2019

Highlights from the Decisions of the Supreme Court of Canada in Criminal Matters in 2019

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In 2019, the Supreme Court of Canada rendered a number of decisions involving criminal law issues. In this edition's column, I intend to highlight a number of the most significant decisions rendered by the Court in 2019 (up to October 31). These decisions involved the following issues:

- the authority of Canadian police to detain and arrest;
- the questioning of sexual offence complainants on their prior sexual activity; and
- the importance of respecting victims in the trial process by refraining from pejorative and demeaning language.

Let us start with the Supreme Court's decisions on the admissibility of prior sexual activity of complainants in sexual offence trials.

THE ADMISSIBILITY OF A COMPLAINANT'S PRIOR SEXUAL ACTIVITY

To question a complainant in a sexual assault trial in Canada, the proposed questioning must comply with section 276 of the *Criminal Code of Canada*, R.S.C. 1985 (section 276 contains a list of offences to which it applies). Section 276(1) indicates that evidence that a complainant "engaged in sexual activity" is "not admissible to support an inference that the complainant "(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief." Section 276(2) of the *Criminal Code* indicates that in order to be admissible, the proposed evidence must relate to "specific instances of sexual activity."

In 2019, the Supreme Court rendered three judgments in this area of Canadian law: *R. v. R.V.*, 2019 SCC 41, *R. v. Barton*, 2019 SCC 33, and *R. v. Goldfinch*, 2019 SCC 38.[1]

R. v. R.V.

In *R.V.*, the accused was charged with the offence of sexual assault. It was alleged that the offence took place on July 1, 2013. At the trial, the complainant testified that she was a virgin at the time of the assault. The Crown introduced evidence of her subsequent pregnancy and the approximate date of conception to support the complainant's testimony that she was sexually assaulted by the accused on the date alleged.

In a pretrial application, the accused sought to question the complainant as to whether anyone else could have caused the pregnancy. In particular, he wanted to question the complainant "about her prior sexual activity, with the [accused], or any other individual, that may have occurred between June 1st and July 1st, 2013."

The application judge ruled that the accused was not permitted to ask whether the complainant had engaged in any other sexual activity because the accused had not presented evidence of "specific instances of sexual activity," as required by § 276(2) of the *Criminal Code*. However, the accused was permitted to cross-examine the complainant about her claim that she was a virgin at the time of the assault.

The accused was convicted. The conviction was overturned by the Ontario Court of Appeal. The Crown appealed to the Supreme Court of Canada. The Supreme Court described the issue raised by the appeal as follows:

> The question in this case is how § 276 operates when the accused seeks to cross-examine the complainant to challenge sexual history evidence led by the Crown. Section 276 requires that the accused's right to make full answer and defence be balanced with the dangers that cross-examination may pose to the complainant's privacy and dignity and to the integrity of the trial process. This analysis applies with equal force regardless of whether the accused seeks to introduce evidence to establish a defence or to challenge inferences urged by the Crown.

The appeal was allowed and the conviction restored, though the Supreme Court concluded that the application judge had erred in refusing to allow the cross-examination.

THE SECTION 276 APPLICATION

The Supreme Court noted that "[b]road exploratory questioning is never permitted under § 276. Open-ended cross-examination concerning a complainant's sexual history clearly raises the spectre of the impermissible uses of evidence that the provision was intended to eliminate. Section 276(2)(a) requires the accused to identify 'specific instances of sexual activity' to avoid unnecessary incursions into the sexual life of the complainant" (at paragraph 47). The Court held, however, that "the clearly identified time period, along with the specific nature of the activ-

Footnotes

1. R. v. Barton, 2019 SCC 33, was analyzed earlier (see Wayne K. Gorman, *Refining the Judicial Lexicon: The Supreme Court Refines the Defence of Consent and Mistaken Belief in Consent*, 55 CT. REV. 116, (2019)).

ity — activity capable of causing pregnancy — was sufficiently specific to satisfy § 276(2) (a)" (at paragraph 55).

