Court File No. 37769

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N:

BRADLEY DAVID BARTON

APPELLANT

– and –

HER MAJESTY THE QUEEN

RESPONDENT

-and-

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I. THE APPLICATION OF *R v Jobidon* TO CASES OF SEXUAL ASSAULT

a. *Restraint/Deference to Parliament*

1. The Respondent, supported by several interveners, asks this Court to expand the net of criminal liability to anyone who engages in sexual activity with a consenting partner but applies force that demonstrates the "*objective* foreseeability of bodily harm... in circumstances where death or serious bodily harm leaving permanent damage results from sexual activity.[1]" Their desire is not only to apply this Court's decision in *R v Jobidon*[2] to sexual activity, but to transform it dramatically, making the subjective intentions of *both* sexual partners wholly irrelevant where bodily harm is objectively foreseeable, and bodily harm of a serious nature has been caused.

2. This Court should be extremely cautious of applying or expanding *Jobidon* to sexual activity.[3] While *Jobidon*'s decision to vitiate consent to a fistfight when an opposing party subjectively intends and causes bodily harm is well-entrenched, it remains a very controversial decision. Commentators are nearly unanimous in their criticism of *Jobidon*, calling its reasoning "badly flawed[4]" and decrying how it "cavalier[ly]" bypasses s 9(a) of the Code,[5] wrongly treats consent as a "defence", and "results in the uncertainty that codification was intended to prevent.[6]" As Roach suggests, *Jobidon* "may be good social policy, but... Parliament was in a better position both to make and to implement policy decisions that would expand the criminal sanction.[7]"

3. This Court's more recent approach to criminal liability contrasts with *Jobidon*'s willingness in to wade into policy-making territory. As Cromwell J noted in *R v DLW*,[8] "apart

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[1] Respondent's Factum, para 120. See also, for example, AG Canada Factum, paras. 23-49; AG of Ontario Factum, paras. 19-24; Mémoire de l'AG Quebec Factum. This will be referred to, henceforth, as "the Respondent's Approach".

[2] *R v Jobidon*, [1991] 2 SCR 714.

[3] The Appellant agreed to *Jobidon*'s application at trial and was acquitted notwithstanding.

[4] Michael Plaxton, *Sovereignty, Restraint, & Guidance: Canadian Criminal Law in the 21st Century* (Irwin Law, forthcoming), Chapter 3 at 25.

[5] Eric Colvin and Sanjeev Anand, *Principles of Criminal Law*, 3d ed. (Toronto: Carswell, 2007) 137. See Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed. (Toronto: Carswell, 2014) 22.

[6] SJ Usprich, "Annotation to *R v Jobidon*" (1991) 7 CR (4th) 235 at 236. See also Stephen Coughlan, "Annotation to *R v Paice* (2005) 26 CR (6th) 3 at 3.

[7] Kent Roach, "*Jobidon* Revisited in *Paice*" (2005) 50 Crim LQ 357 at 357. See also Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed. (Toronto: Carswell, 2014) 637-638; *R v Cuerrier*, [1998] 2 SCR 371 at para 56, per McLachlin J; *R v DLW*, 2016 SCC 22 at paras 69-70.

[8] *R v DLW*, 2016 SCC 22 at para 67 [Emphasis added]. Plaxton, above note 4, chapter 3 at 25, contends that "the majority decision in *DLW* strongly suggests that the Court today would not decide *Jobidon* the same way."

from criminal contempt, there can be no liability for common law crimes. Creating and defining crimes is for Parliament; *the courts must not expand the scope of criminal liability beyond that established by Parliament*." The Alberta Court of Appeal suggested that "Parliament has expressly granted the courts statutory authority to impose limits on consent for sexual offences in s 273.1(3)," allowing public policy considerations to create an undefined number of new situations in which consent could be vitiated. But this sort of wide-ranging application of public policy to new scenarios is not what the clause actually envisions, for this power is restricted, as this Court noted in *R v JA*,[9] "to identify[ing] additional cases in which no consent is obtained, *in a manner consistent with the policies underlying the provisions of the Criminal Code*." As demonstrated below, those policies mandate adherence to subjective *mens rea* orthodoxy.

b. *The Need for a Meaningful Mens Rea Component*

4. If *Jobidon* is to be applied in this context, it should *not* be expanded as the Respondent's Approach suggests, and a subjective intention to cause bodily harm should remain a fundamental requirement for negating an otherwise valid consent. In *Jobidon*, Gonthier J. considered the possibility of consent being vitiated, as it was in England, "even in situations where the assailant did not intend to cause the injured person bodily harm but did so inadvertently." He concluded that the wording of the Code made this *impossible*, and that subjective intention to cause harm was essential, a finding that was reaffirmed in *R v Paice*.[10]

