File Number: 37769

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

BRADLEY DAVID BARTON

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

- and -

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CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY

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INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN AND WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. (JOINTLY)

THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS

VANCOUVER RAPE RELIEF SOCIETY; LA CONCERTATION DES LUTTES CONTRE L'EXPLOITATION SEXUELLE (LA CLES); ASIAN WOMEN FOR EQUALITY SOCIETY; ABORIGINAL WOMEN'S ACTION NETWORK (AWAN); FORMERLY EXPLOITED VOICES NOW EDUCATING (EVE); AND CEASE: CENTRE TO END ALL SEXUAL EXPLOITATION (CEASE) (JOINTLY)

Interveners

REPLY TO INTERVENERS' FACTUMS

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MEMORANDUM OF ARGUMENT

INTRODUCTION

1. Before addressing the Interveners' submissions relevant to the Appellant's stated questions, the Respondent will first address the terms used to describe Cindy Gladue at trial. Several of the Interveners refer to the ABCA's comments in its judgment (at paragraphs 123 to 124) that Ms. Gladue was described as "Native" approximately 26 times and also referred to as a prostitute.

"Native" References by the Crown

2. The word "Native" was first used at the Appellant's trial when the Crown asked one of its witnesses to describe the woman the Appellant was with in the hotel bar on the night of Ms. Gladue's death. The witness, who never met Ms. Gladue before, described the woman as "Native girl, short, plump, dark hair, shoulder length".[1] At times, the Crown utlilized this description in its remaining questions of the witness. The only other time the Crown used this term with respect to Ms. Gladue was in its cross-examination of a defence witness (the hotel bartender) who, in her direct examination, had repeatedly referred to the woman with the Appellant as "Native" (while referring to the Appellant – a man she had met just once before – as "Brad").[2]

3. It is not uncommon for counsel to adopt a witness's description in their examination of the witness. This case illustrates the caution that must be exercised in doing so. Such references must be relevant to the live issues at trial and any potential prejudice must be limited and addressed. Where such references are not relevant, they must be excluded. Neutral terminology must be utilized whenever possible.

"Prostitute" References by the Crown

4. The Crown's references to prostitution must be understood in the context of its theory at trial. The Crown relied upon, *inter alia*, the Appellant's after the fact conduct to establish that he

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[1] Appellant's Record ("AR"), Vol III, Tab 26 at 106/22-23

[2] A first responder also used the term "Native" when the Crown asked the nationality/ethnic origin of the woman he found in the bathtub. AR, Vol III, Tab 28 at 155/33-35

was guilty of first degree murder. This conduct included his repeated lies to various parties regarding the nature of his relationship with Ms. Gladue on the night of her death. As outlined in the Respondent's Factum (paragraphs 9-14), he lied about the true nature of his relationship with Ms. Gladue to his colleague, the 911 operator, the first responder, and the undercover officer.

5. This case highlights, once again, the caution that must be exercised in determining the appropriate terminology to be utilized and the need for appropriate limiting instructions where it is determined that such references are relevant to the live issues at trial.

GROUND 1 - ALBERTA COURT OF APPEAL'S APPROACH

Alternate Theories of Liability/Contrary Positions

6. The Independent Criminal Defence Advocacy Society (CDAS) addresses this Court's decision in *Wexler v R*, [1939] SCR 350 and contends that the ABCA failed to address the argument that the Crown relied on a theory of liability not presented at trial. It appears to argue, under the rubric of the Crown making materially different arguments on appeal, that the rule in *Wexler* also applies when the Crown fails to sufficiently object to misdirection in a jury charge on the theory of liability actually advanced.

7. The Respondent submits that the CDAS misapprehends the evidentiary record and the jurisprudence. The Crown did not advance alternate theories of liability on appeal. As illustrated in paragraphs 30, 33-35, and 40 of the Respondent's Factum, the Crown confirmed at the appeal hearing that it was not relying upon alternative avenues of liability (such as murder based on wilful blindness or manslaughter based on criminal negligence). The ABCA acknowledged same.

8. The ABCA did not act contrary to *Wexler*. In *Wexler,* the Crown's theory at trial was that the accused intentionally shot the deceased with the intent to kill her. The accused relied upon his own evidence that it was an accident. The judge instructed the jury that they could acquit if they believed the accused's account. The Crown was satisfied with this instruction. The accused was found not guilty. The Crown appeal was allowed on the ground that the judge erred by omitting to instruct the jury that they could convict the Appellant of murder under a different section, or of manslaughter, based on certain facts in the accused's testimony. This was not considered, or even suggested, at trial. This Court restored the acquittal. All three judgments

endorsed the fact that the Crown could not use its right of appeal to secure a retrial based on a theory of liability not advanced at the first trial. Significantly, there was no suggestion of any other errors in the charge in relation to the theory of liability actually advanced.

