The Avoidance of Stereotypical Thinking

Wayne K. Gorman

There has been a great deal of controversy lately in Canada over trial judges purportedly resorting to stereotypical reasoning in assessing the credibility of witnesses, particularly complainants in sexual assault trials.[1]

This issue came to a head with a recommendation by the Canadian Judicial Council to the Minister of Justice that a trial judge be removed from office based upon his conduct (i.e., comments during a sexual assault trial).[2] The recommendation arose out of a complaint had been made to the Canadian Judicial Council concerning former Justice Robin Camp.[3] The Council's inquiry committee concluded that Justice Camp "relied on discredited myths and stereotypes about women and victim-blaming during the Trial and in his Reasons for Judgment" (at paragraph 6).[4]

In this column, I intend to review the decision of the Judicial Council in relation to former Justice Camp. I then intend to review how allegations of improper stereotypical thinking have been dealt with by various Canadian appeal courts and, in one case, the Supreme Court of Canada.

THE COMPLAINT

The Camp complaint arose as a result of a sexual assault trial conducted by Judge Camp in *R. v. Wagar*.[5]

In *Wagar*, the accused was charged with the offence of sexual assault. The complainant, A.B., testified that she was sexually assaulted by the accused in the bathroom of an acquaintance's apartment during a party. The accused testified that A.B. consented to the sexual activity.

Justice Camp acquitted the accused. On appeal, the acquittal was overturned (see 2015 ABCA 327). The Alberta Court of Appeal indicated that it was "persuaded that sexual stereotypes and stereotypical myths, which have long since been discredited, may have found their way into the trial judge's judgment" (at paragraph 4).

During the course of the trial, Justice Camp made comments and asked questions, which formed the subject matter of the subsequent complaint.

For instance, during the submissions of counsel, Justice Camp suggested that "young woman want to have sex, particularly if they're drunk" (see paragraph 92 of the Inquiry Report). In addition, during the examination of the complainant, Justice Camp asked the complainant several questions (at paragraph 137 of the Inquiry Report):

> Q. But when—when he was using—when he was trying to insert his penis, your bottom was down in the basin. Or am I wrong?
>
> A. My—my vagina was not in the bowl of the basin when he was having intercourse with me.
>
> Q. All right. Which then leads me to the question: Why not—why didn't you just sink your bottom into the basin so he couldn't penetrate you?
>
> A. I was drunk.
>
> Q. And when your ankles were held together by your jeans, your skinny jeans, why couldn't you just keep your knees together?
>
> A. (NO VERBAL RESPONSE)
>
> Q. You're shaking your head.
>
> A. I don't know.

Finally, in his reasons for acquitting, Justice Camp made the following comments to the accused (at paragraph 224 of the Inquiry Report):

> And I don't expect you to concentrate the whole time, but I want you to listen very carefully to what I'm saying right at the beginning. The law and the way that people approach sexual activity has changed in the last 30 years. I want you to tell your friends, your male friends, that they have to be far more gentle with women. They have to be far more patient. And they have to be very careful.

Footnotes

1. Interestingly, one judge has cautioned against "the error of stereotypical thinking that sexual assault complainants are always truthful." See R. v. Dufresne, 2017 YKTC 45 (Can.).
2. Justice Camp subsequently resigned.
3. The Canadian Judicial Council is a federal body created under the Judges Act, R.S.C. 1985, c J-1. (Can.). It deals with complaints made against federally appointed judges (i.e., Supreme Court judges). Each province has a provincial judicial council, which deals with complaints against provincial court judges.
4. Can. Judicial Council, In the Matter of an Inquiry Pursuant to s. 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp, Report and Recommendation of the Inquiry Committee to the Canadian Judicial Council (2016) [hereinafter the Inquiry Report]. The inquiry report can be found at www.cjc-ccm.gc.ca (search for "Inquiry Report).
5. [2014] CarswellAlta 2756 (Can. Alta.).

To protect themselves, they have to be very careful.

The Canadian Judicial Council convened a committee to consider the complaint and make recommendations.

THE INQUIRY REPORT

In recommending Justice Camp's removal from the bench, the Inquiry Committee suggested that Justice Camp's comments during the trial were designed to "promote discredited sexist stereotypes" (at paragraph 276). The Inquiry Committee indicated that "Judges are not viewed simply as participants in the justice system. They are expected to be leaders of its ethos and exemplars of its values" (at paragraph 289).