5. Punishing on an objective foreseeability standard is problematic for other important reasons. First, it would permit a conviction for a serious offence without a sufficient level of moral fault. The commission of a sexual assault has always required a clear subjective component, and nothing in the Code demonstrates *any* intention to impose liability on an objective standard. As Dickson J. noted in *R v Pappajohn*:[11]

> It is not clear how one can properly relate reasonableness (an element in offences of negligence) to rape (a "true crime" and not an offence of negligence)... To do so, one must, I think take the view that the *mens rea* goes only to the physical act of intercourse and not to non-consent, and acquittal comes only if the mistake is reasonable. This, upon the authorities, is not a correct view, the intent in rape being not merely to have intercourse, but to have it with a non-consenting woman.

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[9] *R v A(J)*, 2011 SCC 28 at para 29 [Emphasis added].
[10] *R v Jobidon*, [1991] 2 SCR 714 at para 106. See also *R v Paice*, 2005 SCC 22 at paras 10-13.
[11] *R v Pappajohn*, [1980] 2 SCR 120 at para 51.

6. The Respondent's Approach to consent would have exactly the effect that this Court decried in *Pappajohn*.[12] A person could intentionally touch another person in a sexual way, with consent and without any subjective foresight that bodily harm could be caused, but be culpable merely because a reasonable person would have foreseen that bodily harm would be the result of his or her actions. This would effectively transform the offence into one where not only the presence or absence of consent was irrelevant, but the accused would have no ability to raise the defence of honest, mistaken belief in consent. So long as the force was objectively likely to cause harm, and serious harm resulted - even if by accident - a conviction must follow.

7. Second, the Respondent's Approach has negative constitutional implications. In *R v Hess*, this Court struck down an earlier version of s 146(1) of the *Criminal Code*, which criminalized the act of having sexual intercourse with a person under the age of fourteen "whether or not he believes that she is fourteen", because it deprived the accused of the defence of mistake of fact. As McLachlin J. pointed out:

> An accused can be convicted under s. 146(1) although he lacks a guilty mind. He clearly must intend to have intercourse. But that is not an offence. Without wishing to commit the crime or intending to commit the crime... an accused may stand convicted. It follows that... s. 146(1) violates s. 7 of the Charter.[13]

8. The reasoning is directly apposite here. The Respondent's Approach does not accord with this Court's proscriptions about the need for a guilty mind, which *at a minimum* requires "a marked departure from the norm [in order to] demonstrat[e] sufficient blameworthiness to support a finding of penal liability.[14]" This lower standard cannot form the basis of any *Jobidon*-adapted policy exception to consent, however. As this Court stated in *R v Lucas*,[15] "in the absence of an express legislative provision, it should be presumed that proof of subjective *mens rea* is a requirement of criminal offences."

9. Third, making liability dependent on objective foresight of bodily harm alone would undermine the approach to liability for manslaughter or unlawfully causing harm established by

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[12] As such, adopting the Respondent's Approach to s 273.1(3) conflicts with the statement in *R v A(J)*, 2011 SCC 28 at para 29, that new exceptions must be consistent with the Code's approach to sexual assault.

[13] *R v Hess*, [1990] 2 SCR 906 at para 76. See also paras 3-15, per Wilson J.

[14] *R v Beatty*, 2008 SCC 5 at para 33.

[15] *R v Lucas*, [1998] 1 SCR 439 at para 64. See also *R v Gaunt & Watts*, [1953] 1 SCR 505; *R v Sault Ste. Marie*, [1978] 2 SCR 1299 at 1309; *R v ADH*, 2013 SCC 28 at paras 27-29.

this Court in *R v DeSousa*[16] and *R v Creighton*.[17] Despite the A.G. Canada's flawed attempt to analogize between the two scenarios,[18] those cases recognize that objective foresight of bodily harm is an acceptable standard for the consequence element of the offences, but *only* because the Crown must *first prove the accused possessed a constitutionally sufficient mens rea standard to commit the underlying offence*.[19] As noted above, for sexual assault, absent a legislative intention to the contrary, this must be a subjective standard. The careful reasoning in these cases would be effectively jettisoned if liability could be founded merely on the presence of objectively foreseeable bodily harm attached to otherwise lawful conduct. Liability under both *DeSousa/Creighton* and *Jobidon* would no longer be required because the Crown would have to prove only that an accused's conduct, undertaken with consent, resulted in objectively foreseeable bodily harm, regardless of the subjective intentions of either the complainant or the accused.

