim who began threatening and using deadly force.

However, in *Commonwealth v. Adjutant*, 443 Mass. 649, 824 N.E.2d 1, the SJC said that a prostitute, who claimed that her customer attacked her with a crowbar before she fatally stabbed him in the throat, was entitled to have the jury learn that the customer had previously engaged in violence.

In its decision, the SJC finally acknowledged what should be intuitively obvious: that even though the prostitute may have been unaware of her customer's violent history at the time of the incident, that history helped validate her claim that the victim was the one who initiated the violence.

The Adjutant decision has already had repercussions in at least one high-profile case, that of Alexander Pring-Wilson, the Harvard graduate student convicted last fall of voluntary manslaughter in the Cambridge street-brawl death of Michael Colono.

Evidence of Colono's history of violence was excluded during trial because Pring-Wilson did not know Colono when the two met on the street and got into a verbal spat that escalated to Pring-Wilson's stabbing Colono to death.

After the Adjutant decision was handed down, however, the trial judge, Superior Court Judge Regina L. Quinlan, scheduled a hearing to determine if Pring-Wilson should be granted a new trial. At the hearing, the two sides were given time to prepare their arguments on such issues as harmless error and retroactivity of the Adjutant decision.

In countless future homicide and assault-and-battery cases, juries will now have access, subject to the trial judge's discretion, to relevant information that will throw light on a defendant's claim that he or she fought back out of a reasonable and realistic fear of serious injury or death from an aggressor — even if the defendant didn't know the attacker's history of violence. Justice will benefit from juries' having a broader rather than a narrow picture of the facts.

'Harris'

Ten days after Adjutant, the SJC handed down its even more controversial ruling in *Commonwealth v. Harris*, 443 Mass. 714, 825 N.E.2d 58, which limited the applicability of portions of the so-called "rape-shield" statute, enacted in 1977 to prevent victims of sexual assault from having their past sexual conduct used to undermine their credibility.

The law was a response to legitimate claims by women's advocates that female victims in rape trials were reluctant to press charges when they realized that their sexual histories would be raised in excruciating detail during trial.

In Harris, however, the court rightfully concluded that the alleged victim's prior criminal conviction for sexual misbehavior — a conviction for being a "common nightwalker," or prostitute — excluded under the rape-shield law, was integral to the defendant's particular argument and impeded his ability to prove his innocence.

Harris was convicted of, among other things, assault and battery, aggravated rape and kidnapping. According to his accuser, Harris forcibly dragged her out of a bar in Lowell and raped her in the stairwell of a nearby building. Harris claimed that his accuser was a prostitute who falsely charged him with rape when he was unable to pay her entire fee.

Under the rape-shield law, the trial judge excluded evidence of the alleged victim's prior conviction for prostitution, effectively preventing Harris from mounting a credible defense that the rape charge grew out of a dispute over a fee for commercial sex.

Adding insult to injury, the prosecutor had the audacity, during his closing summation to the jury, to mock the defendant's claim that he was having consensual sex with a prostitute, by boldly arguing that it was an outrageous insult for the defendant to paint the innocent victim as a hooker. Of course, there was such evidence, but the judge never allowed the defendant to present it to the jury.

In its decision, the SJC pointed out the good intentions of the rape-shield statute, but it also wisely acknowledged the gross unfairness of Harris' conviction, and the possibility of a miscarriage of justice under the facts of this particular case.

As a compromise, the court carved out a modest exception to the rape-shield law: Trial judges now have the discretion to admit as evidence an alleged victim's past sex-related criminal convictions where it might reasonably help the jury determine whether the sex was consensual.

While other aspects of a victim's sexual history — such as a prior romantic life or a general "reputation" for chastity or its opposite — remain off-limits, the ruling dramatically reverses almost 30 years of Massachusetts legal doctrine that has kept juries in the dark about what common sense tells us are highly relevant facts in certain sexual assault cases.