THE JUDICIAL COUNCIL

The Judicial Council accepted the Inquiry Committee's recommendation for removal. The Council indicated that "[t]he Judge's misconduct was manifestly serious and reflected a sustained pattern of beliefs of a particularly deplorable kind, regardless of whether he was conscious of it or not."[6]

The Council concluded that only the Judge's removal from office would restore the public's confidence in the criminal justice system (at paragraph 47):

> In our view, the statements made by Justice Camp during the trial and in his decision, the values implicit in those statements and the way in which he conducted himself are so antithetical to the contemporary values of our judicial system with respect to the manner in which complainants in sexual assault cases should be treated that, in our view, confidence in the system cannot be maintained unless the system disassociates itself from the image which the Judge, by his statements and approach, represents in the mind of a reasonable member of the public. In this case, that can only be accomplished by his removal from the system which, if he were not removed, he would continue to represent.

"Judges are not viewed simply as participants in the justice system. They are expected to be leaders of its ethos and exemplars of its values."

THE HISTORICAL CONTEXT

The issue of stereotypical reasoning by judges has been an issue in Canada for a significant period of time. In *R. v. D.D.*, [2000] 2 S.C.R. 275 (Can.), for instance, the Supreme Court indicated that there is "no inviolable rule on how people who are the victims of trauma like a sexual assault will behave" (at paragraph 65). In *R. v. C.A.M.*, 2017 MBCA 70 (Can.), the Manitoba Court of Appeal suggested that "[o]ne of the unfortunate realities of the Canadian criminal justice system historically is the prevalence of the use by lawyers, judges and juries of myths and stereotyping to discredit female and child witnesses" (at paragraph 48).[7]

Over the last couple of years and early this year, a number of appeals have arisen in Canada based upon the argument that the trial judge's decision in a particular case was the result of improper stereotypical thinking. Though this has primarily involved complainants in sexual assault trials, as will be seen it can also apply to accessing the credibility of an accused person. In this column, I intend to review a number of decisions which might be of assistance in helping judges to avoid this mistake.[8]

APPELLATE CONSIDERATION

In the first decision, the trial judge made the mistake of assuming that victims of childhood sexual abuse should demonstrate behaviours consistent with that abuse.

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6. Can. Judicial Council, In the Matter of an Inquiry Pursuant to s. 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp, Report to the Minister of Justice, para. 24 (2017).
7. In *R. v. Achuil*, 2017 ABPC 292 (Can.), it was indicated that in "assessing credibility, generalized stereotypical thinking must be avoided regardless of the nature of the witness" (at paragraph 19). The Court suggested that "there are a number of such myths in sexual assault cases which have been reviewed in numerous cases. The myths in summary form are as follows:

    1. The Court may not draw an inference with respect to a complainant's credibility based on perceptions as to how a complainant should react to a sexual assault.
    2. No adverse inference against the credibility of the complainant may be drawn that is based on a lack of evidence of physical injury or struggle.
    3. No adverse inference against the credibility of the complainant may be drawn that is based on the post offence demeanour or behaviour of the complainant.
    4. No adverse inference against the credibility of the complainant may be drawn that is solely based upon evidence of questionable moral character such as the consumption of alcohol, controlled drugs, or other behaviour infringing on 'moral character.'"

8. This issue arose in a rather peculiar fashion in the case of *R. v. Dowholis*, 2016 ONCA 801, (Can.). In *Downholis*, the accused was convicted of three counts of aggravated sexual assault. The offences involved the accused participating in homosexual sexual encounters. One of the jurors appeared on a radio show both during and after the trial. The juror made a number of homophobic comments during the radio shows. In setting aside the convictions, the Ontario Court of Appeal concluded that the juror's conduct created the impression of an unfair trial (at paragraphs 44 and 45):

    > The likelihood that a bias against gay men would affect the juror's decision-making process is greater given his willingness to publicly disregard instructions, engage in homophobic rhetoric, and mock the court process. The issue is not whether the juror meant what he said. Nor is it whether he was in fact unfair. The issue is the impression that his conduct created.