10. Fourth, the Respondent's Approach creates an undue focus upon the *result* of a person's conduct, rather than their intention for causing a consequence. Our courts have repeatedly held that conduct does not become unlawful depending on the consequences of that conduct.[20] This is true even for conduct whose culpability is defined by falling below an objective standard.[21]

II. CONCERNS ABOUT SEXUAL HISTORY AND USE OF THE TERM "NATIVE"

11. The Respondent and several interveners make the assertion that the repeated references to Ms. Gladue as a prostitute had the effect of prejudicing the case against the Crown. Ironically, the term was used first and most often by the Crown, 20 times, compared with 11 uses by defence counsel, three references by the trial judge, and two by the Appellant during his testimony.[22]

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[16] *R v DeSousa*, [1992] 2 SCR 944.
[17] *R v Creighton*, [1993] 3 SCR 3.
[18] Attorney General of Canada's Factum, para 47.
[19] This requirement also helps justify the very low threshold to establishing liability for resultant harm or death, as established in *R v Smithers*, [1978] 1 SCR 506 and *R v Nette*, [2001] 3 SCR 488. See Colvin and Anand, *Principles of Criminal Law*, above note 5, at 156-7.
[20] *R v Anderson*, [1990] 1 SCR 265 at 273; *R v Beatty*, 2008 SCC 5 at para 46; *R v Kandola* (1993), 80 CCC (3d) 481 at 489 (BCCA); *R v Kong*, 2005 ABCA 255 at paras 208-9, per Wittman JA, dissenting, rev'd 2006 SCC 40.
[21] The Appellant also adopts paras 12-29 of the submissions of the CLAO, explaining why the exception requires a subjective standard.
[22] Trial Transcript, Vol 1, 14/15 **[Tab 22 Appellant's Record (A.R.)]**

12. Moreover, the Crown's treatment of Ms. Gladue's sexual history was no mere "failure to object", but a strategic decision.[23] It used Ms. Gladue's status as a prostitute, along with the Appellant's description of sexual activity on the first night, for three distinct purposes. First, as proof of the Appellant's earlier lies to Crown witnesses that he did not know the victim, which strengthened the Crown's argument on after the fact conduct;[24] second, that these lies adversely affected his credibility as a witness at trial;[25] and third, alarmingly, to explain the "commercial nature of prostitution" and how Ms. Gladue would more likely have stolen money from the Appellant had the story occurred in the manner he suggested, rendering his version implausible.[26]

13. Several of the interveners have objected strongly to the use of the term "native" by witnesses and counsel throughout the trial. While the use of terminology was somewhat outdated,[27] it was never applied to Ms. Gladue in a disparaging manner. All references were made solely for the purpose of providing her physical description, as Ms. Gladue was a stranger to every witness who testified about her in this trial with the exception of the Appellant, who always referred to her as "Cindy".[28] The others did not use her name because they did not know her by name. The witnesses chose the term "native" to identify Ms. Gladue, and both counsel repeated these terms back to the witnesses simply to avoid confusion.[29] The Interveners fail to recognize that it is standard procedure for witnesses to use physical descriptors, including apparent racial origin, when identifying unknown persons for courtroom or police investigative purposes.[30]

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED AT Edmonton, Alberta this 21st day of September 2018

DINO BOTTOS **PETER SANKOFF**

[23] In an adversarial process, parties are held to their choices: *R v Swain*, [1991] 1 SCR 933.
[24] Trial Transcript, Vol 4, 1656/4-12 **[Tab 44 A.R.].**
[25] Trial Transcript, Vol 4, 1660/40- 1661/2 **[Tab 44 A.R.].**
[26] Trial Transcript, Vol 4, 1666/30- 1667/15 **[Tab 44 A.R.].**
[27] This Court used the term as recently as 2008: *R v Kapp*, 2008 SCC 41. The Alberta Court of Appeal did so as recently as 2012: *R v Bigsorrelhorse*, 2012 ABCA 327.
[28] Trial Transcript, Vol. 4, 1104/14; 1116/27; 1117/3-17; 1118/30; 1120/25; 1121/26; 1122/17; 1128/30 **[Tab 39 A.R.].**
[29] See, eg., Trial Transcript, Vol 1, 143/23; 164/13; 173/37 **[Tab 26 A.R.]**; 323/35 **[Tab 28 A.R.]**; Vol. 4, 1301/11; 1301/28-30; 1314/35 **[Tab 41 A.R.]**.
[30] See eg. *R v Saddleback*, 2016 ABCA 204 at para 5. The intervener ALS factum at para 11 thus oversimplifies the matter in noting that "the identity of Ms. Gladue was not in question".

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