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)

FACTUM OF THE RESPONDENT ATTORNEY GENERAL OF ALBERTA

PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

Publication Ban pursuant to s. 486.5 of the *Criminal Code*

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PART I – OVERVIEW AND FACTS

Overview

1. Cindy Gladue's deceased, naked and bloody body was found in the bathtub of the Appellant's hotel room. An autopsy revealed she bled to death from a large gaping hole through her vaginal wall. The Appellant admitted to killing her by thrusting his hand past his knuckles into her vagina for ten minutes. He claimed the resulting injury and death was an "accident".

2. The Appellant was charged with first degree murder. After a jury trial, he was acquitted of that charge as well as the included offence of manslaughter. Based on numerous errors in the jury charge, the Alberta Court of Appeal unanimously allowed a Crown appeal and ordered a new trial on first degree murder. The Appellant was granted leave to appeal to this Court.

3. The Appellant alleges the Court of Appeal did not act fairly in ordering a new trial based on issues raised of its own motion and on alternate Crown theories and positions. He argues that the interveners exceeded the proper limits of intervention, and complains about initially having been denied a complete transcript of the appeal hearing. He further argues that the Court erred in its treatment of motive, failed to properly address the instruction on after the fact conduct, erred in its treatment of prior sexual conduct evidence, and erred in finding the Trial Judge committed legal errors in instructing on manslaughter.

4. The Appellant's grounds lack merit. The appeal was handled fairly and properly by the Court of Appeal. The Court did not improperly raise new issues or order a new trial based on contrary Crown positions; nor did the Crown advance alternate theories of liability. The participation of the interveners did not affect the fairness of the appeal, and the transcript issue is moot as the Appellant has now been provided a complete transcript of the appeal hearing. The Court correctly found the Trial Judge erred in admitting presumptively inadmissible and highly prejudicial evidence of other sexual activity in the absence of a section 276 *voir dire*. It properly concluded there were numerous errors in the instruction on motive, after the fact conduct, sexual assault, consent and manslaughter. The decision of the Court ordering a new trial on first degree murder is correct. The appeal should be dismissed.

Facts

5. On June 20, 2011, the Appellant checked into room 139 of Edmonton's Yellowhead Inn. At the time, he was employed as a driver for a moving company. He and his work colleagues (including Kevin Atkins and John Sullivan) were in the area as part of a multi-day move.

Cindy Gladue

6. On the evening of June 21, 2011, hotel surveillance captured Gladue in the hotel bar with the Appellant and Atkins. At approximately 12:42 am, Gladue and the Appellant were captured walking to and entering the Appellant's room. Gladue's gait was uneven, and she appeared to grab towards a wall and lean on the Appellant at various times.[1] Gladue was never seen alive again. A hotel guest in the adjacent room reported hearing a loud thud from the Appellant's room that morning at approximately 2:00 am.[2]

7. The same morning (June 22, 2011), at approximately 8:08 am, police and hotel staff attended the Appellant's hotel room in response to his 911 call. When they arrived, the Appellant was sitting on a bed. A bloody bedspread was on the ground next to the bed. Gladue was lying in the bathtub. She was naked, covered in blood, and deceased.[3] She had died from blood loss from a wound inside her vagina. The perforation was more than 11 cm long and it went completely through, and ran almost the full length of, her vaginal wall. She also had an injury to her labia and bruising between her anus and vagina. Her blood alcohol level was 340 milligrams percent per 100 milliliters of blood (more than four times the legal limit).[4]

8. The Crown and defence experts were divided on the nature and cause of the fatal wound. Dr. Dowling, the medical examiner, opined that it was a cut caused by a sharp instrument. The defence expert (who conceded having no expertise in the factors impacting the strength of a vaginal wall) opined that it was a laceration caused by blunt force trauma. Dr. Dowling testified that if the wound was caused by blunt trauma, "considerable" or "excessive" force would have

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[1] *R v Barton* Reasons for Judgment Reserved ("RJR"), 2017 ABCA 216 at para 13 [Appellant's Record ("AR"), Vol I, Tab 2 at 4]
[2] RJR at para 41 [AR, Vol I, Tab 2 at 21]; Roxanne Skiba's testimony at 20/16-23/23 [Respondent's Record "RR", Tab 3]
[3] RJR at para 24 [AR, Vol I, Tab 2 at 17-18]; Daniel Chartrand's testimony at 5/9-13/1 [RR, Tab 2]; Cst. Sled's testimony at 24/4-29/40 [RR, Tab 4]
[4] RJR at paras 2-3, 28, 30-32, 42 [AR, Vol I, Tab 2 at 12, 18-19, 21]; Autopsy Report marked exhibit 25 [RR, Tab 8 at 48-54]; Toxicology Report marked exhibit 22 [RR, Tab 7 at 47]

been required. He described "considerable force" as being enough force that an "independent person would say, you know, you're going to hurt that person".[5]

The Appellant's after the fact conduct

9. On June 22, 2011, at approximately 7:43 am, the Appellant attended the front desk in his work clothes and checked out of his room. He went to the parking lot and discussed work with Atkins.[6] He then called Sullivan from his cell phone and waited in the driver's seat of his running vehicle. Sullivan arrived and said they were going to have a good day. The Appellant replied "not until the police come". He stated there was a girl bleeding in his room. He claimed she had knocked on his door the night before and asked if she could have a shower. Sullivan told him to call 911. They talked for four or five minutes before the Appellant returned to the hotel. Sullivan drove to the work site with the Appellant's duffle bag.[7]

10. At 7:51 am, hotel surveillance captured the Appellant at the hotel lobby doors. At 7:56 am, he appeared in the hallway with a coffee cup in his hand. He requested a new key card from the hotel clerk for his room, claiming to have forgotten some papers. At 7:58 am, he walked back to his room. At 8:03 am, he used the room phone to call 911.[8]

11. The Appellant told the 911 operator that he woke up and there was a girl in his tub covered in blood. He didn't know her. He let her in the night before at around 10:30 pm to have a shower. He fell asleep. He told the operator he was "shaking like crazy" and "scared shitless". He was still on the phone when hotel maintenance and police arrived. The maintenance worker testified the Appellant displayed no emotion.[9]

12. After police arrived, the Appellant was escorted to a police vehicle. He stated "I didn't do anything" and "I'm married, and I don't do this stuff"[10] Atkins testified that he spoke with

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[5] RJR at paras 29-31 [AR, Vol I, Tab 2 at 18-19]; Dr. Dowling's testimony at 77/34-78/17, 79/15-24, 106/38-107/17 [AR, Vol IV, Tab 34]
[6] RJR at para 20 [AR, Vol I, Tab 2 at 17]; Kevin Atkins' testimony at 117/39-119/41, 144/25-145/31 [AR, Vol III, Tab 26]
[7] RJR at para 21 [AR, Vol I, Tab 2 at 17]; John Sullivan's testimony at 19/25-27/3, 29/19-30/8, 56/18-59/24 [AR, Vol III, Tab 23]
[8] RJR at para 22 [AR, Vol I, Tab 2 at 17]; Veronica Chysyk's testimony at 1/6-4/26 [RR, Tab 1]
[9] 911 call at 38/5-14, 38/27-40/2, 43/10-44/8, 45/10-46/6 [RR, Tab 6]; RJR at paras 23, 72 [AR, Vol I, Tab 2 at 17, 28]; Daniel Chartrand's testimony at 7/37-8/2, 13/11-19/18 [RR, Tab 2]
[10] RJR at para 24 [AR, Vol I, Tab 2 at 17-18]; Cst. Jones' testimony at 35/13-14 [RR, Tab 5]

the Appellant again later that day. When Atkins asked what happened, the Appellant stated "they" had gone back to his room where they talked and started to fool around. While he was "fingering her", she was bleeding or started to bleed. He said enough of that and passed out.[11]

13. After Gladue's cause of death was confirmed, the Appellant was arrested. On June 27, 2011, he was in a transport vehicle with an undercover police officer ("UC"). He told the UC that he had rented a hotel room but let his two "swampers" (movers) sleep in it while he slept in his truck. The next morning, he walked into the destroyed room to have a shower and found a girl sitting in the bathtub covered in blood. He phoned the cops right away.[12] He later told the UC that he went outside after he found the body and asked where the two men were. When he found out they split, he told an unidentified person to take the truck and get the job done because he had something to do. He went back inside and phoned the cops, but didn't go in the room.[13]

14. The Appellant also told the UC that, if he had done it, he would have buried her. He would have wrapped her up in his carry out or truck and cleaned the room. She would have disappeared down the highway 2000 miles away. He stated that he phoned the cops because he didn't do anything wrong to the girl and didn't touch her. He said he wasn't even there.[14] He repeatedly claimed that the "swampers" were on the run.[15]

The Physical Evidence

15. An expert in bloodstain pattern analysis opined that: the blood patterns within the bathtub, on its edges, and on its water taps were consistent with Gladue repeatedly moving within the bathtub while actively bleeding; there was evidence that the bedding had been re-arranged; and, there were clean-up activities in respect to the bedding and bathroom. The expert did not observe any blood on the carpet between the bed and the bathroom.[16]

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[11] Kevin Atkins' testimony at 124/2-125/34 [AR, Vol III, Tab 26]
[12] Appellant's statements to undercover officer at 57/15-59/11, 60/17-61/13, 67/17-69/4 [RR, Tab 9]
[13] *Ibid* at 69/8-70/3 [RR, Tab 9]
[14] *Ibid* at 70/12-16, 86/6-24, 108/17-109/26, 119/17-20, 135/7-24, 149/25-151/1 [RR, Tab 9]
[15] *Ibid* at 61/2-13, 67/20-68/20, 110/10-23, 128/6-129/26, 138/8-13, 146/13-147/1 [RR, Tab 9]
[16] RJR at paras 38-41 [AR, Vol I, Tab 2 at 20-21]; Cst. Allen's testimony at 245/6-257/20 [AR, Vol III, Tab 31]

16. Police searched the garbage containers inside and outside the hotel for evidence. They located a hand towel with small red stains in one of the exterior bins. It contained Gladue's blood and the DNA of both Gladue and the Appellant.[17]

The Appellant's testimony

17. The Appellant testified that he had first met Gladue on June 20, 2011. He saw a "native fella" wandering around outside the hotel and asked if he had any lady friends (prostitute/call in girl). The man returned with Gladue. The Appellant and Gladue spoke for five to ten minutes and he agreed to pay $60 for "everything" (defined as "intercourse, sex"). They went to his room and took off their clothes. She put his penis in her mouth. After two or three minutes, he started "playing around" with her vagina (gradually putting four fingers in and out her vagina). This went on for about five to ten minutes while she sucked his penis. When he was all good to go and ready, he took his hand out and she removed her mouth. He put her legs on his shoulders and had sex until he ejaculated. She cleaned up, they exchanged phoned numbers, and she left.[18]

18. The Appellant testified that he called Gladue the next night (June 21, 2011). She joined him and Atkins in the hotel bar. Before going to his room, there was small talk and "she [knew] what she was coming for". They agreed to the same price as the night before. After they had a beer in the room, she went to the bathroom and he hid his wallet. She came out naked and sat on the edge of the bed. She pulled him in and gave him oral. Eventually, he started "playing" with her vagina (gradually placing four fingers inside her vagina in a conical shape about 1-2 cm past his knuckles for 10 minutes). The Appellant confirmed that he was "thrusting" harder, farther, and longer than the night before. When he removed his hand, he noticed blood. He decided he didn't want intercourse and refused to pay. He told her to wash up and leave. When she went to the washroom, he fell asleep.[19]

19. The Appellant testified that he woke up between 7:20 and 7:25 am (June 22, 2011). He stepped into the bathroom and saw Gladue in the bathtub. There was blood everywhere and he stepped in it. He panicked and grabbed a towel. He wet the towel and cleaned his feet and

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[17] RJR at paras 19, 43, 66 [AR, Vol I, Tab 2 at 17, 21, 27]
[18] RJR at paras 13, 113 [AR, Vol I, Tab 2 at 15, 39]; Appellant's testimony at 234/1-239/17 [AR, Vol IV, Tab 39]
[19] RJR at paras 13-15, 114 [AR, Vol I, Tab 2 at 15-16, 39]; Appellant's testimony at 248/23-258/39, 259/39-262/8 [AR, Vol IV, Tab 39]; 78/8-24, 79/11-40, 80/41-82/1 [AR, Vol V, Tab 40]

wiped the floor. He quickly grabbed everything in his room and got out. He ran out the back door to the parking lot and threw the towel into a garbage can. He threw his bag into his van, returned to the hotel, and checked out at the front desk. He went to the coffee shop for a coffee, before returning to the parking lot.[20]

20. At the time he inflicted the fatal wound, the Appellant was 6'1" and 220 pounds. His left hand measured 14 cm (about 5 ½ inches) from the tip of his middle finger to the one cm beyond the knuckle he claimed to have inserted into Gladue. In the conical shape he alleged to have used, the widest part at his knuckles was approximately 11 cm (about 4 ¼ inches across).[21] Gladue was 5'5" and 110 pounds.[22]

The Crown and the Appellant positions on available verdicts

21. At trial, the Crown and the Appellant took the position that a verdict of second degree murder was not available because section 231(5) of the *Code* makes murder first degree if death is caused during the commission of an enumerated offence (such as sexual assault, sexual assault with a weapon or sexual assault causing bodily harm).[23] As a result, the only possible verdicts were first degree murder, manslaughter, or acquittal. They further agreed that the jury could only find the Appellant guilty of murder if they also found that the fatal wound was a sharp injury. If they found he caused a blunt force injury by way of manual penetration, he could only be found guilty of manslaughter.[24] As a result, murder based on blunt force injury was taken off the table.