'Boston Police Patrolmen's Association'

One's hope that these two cases might indeed signal a trend toward more reality and less abstract theory in our court system is further confirmed by yet a third case, decided April 4.

As any honest observer of the criminal justice system can tell you, in some geographic districts police perjury is a serious problem. When Harvard Law Professor Alan Dershowitz came up with the term "testilying" to describe police testimony in many courts, he was roundly attacked by police departments and their supporters in the commonwealth and around the country.

However, appellate courts here and elsewhere are often blind to the extent of the problem.

Our courts have long been timid about addressing questions of police perjury. The state court system became a bit more confrontational in 1989, when Superior Court Judge Elizabeth A. Porada wrote an opinion in which she chastised Boston Police Officer Trent Holland for blatantly fabricating testimony in a case regarding a drug deal; Holland claimed to have witnessed a drug deal while looking across an empty field where in fact a large building stood.

Judge Porada recommended that Holland be the subject of an "official investigation." But neither Porada nor the Appeals Court judge in that case, Charlotte A. Perretta, went so far as to actually charge Holland with contempt-of-court for his behavior. Instead, it was left to then-Suffolk County District Attorney Newman A. Flanagan to appoint Holland's fellow police officers to "investigate" him for possible perjury.
See *Commonwealth v. Cornish*, 28 Mass. App. Ct. 173, 547 N.E.2d 948 (1989).

To no one's surprise, the investigation turned up nothing. Holland was later implicated in an even larger scandal involving the investigation of William Bennett in the infamous murder of Carol DiMaiti Stuart.

Holland allegedly used threats of violence and planted drugs to intimidate witnesses into identifying Bennett, a black man, as the killer of the pregnant Stuart, who was later found to have been murdered by her husband.

A subsequent investigation by the U.S. Attorney's Office turned up troubling signs of serious police misconduct in the department, but couldn't find enough evidence to support prosecutions. An internal Boston Police Department investigation was similarly fruitless.

Despite his spotty record, Holland was promoted to detective. Had the system more effectively confronted Holland with his pattern of lies in 1990, a lot of innocent citizens likely would have been spared their agony.

In *City of Boston v. Boston Police Patrolmen's Association,* 443 Mass. 813, 824 N.E.2d 855, 176 L.R.R.M. (BNA) 3265, however, the police department's administration finally took a more active position regarding police misconduct, and the SJC has lent its firm support.

Boston Police Officer John DiSciullo came under scrutiny by the department in 1997 for harassing, threatening and filing false charges against an innocent couple sitting in a car, and repeatedly lying to his superiors about the circumstances of the incident.

An internal affairs inquiry found him guilty of 16 disciplinary charges, and he was dismissed in 1999. DiSciullo asked for an arbitrator's review of the decision under the terms of his union's collective bargaining agreement.

The arbitrator affirmed the internal affairs board's determination that DiSciullo had engaged in "egregious" and "outrageous" misconduct and characterized his behavior as "bizarre" and "extreme." Nonetheless, she concluded that his termination should be reduced to a one-year unpaid suspension, under the perverse reasoning that he deserved better because other officers convicted of even worse offenses had been punished more lightly!

The SJC was sufficiently shocked by the arbitrator's decision that it took the highly unusual step of overturning it, concluding that the arbitrator's reversal of the department's action "frustrated public policy."

In a city where the police union wields tremendous authority over the firing of cops, the SJC's decision was welcome and refreshing: "Although arbitration decisions are given great deference, they are not sacrosanct," wrote the court. "Here we cannot say that the strong public policy favoring arbitration should trump the strong (and in our view, stronger) public policy that police officers be truthful and obey the law in the performance of their official duties," it concluded.

If there's anything to take away from all of this recent muscle-flexing by the SJC, it's that the court is becoming more grounded in its understanding of the criminal justice system and the real-world impact of some old rules and attitudes.

In allowing for a more realistic view of the law and of the streets, the SJC has ensured that the gulf between the Massachusetts legal system and the real world will be a whole lot smaller — and that it'll be a whole lot harder for the innocent to be convicted.

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