The Supreme Court concluded that because the "Crown-led evidence implicated a specific sexual act, namely activity capable of causing pregnancy within a particular timeframe," the accused's "request satisfied the 'specific instances' requirement of § 276(2) because it was sufficiently detailed to permit the judge to apply the regime" (at paragraph 6).

The Supreme Court pointed out that the "Crown clearly intended to rely on evidence of the pregnancy to establish the *actus reus*. The presumption of innocence requires the accused to be permitted to test such critical, corroborating physical evidence before it can be relied on to support a finding of guilt. Given the accused's denial of any sexual contact with the complainant, and the lack of other evidence of paternity, the ability to cross-examine the complainant was fundamental to his right to make full answer and defence" (at paragraph 7).

CONCLUSION (*R. v. R.V.*)

However, despite the error, the Supreme Court concluded that "no miscarriage of justice occurred in this case. The cross-examination that was permitted and actually occurred allowed the defence to test the evidence with sufficient rigour" (at paragraph 9).

R. v. GOLDFINCH

In *Goldfinch*, the accused was also charged with the offence of sexual assault. In this case, the complainant was a woman the accused had previously lived with. Their relationship at the time of the alleged offence was described as being one of "friends with benefits" (at paragraph 3).

At his trial, the accused applied, pursuant to § 276 of the *Criminal Code*, to have evidence admitted that he and the complainant were in a sexual relationship at the time of the alleged assault.

The trial judge admitted the evidence. A jury found the accused not guilty. A majority of the Alberta Court of Appeal allowed the Crown's appeal and ordered a new trial, finding that the trial judge had erred in admitting the evidence.

THE APPEAL

The accused appealed to the Supreme Court of Canada. The Court indicated that "[t]his case asks whether evidence of a relationship with an implicit sexual component engages § 276 of the *Criminal Code* and, if so, when such evidence may be admitted."

THE SUPREME COURT'S DECISION

The appeal was dismissed. The Supreme Court of Canada held that "[i]ntroducing evidence of the sexual nature of the relationship served no purpose other than to support the inference that because the complainant had consented in the past, she was more likely to have consented on the night in question. It was therefore barred by § 276(1)." The Court also held that the evidence "was not 'relevant to an issue at trial'… Bare assertions that such evidence will be relevant to context, narrative or credibility cannot satisfy § 276. The evidence in this case should not have been admitted and a new trial is required" (at paragraphs 4 and 5).

"[T]he Supreme Court of Canada has emphasized the important 'gatekeeper' role trial judges play in sexual assault trials."

COMMENTARY

In this series of decisions, the Supreme Court of Canada has emphasized the important "gatekeeper" role trial judges play in sexual assault trials. In particular, the Court has emphasized the "importance of remaining alive to the objectives of § 276 as the trial unfolds by actively supervising cross-examination and adapting § 276 rulings as necessary when new evidence comes to light" (see *R.V.*, at paragraph 71. Also see *Barton*, at paragraphs 68 and 197, and *Goldfinch*, at paragraph 75).

In *Barton*, the Court extended the application of § 276 by holding that it applied to any charge "in which an offence listed in § 276(1) has some connection to the offence charged, even if no listed offence was particularized in the charging document" (at paragraph 76). In *R.V.*, the Court narrowed the applicability of § 276 in those cases in which the evidence of sexual activity was led by the Crown to incriminate the accused. Finally, in *Goldfinch*, the Supreme Court stressed the importance of trial judges ensuring, before evidence of prior sexual activity is admitted, that there be a clearly identified basis as to why the proposed evidence is relevant and why it does not involve myth reasoning concerning victims of sexual assault. As noted by the dissenters in *R.V.*, "[s]exual offence trials are unique among criminal trials in Canada… Evidence of a complainant's sexual history is inadmissible where it is tendered by the accused, unless and until the accused meets the admissibility criteria set out in § 276(2)" (at paragraph 101).