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[20] RJR at paras 18-20 [AR, Vol I, Tab 2 at 16-17]; Appellant's testimony at 262/34-265/34 [AR, Vol IV, Tab 39]
[21] RJR at para 16 [AR, Vol I, Tab 2 at 16]
[22] RJR at para 28 [AR, Vol I, Tab 2 at 18]
[23] JC submissions at 114/33-115/31 [AR, Vol VI, Tab 48]; *Criminal Code*, RSC 1985, c C-46, s 231(5)
[24] JC submissions at 172/18-173/5 [AR, Vol VI, Tab 48]

PART II – STATEMENT OF ISSUES

Ground I: Did the ABCA's approach compromise the fundamental fairness of the appeal?

Response: The ABCA's approach did not compromise the fundamental fairness of the appeal.

Ground II: Did the ABCA err in its treatment of motive?

Response: The ABCA properly held the Trial Judge erred in both charging on motive and providing an unbalanced instruction.

Ground III: Did the ABCA correctly address the Trial Judge's charge with respect to post-offence conduct?

Response: The ABCA correctly found the charge on after the fact conduct was deficient, misleading and incorrect.

Ground IV: Did the ABCA err in its treatment of the evidence of prior sexual activity?

Response: The ABCA correctly held that the failure to conduct a section 276 *voir dire*, resulting in the admission of inadmissible and prejudicial evidence of other sexual activity, warranted a new trial on murder.

Ground V: Was the offence of unlawful act manslaughter properly explained to the jury?

Response: The ABCA correctly concluded the jury was not properly instructed on sexual assault, consent, and unlawful act manslaughter.

PART III – ARGUMENT

Ground 1 – Did the ABCA's approach compromise the fundamental fairness of the appeal?

22. The Appellant alleges that the Court of Appeal compromised the fundamental fairness of the appeal by improperly raising new issues and ordering a new trial on Crown positions contrary to those taken at trial. He also complains that he was initially denied a transcript of the appeal hearing and that the interveners failed to comply with the order granting them leave. His arguments lack merit.

Governing Principles

23. An appellate court's discretion to raise a new issue should be exercised in rare circumstances; when failing to do so would risk an injustice. Where there is good reason to believe that the result would have realistically differed had the error not been made, the risk of injustice warrants intervention.[25] Where a new issue is raised, there must be both notification to the parties and the opportunity to respond.[26]

24. An issue is new when it raises a new basis for potentially finding error in the decision beyond the grounds of appeal framed by the parties; it is legally and factually distinct from the grounds of appeal and cannot be said to stem from them. Not all questions asked by an appeal court will constitute new issues; appellate courts enjoy a broad jurisdiction to ask questions during the oral hearing.[27]

25. The Crown is, generally, not entitled to present a new/alternate theory of liability on appeal. In such circumstances, appellate courts may decline to order a new trial. To do otherwise would violate the principle that an accused is entitled to know the case to be met and the Crown must present its case at trial to avoid putting an accused in jeopardy more than once.[28]

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[25] *R v Mian*, 2014 SCC 54 at paras 41, 45-46
[26] *Ibid* at paras 54-59. See also *R v Suter*, 2018 SCC 34 at para 33
[27] *Ibid* at paras 30-35
[28] *Wexler v R*, [1939] SCR 350; *Savard and Lizotte v R*, [1946] SCR 20; *R v Egger*, [1993] 2 SCR 451 at 480-81; *R v Penno*, [1990] 2 SCR 865 at 895-96. See also *R v Suarez-Noa*, 2017 ONCA 627 at paras 26-39; *R v Tran*, 2016 ONCA 48 at paras 1-4; *R v Varga*, 1994 CarswellOnt 73 (CA)

26. An appellant will not, generally, be permitted to advance contradictory positions on appeal. There is no rule that a Crown failure to object to misdirection in a jury charge bars a Crown appeal from acquittal.[29] Counsel's position at trial will not be determinative when misdirection or non-direction is raised as a ground of appeal. A legal error remains a legal error even if counsel does not object to, or supports, the erroneous instruction.[30]

27. Although jury charge discussions can provide invaluable assistance in crafting correct charges, it remains the role of the trial judge to instruct the jury on all relevant questions of law arising on the evidence. In some cases, those instructions will not accord with the positions advanced by counsel.[31]

Application to Instant Case

28. An examination of the evidentiary record and the relevant jurisprudence confirms that the Court of Appeal did not compromise the fairness of the appeal by improperly raising new issues or by ordering a new trial based on alternate Crown theories or reversed Crown positions. A brief background is provided first for context.

Background

29. The appeal hearing commenced on September 6, 2016. The Court immediately advised counsel that it would be asking a lot of questions on a number of issues, that some of these were on issues not canvassed, and that written submissions may be invited.[32] Throughout the hearing, the Court confirmed that time was not an issue and it extended the hearing to a second day. When requested, the Court provided counsel with an opportunity to reflect or research issues. The Court also reiterated that additional written submissions could be provided if necessary.[33]

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[29] *Cullen v R*, [1949] SCR 658 at 664-5. See also *R v George*, [1960] SCR 871 at 873-77, 890 (included offences); *R v Cousins*, 1997 CarswellNfld 168 at paras 11-25 (CA); *R v Druken*, 2002 NFCA 23 at paras 41-46 (included offences); *R v Budai*, 2001 BCCA 349 at paras 56-60, 108, 114

[30] *R v Polimac*, 2010 ONCA 346 at para 97; *R v Daley*, 2007 SCC 53 at paras 27, 32, 58; *R v Jacquard*, [1997] 1 SCR 314 at para 37. See also *R v Barabash*, 2015 SCC 29 at para 54

[31] *R v Pickton*, 2010 SCC 32 at para 27; *R v Chahal*, 2018 ABCA 132 at paras 10-14

[32] ABCA hearing at 172/40-173/4 [AR, Vol II, Tab 17]

[33] ABCA hearing at 202/28-37, 218/28-220/13, 223/4-11, 239/34-240/26, 274/30-31, 282/26-283/11, 288/4-18, 334/22-335/11, 361/27-36, 366/21-367/17 [AR, Vol II, Tab 17]

30. On the hearing's first day, the Appellant expressed concern with the Court's comments that other grounds of appeal should have been advanced. The Court responded that it would be important to highlight potential problems in the event a new trial was ordered. It also confirmed that some of the questions related to issues already raised. The Appellant advised he was prepared to answer all questions, but cautioned it would be unfair to allow the appeal on a factual scenario and legal submissions not advanced at trial. The Court acknowledged the principle, noted it was reinforced in *Mian*, and acknowledged that it was not its role to make up other theories for the Crown. It confirmed (and the Appellant agreed) that appellate courts are always able to pronounce on the law, and reiterated where the Crown was not pursuing new paths to liability.[34] The next day, the Appellant confirmed that the Court could only interfere where there were true mistakes of law as opposed to Crown theories not advanced.[35]

31. At the end of the hearing, the Court reserved. On June 30, 2017, the Court released its decision. Significantly, at no point in the hearing or ensuing nine months did the Appellant's "very experienced" counsel ever request an opportunity to provide additional submissions.[36]

The Court of Appeal did not improperly raise new issues

32. The Appellant alleges that the Court of Appeal improperly raised new issues at the appeal hearing; specifically, wilful blindness, criminal negligence, consent to bodily harm, and after the fact conduct ("ATFC"). An examination of the evidentiary record and the Court's reasons confirms that the first three issues formed no part of the Court's decision and the latter was properly raised.

33. First, with respect to wilful blindness, the Court of Appeal asked the Crown why the jury was not charged on this in relation to murder thereby denying another pathway to conviction. The Crown responded that it was not included in the charge due to its position at trial (first degree murder based on the use of a knife). The Crown also advised that its inclusion on manslaughter was sought, but the Appellant argued it was not realistic on the evidence. The Crown agreed that this was a fairness issue and confirmed that it was not arguing that the jury

[34] ABCA hearing at 273/39-277/22 [AR, Vol II, Tab 17]
[35] ABCA hearing at 292/26-297/36 [AR, Vol II, Tab 17]
[36] ABCA hearing at 241/3-5 [AR, Vol II, Tab 17]

ought to have been instructed on wilful blindness if it found a knife was not used.[37] In its decision, the Court restricted its analysis of wilful blindness to sexual assault.[38]

34. Second, with respect to criminal negligence, the Court of Appeal asked the Crown if the Trial Judge erred in failing to instruct the jury on manslaughter on this avenue of liability. The Court was aware that there was a discussion on this issue at trial and that the Trial Judge concluded that only unlawful act manslaughter would be charged. The Crown submitted to the Court that the evidence did not support that pathway to conviction.[39] In its decision, the Court confirmed that the trial Crown's decision not to pursue this avenue of liability fell within prosecutorial discretion and did not address the matter further.[40]

35. Third, with respect to consent to bodily harm, the Crown and Appellant provided extensive oral and written submissions on the separate pathways to manslaughter. At trial and on appeal, the Crown assumed the correctness of the Ontario judiciary's interpretation of the *Jobidon* pathway in the context of sexual assault causing bodily harm. In its decision, the Court of Appeal confirmed that it remained an open issue and declined to definitely resolve the issue.[41]

36. Finally, with respect to ATFC, the Court recognized that this was a new issue.[42] And, it properly raised it. A legally correct instruction on ATFC was crucial for the jury to assess a key issue at trial – credibility. The Appellant's credibility was inextricably linked to the jury's analysis of both murder and unlawful act manslaughter. Unfortunately, the charge provided was marked by misdirection and non-direction. As the Court of Appeal correctly noted, it was "inaccurate, incomplete, inconsistent and, in the end, incomprehensible".[43]

37. The Appellant did not suffer any procedural unfairness. The Court raised the issue on the first day during Crown submissions. When the Crown requested an opportunity to think about the issue and provide written submissions, the Court agreed.[44] The Appellant addressed the issue

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[37] ABCA hearing at 197/4-13, 199/2-201/36 [AR, Vol II, Tab 17]
[38] RJR at paras 82, 225-229, 238 [AR, Vol I, Tab 2 at 31, 73-74, 77]
[39] ABCA hearing at 234/40-235/21, 238/2-239/29 [AR, Vol II, Tab 17]
[40] RJR at footnote 76 [AR, Vol I, Tab 2 at 56]
[41] RJR at paras 47, 301-303 [AR, Vol I, Tab 2 at 22, 95-96]
[42] RJR at para 46 [AR, Vol I, Tab 2 at 22]
[43] RJR at paras 74-75 [AR, Vol I, Tab 2 at 29]
[44] ABCA hearing at 212/23-215/7, 218/24-219/33 [AR, Vol II, Tab 17]

the following day. He did not request an opportunity to provide further submissions during or after the hearing.[45]

38. The Appellant also argues that the Court of Appeal's general disregard for due process norms was further exemplified by the remedy imposed (new trial on murder) for the failure to conduct a section 276 hearing. He complains that the parties were asked no follow up questions when each submitted at the hearing that the appropriate remedy on this ground was a new trial on manslaughter. As the Court confirmed, however, it was not bound by counsel's positions as to remedy on a point of law. This Court has also confirmed that remedy is not a "new issue".[46]

The Court of Appeal did not order a new trial based on new Crown theories of liability

39. The Appellant also alleges that the Court of Appeal ordered a new trial on new/alternate Crown theories and reversed Crown positions. His complaints rest on a misapprehension of the jurisprudence, legislation, and evidentiary record.