    The impression created by the juror's conduct goes beyond a bias against gay men. A reasonable observer would have the impression that the juror lacked respect for the justice system. This goes directly to the perception of fairness.

"...it is neither logical nor a matter of common sense to expect a child [sexual assault] complainant to behave in any particular manner."

R. v. A.R.D.

In *R. v. A.R.D.*, 2017 ABCA 237 (Can.), the accused was charged with the offence of sexual assault. The complainant testified that "over a number of years, when she was between the ages of 11 and 16, the respondent touched her sexually numerous times." The trial judge entered an acquittal. He indicated that he had a reasonable doubt based upon the complainant's evidence. In acquitting the accused, the trial judge placed significant emphasis on the complainant's failure to avoid the accused after the alleged assault:

> [G]iven the length of time that these events occurred over, and the fact that the most serious event occurred months before [the complainant] complained, I would have expected some evidence of avoidance either conscious or unconscious . . . [a]s a matter of logic and common sense, one would expect that a victim of sexual abuse would demonstrate behaviours consistent with that abuse or at least some change of behaviour such as avoiding the perpetrator . . . [w]hile I recognize that everyone does not react in the same way, the evidence suggests that despite these alleged events, the relationship between the accused and the complainant was an otherwise normal parent/child relationship . . . [t]hat incongruity is significant enough to leave me in doubt about these allegations.

The Crown appealed from the entering of the acquittal. The Alberta Court of Appeal indicated that the "appeal raises one issue":

> [D]id the trial judge err by relying on an impermissible stereotype, or myth, about the behaviour of sexual assault victims in assessing the complainant's credibility and ultimately acquitting the accused? Specifically, that "one would expect that a victim of sexual abuse would demonstrate behaviours consistent with that abuse or at least some change in behaviour such as avoiding the perpetrator."

A majority of the Court of Appeal answered this question succinctly: "The answer is clear: he did."

The Alberta Court of Appeal indicated that "judges must be hypervigilant against the incursion of stereotypical analyses or assumptions into their judicial reasoning" because "speculative myths, stereotypes, and generalized assumptions about sexual assault victims . . . have too often in the past hindered the search for truth" (at paragraphs 49, 60). The majority of the Court of Appeal suggested that an "accused's right to make full answer and defence and the criminal standard of proof beyond a reasonable doubt, do not allow reliance on prejudicial generalizations about sexual assault victims; this is of paramount importance when adjudicating matters involving child complainants" (at paragraph 6).

A majority of the Court of Appeal also held that (at paragraph 43):

> The most serious problem with the trial judge's comparison-based assessment of the complainant's credibility stems from his impermissible reliance on a myth or stereotype (masquerading as logic and common sense) about how a sexual assault complainant, in general and in this case, is assumed or expected to behave post-sexual assault(s). Put plainly, the trial judge's reliance on his own "logic and common-sense" about how humans react following sexual assault, is itself highly questionable as to relevance and reliability. But it becomes particularly dangerous when reliance on that "logic" overshadows any resort to or assessment of the actual evidence at trial. The trial judge found reasonable doubt because this particular complainant did not exhibit expected predictive, avoidant behaviour. In our view, it is neither logical nor a matter of common sense to expect a child complainant to behave in any particular manner.

A majority of the Court of Appeal concluded as follows (at paragraphs 70 to 73):

> The search for avoidant behaviour or a change of behaviour in a sexual assault complainant, particularly a child, is in its essence nothing more than a search for confirmatory evidence, without which a complainant becomes less worthy of belief. The problem with such a search is that there is no reliable support for the presumption that a sexual assault victim will invariably, more often than not, or even to a statistically meaningful degree, display any predictable behaviours following the abuse. Indeed, the converse may well be true: that a vast proportion of child sexual abuse victims are asymptomatic in the post-victimization period both before and after disclosure.
>
> An accused's constitutionally-protected right to make full answer and defence does not permit reliance on prejudicial generalizations about sexual assault victims. Reasonable doubt is not a shield against appellate review if that doubt is informed by inferences based on external, personal assumptions or expectations about how sexual assault victims behave either generally, or specifically. Appellate courts must carefully scrutinize reasons to ensure that findings said to be based on "common sense or logic" are reliably just that, and are not, in fact, unfair and inaccurate external viewpoints that find no foundation in the record.
>
> For all of these reasons, the Crown has established an error of law that is directly tied to the acquittals in this matter. We are satisfied that the crucial credibility assessment of the complainant's testimony was not solely based on an assessment of the evidence; instead, it was directly affected by an impermissible stereotype, or myth, that had a material bearing on the acquittals.
>
> For these reasons, we allow the appeal, and direct a new trial.