CONSTITUTIONAL DETENTION IN CANADA

Another area in which the Supreme Court has rendered decisions this year involves the authority of Canadian police to detain and arrest. The Court considered this issue from a constitutional perspective (arbitrary detentions) and a common-law perspective (the power to arrest to maintain the peace). It also considered, at length, the impact that membership in a visual minority has on a judicial determination as to whether a suspect was arbitrarily detained in violation of § 9 of the *Charter*.

Section 9 of the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, states:

Everyone has the right not to be arbitrarily detained or imprisoned.

This section of the *Charter* has received a significant amount of attention by the Supreme Court of Canada.[2] The Court's seminal decision remains *R. v. Grant*, [2009] 2 S.C.R. 353. In *Grant*, the Court held that from a constitutional perspective a person could be physically or "psychologically detained." In the latter

2. See, for instance, R. v. Clayton, 2 S.C.R. 725 (2007), R. v. Nolet, 1 S.C.R. 851 (2010), and R. v. MacKenzie, 2 S.C.R. 250 (2013).

"[A]n 'important consideration when assessing when a detention occurred is that Mr. Le is a member of a racialized community.'"

instance, the Court held in *Grant* that detention could arise in two ways: (1) the accused complies with a police demand because she or he is "legally required to comply with a direction or demand;" or (2) the accused is not under a legal obligation to comply with a direction or demand made by the police, "but a reasonable person in the subject's position would feel so obligated" and would "conclude that he or she was not free to go" (at paragraphs 30 and 31). Note the objective nature of the test.

The Court's most recent consideration of § 9 of the *Charter* occurred in *R. v. Le*, 2019 SCC 34. In *Le*, the accused was standing in a backyard talking to "four Black men" (see paragraph 1). The accused was described as being of "Asian descent" (see paragraph 69). The police approached them and asked for identification. The accused fled. He was caught and arrested. He was found to be illegally in possession of a handgun. At trial, he was convicted of firearm-related offences. The Ontario Court of Appeal upheld the convictions. An appeal was taken to the Supreme Court of Canada.

The Supreme Court indicated that the appeal presented the issue of "whether this encounter between the police and Mr. Le infringed his right to be free from arbitrary detention." The Court's decision in *Le* considers this issue, but as will be seen, the decision also considers the more complex issue of police interaction with visible minorities. Let us commence by looking at the Court's consideration of § 9 of the *Charter*.

SECTION 9 OF THE CHARTER-ARBITRARY DETENTION:

The Supreme Court indicated, at paragraph 25, that § 9's prohibition of arbitrary detention "is meant to protect individual liberty against unjustified state interference." The Court concluded that the accused "was detained when the police entered the backyard and made contact" because "no statutory or common law power authorized his detention at that point, it was an arbitrary detention" (at paragraph 30). Thus, the accused was detained before he fled.

The Court concluded that "Mr. Le's detention was arbitrary because, at the time of detention (when the police entered the backyard), the police had no reasonable suspicion of recent or ongoing criminal activity. Investigative objectives that are not grounded in reasonable suspicion do not support the lawfulness of a detention, and cannot therefore be viewed as legitimate in the context of a § 9 claim. This detention, therefore, infringed Mr. Le's § 9 *Charte*r right" (at paragraph 133).

RACE AND MINORITY STATUS AS A CONSIDERATION IN THE DETENTION ANALYSIS:

In addition, the Court made the following comments concerning how the accused person's "racial background" affects the issue of detention (at paragraph 75):

> At the detention stage of the analysis, the question is how a reasonable person of a similar racial background would perceive the interaction with the police. The focus is on how the combination of a racialized context and minority status would affect the perception of a reasonable person in the shoes of the accused as to whether they were free to leave or compelled to remain. The § 9 detention analysis is thus contextual in nature and involves a wide ranging inquiry. It takes into consideration the larger, historic and social context of race relations between the police and the various racial groups and individuals in our society. The reasonable person in Mr. Le's shoes is presumed to be aware of this broader racial context.