40. First, the Crown did not appeal the acquittal based on new/alternate theories of liability. To the contrary, the Crown was careful not to do that. As previously noted, at the hearing, the Crown confirmed that it was not advancing non-direction on wilful blindness in the context of murder or criminal negligence in the context of manslaughter as legal errors.

41. Second, the Court of Appeal did not order a new trial based on reversed Crown positions. On the manslaughter instruction, the Crown at trial repeatedly expressed the need for instructions on objective foreseeability and dangerousness.[47] The Crown maintained this position on appeal, but also addressed the need to evaluate consent in the context of objectively foreseeable risk of bodily harm when considering sexual assault causing bodily harm. The instruction ultimately provided on both was replete with error.

42. As for ATFC, the Crown's proposed instruction (ATFC was proof the Appellant knew he committed an unlawful act) was not the instruction ultimately provided (the jury could not infer

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[45] ABCA hearing at 286/41-287/20, 349/14-352/2 [AR, Vol II, Tab 17]
[46] CA letter to Appellant [AR, Vol III, Tab 19 at 4-5]; *Mian*, *supra* note 25 at para 35
[47] JC submissions at 179/40-180/25, 184/20-185/36, 242/4-11, 243/26-244/19 [AR, Vol VI, Tab 48]; 275/38-285/29, 287/15-27 [AR, Vol VII, Tab 52]; Crown closing address at 238/21-26, 243/39-248/10 [AR, Vol V, Tab 44]; JC submissions at 87/27-96/20, 107/18-110/24 [AR, Vol VIII, Tab 54]

from ATFC that the Appellant was guilty of any offence).[48] The instruction provided was a clear legal error.[49] The misdirection was accompanied by non-direction. The key issue at trial was credibility, yet the jury was never instructed that it could use ATFC in assessing same.[50] The Crown's failure to object to the final instruction, while a consideration, was not conclusive and could in no way be characterized as a strategic or tactical decision.

43. Finally, with respect to section 276, the Appellant misapprehends the nature and effect of the section. An accused cannot adduce evidence of other sexual activity without an application, hearing, and ruling. Nor can the Crown waive an accused's compliance with this mandatory scheme.[51] The Crown's failure to object in this case must be examined in the context of the offence charged. Murder is not one of the enumerated offences and, as the Court of Appeal noted, the little academic commentary on this issue is divided.[52] Section 276 was not raised until the end of the trial when the parties began discussing the correct charge on sexual assault. In the final analysis, the fact that presumptively inadmissible evidence engaging the twin myths was adduced without the necessary limiting instructions (mid-trial or final) was fatal.

The interveners did not compromise the fairness of the appeal

44. In their application for leave to intervene, the Women's Legal Education and Action Fund and the Institute for the Advancement of Aboriginal Women proposed to address the definition of "sexual activity" in section 273.1(1), provide a substantive equality analysis of the meaning of consent, and make observations on the procedure required by section 276. The application was granted because they had contributed helpful interventions in many cases, particularly those concerning gender discrimination.[53]

45. It is the Respondent's submission that the interveners did not compromise the fundamental fairness of the appeal. They focused on "consent" and section 276, issues already raised by the Crown. They addressed them in the context of Indigenous women and women

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[48] JC submissions at 156/28-157/3, 248/2-14 [AR, Vol VI, Tab 48]; JC at 148/29-31, 149/18-19 [AR, Vol I, Tab 7]
[49] RJR at paras 63-69 [AR, Vol I, Tab 2 at 26-28]
[50] RJR at paras 70-73 [AR, Vol I, Tab 2 at 28-29]
[51] RJR at paras 111-112 [AR, Vol I, Tab 2 at 38-39]; *R v AJB*, 2007 MBCA 95 at para 51
[52] RJR at para 101 [AR, Vol I, Tab 2 at 36]
[53] Reasons for Decision, 2016 ABCA 68 at paras 11-12 [AR, Vol I, Tab 1 at 4]; Interveners Memorandum of Argument [AR, Vol II, Tab 16 at 127-168]

engaged in prostitution.[54] They provided no submissions on two of the grounds upon which the Court ordered a new trial (ATFC and motive).[55]

The transcript issue is moot

46. Following the release of the Court of Appeal's decision, the Appellant wrote the Chief Justice. He expressed concerns with aspects of the decision and requested a transcript of the hearing. He was provided portions of the transcript relevant to the concerns raised. After he was granted leave to appeal to this Court, he renewed his transcript request and the Court complied.[56]

47. The Appellant now seeks to have this Court impose administrative rules on appellate courts. Although the Respondent concedes that there are occasions where transcripts should be provided upon request (an unrepresented accused or the raising of new issues), this Court should exercise caution in imposing broad rules where the issue has been rendered moot, no prejudice has been demonstrated, and the requisite foundation is lacking.

Ground 2 – Did the ABCA err in its treatment of motive?

48. The Court of Appeal did not err in its treatment of motive. Motive refers to the ulterior motivation of a person in committing an offence. The Court correctly noted that while evidence of the existence of motive is usually admissible, the Crown is not required to prove motive as a matter of law. There are two reasons for this. First, many people who commit criminal offences do not have a specific motive for doing so.[57] As stated in *R v O'Grady*, "to deny motive in an apparently motiveless crime simply does not lead anywhere."[58] Second, Parliament defines crimes on the basis of the relevant *actus reus* and *mens rea*, and rarely makes motive an essential ingredient to an offence. Motive is not a statutory element of the crimes alleged in this case, being murder or manslaughter, or the alleged underlying offence of sexual assault.[59]

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[54] Interveners Factum [AR, Vol II, Tab 14 at 51-75]
[55] CA hearing at 232/38-233/4, 235/2-6, 235/34-237/26 [AR, Vol II, Tab 17]. See also RJR at paras 117-118 [AR, Vol I, Tab 2 at 39-40]
[56] Appellant's letter to CA dated July 6, 2017 [AR, Vol III, Tab 18]; CA's letter to Appellant dated August 17, 2017 [AR, Vol III, Tab 19]; Appellant's letter to CA dated April 19, 2018 [AR, Vol III, Tab 20]; CA's letter to Appellant dated April 24, 2018 [AR, Vol III, Tab 21]
[57] *R v Lewis*, [1979] 2 SCR 821 at 833-35; *R v Cloutier*, [1979] 2 SCR 709 at 735
[58] *R v O'Grady*, 1999 BCCA 189 at para 17
[59] *R v Lutoslawski*, 2010 ONCA 207 at para 36. See also *R v GB*, 2009 BCCA 88 at paras 18-30

49. Trial judges are required to instruct on motive only where the Crown has adduced evidence of motive or the defence has proved absence of motive. Otherwise the decision to refer to motive in the jury charge falls within the general discretion of the trial judge. The decision will not be interfered with unless the trial judge misdirects himself or his decision is so clearly wrong as to amount to an injustice. Motive is always fact and evidence based.[60] Contrary to the Appellant's suggestion, there is no reason to believe the Court of Appeal misunderstood the standard of review applicable to the exercise of a trial judge's discretion.

50. Until now, this Court and provincial appellate courts have dealt with cases where trial judges' decisions to refuse to charge on motive have been upheld in circumstances where there was no mandatory obligation to provide such a charge.[61] This Court has not yet considered situations such as the present case where the Trial Judge instructed on motive when he ought not to have. Although it was within the Trial Judge's discretion to charge on motive in this case (the Crown did not adduce evidence of motive and the defence did not prove absence of motive), his decision to provide an instruction on motive in this case was clearly wrong and amounted to an injustice. Motive was completely irrelevant because: (1) the Crown had adduced no evidence of motive;[62] (2) identity was not in issue;[63] (3) the absence of motive was not destructive to any element of the Crown's case;[64] and (4) the motive was not readily apparent and could only have been known to the Appellant.[65] No plausible motive had ever been suggested, either for the Appellant, or anyone else. This is comparable to child abuse cases where the motive for abusing one's child may not be obvious.

51. As correctly held by the Court of Appeal, to instruct on motive might have left the jury with the impression that the Crown's case was deficient because the Crown failed to prove motive. The fact of charging on motive signaled to the jury that it was relevant to their

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[60] *Lewis, supra* note 57 at 833, 835-38, 841, 847-48; *R v Thompson* (1992), 19 BCAC 303 at para 27; *Elsom v Elsom*, [1989] 1 SCR 1367 at 833, 835-38, 841, 847-48

[61] *Lewis, supra*, note 57 at 841-42, 847; *O'Grady, supra* note 58; *R v Ilina*, 2003 MBCA 20 at paras 62-63; *R v Kennedy* (1991), 1 OR (3d) 464 (CA) at 10-12; *R v Cook*, 1997 CarswellQue7 at para 45 (CA); *R v Edgar* (2000), 128 OAC 125 at paras 57-58; *R v Vokurka*, 2013 NLCA

[62] *R v Williams*, (1985), 7 OAC 201 at 32-34

[63] *Lewis, supra* note 57 at 833-34, citing *R v Imrich* (1974), 6 OR (2d) 496, 1974 CarswellOnt 570 (CA) at 11-12; *R v Teerhuis-Moar*, 2010 MBCA 102 at para 58

[64] *Lewis, supra* note 57 at p 836, citing *Imrich, supra* note 63 at 13

[65] *O'Grady, supra* note 58 at para 17

deliberations; otherwise why charge on this issue at all. Furthermore, contrary to the Appellant's assertion, there was no need for the Court of Appeal to explicitly review the evidence or assess how an absence of motive could have affected the defence case because motive was irrelevant.

52. The cases have distinguished between the *absence of evidence of motive* and *proved absence of motive* and held that only the latter requires an instruction on motive.[66] In the instant case, the Trial Judge had declined to find proved absence of motive.[67] Notwithstanding, the Appellant attempts to re-argue this by citing evidence allegedly proving the Appellant had no motive to commit a crime.[68] This argument had already been rejected by the Trial Judge and should similarly be rejected by this Court. Significantly, even if there had been proved absence of motive, it would have been immaterial since this was a crime committed for no apparent reason.[69] Also, evidence such as visiting the hotel on many occasions, being known to the hotel staff and registering for his room in his own name is evidence of lack of premeditation, not evidence of lack of motive. Premeditation was not relevant in this case.

53. Moreover, the motive instructions were unbalanced. Where the Crown provided no evidence of motive, an instruction that proof of motive for the commission of an offence may be of assistance implied that the Crown's case was somehow deficient because it never proved motive.[70] Importantly, it was extremely misleading and prejudicial to the Crown to instruct that: "If you conclude that Bradley Barton had no motive to commit a particular offence, it would be an *important fact* for you to consider. It is a factor that might support Mr. Barton's denial of guilt and raise a reasonable doubt that the Crown has proven its case."[71] This instruction is misleading because the absence of motive was not an important fact at all. It is significant to note this was the only time during the entire jury charge that the trial judge characterized something as "important." The unfairness was exacerbated by the Appellant's comment in his closing address to the jury: "The Crown doesn't have to prove he had a motive, but when you

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[66] *Lewis*, *supra* note 57 at 835, 837; *R v White* (1996), 91 OAC 321 at 45; *Teerhuis-Moar*, *supra* note 63 at para 60; *O'Grady*, *supra* note 58 at para. 16; *R v Guyatt* (1997), 97 BCAC 106 at para 100

[67] JC submissions at 142/35-143/26 [AR, Vol VI, Tab 48]. See also *White* (1996), *supra* note 66 at 45; and *Ilina*, *supra* note 61 at para 50

[68] Appellant Factum at para 55; Appellant closing address at 198/24-199/17 [AR, Vol V, Tab 43]

[69] *O'Grady*, *supra* note 58 at para 17

[70] JC at 146/30-31, 37-38 [AR, Vol I, Tab 7]

[71] JC at 147/2-5 [AR, Vol I, Tab 7] (emphasis added)

don't have motive in this clear-cut of a situation, it should raise serious concerns about the theory of the Crown's case."[72]

54. The charge was additionally confusing because it did not specify what conduct the motive was in relation to – whether it was to kill the complainant, to hurt the complainant, to commit another offence, or something else.

55. Finally, the Appellant argues the Court of Appeal wrongly criticized the charge on the basis that the jury was not told how a more generalized purpose or attitude, including an *animus* against a person or persons and the desire to use a sex trade worker in an objectifying or dehumanizing manner for personal gratification, could qualify as motive. The Appellant argues there is no mandatory form of instruction for absence of motive. However, the Court emphasized they were not deciding that instructions to this effect *should have been given*. They were merely referring to animus to underscore that what *was* said about motive was not only erroneous but unbalanced. In addition, the Court was not speculating about matters not in evidence. There *was* evidence to suggest that the Appellant had a "generalized purpose or motive" with respect to objectifying sex trade workers. For example, the Appellant offered Atkins a "piece" of Gladue after having earlier (falsely) reassured Gladue's male friend that she would be with the Appellant only.

