

TOP FIVE 2019

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2019 cases were selected and discussed by Mr. Justice Lorne Sossin of the Ontario Superior Court of Justice. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R v BARTON, 2019 SCC 33 (CANLII)

Date released: May 24, 2019

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17800/index.do>

Disclaimer: This case includes graphic sexual content and describes sexual violence against an Indigenous woman.

Facts

This appeal is about the death of Cindy Gladue and the role Bradley Barton played in it. Ms. Gladue was an Indigenous woman and a sex worker who was found dead in the bathroom of Mr. Barton's Edmonton hotel room. Mr. Barton was charged with first-degree murder. The cause of death was determined to be loss of blood due to an 11 cm wound in her vaginal wall. The Crown's theory was that during the accused and the deceased's sexual activity, while the deceased was incapacitated by alcohol, the accused cut the inside of her vagina with a sharp object with intent to seriously harm or kill her. The Crown also took the position that if the accused did not murder the deceased, he committed unlawful act manslaughter (this is when someone causes another person to die without specifically intending to kill them,

by actions that are dangerous or illegal that they should have known might cause serious harm).

Although Mr. Barton admitted that he caused Ms. Gladue's death, he said that it was an accident. At his trial, he testified that he had hired Ms. Gladue to have sex two nights in a row. On the first night, he said, he put his hand in her vagina and thrust a few minutes before having sex. On the second night, he did the same thing, but thrust deeper and harder. On the second time, there was blood, so Ms. Gladue went to the bathroom to clean up, and Mr. Barton claimed he fell asleep before finding her dead the next morning. Mr. Barton denied using a sharp object and asserted that the deceased consented to the sexual activities in question, or at least that he honestly believed that she did. What Mr. Barton honestly believed is important to the case, because in sexual assault cases, if the accused honestly believed there was consent, this can be a defence in some circumstances.



Procedural History

The jury at the Court of Queens Bench of Alberta found Mr. Barton not guilty. The Crown claimed the judge made mistakes, and appealed, seeking a new trial. The Court of Appeal ordered a new trial. Mr. Barton then appealed to the Supreme Court of Canada (SCC), seeking to have the original verdict of not guilty affirmed.

Issues

1. Did the trial judge err in not instructing the jury properly and allowing the evidence of the deceased's prior sexual conduct to be introduced by the accused?
2. If the trial judge did make those errors should the accused be tried again for both first degree murder and manslaughter?

Decision

All the judges at the Supreme Court agreed that the trial judge made errors in allowing the evidence of the deceased's prior sexual conduct and in failing to properly instruct the jury on the defence of honest but mistaken belief in communicated consent. The majority held that these errors warranted a new trial on unlawful act manslaughter but not first

degree murder. The dissenting judges held that the trial judge's errors tainted the whole trial and would have ordered Mr. Barton to face a second trial for first degree murder.

Ratio

It was an error for the trial judge not to determine whether the evidence of Ms. Gladue's past sexual activity was inadmissible because it was based on myths about women and sexual consent. The criminal justice system should take steps to address systemic biases, prejudices, and stereotypes against Indigenous women and sex workers.

Reasons

The SCC held that by relying on the complainant's prior sexual activities at trial, and allowing the jury to hear that evidence without any instructions, the fairness of the trial was compromised.

The *Criminal Code of Canada* ("The Code") requires certain procedures to be followed before any evidence of the complainant's prior sexual activity is allowed into evidence. Judges must consider whether evidence of a complainant's prior sexual activities is inadmissible because it relies on two myths about women and sexual consent. The first myth is that women are more likely to have consented to the sexual activity in question because of

past sexual activity. The second myth is that because of previous sexual activity the complainant is less worthy of belief. In other words, if Ms. Gladue had consented the first time this does not mean she consented the second time and even if someone has willingly engaged in a sexual activity in the past, this does not mean that their complaint about engaging non-consensually in the same activity is any less serious or believable under the law.

In this case, the required procedures were not followed. The trial judge did not decide whether this evidence was admissible and did not give any instructions to the jury on how the evidence should be used.

At trial, the accused relied on the defence of "honest but mistaken belief in communicated consent". This means that he claimed that he believed Ms. Gladue had consented to the sexual activity even though she had not. The SCC held that Mr. Barton made a **mistake of law** by thinking that Ms. Gladue had consented to the sexual activity on the second night based on her activity on the first night, not a **mistake of fact**. A mistake of law cannot be used as a defence. The trial judge erred by failing to instruct the jury about this, leaving the jurors without the legal tools to do a proper analysis.

This case is extremely important because it acknowledges prejudices against Indigenous women and sex workers like Ms. Gladue. The SCC held that the criminal justice system needs to take steps to address systemic biases, prejudices, and stereotypes against Indigenous women and sex workers. In sexual assault cases where the complainant is an Indigenous woman or girl, trial judges should provide a specific instruction aimed at countering prejudice against Indigenous women and girls.

DISCUSSION

1. Why were Mr. Barton's beliefs about what happened so important to the outcome of the case?
2. What is the difference between a mistake of law and a mistake of fact?
3. Why is it so important that the judge gives instructions to the jury before they consider evidence? Aren't they the ones deciding on the case?
4. What makes myths and stereotypes about people so problematic when it comes to the legal issue of sexual consent?
5. The SCC acknowledged that the criminal justice system is guilty of systemic biases, prejudices, and stereotypes against Indigenous women and sex workers. How can the law help to confront these issues?