THE DISSENT

In a dissenting judgment, Mr. Justice Slatter fond no stereotypical thinking (at paragraph 108):

> In conclusion, the reasons for judgment must be read as a whole and in context. Determining if there is a reasonable doubt based on the evidence or absence of evidence is the particular mandate of the trial judge. Trial judges are entitled to rely on logic and common sense, so long as inferences are not based on stereotypical thinking. This trial judge self-instructed on the need to avoid prohibited lines of analysis. Assuming this record engages a question of law, the Crown has not shown that the trial judge made the asserted error, and the appeal should be dismissed.

The accused appealed to the Supreme Court of Canada. In a brief oral argument (see 2018 SCC 6), the Supreme Court, in dismissing the appeal, concluded that the trial judge had erred in relying on the "expected behavior of the stereotypical victim":

> In considering the lack of evidence of the complainant's avoidance of the appellant, the trial judge committed the very error he had earlier in his reasons instructed himself against: he judged the complainant's credibility based solely on the correspondence between her behaviour and the expected behaviour of the stereotypical victim of sexual assault. This constituted an error of law.

The next decision illustrates the danger of accepting submissions of counsel based upon myths and stereotypes.

R. v. C.A.M.

In *C.A.M.*, the accused was convicted of the offence of sexual assault. On appeal, the accused argued that the trial judge erred in assessing the complainant's evidence. The accused argued that (at paragraph 45):

> [T]he Complainant's actions encouraging the [Accused] to remain in the residence with her and physically comforting him after he had, as she described, violently sexually assaulted her multiple times and threatened her with a knife, was not at all considered in the analysis of the Complainant's credibility and the plausibility of her version of events. Further her continued contact with the [Accused] in the days and months that followed and his continued time spent alone with the children, was not considered by the Learned Trial Judge as a factor to consider when assessing the version of events set forth by the Complainant. It is respectfully submitted that a close critical look at the Complainant's evidence, as was applied to the [Accused's], would have caused these factors to be of significant concern on the issue of credibility.

The Manitoba Court of Appeal rejected this submission. The Court of Appeal indicated, at paragraph 46, that the "strategy of using myths and stereotypes to discredit the credibility of a complainant in an allegation of sexual violence is 'invidious' because such a submission is subtlety persuasive by its appeal to common sense."

"[T]he law is now well settled that the use of myths and stereotypes has no place in the determination of credibility."

The Court of Appeal noted that the "law is now well settled that the use of myths and stereotypes has no place in the determination of credibility because such reasoning corrupts and distorts the trial process and may result in an unfair trial" (at paragraph 50). The Court of Appeal also indicated that (at paragraph 51):

> [T]rial judges have a heavy responsibility to ensure that counsel do not introduce the spectre of such forbidden reasoning into a trial. If that occurs in a jury trial, it should be answered by a timely and appropriate instruction to the jury (see *R v Barton*, 2017 ABCA 216 at paras 1, 159-61). In judge-alone trials, judges must not succumb to drinking from such a poisoned chalice in their assessment of credibility.

The Court of Appeal concluded that the accused's submission was "unsound" (at paragraph 52 and 53):

> The accused's submission that the complainant's credibility as to her version of events was undermined because it did not conform to some "idealized standard of conduct" (*R v CMG*, 2016 ABQB 368 at para 60) is unsound. I reject it unequivocally. Credibility determinations must be based on the totality of the evidence, not untested assumptions of a victim's likely behaviour based on myths and stereotypes.
>
> The judge properly looked at the evidence, as opposed to myth and stereotypes, and accepted that the complainant's motivation for staying with the accused after being raped on July 23, 2012, and not telling the police, was to help him and to not further disrupt their family situation. The fact that the complainant did not tell the police that night about being raped was irrelevant to assessing her credibility . . . . . The judge also accepted the complainant's evidence that she sincerely believed that her children were not in danger and that, regardless of the conflict between her and the accused, he could continue to care for the children after the July 23, 2012 incident. There is nothing in the record to suggest other than the accused was a good caregiver for the children; particularly when the complainant was not around. I see no palpable and overriding errors in the judge's conclusions as to the complainant's credibility given the fact that she did not sever all contact with the accused after the July 23, 2012 incident.