Ground 3 – Did the ABCA correctly address the Trial Judge's charge with respect to post-offence conduct?

56. The Court of Appeal properly found the Trial Judge's charge regarding ATFC to be inaccurate, incomplete, inconsistent, and incomprehensible. The ATFC consisted of cleaning up the scene, disposing the bloody towel that would have contained his DNA and Gladue's blood into a garbage bin outside the hotel, leaving the hotel, getting into a running van and only returning later to the hotel room, and lying to six different people about key facts (Sullivan, the hotel clerk, the 911 operator, the initial investigating officer Constable Jones, Atkins and the UC). As noted by the Court, these actions fell into several recognized types of relevant ATFC: destruction of evidence, concealing of evidence, erasing a link to the scene, and concoction and fabrication of lies. A more complete summary of the ATFC is set out in Appendix A.[73]

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[72] Appellant closing address at 198/24-199/16 [AR, Vol V, Tab 43]
[73] ATFC Summary [Appendix A]

57. The Court of Appeal correctly observed that ATFC may support certain inferences, including that the Appellant: (1) did not act lawfully (unlawful conduct or culpable act – consciousness of guilt); and (2) should or should not be believed (credibility). The Court properly concluded that the Trial Judge erred in the jury instructions on both issues. As well, the jury was not instructed they could consider whether the ATFC was out of all proportion to the Appellant's stated rationale for covering up his actions (hiding from his wife and employer the fact he had sex with another woman). These errors met the test in *Graveline* and, on their own, justified a new trial on first degree murder.[74]

58. The jury was given the following erroneous instructions on whether they could infer guilty conduct from the ATFC:

> You cannot infer that Mr. Barton is *guilty of any offence* as a result of his after the fact conduct, but it may be used to assess his claim that Cindy Gladue's injury was an accident.[75]
>
> This evidence *might only be used to draw an inference* relating to Ms. Gladue's injuries being accidental.[76]

59. The Court of Appeal correctly held this wording led the jury to wrongly believe that the ATFC was not logically and legally capable of supporting an inference that the Appellant was aware he had committed an unlawful act. It left them with the mistaken impression they could only use this evidence to assess the Appellant's claim that Gladue's injuries were accidental. Even then, the jury was not clearly told how this evidence related to any claim of "accident". The Court noted these instructions were contradicted by other accurate portions of the charge directing the jury they could infer guilt in certain circumstances, which further confused the jury.[77]

60. The Appellant claims it was the Crown who suggested the wording on the ATFC instruction found problematic by the Court of Appeal. Even if true, it would not be fatal. A trial judge bears primary responsibility for properly instructing the jury.[78] That said, the Crown

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[74] *R v Graveline*, 2006 SCC 16 at para 14
[75] JC at 148/29-31 [AR, Vol I, Tab 7] (emphasis added)
[76] JC at 149/18-19 [AR, Vol I, Tab 7] (emphasis added)
[77] JC at 148/25-27, 33-35; 149/19-20 [AR, Vol I, Tab 7]
[78] *Daley*, *supra* note 30 at para 58; *R v Khela*, 2009 SCC 4 at para 49; *Jacquard*, *supra* note 30 at para 37; *Cullen*, *supra* note 29 at 664-5; *Polimac*, *supra* note 30 at para 97

submissions confirm that it did *not* suggest the impugned wording. The Crown commented: "I want to make sure I see it is the same as how counsel sees it, that after the fact conduct goes to his …position that this is an accident, not intention for murder or manslaughter…"[79] and "I also meant to say how I'm intending to use it is in the sense that *it's the Crown's position it wasn't an accident. He knew he had committed an unlawful act*, and that's why I'm using it."[80] This excerpt confirms the Crown suggested that the jury be instructed to consider the ATFC as being *relevant to the Appellant knowing he committed an unlawful act*. The impugned instruction told the jury the exact opposite – it could *not infer* from the ATFC *that he was guilty of any offence* and the evidence *might only be used to draw an inference* relating to Gladue's injuries being accidental.

61. The Appellant suggests the Trial Judge merely misspoke when he stated "you cannot infer that Barton is guilty *of any offence* as a result of his after the fact conduct…". He speculates that what he meant to say was "you cannot infer that Barton is guilty of any *specific offence*." Even if one were to accept that theory, the Trial Judge did not communicate this and the jury would not have discerned what was in his mind. The ambiguity was not, as the Appellant asserts, later clarified in the charge. The Court of Appeal properly noted the charge was confusing because of contradictory portions in it.[81]

62. The Appellant submits the jury would have understood they could use the ATFC to infer culpable conduct because the instruction on accident effectively told them they could use the evidence to infer the opposite of accident, which is guilt. The Respondent submits it is difficult to see how the jurors would have drawn that inference from the cryptic instruction. Also, this interpretation is directly contradicted by the immediately preceding instruction directing the jury not to infer guilt for any offence from the ATFC. This was in the context of erroneous instructions on accident, which will be explained further below.

63. Importantly, the Court of Appeal correctly noted there was no instruction whatsoever directing the jury they could use the ATFC, including the Appellant's admitted lies, to assess credibility. This Court has repeatedly affirmed that an accused's ATFC may be used to generally

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[79] JC submissions at 156/34-35 [AR, Vol VI, Tab 48]
[80] JC submissions at 248/6-7 [AR, Vol VI, Tab 48] (emphasis added)
[81] RJR at para 68 [AR, Vol I, Tab 2 at 28]

undermine or impugn an accused's credibility.[82] As Gladue was deceased and the Appellant was the only person who could testify as to what happened, his credibility was crucial. The non-direction was exacerbated by repeated instructions implying the jury should evaluate critical legal issues based solely on what he testified happened.

64. The Appellant suggests the Court of Appeal misunderstood the actual role ATFC plays in the assessment of an accused's credibility. He claims that a trier of fact is entitled to use ATFC to assess an accused's credibility, but then restricts its application in this case to the Appellant's "defence" of accident. He relies upon *R v Jaw* in support, but fails to appreciate that *Jaw* does not support this narrow interpretation.[83] *Jaw* clearly held that ATFC can be relied upon to impugn credibility *generally*. Other cases from this Court and other provincial appellate courts have held the same.[84] Thus, the jury in this case was permitted to rely on the ATFC to assess the Appellant's credibility *generally* on everything he testified to, including events from the night before as well as his belief as to whether Gladue consented to the sexual activity in question.

65. The Appellant further argues (based on the wrong principle that the ATFC could be used to assess the credibility his claim of accident only), that the jury was adequately instructed regarding ATFC and credibility because they were "effectively asked…to consider whether the Appellant's ATFC rendered his claim of accident at trial *less* believable."[85] The Respondent submits the jury would not have understood from the confusing instruction on ATFC and accident that they were entitled to rely upon the ATFC to assess the credibility of *anything*, including the Appellant's story of accident. The jury was told specifically *not to infer any culpable conduct* from the ATFC. This was followed by an instruction they could use the ATFC to assess the Appellant's claim of accident, followed by an instruction they could *only* use the ATFC to draw an inference regarding whether Gladue's injuries were accidental. At best, the jury would have inferred the ATFC could be relied upon to *support* the Appellant's claim of accident to determine whether his version was thereby rendered *more* believable, not *less*

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[82] *R v White*, [1998] 2 SCR 72 at para 26; *R v Jaw*, 2009 SCC 42 at para 39
[83] *Jaw*, *supra* note 82 at para 39
[84] *White*, (1998), *supra* note 82 at para 26; *R v Allen*, 2009 ABCA 341 at paras 97-98; *R v Head*, 2014 MBCA 59 at para 49; *R v Feil*, 2012 BCCA 110 at para 63; *R v Calnen*, 2017 NSCA 49 at para 58 (on reserve at SCC); *R v Yliruusi*, 2013 BCCA 496 at para 36; *R v Bulatci*, 2012 NWTCA 6 at paras 44-48
[85] Appellant Factum at para 65 (emphasis added)

believable. Nothing in the instruction conveyed the message that his credibility could be *impugned* by his AFTC.

66. The Appellant argues the Court of Appeal was wrong because there is no authority mandating a distinct direction on credibility tied to ATFC. Respectfully, whether an instruction is mandatory for *all* jury instructions on every trial is beside the point. *In this particular case*, the jury should have been clearly told that the ATFC can be used to assess credibility. This is especially true considering the admitted post offence lies, the fact he was the only person alive to testify as to what happened, and his incredible explanation as to what he did (manual penetration of Gladue's vagina for 10 minutes past the knuckles) juxtaposed with the undisputed medical evidence of an 11 cm hole through Gladue's vaginal wall.

67. Furthermore, although the jury was instructed on the assessment of witness credibility in general, the Court of Appeal correctly observed that this instruction was not sufficient because it did not specifically relate the ATFC to the assessment of the Appellant's credibility.

68. The Appellant argues that the Crown's failure to suggest that a direction along these lines was necessary shows the lack of significance of this matter to the Crown. But the failure to instruct the jury that ATFC can be used to assess credibility is a clear legal error. The Trial Judge was required to instruct correctly on this, regardless of the Crown's position. Counsel's failure to object, while a factor in appellate review, is not decisive.[86] In addition, there was no tactical reason behind the Crown's failure to complain about this non-direction.[87] The omission was clearly a disadvantage to the Crown.

69. Finally, with respect to accident, it is acknowledged that the Court of Appeal's comments regarding accident were *obiter*.[88] Nonetheless, the errors in the instructions on accident cannot be ignored.[89] To claim something was an "accident" really amounts to a denial of a required element of the *actus reus* (the act was unintentional) or alternatively, a denial of the required *mens rea* (the accused did not subjectively intend or foresee the consequences of his or her

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[86] RJR at para 58 [AR, Vol I, Tab 2 at 25]; *George*, *supra* note 29 at 873-77, 890; *R v Elder*, 2015 ABCA 126 at para 12; *Daley*, *supra* note 30 at para 58; *Khela*, *supra* note 78 at para 49; *Jacquard*, *supra* note 30 at para 37; *Polimac*, *supra* note 30 at para 97; *Cousins*, *supra* note 29 at paras 11-25; *R v White*, 2011 SCC 13 at para 167; *R v Rodgerson*, 2015 SCC 38 at para 30

[87] *Jacquard*, *supra* note 30 at para 37

[88] RJR at para 47 [AR, Vol I, Tab 2 at 22]

[89] JC at 157/25-158/10 [AR, Vol I, Tab 7]

conduct).[90] With respect to *actus reus*, accident was not available because the Appellant's act was intentional. He admitted to repeatedly thrusting his hand into Gladue's vagina and did not dispute applying the amount of force used, which is consistent with the common sense inference that people intend the natural and probable consequences of their actions. As for *mens rea*, subjective foresight of harm is irrelevant to manslaughter where only objective foreseeability is required.[91] The Court also noted that if the jury found that the Appellant sexually assaulted Gladue, his actions would not cease to be unlawful and become an "accident" simply because he did not intend or foresee the harm caused. The instruction diverted the jury's focus onto this irrelevant consideration and misled them into thinking there was no dangerous or unlawful act without subjective foresight of harm. The erroneous instructions on accident exacerbated the problematic instructions on ATFC.

Ground 4 – Did the ABCA err in its treatment of evidence of prior sexual activity?

70. The Appellant alleges that the Court of Appeal erred in its analysis of section 276. He does not dispute that he adduced evidence of previous sexual activity in the absence of a section 276 application, hearing, or ruling. He argues that the Crown opened the door, that it was admissible in any event, and that the proper remedy was a new trial on manslaughter. His submissions are based upon a misapprehension of the evidentiary record, section 276, and the governing jurisprudence. Compliance with section 276 is mandatory. The failure to conduct a hearing resulted in the jury hearing inadmissible and highly prejudicial evidence in the absence of the necessary limiting instructions on the permissible *and prohibited* uses of such evidence.