The Court indicated that an "important consideration when assessing when a detention occurred is that Mr. Le is a member of a racialized community in Canada. Binnie J. in *Grant* found that 'visible minorities who may, because of their background and experience, feel especially unable to disregard police directions, and feel that assertion of their right to walk away will itself be taken as evasive'" (at paragraph 72).

The Court accepted, as accurate, a number of extrinsic reports presented at the appeal by interveners concerning police contact with racial minorities. The acceptance of these reports led the Court to conclude that "[m]embers of racial minorities have disproportionate levels of contact with the police and the criminal justice system in Canada" (at paragraph 90). The Court then indicated that "it is in this larger social context that the police entry into the backyard and questioning of Mr. Le and his friends must be approached. It was another example of a common and shared experience of racialized young men: being frequently targeted, stopped, and subjected to pointed and familiar questions." The Court suggested that the "documented history of the relations between police and racialized communities would have had an impact on the perceptions of a reasonable person in the shoes of the accused. When three officers entered a small, private backyard, without warrant, consent, or warning, late at night, to ask questions of five racialized young men in a Toronto housing cooperative, these young men would have felt compelled to remain, answer and comply" (at paragraph 97).

THE ACCUSED'S PHYSICAL STATURE:

Interestingly, the Supreme Court also concluded that Mr. Le's "small stature" was a factor establishing that he was arbitrarily detained (at paragraph 123):

> As to stature, the trial judge found that Mr. Le had a small physical stature and said he took this consideration into account when concluding that his detention only began when he was questioned about the contents of his bag. While it is not clear how this consideration was taken into account, we are of the view that a reasonable person with the same physical stature would likely be profoundly intimidated when three police officers entered the backyard in the manner in which these officers did. In such a circumstance, a person of small stature may be more likely to feel overpowered and conclude that it is not possible to leave the backyard. Such a person may think it more necessary to comply with the police commands and directions. This element, then, supports a conclusion that a detention arose at the moment the police entered the backyard.

The Court's decision in *Le* deals with a pressing societal issue: contact between the police and racial minorities. However, it is difficult to know what to say about the Court's physical stature comments. Mr. Le was not a child or a young offender. Is the Supreme Court of Canada really saying that short or slightly built Canadians are more susceptible to constitutional detention than tall or heavily built ones?

COMMENTARY:

The Supreme Court has encouraged Canadian judges in *Le* to be cognizant of the realities of the nature of the type and extent of the contact that occurs between the police and racial minorities in assessing whether a specific individual, who belongs to a racial minority, has been detained.

The Court appears to be suggesting that the reports it considered can form the basis for a contextual approach: "[O]n a go-forward basis, these reports will clearly form part of the social context when determining whether there has been an arbitrary detention contrary to the *Charter*" (at paragraph 96). The Court also appears to be suggesting that even in the absence of evidence that the specific accused felt compelled to comply with a police officer's direction, an arbitrary detention could be found in the accused's membership in a racial minority (at paragraph 160):

> The need to consider the race relations context arises even in cases where there is no testimony from the accused or any witness about their personal experience with police. Even without direct evidence, the race of the accused remains a relevant consideration under *Grant*.

It is difficult to determine how these comments will subsequently be interpreted in future arbitrary detention cases. It has recently been suggested, for instance, that *Le* affirms "the importance of understanding the social context of interactions between police and racialized groups when adjudicating the circumstances of a specific encounter,… It affirmed that social context evidence can, and should, be 'used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case'" (see *Campbell v. Vancouver Police Board*, 2019 BCHRT 128, at paragraph 22). In another recent decision, *Le* was seen as a basis upon which to impose a lesser sentence in a weapon offence (see *R. v. Virgo*, 2019 ONCJ 575). In doing so, the sentencing judge indicated that "the perception of racialized groups, and Mr. Virgo is a young black man, that they are not treated equally by criminal justice institutions has been recognized by the Supreme Court of Canada. And one report prepared for and accepted by the Superior Court in a sentencing case has recognized the link between black youth not trusting the police to protect them and resorting to self-help" (at paragraph 23).