The next decision illustrates that stereotypical thinking can also be improperly applied to the evidence of the accused.

"[T]he [accused's] sexual orientation was not relevant to the charges against him."

R. v. T.J.B.

In *R. v. T.J.B.*, 2017 BCCA 49 (Can.), the accused was convicted of the offence of sexual assault. The complainant was ten years of age at the time. The accused was twenty years of age. During the cross-examination of the accused, Crown counsel asked a number of questions concerning the accused's sexuality:

> Q. So you consider yourself to be a heterosexual?
>
> A. Yes.
>
> Q. Okay. Have you ever talked with anyone about homosexuality, interests in that?
>
> A. No.
>
> Q. Okay. How about with your friends, do you talk about girls?
>
> A. Oh, yeah.
>
> Q. And I am not trying to cast aspersions or anything, but kind of—the sort of thing like you're out with your friends and you see a good looking girl you'd be kind of she looks nice, make a comment kind of thing?
>
> A. Yeah. Actually just on break.
>
> Q. Okay. And have you had any girlfriends?
>
> A. I've had relationships that haven't lasted long.
>
> Q. With women?
>
> A. Yes.
>
> Q. With any men?
>
> A. No.

In convicting the accused, the trial judge made use of this evidence in concluding that the accused's testimony was not believable (at paragraph 23):

> [W]hen asked in cross-examination if he was gay, the accused strongly denied that he was anything other than heterosexual. When asked if he talked about girls, he said "Oh yeah". He commented that he had seen a good looking girl during a break in the trial and he would comment on this sighting to his friends. He testified that he has had relationships with women, but they have not lasted very long. I found the accused highly defensive of his sexuality. He appeared to try too hard to convince the Court that he was heterosexual. I found his responses to be disingenuous and contrived.

The accused appealed from conviction.

The British Columbia Court of Appeal ordered a new trial. It indicated that (at paragraph 25):

> [T]he [accused's] sexual orientation was not relevant to the charges against him. It is settled law that with certain limited exceptions (where, for example the crime involves deviant sexual behaviour or the accused himself testifies to strong aversion to the sexual activity alleged, making his own sexual tastes an issue), evidence of sexual orientation is not probative of guilt and cannot be used to draw an inference that the accused is more likely to have committed the crime charged.

The British Columbia Court of Appeal concluded that the trial judge permitted the accused "to be put" in an "unfair position" and "it was unjust to judge the [accused] on the quality of his responses" (at paragraphs 35-37):

> The reliance on the inadmissible evidence to assess credibility in this case is problematic. The examination of an accused on sexual orientation puts that person in an unfair position. There may be many reasons unrelated to guilt or innocence why a person may not wish to publicly assert their sexual orientation. Those reasons may be very strong in a small or religious community.
>
> . . . .
>
> Similarly, a gay man charged with sexually assaulting a boy could properly harbour concerns that acknowledging his homosexuality would be wrongly taken as an acknowledgment of sexual attraction and could lead to an improper inference that he is more likely to have committed the crime charged. He could equally have concerns that a negative answer could be viewed as patently false. A negative answer might be viewed as an obvious lie even, as in this case, in the absence of evidence of its falsity, and as an attempt to avoid responsibility.

Finally, the most recent decision I wish to review illustrates that the line between stereotypical thinking and assessing the specific circumstances of a case can be a thin one and that it is not always the prosecution suggesting we erred.

R. v. ROBERTS

In *R. v. Roberts*, 2017 NWTCA 9 (Can.), the accused was convicted of the offence of sexual assault. The evidence presented at the trial established that both the accused and the complainant were under the influence of alcohol. The complainant testified that she had gone to bed and was awoken by the accused having sexual intercourse with her. The accused testified that the complainant initiated multiple sexual encounters with him, all of which were consensual. In convicting the accused, the trial judge stated: "On the accused's evidence, every aspect of the sexual encounter between the accused and [the complainant] is instigated by [the complainant]. While that is not impossible, it certainly seems improbable."