Governing Principles

71. The purpose of a criminal trial is to get at the truth. Irrelevant evidence which may mislead the jury should be eliminated insofar as possible. Evidence of a complainant's sexual activities has often had this effect; empirical studies have suggested that juries often misused such evidence.[92]

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[90] RJR at para 286 [AR, Vol I, Tab 2 at 90]; *R v Parris*, 2013 ONCA 515 at paras 106-8
[91] JC at 158/7-8 [AR, Vol I, Tab 7]; Appellant closing address at 174/12-14 [AR, Vol V, Tab 43]
[92] *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at p 605

72. Section 276 of the *Code* was enacted to *inter alia* protect the integrity of the trial by excluding misleading evidence.[93] It provides that, for proceedings involving enumerated offences, evidence of other sexual activity is inadmissible to support an inference that the complainant is more likely to have consented to the sexual activity forming the subject matter of the charge or is less worthy of belief (the prohibited "twin myths").[94]

73. Section 276 also provides that an accused may not adduce evidence of a complainant's other sexual activity unless it involves specific instances of sexual activity, is relevant to an issue at trial, and has significant probative value not substantially outweighed by the danger of prejudice to the proper administration of justice. A judge must make this determination after considering a non-exhaustive list of factors including the need to remove any discriminatory belief or bias from the fact-finding process, the risk the evidence may unduly arouse sentiments of prejudice or hostility in the jury, and the right of the complainant to the full protection and benefit of the law.[95]

74. Section 276 includes a number of procedural safeguards including a written application by the accused, a hearing where the judge is satisfied that the proffered evidence is capable of being admissible, and reasons (confirming the evidence to be admitted, the factors affecting the determination, and the expected relevance).[96] Where the evidence is admitted, a jury must be instructed as to the uses that it may *and may not* make of the evidence.[97]

75. The section 276 provisions are mandatory. Evidence adduced by an accused in the absence of a hearing is not rendered admissible by the mere fact that the Crown did not object.[98] An accused has never had the right to adduce irrelevant evidence. Nor does he have the right to adduce misleading evidence to support illegitimate inferences.[99]

76. This Court has identified situations where such evidence could be adduced for a legitimately relevant purpose *following* the necessary application and ruling. These include: to support the mistaken belief defence, to demonstrate bias or a motive to fabricate, to explain a

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[93] *R v Darrach*, 2000 SCC 46 at paras 19, 25
[94] *Criminal Code*, RSC 1985, c C-46, s 276(1)
[95] *Criminal Code*, RSC 1985, c C-46, ss 276(2), 276(3)
[96] *Criminal Code*, RSC 1985, c C-46, ss 276.1(1), 276.2
[97] *Criminal Code*, RSC 1985, c C-46, s 276.4; RJR at para 93 [AR, Vol I, Tab 2 at 34]
[98] *R v Wright*, 2012 ABCA 306 at para 10; *R v AJB*, *supra* note 51 at para 51
[99] *Darrach*, *supra* note 93 at para 37

complainant's physical condition, and to explain the knowledge of a young complainant. This Court also confirmed that pattern of conduct may "on occasion" be relevant, but cautioned that it closely resembled the prohibited use and must be carefully scrutinized.[100]

Application to Instant Case

77. An examination of the evidentiary record confirms that the Appellant adduced evidence of Gladue's other sexual activity without a section 276 application, hearing, and ruling. He argues that the section did not apply to him because the Crown effectively opened the door, that there was no prejudice given the final instructions to the jury, and that the evidence would have been admitted in any event. Before addressing these arguments, some background is necessary for context.

Background

78. The Appellant was the first defence witness. Before describing the sexual activity on the alleged offence date, he detailed Gladue's prior sexual activity. According to the Appellant, he met Gladue the day before he inflicted the fatal wound. On this previous occasion, she agreed to "everything" (meaning "intercourse, sex") for $60. They removed their clothing and, after she put his penis in her mouth, he moved his fingers (beginning with one and ending with four) in and out of her vagina for five to 10 minutes. When he was ready, he put her legs on his shoulders and had sexual intercourse until he ejaculated.[101]

79. Up to this point in the trial, no evidence had been adduced of specific instances of Gladue's prior sexual activity. The Crown did not object and the Trial Judge made no comment to counsel or the jury. The actual relevance of this evidence was first raised when counsel received the first draft of the proposed jury charge near the end of the trial.

80. The Crown expressed concern with the charge's reference to Gladue as a prostitute and its reference to her prior sexual activity in the context of the subjective consent instruction. When the Appellant stated "isn't that part of the narrative", the Crown replied that it was but

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[100] *Seaboyer*, *supra* note 92 at pp 613-16, 634-36. See *R v GG*, 2015 ONSC 5321 at paras 26-38
[101] Appellant's testimony at 234/5-238/30 [AR, Vol IV, Tab 39]

cautioned that the jury should not be under the impression that, because Gladue was a prostitute, it could automatically assume she was consenting.[102] The Respondent responded:

> MR. BOTTOS: Seriously?
>
> MS. DOWNEY: Yes, seriously. I mean, it's almost like a 276 issue, right?
>
> MR. BOTTOS: A naked prostitute walks out of the bathroom after negotiating $60. And we can't take that into account?[103]

81. The Crown referred the Trial Judge to *R v Drakes* for the proposition that the trier of fact cannot use the fact that a woman is a prostitute to lead to the inference that she is more likely to have consented to sexual activity on a particular occasion. The Appellant replied that he was skeptical of that proposition in law. When the Crown recommended that the passage be removed in its entirety, the Appellant objected and stated that it was important that everyone was reminded about what she was there for.[104] In his concluding comments on the subjective consent instruction, the Appellant stated that:

> And it defies reason from the evidence in this trial that she was not there to consent to sex on night number two. The only limit to that consent was if he went beyond what she consented to, *not that she was not consenting generally to sex.* So that's really it. And all of that evidence is relevant. And you raise a very good point, Sir. The deceased is not here to be cross-examined as to her prior sexual history. But if -- you know, in another case, if the complainant says, you know, we had sex the night before, but I wanted nothing to do with him on night number two, to discredit the complainant not because she's less worthy of belief but to discredit the fact that she wanted nothing to do with a guy, you can raise sexual history, because then it's relevant to something other than the twin myths. And so here the Crown -- sorry. Here all of the circumstances should be taken into account, including that *this was a continuing commercial transaction that started some 26 hours earlier.*[105]

82. It is within this context, that the Appellant's submissions must now be examined.

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[102] JC submissions at 197/8-26 [AR, Vol VI, Tab 48]; Jury Charge (draft 1) at paras 101-106 [AR, Vol VI, Tab 46 at 47-49]
[103] JC submissions at 197/23-29 [AR, Vol VI, Tab 48]. See also 198/1-5 [AR, Vol VI, Tab 48]
[104] JC Submissions at 198/26-199/18 [AR, Vol VI, Tab 48]; *R v Drakes*, 1998 CarswellBC 90 (CA)
[105] JC submissions at 201/21-32 [AR, Vol VI, Tab 48] (emphasis added)

Section 276 applied to the evidence adduced by the Appellant

83. The Appellant argues that section 276 did not apply to him because the Crown opened the door to the admission of this evidence in its opening address and in its direct examination of two Crown witnesses. His submissions lack merit.

84. First, the Crown did not open the door in its opening address by referring to Gladue as a prostitute or by commenting that she and the Appellant had struck up a working relationship.[106] For the reasons provided by the Court of Appeal, the repeated labelling of Gladue as a prostitute (by the Crown, Appellant, and Trial Judge) was unnecessary and prejudicial. However, an opening address is not evidence and it did not relieve the Appellant of his obligation to comply with section 276 before adducing evidence of specific, prior sexual activity.

85. Second, the Crown did not open the door in its direct examination of the Appellant's work colleagues. Atkins testified that the Appellant was joined by a woman in the hotel bar *on the night of the alleged offence*. He confirmed that this woman, whom he had never seen before, was with the Appellant when they left the hotel bar and returned to their respective rooms. On the way, the Appellant asked Atkins if he "wanted to have a piece of her".[107] This testimony did not constitute evidence of other sexual activity and it did not permit the Appellant to adduce such evidence contrary to section 276.

86. Unlike Atkins, Sullivan had no contact with Gladue. The Crown questioned him on the Appellant's version of events provided on the morning of Gladue's death. He testified that the Appellant told him that there was a girl bleeding in his room and that she had knocked on his door the night before and asked if she could take a shower. In this context, the Crown asked Sullivan if the Appellant had said anything about having a sexual relationship with the woman, told him that the woman was a prostitute, or told him whether they had met before. Sullivan answered "no".[108] His answers did not invite the Appellant to ignore section 276 and adduce evidence of Gladue's prior, specific sexual activity.

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[106] Crown opening remarks at 13/13-21 [AR, Vol III, Tab 22]
[107] Atkin's direct examination at 108/28-29 [AR, Vol III, Tab 26]
[108] Sullivan's direct examination at 29/23-40 [AR, Vol III, Tab 23]

The evidence was not admissible in any event

87. The Appellant also argues that the evidence was admissible in any event to respond to the Crown opening and direct examinations, to assess his state of mind on the night of the alleged offence, and as part of the narrative. As the Court of Appeal noted, however, it is difficult to assess the purported avenues of admission since the mandatory application process was not followed.[109] Nevertheless, certain flaws are readily apparent.

88. First, as previously noted, nothing in the Crown's opening or direct examinations permitted the Appellant to adduce the impugned evidence contrary to section 276. Even if the comments in the opening address constituted evidence of other sexual activity, they were wholly unconnected to the evidence of specific sexual activity adduced by the Appellant. Significantly, this was not a case where Gladue provided a statement claiming that their prior relationship was platonic or testified that she would never have engaged in the manual penetration described.[110]

89. Second, the Appellant's attempt to rely on "the narrative" is without merit. As the Court of Appeal noted, to simply say "narrative" is not enough where the only possible relevance would be to introduce precisely the inappropriate thinking based on prior sexual conduct that section 276 prohibits. As noted above, when the Appellant first addressed the relevance of this evidence in the context of subjective consent, his reference to the narrative engaged one of the twin myths section 276 was designed to capture and remove from the trial process. The Court correctly confirmed that there were other ways to explain how Gladue and the Appellant met on the fatal night without leading evidence of the prior sexual conduct between them.[111]

90. Finally, the Appellant's argument that the evidence would have inevitably been admitted to support the honest but mistaken belief defence (to help establish "what [he] was thinking on the second evening") is problematic. He needed no help in that regard. When asked if there were any discussions with Gladue before they went into his room on the night he inflicted the fatal wound, he replied there was small talk and "she knows what she was coming for".[112]

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[109] RJR at para 134 [AR, Vol I, Tab 2 at 45]
[110] See, for example, *R v Crosby*, [1995] 2 SCR 912 at paras 10-14; *R v SB*, 2016 NLCA 20 at paras 43, 53-55; *R v Harris*, 1997 CarswellOnt 3268 at paras 40-51 (CA); *R v Nelson*, 2001 BCCA 351 at paras 49-51
[111] RJR at para 136 [AR, Vol I, Tab 2 at 45]. See also *R v Goldfinch*, 2018 ABCA 240 at paras 17, 31, 48, 51, 53; *R v GG*, *supra* note at paras 26-38
[112] Appellant's testimony at 253/9-12 [AR, Vol IV, Tab 39]

91. This Court has acknowledged that section 276 is most often used in attempts to substantiate claims of a mistaken belief in consent. To make out this defence, however, an accused must show that "he believed that the complainant communicated consent to engage in the sexual activity in question". To establish that prior sexual activity is relevant, he must provide some evidence of what he believed at the time of the alleged assault.[113] His speculation as to what was going on in the complainant's mind provides no defence. What matters is whether he believed she effectively said "yes" through her words or actions".[114]

92. The Court of Appeal committed no error in determining that it was unable to conclude that the evidence would necessarily have been admitted, or for what purpose, had the required procedure been followed.[115] Evidence of other sexual activity *is not rele*vant or admissible under section 276 unless an accused first establishes that the defence has an air of reality. The focus at this stage is restricted to "how the prior sexual history mistakenly led the accused to believe that the complainant was affirmatively communicating consent on the incident in question".[116]

93. The Appellant also fails to appreciate that section 273.2(b), which modified the mistaken belief defence, plays an integral role in this analysis.[117] In *Ewanchuk*, L'Heureux-Dube J. held in her concurring judgment that the section precludes an accused from raising the defence if he did not take reasonable steps in the circumstances known to him at the time to ascertain that the complainant was consenting.[118] Although a majority of this Court has not yet addressed the issue, the Court of Appeal acknowledged the appellate authority confirming that "reasonable

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[113] *Darrach*, *supra* note 93 at para 59; *R v Ewanchuk*, [1999] 1 SCR 330 at para 46
[114] *Ewanchuk*, *supra* note 113 at para 47
[115] RJR at para 142 [AR, Vol I, Tab 2 at 47]
[116] RJR at para 140 [AR, Vol I, Tab 2 at 46]
[117] *Criminal Code*, RSC 1985, c C-46, s 273.2(b). See *R v Flaviano*, 2014 SCC 14 at para 1; *R v JA*, 2011 SCC 28 at paras 24, 30, 42; *R v Dippel*, 2011 ABCA 129 at paras 12-14, 22; *R v Ashlee*, 2006 ABCA 244 at paras 31-32; *R v Cornejo*, 2003 CarswellOnt 4679 (CA) at paras 19-23
[118] *Ewanchuk*, *supra* note 113 at paras 98-100. See also *R v Esau*, [1997] 2 SCR 777 at paras 49-50, McLachlin JA, dissenting

steps" must also go through the air of reality filter.[119] Significantly, section 273.2(a) also modifies the mistaken belief defence in the case of wilful blindness or recklessness.[120]

The absence of a limiting instruction exacerbated the prejudice

94. The Appellant argues that, because section 276 did not apply, a limiting instruction was not required. As previously noted, the Appellant's argument rests on a misapprehension of the evidentiary record, jurisprudence, and legislation. In this case, a limiting instruction informing the jury of the permitted *and prohibited uses* of the evidence was *mandatory*. Indeed, a strong and timely limiting instruction was even more critical given the increased prejudice associated with prostitution-related evidence.