9. This Court has not expanded *Wexler* to bar Crown appeals based on a failure to object to misdirection in a jury charge. Nor have the ensuing cases cited by the CDAS. The CDAS miscontrues the Respondent's comment that "a legal error remains a legal error" as the Respondent's position that the failure to object to misdirection in a jury charge is never relevant in a Crown appeal. It is the Crown's position that *Wexler* does not bar a Crown appeal in such circumstances as evidenced in *Cullen v R*, [1949] SCR 658. It is also the Crown's position that misdirection remains a legal error regardless of the Crown's response. It may, however, be a factor to be taken into consideration by an appellate court in determining whether to allow a Crown appeal.

10. In this case, the ABCA did not allow the appeal from acquittal based on contrary Crown positions. As discussed at paragraphs 41, 108 and 109 of the Respondent's Factum, the Crown at trial repeatedly requested and argued for the inclusion of objective foreseeability of the risk of bodily harm as the *mens rea* for manslaughter. The Appellant insisted it was not necessary. The failure to include objective foreseeability of the risk of bodily harm in the manslaughter instruction was a fatal legal error. For the reasons set out at paragraphs 121 to 122 of the Respondent's Factum, this error impacted the acquittal.

11. The Crown also argued on appeal that objective foreseeability of the risk of bodily harm should be taken into account in assessing subjective consent. Contrary to the submission of the Criminal Lawyers' Association of Ontario, it is not a consideration of whether the average person would have consented to the risk of harm but whether the complainant subjectively consented to the application of force which a reasonable person would know would risk bodily harm. The Crown argued this in the context of additional concerns the Court should have arising from the trial Crown's repeated expressed concerns with the need to include objective foreseeability of the risk of bodily harm. In this respect, the Crown is not taking a contrary position, but merely expanding upon the trial Crown's position. The ABCA's acceptance of this argument formed a small part of the Court's analysis and did not seriously impact it.

12. Regarding after the fact conduct, the trial Crown argued that the instruction should state that the jury could infer guilt from the after the fact conduct. This is not how the jury was instructed.[3] In addition, the jury was not directed in relation to credibility, even though it was a key issue at trial given the numerous after the fact conduct lies the Appellant told a number of people.[4] The Crown's failure to object to the ultimate instruction on after the fact conduct was neither tactical nor strategic.

13. The CDAS does not address two key issues in this case. The first is the effect of an accused's active participation in misdirection in a jury charge. It is the Respondent's position that an accused is not entitled to a jury charge replete with legal error and that active participation in such a result is a factor to be taken into consideration in determining whether to allow a Crown appeal. The second issue is the effect of a Crown failure to object to an accused's non-compliance with section 276. On this issue, the Respondent also adopts the analysis of the Attorney General of Manitoba in relation to appellate intervention in the context of section 276.

Transcripts

14. The Canadian Media Lawyers Association (CML) addresses the ABCA's response to the Appellant's request for a transcript of the appeal hearing. In doing so, it conducts a collateral attack on a previous ABCA decision (*McDonald v Brookfield Asset Management Inc*, 2016 ABCA 416). The CML fails to appreciate that this case is distinguishable and the issue moot. The Appellant requested a transcript of the appeal hearing based on specified areas of concern. He received portions of the transcript relating to those concerns. He did not challenge this response or complain it was insufficient. When he was granted leave to appeal, he renewed his request and was provided the complete transcript.

The Role of Interveners

15. The facta of two Interveners refer to the admission into evidence of a specimen from Ms. Gladue's body.[5] The Respondent notes that the ruling to admit this evidence followed an extensive *voir dire* which included the testimony of the former Chief Medical Examiner and the

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[3] See also paras 42 and 60 of the Respondent's Factum
[4] See also paras 42, 63, 66 and 68 of the Respondent's Factum
[5] Women of the Métis Nation/Les Femmes Michif Otipemisiwak at paras 32-40; Assembly of First Nations at para 25

submissions of counsel. Despite the comments of the Appellant and the Joint Intervener (LEAF and IAWW), the ABCA made no reference to the Trial Judge's ruling in its comprehensive judgment. The suggestion that the admission of this evidence may have been racially motivated is without foundation.

GROUND 3 - OTHER SEXUAL ACTIVITY

16. In paragraphs 9-20 of its Factum, the Attorney General of Canada canvasses the principles of statutory interpretation supporting a broad application of section 276. The Respondent adopts its analysis. The Respondent also adopts the Manitoba Attorney General's analysis of section 276.

GROUND 4 - UNLAWFUL ACT MANSLAUGHTER AND SEXUAL ASSAULT

17. The Joint Intervener addresses consent in the context of the degree of force utilized. The Respondent adopts the analysis of the Joint Intervener in paragraphs 21 to 25 of their Factum.

18. Although the Respondent has submitted that the ABCA's analysis of the application of *Jobidon* in the sexual context was *obiter*, several Interveners have provided submissions on this issue. If this Court proposes to deal with this issue, the Respondent adopts the analyses of the Attorney General of Canada, Quebec and Manitoba.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 24th day of September, 2018.

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