The accused appealed from conviction. He argued that the

trial judge "made a stereotypical assumption about the implausibility of the complainant initiating multiple sexual encounters which materially eroded the trial's truth-seeking function and unfairly compromised the fairness of the trial, rendering the appellant's conviction unsafe" (at paragraph 51). He argued that "in rejecting" his "evidence that the complainant had initiated the sexual contact as 'implausible', the trial judge resorted to myth-based assumptions and beliefs about how a woman would sexually engage in this situation" (at paragraph 51).

The Court of Appeal of the North West Territories suggested that it "may fairly be said that a bulk of judicial attention has been expended on various types of stereotypical thinking, assumptions or generalizations identified as being unfairly applied to sexual assault complainants" (at paragraph 47).

The Court of Appeal held that (at paragraph 62):

> [T]he trial judge did not resort to impermissible stereotypes or assumptions about how a complainant would engage sexually in the circumstances of this case. There is nothing in the trial judge's decision that hints at such a stereotype being considered or assessed, or any such generalized assumption being made; and the appellant's reliance on one small portion of the decision concerning implausibility is no evidence of such an error, either in its own right or when necessarily considered in the context of the entire decision.

The Court of Appeal concluded that the conviction was "not based on a stereotypical generalized assumption about sexual behavior" (at paragraphs 65 and 66):

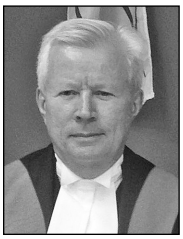
> In our view, the conclusion reached by the trial judge was not based on a stereotypical generalized assumption about sexual behaviour, but was grounded in and arose directly from the evidence. Her conclusions were not impermissibly anchored in some personal worldview unrelated to the evidence, and did not find any genesis, or provenance, in dangerously presumptive generalizations or assumptions about the normative behaviour of a sexual assault complainant, or this particular sexual assault complainant.
>
> Rather, we conclude that this finding rested upon the totality of the evidence the trial judge did accept: that in the factual matrix of this case, this complainant, would not have instigated multiple sexual encounters with the appellant. In her reasons, this finding was directly tied to the evidence of the complainant as to her distressed state arising from an argument with her spouse and him leaving with the children, as well as the testimony of DE and MS – both of whom confirmed the complainant was upset a short while before the sexual encounter took place. It was also uncontradicted that the police had attended at the residence earlier that night on a domestic dispute call. The complainant further testified that she had gone to bed after the police left and awoke to the appellant having sexual intercourse with her; when she told him to get off, he punched her in the head and threatened her. She admitted she was intoxicated throughout.

CONCLUSION

It has been suggested that in assessing the credibility of a witness it can be "very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events."[9] It has also been suggested that it "is now acknowledged that demeanour is of limited value because it can be affected by many factors including the culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom."[10]

Whatever one might think of these suggestions, it is clear that the time when it was thought that "the ideal judicial voice would have sounded something like the voice of God" is long past.[11]

It is also clear that there is no place for trial judges to assess credibility based upon assumptions as to how a true victim of a sexual assault should act or behave.[12]



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9. R. v. Gagnon, 1 S.C.R. 621 (Can.), at paragraph 20.
10. R. v. Dyce, 2017 ONCA 123 (Can.), at paragraph 12.
11. Richard Posner, *Judges Writing Styles (and do they matter?)*, 62 U. Chi. L. Rev. 1421, 1426 (1995).
12. In *R. v. Richards*, 2017 ONCA 424 (Can.), the issue arose as a result of comments made in an unrelated matter. In *Richards*, the trial judge in a sentencing case held just before Mr. Richard's trial commenced, referred to addicts as being "liars, cheaters, and thieves, every one." The accused argued on appeal from conviction that these comments gave rise to a reasonable apprehension of bias. In rejecting this argument, the Ontario Court of Appeal held that (at paragraph 58):

> [T]he impugned remarks, made in unrelated proceedings after guilt had already been determined, is incapable of demonstrating any sound basis for perceiving that any decision made at trial was grounded in prejudice, generalizations or stereotypical reasoning. In coming to this conclusion, I in no way condone the word choice employed by the trial judge in the unrelated proceedings.