95. In *Seaboyer*, L'Heureux-Dube J. referred to the documented effects where the complainant was a prostitute including "jurors were more likely to convict a defendant accused of raping a woman with a chaste reputation than an identical defendant charged with assaulting a prostitute".[121] She found that evidence of prior acts of prostitution or allegations of prostitution were properly excluded by the predecessor to section 276. She confirmed that "this evidence is never relevant and, besides its irrelevance, is hugely prejudicial".[122]

96. In this case, the jury *never* received a limiting instruction at the time the evidence was adduced. It was not told what it could and *could not* use the evidence for. The Appellant argues that there was no prejudice because the jury was eventually instructed on what the evidence could be used for. He does not appreciate that the final instruction was neither complete nor correct.[123] His argument also reflects a complete lack of appreciation for the dangers associated with this type of evidence.

A new trial on first degree murder was the appropriate remedy

97. The Appellant argues that if the failure to hold a section 276 hearing did constitute reversible error, the appropriate remedy was a new trial for manslaughter rather than murder. As

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[119] RJR at footnote 60 [AR, Vol I, Tab 2 at 46]. See *R v Flaviano*, 2013 ABCA 219; *R v Cornejo*, *supra* note 117 at paras 2-3, 19; *R v Despins*, 2007 SKCA 119 at paras 11-12
[120] *Criminal Code*, RSC 1985, c C-46, s 273.2(a)(ii)
[121] *Seaboyer*, *supra* note 92 at p 661, dissenting in part
[122] *Ibid* at p 690
[123] RJR at paras 145, 151-152 [AR, Vol I, Tab 2 at 48, 50]; JC at 159/40-160/22, 161/37-164/6 [AR, Vol I, Tab 7]; Written JC at paras 156-159, 171-186 [AR, Vol VIII, Tab 57 at 199-200, 205-211]

noted, he does not appreciate the impact such evidence has on the fairness of the trial process. As noted by L'Heureux-Dube J. in *Seaboyer*:

> When juries are provided with certain types of information about the complainant, such as evidence regarding past sexual conduct, the weight of the evidence is that they then utilize the myths and stereotypes discussed above and focus on them in "resolving" the particular legal issues raised by the case.[124]

98. The impugned evidence infected the entire trial process. Accordingly, a new trial on the offence charged was the appropriate remedy. Women – regardless of their race, profession, or status – are entitled to equal protection of the law and a trial process free from myths and stereotypes. Gladue was denied the latter when the Appellant adduced evidence of prior sexual activity in the absence of the mandatory 276 hearing and necessary limiting instructions.

99. The Court of Appeal's ruling does raise the issue of the Crown's responsibility in such cases. It is the Respondent's position that, even though section 276 applies solely to the accused, the Crown must be proactive in ensuring such evidence is not improperly placed before a jury in the future. This responsibility is not limited to making objections. The Crown should advise the trial judge as soon as practicable when it intends to adduce such evidence (explicitly or implicitly) and identify the purpose for which such evidence is being adduced. This would put both the trial judge and accused on notice as to its limited use. It would also remind the parties as to the need for appropriate limiting instructions (both in terms of timing and content).

Ground 5 – Was the offence of unlawful act manslaughter properly explained to the jury?

100. There were two possible routes to unlawful act manslaughter in this case: (1) the standard pathway requiring proof of the unlawful act of sexual assault and objective foreseeability of the risk of bodily harm, which is neither trivial nor transitory, in the context of a dangerous act that caused death;[125] and (2) the *Jobidon* pathway in which apparent consent is vitiated based on the accused's subjective intention to cause bodily harm, where death was caused.[126] Numerous

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[124] *Seaboyer*, *supra* note 92 at p 661, dissenting in part. See also RJR at para 154 [AR, Vol I, Tab 2 at 51]

[125] *R v Creighton*, [1993] 3 SCR 3 at 44-45; *R v DeSousa*, [1992] 2 SCR 944 at 961-62; *R v Nelson*, 2014 ONCA 853 at paras 24, 25; *R v S (F)*, 2006 CarswellOnt 1539 at para 28; *R v Godin* [1994] 2 SCR 484 at 485; *R v Williams*, 2003 SCC 41 at para 22

[126] *R v Jobidon*, [1991] 2 SCR 714 at 766; *R v Paice*, [2005] 1 SCR 339 at paras 12, 18

errors in the standard pathway instructions on both sexual assault and manslaughter effectively precluded the jury from finding the Appellant guilty of manslaughter by any route other than the *Jobidon* pathway. The Court of Appeal discussed these errors at paragraphs 164 to 300 of their decision. The Respondent will address only the errors that relate to the Appellant's arguments.

The Trial Judge erred in his instruction on sexual assault

101. A review of the Trial Judge's instructions on sexual assault, including consent, reveals a number of legal errors.

The instructions on consent were erroneous

102. The Trial Judge's instructions on consent were incorrect and confusing. Section 273.1(1) of the *Criminal Code* defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question." This means the conscious agreement to each occasion of sexual activity and each and every sexual act at the time the activity occurred. Consent cannot be based on silence, submission, non-resistance or failure to express lack of consent. There is no implied or broad advance consent, and consent can be revoked at any time.[127] The "sexual activity in question" constitutes the "specific physical sex act", its sexual nature, and the identity of the partner.[128] Sections 265(3) and 273.1(2) further stipulate circumstances where consent is not obtained.[129]

103. Not once throughout the entire instruction did the Trial Judge ever instruct the jury that "consent" meant the "voluntary agreement to the sexual activity in question", or explain what "sexual activity in question" meant. Instead, he instructed the jury to consider whether Gladue consented to "touching", "application of force", "sexual activity", "touching as described by Mr. Barton in his testimony", "type of touching as described by Mr. Barton in his testimony" or "type of sexual activity as described and demonstrated by Mr. Barton in his testimony".[130] Importantly, Gladue did not die because she agreed to be "touched", or agreed to the "application

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[127] RJR at para 179 [AR, Vol I, Tab 2 at 60-61]; *R v JA*, 2011 SCC 28 at paras 23, 34, 40-47; *Ewanchuk*, *supra* note 113 at para 31; *R v M (ML)*, [1994] 2 SCR 3 at 4; *R v Hutchinson*, 2014 SCC 19 at para 17

[128] *Hutchinson*, *supra* note 127 at paras 54-55, 57-58

[129] *Criminal Code*, RSC 1985, c C-46, s 265(3)

[130] JC at 159/28-160/1; 160/24-32; 161/27-29, 37-40; 162/1-2, 20-23; 163/23-164/32; 165/22-38 [AR, Vol I, Tab 7]

of force". The Court of Appeal correctly noted that the real issue was whether she consented to what the jury determined the Appellant actually did that caused her death. They observed that "[t]he jury instructions were totally disconnected from the reality of what caused her death."[131] Where, as in this case, it was open to the jury to conclude that the complainant consented to some sexual activity, the emphasis on "touching" or "application of force" was misleading, confusing and unhelpful for the jury.

104. The jury needed to clearly understand that in the circumstances, the "sexual activity in question" included the specific sexual act done, the amount of force the Appellant used, whether the force exceeded any consent given, and whether there was a risk of bodily harm that was objectively foreseeable. At a minimum and based on the Appellant's own admissions, the sexual activity that caused Gladue's death was the repeated thrusting of his hand into Gladue's vagina for 10 minutes with such force that it caused an 11 cm perforating wound to her vaginal wall.

105. The Court of Appeal correctly held that the instruction to consider whether Gladue consented to the "type of sexual activity as described and demonstrated by Barton in his testimony" is wrong because "type" can encompass a broad range of activity – for example, vaginal penetration as a "type" of sexual activity can include penetration by the Appellant's penis, fingers, hand or exacto knife. A complainant must agree to the specific sexual act since "agreement to one form of penetration is not agreement to any or all forms of penetration and agreement to sexual touching on one part of the body is not agreement to all sexual touching."[132] Saying yes to one form of sexual activity does not give the other person license to engage in more invasive or different sexual activity *without prior consent*.[133]

106. The Court of Appeal was correct to conclude that the instruction "as described and demonstrated by Mr. Barton in his testimony" wrongly directed the jury's focus on the Appellant's version of events as being the only version on which the jury was to decide the case. This is because it was for the jury to decide exactly what happened, based on all of the evidence, including the expert medical evidence. The jury was not bound by his description of what he admitted to doing simply because there was no one else alive to dispute it. This applies to both

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[131] RJR at para 189 [AR, Vol I, Tab 2 at 63]
[132] *Hutchinson*, *supr*a note 127 at paras 54, 87
[133] RJR at para 188 [AR, Vol I, Tab 2 at 63]

the night Gladue died as well as the previous night. Given the inculpatory ATFC including his admitted post-offence lies, it was a serious error to instruct the jury to consider consent from his perspective only, and on the assumption that his version was true.

107. The Court of Appeal rightfully found that the jury was not instructed that "consent" for the purpose of *actus reus* meant the complainant in her mind consented to the sexual activity in question, whereas for *mens rea* – specifically for the purpose of honest but mistaken belief in consent – "consent" meant the complainant had affirmatively communicated by words or conduct her agreement to engage in the sexual activity in question with the accused.[134] Although the jury was given the partially correct instruction of: "Consent is a matter of the subjective state of mind of Cindy Gladue at the time the force was applied to her,"[135] consent was again not related back to the "sexual activity in question." The Trial Judge compounded the error by misdirecting the jury about what was "important" to Gladue's subjective consent: (1) that she was a prostitute; (2) that this was a commercial transaction; (3) that she returned voluntarily to meet the Appellant the second night; (4) that the Appellant said "similar" activities occurred on both nights; and (5) that the Appellant thought she was enjoying herself. The Court properly held that none of these facts were relevant to Gladue's subjective consent.[136]

108. On the definition of consent given, (consent to sexual touching, application of force, sexual activity in general or as described by the Appellant), it was virtually impossible for the jury to find Gladue had not consented to any of these acts given the Appellant's testimony that she consented to sexual intercourse for $60. Further, as a result of the Appellant's persistent submissions to the Trial Judge to delete all references to objective foreseeability of the risk of bodily harm,[137] the jury was told that nothing further needed to be considered once the Crown had failed to prove a sexual assault; they would have to find the Appellant not guilty of manslaughter.[138] The elimination of all references to objective intent led to an incomplete instruction on the standard pathway to manslaughter. The Trial Judge failed to tell the jury they

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[134] *Ewanchuk*, *supra* note 113 at paras 26, 45-49; *JA*, *supra* note 117 at paras 37, 41, 48
[135] JC at 160/6-16 [AR, Vol I, Tab 7]
[136] RJR at para 211 [AR, Vol I, Tab 2 at 69]; JC at 160/6-16 [AR, Vol I, Tab 7]
[137] JC submissions at 223/6-232/15 [AR, Vol VI, Tab 48], 275/38-285/24, 287/15-27 [AR, Vol VII, Tab 52], 243/39-248/10 [AR, Vol V, Tab 44]; 87/27-96/20, 106/18-22, 107/18-110/24 [AR, Vol VIII, Tab 54]
[138] JC at 165/34-38 [AR, Vol I, Tab 7]

could still find the Appellant guilty, even if he did not intend to cause bodily harm, *as long as there was objectively foreseeable risk of bodily harm* and Gladue did not consent to the force being applied.[139] The result was that the jury was prevented from finding the Appellant guilty of manslaughter by any way other than the *Jobidon* pathway on the basis that he subjectively intended to cause Gladue bodily harm.[140]

109. The Appellant alleges that consent was not the focus of the trial or the Crown's appeal, and was practically non-important. The Respondent submits this is contrary to the record. On appeal, the Crown clearly disputed consent in the context of errors in the instructions on manslaughter, prior sexual conduct, and honest but mistaken belief in consent.[141] Specifically regarding manslaughter, the Crown on appeal argued the jury ought to have been instructed to consider objectively foreseeable risk of bodily harm *in assessing consent* as part of the underlying unlawful act of sexual assault causing bodily harm. At trial, the Crown continually argued for the inclusion in the charge of objective foreseeability of the risk of bodily harm and *lack of consent* as part of the standard pathway to manslaughter as an alternative to the *Jobidon* pathway.[142] At times, the Trial Judge also seemed to understand that *consent was impacted* by bodily harm that was reasonably foreseeable.[143] He eventually found the case of *R v Nelson* which confirmed that sexual assault causing bodily harm can be proven through objective *mens rea*. It also implied that the assessment of consent is impacted by objectively foreseeable risk of bodily harm.[144] Yet the Appellant's counsel pressed on, arguing against this principle, ultimately convincing the Court to provide the jury with the now impugned instructions on consent.[145] Thus, despite the evidentiary foundation for Gladue's non-consent to the sexual activity in question (evidence of the sheer magnitude of the injury itself and the fact that she died), the message communicated to the jury in the final charge was that consent was not truly in issue.

