

How sexual assault trial could play out for Harvey Weinstein

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This story is part of #MeToo 2020, a CBC News series examining what's changed since the start of the #MeToo movement two years ago and how the trial of disgraced Hollywood mogul Harvey Weinstein will impact the future of the movement.

When Harvey Weinstein's criminal trial begins in a Manhattan courtroom today, the disgraced movie mogul will face a legal reckoning for what dozens of accusers have said is a decades-long pattern of sexual assault, rape and intimidation.

But proving that behaviour that many actresses alleged was common knowledge in Hollywood was a crime is one of many challenges facing prosecutors in the highest profile trial of the #MeToo era.

Weinstein has been accused by more than 80 women of being a serial harasser and sexual predator. The list reads like a who's who in Hollywood: Angelina Jolie, Ashley Judd, Salma Hayek, Rosanna Arquette to name a few.

But despite numerous accusers, Weinstein's criminal charges focus on just two specific cases. He's denied any non-consensual sex and pleaded not guilty to five charges including two charges of predatory sexual assault and two charges of rape. If convicted he could face up to life in prison.

The 67-year-old has pleaded not guilty to charges that he raped a woman in a hotel room in Manhattan in 2013. He's also charged with performing a forcible sex act on Mimi Haley, a former production assistant with his company in 2006 who has spoken publicly about the assault.

Parallels with Cosby case

Having two accusers gives prosecutors an advantage as they seek a conviction said Kristen Gibbons Feden, who was part of the team that successfully prosecuted comedian Bill Cosby in 2018.

While the Cosby case rested predominantly on the testimony of Canadian Andrea Constand, whom a jury found the comedian drugged and sexually assaulted in 2004, Gibbons Feden said the Weinstein prosecutors will be able to obtain a conviction "whether the jury believes one of the witnesses or whether the jury believes both of the witnesses."

Like the Cosby trial, the Weinstein trial will also hear from women whose allegations of assault did not lead to charges, either because they were too old or the incidents didn't happen in New York.

Weinstein's trial will hear from three so-called "prior bad act" witnesses. Gibbons Feden said their testimony allows the prosecution to establish a pattern in the defendant's behaviour.

"The prosecution is going to have to show Weinstein's criminal tendencies ... a pattern of raping these women, a pattern of establishing trust, grooming them, so that they are alone and in a private place with him such that he can prey upon them," Gibbons Feden said, noting the second Cosby trial had five "prior bad act" witnesses.

Giving testimony to 'make a difference'

One of those witnesses claims Weinstein assaulted her in 2005. Her lawyer, Douglas Wigdor, said his client came forward voluntarily to help the prosecution, knowing the impact it would have on her life once her name is revealed.

"She thought long and hard about it, but she knew that as time went on and she got older and maybe had children of her own, that she could look back and say that she tried to make a difference in something that was very important."

Wigdor says his client's testimony will support the two accusers by showing how Weinstein used his power and influence as a Hollywood producer to prey upon her.

"What Harvey Weinstein was doing was actually a scheme and a plan," Wigdor alleges. "He would typically lure the women that he would sexually assault by having them come to his office or to his apartment under the ruse of getting advice about their career or reading a script."

Wigdor also represents women seeking civil cases against Weinstein. While a \$25-million US settlement with some plaintiffs was reported in December, he said his clients will continue to pursue their case.

A fourth witness, former *Sopranos* star Annabella Sciorra, will also testify. She alleges Weinstein raped her 26 years ago, beyond the statute of limitations. Her testimony will be used to support the predatory sexual assault charge, which the prosecution must show at least two women were assaulted by the defendant.

How #MeToo plays into trial

In 2017, when the New York Times detailed numerous allegations of rape and sexual assault against Weinstein, it sparked a national conversation about sexual abuse and assault by men in powerful positions known as the #MeToo movement.

The case will be heard before a 12-person jury, with selection beginning this week. Lawyers watching the case say a challenge will be finding people who aren't looking for justice for the broader movement, or conversely, think #MeToo has gone too far and will be seeking to exonerate Weinstein because of it.

"It's going to be impossible to find jurors that haven't heard about [#MeToo]," said criminal defence lawyer Dmitriy Shakhnevich.

"The next step will be to find jurors that have heard of it, but can put aside their preconceived notions."

Weinstein's lawyer, Donna Rotunno, has been critical of #MeToo, telling CBS News recently that "it allows the court of public opinion to take over the narrative."

She says the evidence in the criminal case favours her client and that Weinstein may not be perfect, but he's not a criminal.

"I'm not here to say that he was not guilty of committing sins. I'm not here to say that at all. But there's a difference between sins and crimes and I don't think he's a rapist. I don't believe he's a rapist," Rotunno told CBS.

Legal observers like Matthew Galluzzo, a former sex crimes prosecutor now a criminal defence attorney, said the Weinstein defence team will have to remind the jury that this case is not a referendum on #MeToo.

"Did he do X? Not, did he do something wrong. There's black-and-white letter law for what is and is not a crime and if it doesn't fit, then it's not a conviction," Galluzzo said.

He said the defence will also chip away at the credibility of the witnesses by putting their story on trial, offering other reasons for their interactions with Weinstein.

"I think that's going to be the defence, essentially they agreed to have sex with him and now they're telling a different story all these years later, for whatever reason. It's gonna be up to the defence to fill in that explanation."

Dispelling rape myths

Gibbons Feden said in the Cosby trial, the prosecution recognized it would need to educate jurors about the behaviour of sexual assault survivors as a way to blunt attacks from the defence. They called an expert to explain that victims don't always report crimes right away

and often maintain contact with their alleged assailant. That witness, Dr. Barbara Ziv, will also testify in the Weinstein trial.

"There is no typical response to sexual abuse, and if there is a delayed disclosure, if there's continued contact with an offender, that does not mean that that woman or man was not sexually abused," Gibbons Feden said.

Weinstein's case has already had some ups and downs before trial. In late 2018, the prosecution dropped one charge relating to an accusation made by aspiring actress Lucia Evans, when inconsistencies emerged in her story. It was also revealed that a New York police detective may have coached her to withhold evidence that put her story in question.

Gibbons Feden hopes the Cosby trial and the #MeToo movement have helped better educate the public and courts about the behaviour of sexual assault victims.

While other jurisdictions are still investigating allegations against Weinstein, she said the Cosby conviction should give Weinstein's accusers and the prosecution confidence that a high-profile defendant can be found guilty.

"The fact that is possible, the fact that there are juries out there who will convict high-profile offenders as long as the evidence is there."