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[139] JC at 159/5-26; 165/14-25 [AR, Vol I, Tab 7]; *Nelson* (2014 ONCA), *supra* note 125 at paras 24-25
[140] Appellant opening remarks at 215/20-21 [AR, Vol IV, Tab 38] (focused on intention to harm)
[141] Crown CA Factum (Grounds 1, 2 and 3) [AR, Vol II, Tab 13]
[142] JC submissions at 184/20-185/36, 243/26-244/19 [AR, Vol VI, Tab 48]; 275/38-285/29, 287/15-27 [AR, Vol VII, Tab 52]; Crown closing address at 238/21-26, 243/39-248/10 [AR, Vol V, Tab 44]; JC submissions at 87/27-96/20, 107/18-110/24 [AR, Vol VIII, Tab 54]
[143] JC submissions at 284/32-39 [AR, Vol VII, Tab 52]; Crown closing address at 244/18-248/10 [AR, Vol V, Tab 44]
[144] *Nelson* (2014 ONCA), *supra* note 125 at paras 24-25
[145] JC submissions at 87/27-96/24, 110/23-28 [AR, Vol VIII, Tab 54]

110. In furtherance of his argument that consent was not an important issue at trial, the Appellant points to his not having been asked a single question in cross-examination which focused upon Gladue's actual consent. He ignores the reality that the Crown did not have her version with which to cross-examine him because she was deceased. Because there was no direct evidence of her state of mind, the jury had to evaluate her subjective consent to the sexual activity in question based on circumstantial evidence of her state of mind, including the medical evidence, and not just his testimony.[146] Further, his evidence in direct examination did not support consent to the manual penetration that caused her death. His evidence that "she knows what she was coming for," that the moans were "all good signs" and "she was enjoying it, good moans," [147] was merely his perception of her state of mind, which is not relevant to subjective consent as part of *actus reus*.[148] The "moaning and groaning" was ambiguous and could have been the result of feelings of intense pain. Evidence that she agreed to the same price as the night before ($60 for "everything", meaning "intercourse, sex")[149] was evidence that she consented to intercourse, not manual penetration of her vagina. Evidence that she did not express disagreement was meaningless.[150] Cross-examination regarding consent was therefore unnecessary.

Consideration of objectively foreseeable risk of bodily harm is critical

111. The Appellant contends the Trial Judge was not required to instruct the jury to take into account objectively foreseeable risk of bodily harm in considering the amount of force used, but suggests it was sufficient for juries to be directed to "consider the nature of the sexual activity in question, the force used, and whether consent was provided for those things."[151]

112. The Appellant's submission lacks merit. The Court of Appeal correctly stated that the jury should have been invited to determine whether the degree of force used in the sexual activity

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[146] *R v Al-Rawi*, 2018 NSCA 10 at paras 94, 98-99; *Ashlee*, *supra* note 117 at para 17; *R v Cook*, [1997] 1 SCR 1113 at paras 51-52
[147] Appellant's testimony at 253/9-12, 256/4-16, 260/24-25 [AR, Vol IV, Tab 39]
[148] *Ewanchuk*, *supra* note 113 at para 30
[149] Appellant's testimony at 253/9-19, 235/20-30 [AR, Vol IV, Tab 39]
[150] Appellant's testimony at 256/8-12 [AR, Vol IV, Tab 39]
[151] Appellant Factum at para 102

exceeded the scope of any consent Gladue may have given.[152] As a relevant and necessary part of that analysis, the jury ought to have been directed to consider whether it was objectively foreseeable that the actions they concluded the Appellant did that night would risk bodily harm to Gladue. This included a consideration of the relevant forensic evidence, whether there was any evidence Gladue voluntarily agreed to engage in sexual activity that involved the degree of force required to rip an 11 cm hole in her vaginal wall, and the obvious fact that Gladue lived the first night and died the second.[153] The same considerations applied to instructions regarding honest but mistaken belief in consent.[154]

113. While the Trial Judge did address the level of force the Appellant used and whether it surpassed the limits of consent given, his instructions on this were misleading, confusing and deficient:

> When a person consents to the application of force, including during sexual activity, *that consent only covers a certain amount of force. It does not cover force that goes beyond the consent*…. You will have to decide whether, if Cindy Gladue validly consented to being touched, to sexual activity, and to the touching described by Mr. Barton in his testimony, *she consented to the amount of force that Mr. Barton used.*[155]
>
> *The burden is on the Crown to prove beyond a reasonable doubt that the force used by Mr. Barton exceeded the amount of force consented to by Ms. Gladue*. If you have a reasonable doubt as to whether Ms. Gladue consented to the application of such force, you must give the benefit of that doubt to Mr. Barton.[156]
>
> If you make the determination that Ms. Gladue consented to the type of touching described by Mr. Barton in his testimony *but did not consent to the amount of force used by him*, you will have decided that…Mr. Barton committed an unlawful act. [157]

114. The instructions on degree of force were buried amongst incorrect instructions to consider consent to the sexual activity as described by the Appellant. The overall confusing instructions had the potential to mislead the jury into thinking they had to assess not whether Gladue consented to the amount of force *actually used* but the amount of force *the Appellant said*

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[152] *Jobidon***,** *supra* note 126 at 766-67; *R v Sullivan*, 2011 NLCA 6 at paras 34-39, 43
[153] RJR at para 195 [AR, Vol I, Tab 2 at 65]
[154] RJR at para 255 [AR, Vol I, Tab 2 at 82]
[155] JC at 164/13-20 [AR, Vol I, Tab 7] (emphasis added)
[156] JC at 164/22-25 [AR, Vol I, Tab 7] (emphasis added)
[157] JC at 164/27-31 [AR, Vol I, Tab 7] (emphasis added)

he used. Also, the Court of Appeal properly concluded that the instruction to consider the degree of force used was not clear in terms of whether it related to the standard pathway or *Jobidon* pathway to manslaughter. In this regard, the Respondent notes that the comments on extent of force were given long after the instruction on the *Jobidon* pathway and the partial instruction on the standard pathway, and after many erroneous definitions of consent.

115. The Appellant suggests it would be dangerous and contrary to existing law to instruct jurors to consider whether the force utilized was objectively likely to cause bodily harm in assessing consent. He argues the objective standard is inconsistent with subjective consent as part of *actus reus*. However, objective foreseeability of the risk of bodily harm relates strictly to the magnitude of force used and whether it went beyond the consent given. It does not change the *subjective assessment* of whether the complainant in her mind consented to those things. The two concepts are distinct. The question is: did the complainant subjectively consent to the sexual activity in question including force that is reasonably foreseeable to cause bodily harm?

116. The Court of Appeal's approach of taking into account objectively foreseeable risk of bodily harm does not amount to evaluating consent according to the *result* of the sexual activity in question. Consent remains consent to the sexual activity in question, which includes a consideration of the degree of force *actually used*, the limits of the scope of consent, and any risk of bodily harm that was reasonably foreseeable.

117. The Court of Appeal stated that consent to sexual activity does not mean consent to bodily harm or the risk of bodily harm arising from that sexual activity. The Respondent agrees but recognizes that consent to unprotected sexual intercourse may involve the risk of pregnancy or transmission of sexually transmitted diseases which may constitute bodily harm. However, these are foreseeable consequences of the sexual activity in question, voluntarily agreed to (although consent may be vitiated where there is a serious risk of significant bodily harm such as HIV transmission, or deception regarding conditions or qualities of the physical act[158]). Pregnancy or STI infections are very different in nature from serious injuries resulting from the actual physical act of the sexual activity itself and the degree of force applied. Aside from the sado-masochistic context (which is not applicable here as there was no evidence of consent to

[158] *R v Cuerrier*, [1998] 2 SCR 371; *R v Mabior*, [2012] 2 SCR 584; *Hutchinson, supra* note 127

bodily harm), people engaged in sexual activity do not normally expect to get seriously physically harmed.

For policy reasons, consent should be vitiated based on objective foreseeability of the risk of bodily harm as opposed to subjective intention to cause bodily harm

118. Contrary to the Appellant's argument, the Court of Appeal's comments – that consent to "intercourse, sex" in the circumstances here (woman, Native, prostitute) does not equal consent to the risk of, or actual bodily harm – did not challenge the law that consent is vitiated for public policy reasons based on subjective intention to cause bodily harm as opposed to objective foreseeability of the risk of bodily harm ("*Jobidon* issue"). Their comments did not involve a reconsideration of the *mens rea* required for vitiation of consent. The Court explicitly declined to definitively resolve the *Jobidon* issue and was content to apply the *Zhao* approach in which consent is vitiated only by bodily harm subjectively intended.[159] In his Factum, the Appellant acknowledged that the *Jobidon* issue was *obiter*.[160]

119. While the result of the appeal in this Court does not depend on the resolution of the *Jobidon* issue, as correctly observed by the Court of Appeal, this issue will need to be resolved by the new trial judge in this case. Guidance from this Court would be helpful to prevent future appeals on this issue, particularly because this Court declined to consider it in *R v JA*, has not addressed it since, and has before it an evidentiary record sufficient to provide context for the proper resolution of this issue.[161]

120. Should this Court decide to consider the *Jobidon* issue, the Respondent's position is that consent or apparent consent should be vitiated for policy reasons based on *objective foreseeability of the risk of bodily harm*, as opposed to *subjective intention to cause bodily harm*, in circumstances where death or serious bodily harm leaving permanent damage results from sexual activity. The Ontario line of cases of *Quashie*, *Zhao* and *Nelson* held that the *mens rea* required to vitiate consent is subjective intention to cause bodily harm.[162] However, these cases

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[159] RJR at para 303 [AR, Vol I, Tab 2 at 96]
[160] Appellant Factum at para 93
[161] *JA*, *supra* note 117 at para 21
[162] *R v Quashie* (2005), 200 OAC 65 at paras 57-58; *R v Zhao*, 2013 ONCA 293 at paras 105-107; *Nelson* (2014 ONCA), *supra* note 125 at paras 24, 25

involved sexual assault causing bodily harm where victims were alive to testify. Different reasoning should apply where sexual violence resulted in death, in which direct evidence from the victim regarding subjective consent is unavailable. Furthermore, *Jobidon* and *Paice* involved consensual fist fights where there was an agreement to fight and an expectation of harm or risk of harm.[163] On the contrary, people engaged in sexual activity do not normally anticipate getting seriously hurt. Where harm is reasonably foreseeable and serious injury results from *sexual violence*, the law should provide more protection than for those involved in consensual fights.[164] Lastly, unlike medical treatment, rough sporting activities, or daredevil activities that are socially useful, [165] sexual violence, like fist fights, has no valuable social purpose.[166]

The Trial Judge erred in his instruction on manslaughter

121. The Trial Judge committed a fundamental legal error in omitting the *mens rea* for manslaughter, which is objective foreseeability of the risk of bodily harm that is neither trivial nor transitory, in the context of a dangerous act.[167] He failed to instruct the jury on all possible routes to unlawful act manslaughter. This is a clear error in law that meets the *Graveline* test.[168] Although objective foreseeability of the risk of bodily harm is legally equivalent to dangerousness, the instructions on dangerousness were confusing and contradictory.[169]

122. The Appellant argues that to the extent this was an error, it was an error that benefitted the Crown because it eliminated an element that otherwise needed to be proven in order to convict him of manslaughter. But losing an alternate path to conviction for manslaughter is not a benefit to the Crown. On the instructions given, the Appellant could have been convicted of manslaughter only if the jury found he sexually assaulted Gladue (aside from finding that she lacked the capacity to consent due to intoxication, which is not an issue on this appeal). This result was highly unlikely given the erroneous instructions on consent. Alternatively, the jury could have convicted if they found the Appellant subjectively intended to cause bodily harm.

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[163] *Paice*, *supra* note 126
[164] *R v Welch*, (1995) 86 OAC 200 at 9, 32-33
[165] *Jobidon*, *supra* note 126 at paras 128-130
[166] *Welch*, *supra* note 164 at 33
[167] *Creighton*, *supra* note 125 at 44-45; *DeSousa*, *supra* note 125 at 961-62
[168] *R v Miljevic*, 2011 SCC 8 at para 20
[169] JC at 158/40-41, 159/12-19, 164/27-32, 165/1416 [AR, Vol I, Tab 7]; RJR at paras 270-274 [AR, Vol I, Tab 2 at 86-88]

The jury was given no alternate pathway to manslaughter based on objective intent. They were not told how Dr. Dowling's evidence – that considerable and excessive force would have been required to cause the fatal injury such that an independent witness in the room observing this would know the victim would be hurt – was significant to objective *mens rea*. Given the absence of an alternate *mens rea*, if the jury did not find subjective intent, they would have found Gladue's death was an accident, consistent with the Appellant's defence of accident and in accordance with the misleading instructions on accident. On this basis alone, a new trial on manslaughter was warranted.

PART IV – COSTS

123. The Respondent does not seek costs.

PART V – NATURE OF RELIEF REQUESTED

124. The Respondent requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 24th day of July, 2018.

Joanne B. Dartana
Counsel for the Respondent

Christine Rideout
Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES AND LEGISLATION

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R v Harris, 1997 CanLII 6317 (ONCA), 1997 CarswellOnt 3268 (CA)	88	
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R v Williams, 2003 SCC 41	100	
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APPENDIX A – AFTER THE FACT CONDUCT

DESTRUCTION OF EVIDENCE	REFERENCE
There was evidence that the bedding had been re-arranged; and, there were clean-up activities with respect to the bedding and the bathroom. There was evidence that someone had wiped the flooring near the bathtub, front vertical surface of the bathtub, and front vertical surface of the toilet bowl below the toilet seat. At trial, the Appellant only admitted to wiping the floor where he stepped. He denied wiping the side of the bathtub. He denied wiping or touching the toilet. In re-examination, he stated he did not recall whether he wiped the toilet bowl or front of the bathtub wall.	*R v Barton* Reasons for Judgment Reserved ("RJR"), 2017 ABCA 216 at paras 38-41 [AR, Vol I, Tab 2 at 20-21]; Constable Allen's testimony at 461/6-473/23 [AR, Vol III, Tab 31]; Appellant's testimony (cross) at 53/19-41 [AR, Vol V, Tab 40]; (re-examination) at 103/12-18 [AR, Vol V, Tab 40]

ERASING LINK TO SCENE	REFERENCE
After stepping in blood in the bathroom, the Appellant grabbed a towel, wet the towel, and wiped up blood from his feet and part of the floor.	RJR at para 17 [AR, Vol I, Tab 2 at 16]; Appellant's testimony (in chief) at 263/4-11 [AR, Vol IV, Tab 39]; Appellant's testimony (cross) at 33/16-17, 49/17-39 [AR, Vol V, Tab 40]
The Appellant did not call 911 immediately after he found Cindy Gladue in the bathtub. Instead, he quickly put his work clothes on, grabbed his wallet from under the mattress, packed his bag and "just got right out of the hotel room." He went to his moving van, threw his duffle bag inside the van and went back to the hotel and checked himself out at the clerk's desk.	RJR at paras 19-30 [AR, Vol I, Tab 2 at 17-19]; Appellant's testimony (in chief) at 263/11-264/18 [AR, Vol IV, Tab 39]; Appellant's testimony (cross) at 33/19-41 [AR, Vol V, Tab 40]; Veronica Chysyk's testimony in chief at 1/22-24 [RR, Tab 1]
After the Appellant checked out of his hotel room, he returned to his room and called 911. He did not use his cellphone, or phones in the lobby or at the front desk. In cross, he was asked to explain that. He claimed he didn't use his cellphone because he was in shock, his head was spinning, and he didn't know what to do.	RJR at para 22 [AR, Vol I, Tab 2 at 17]; Appellant's testimony (in chief) at 270/23-27 [AR, Vol IV, Tab 39]; Appellant's testimony (cross) at 17/33-19/12 [AR, Vol V, Tab 40]

CONCEALING EVIDENCE	REFERENCE
The Appellant threw the bloody towel, which had been used to wipe Gladue's blood from his feet and bathroom floor, into a garbage can outside in the parking lot.	RJR at paras 19, 43, 66 [AR, Vol I, Tab 2 at 17, 21, 27]; Appellant's testimony (in chief) at 264/6-10 [AR, Vol IV, Tab 39]

CONCOCTION AND FABRICATION	REFERENCE
When introducing Kevin Atkins to Gladue, the Appellant lied to Atkins and told him Gladue was a packer. At trial, he admitted the lie.	Kevin Atkins' testimony (in chief) at 105/18-106/37 [AR, Vol III, Tab 26]; Appellant's testimony (in chief) at 249/13-24 [AR, Vol IV, Tab 39]
The Appellant lied to Gladue's man friend. He told him Gladue would only be with him and not him and Atkins. He then later asked Atkins if he wanted "a piece" of Gladue.	Kevin Atkins' testimony (in chief) at 108/4-40 [AR, Vol III, Tab 26]; Appellant's testimony (in chief) at 250/22-251/6; 252/18-29 [AR, Vol IV, Tab 39]; (cross) at 17/11-17, 48/3-49/15 [AR, Vol V, Tab 40]
The Appellant met with Atkins and Rick Wessles after checking out of the hotel. He did not tell them anything about Gladue being deceased in his bathtub.	Kevin Atkins' testimony (in chief) at 118/4-119/32 [AR, Vol III, Tab 26]; Appellant's testimony (in chief) at 266/7-34; 297/19-28 [AR, Vol IV, Tab 39]
The Appellant lied to John Sullivan. He told Sullivan he woke up and found a dead woman in his bathtub. She had shown up at his door the night before and asked to use his shower. He let her in. At trial, he admitted he lied because Sullivan knew he was married and the Appellant did not want Sullivan to know he was with a prostitute. In cross, he admitted he lied to Sullivan because he couldn't trust him. He said he was in shock and his head was spinning. He admitted giving a different version to Atkins – that he "fingered" Gladue. He claimed he did that because he and Atkins worked for the same agent, whereas Sullivan did not. In re-examination, he said it was because Atkins knew Gladue was in the Appellant's room, whereas Sullivan had no idea she was there.	Appellant's testimony (in chief) at 269/3-270/7 [AR, Vol IV, Tab 39]; (cross) at 13/6 - 15/21; 16/32-17/31; (re-examination) at 103/20-27 [AR, Vol V, Tab 40]; John Sullivan's testimony (in chief) at 24/10-26/41, 29/20-28, 30/1-3; (cross) at 56/23-59/21 [AR, Vol III, Tab 23]
The Appellant lied to Veronica Chysyk (hotel clerk). He told her he had forgotten something in the room. In cross, he admitted he lied in order to get back into the room.	Veronica Chysyk's testimony (in chief) at 2/36-3/12, 4/6-26 [RR, Tab 1]; 83/13-30 [AR Vol III, Tab 24]; Appellant's testimony (in chief) at 270/15-20, 293/40-41 [AR, Vol IV, Tab 39]; (cross) 19/14-20/7 [AR, Vol V, Tab 40]

CONCOCTION AND FABRICATION	REFERENCE
The Appellant lied to the 911 operator. He told him that a woman he didn't know knocked on his door and asked to use his shower. He went to bed and woke up the next day to find her covered in blood in his bathtub. He poked her and she didn't move. He didn't want to touch her. He told the 911 operator he knew nothing about her or how old she was, (even though he knew her phone number, knew she came with a male friend named "Steve", knew she was in her 30s, knew she was a prostitute and had children). When asked for his address, he stated he didn't want his wife to find out anything and that he didn't do anything wrong. At trial, he admitted to lying to the 911 operator. He claimed he did it because he didn't want his wife to find out. In cross, he stated that he told the 911 operator "I'm married, got kids and everything else"(even though he also alleged he did nothing wrong). He claimed he said this because he was "in shock". He also told the 911 operator that he was "shaking like crazy" and "scared shitless". The maintenance worker came in while he was still on the phone. He testified that the Appellant displayed no emotion.	Transcript of 911 call at 38/5-40/2, 42/11-15, 43/10-45/17, 46/10-50/6 [RR, Tab 6]; RJR at paras 23, 72 [AR, Vol I, Tab 2 at 17, 28]; Appellant's testimony (in chief) at 270/29-271/3 [AR, Vol IV, Tab 39]; (cross) at 24/30-40, 25/13-32/36 [AR, Vol V, Tab 40]; Daniel Chartrand's testimony at 7/37-8/2, 13/11-19/18 [RR, Tab 2]
The Appellant admitted when he called 911 that he asked for police, not an ambulance. He told the 911 operator that when he touched her she didn't move. He did not tell her he believed she was dead, even though he had earlier told Sullivan he believed she was dead. At trial, in cross, he testified that at the time he was speaking to the 911 operator he wasn't sure she was dead.	Transcript of 911 call at 38/1-3 [RR, Tab 6]; Appellant's testimony (in chief) at 263/15-20; 269/34-40 [AR, Vol IV, Tab 39]; (cross) at 20/9-21/21[AR, Vol V, Tab 40]
The Appellant lied to Constable Jones. He said "I didn't do anything. I'm married, and I don't do this stuff." At trial, he claimed he lied because he didn't want his wife to find out or lose his job. In cross, he stated he told the police officer he was married and didn't do this stuff (even though the police officer would not have known about his marital status) because she was found in his hotel room and he was responsible for that room.	Cst. Jones' testimony at 35/13-14 [RR, Tab 5]; Appellant's testimony (in chief) at 272/6-22, 274/2-12 [AR, Vol IV, Tab 39]; (cross) 16/11-30 [AR, Vol V, Tab 40]

CONCOCTION AND FABRICATION	REFERENCE
The Appellant lied to Atkins. When Atkins asked the Appellant what happened, the Appellant stated that "they" had gone back to his room where they talked and started to fool around. While he was "fingering her", she was bleeding or started to bleed. He said enough of that and passed out.	Kevin Atkins' testimony (in chief) at 124/2-125/34 [AR, Vol III, Tab 26]
The Appellant lied to the undercover officer. The Appellant had initiated the conversation and denied any involvement in Gladue's death. He claimed he had rented out his hotel room to some "swampers" (movers) and slept in his truck. The next day he walked into his room and there was a dead girl in his bathtub. He went outside to find the guys but found out they had left. He stated that he phoned the cops because he didn't do anything wrong to the girl and didn't touch her. He said he wasn't even there. He claimed the "swampers" were on the run. He said if he had done it, he would have buried her. He would have wrapped her up in his carry out or truck and cleaned the room. She would have disappeared down the highway 2000 miles away. He stated he was not into prostitution. At trial, he admitted the lies. He claimed he lied because he was suspicious of everyone. He wasn't saying a word. He agreed no one forced him to say anything. He was just lying. He claimed "I lied but I am not a liar".	Appellant's statements to undercover officer at 57/15-59/11, 60/17-61/13, 67/17-69/4, 69/8-70/3, 70/12-16, 86/6-24, 108/17-109/26, 110/10-23, 119/17-20, 128/6-129/26, 135/7-24, 138/8-13, 146/13-147/1, 149/25-151/1 [RR, Tab 9]; Appellant's testimony (in chief) at 276/36- 278/15 [AR, Vol IV, Tab 39]; (cross) at 54/5-57/35, 60/11- 64/38, 65/25-73/14 [AR, Vol V, Tab 40]