In 2019, the Supreme Court of Canada also considered the power of the police to arrest through common-law authority.

THE ANCILLARY COMMON-LAW POLICE AUTHORITY:

In *Fleming v. Ontario*, 2019 SCC 45, the plaintiff was arrested while walking to a protest, though he had not committed any offence. He sued the police successfully, but the trial judge's decision was overturned by the Ontario Court of Appeal on the basis that the arrest was lawful at common law to prevent an apprehended "breach of the peace."

"[T]he Supreme Court of Canada rendered a decision that should cause all judges to reassess their approach to those who appear before us."

On appeal to the Supreme Court of Canada, the trial judge's decision was affirmed. The Supreme Court indicated that the issue was whether the police have the power to "arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace?"

The Supreme Court held that "no such power exists at common law. The ancillary powers doctrine does not give the police a power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace." The Court indicated that a "drastic power such as this that involves substantial interference with the liberty of law-abiding individuals would not be reasonably necessary for the fulfillment of the police duties of preserving the peace, preventing crime, and protecting life and property. This is particularly so given that less intrusive powers are already available to the police to prevent breaches of the peace from occurring" (at paragraph 7).

The Court also indicated that at "common law, a breach of the peace has always involved 'danger to the person'… an act can be considered a breach of the peace only if it involves some level of violence and a risk of harm. It is only in the face of such a serious danger that the state's ability to lawfully interfere with individual liberty comes into play. Behaviour that is merely disruptive, annoying or unruly is not a breach of the peace." (at paragraphs 58 and 59). The Court stated that it "seriously questioned whether a common law power [to arrest a person for the purpose of preventing that person from breaching the peace] would still be necessary in Canada today" (at paragraph 60).

The Court concluded that the police did not have lawful authority to arrest the plaintiff "[b]ecause there is no common law power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace" (at paragraph 102).

COMMENTARY:

This decision is much less controversial than *Le*, though possibly as far reaching. Mr. Fleming was walking toward a protest. He had not committed any crime nor were there any grounds to believe that he might do so. The arrest was unnecessary, and as we have seen, unlawful. Interestingly, despite this, it was deemed lawful by the Ontario Court of Appeal.

It could be argued that the Supreme Court's decision effectively eliminates the vague arrest power asserted through the doctrine of preventing a breach of the peace. The decision might cause Canadian police officers to refrain from ever again arresting someone on such a dubious basis.

INDIGENOUS VICTIMS-BIAS AND PREJUDICE:

Finally, in mid-2019, the Supreme Court of Canada rendered a decision that should cause all judges to reassess their approach to those who appear before us or who are the subjects of homicides.

In *Barton*, the accused was charged with murder. The victim (Ms. Gladue) was an Indigenous woman who was a sex-worker. The offence took place in the accused's hotel room. The victim

died as a result of loss of blood caused by a cut to her vaginal wall.

As we saw earlier, the Supreme Court considered a number of issues in this decision. One that has not been referred to yet, involves the Court's insistence that trial judges recognize that we "play an important role in keeping biases, prejudices, and stereotypes out of the courtroom" (at paragraph 197).

The Court stated that "our criminal justice system and all participants within it should take reasonable steps to address systemic biases, prejudices, and stereotypes against Indigenous persons — and in particular Indigenous women and sex workers — head-on." The Court indicated that "[t]urning a blind eye to these biases, prejudices, and stereotypes is not an answer. Accordingly, as an additional safeguard going forward, in sexual assault cases where the complainant is an Indigenous woman or girl, trial judges would be well advised to provide an express instruction aimed at countering prejudice against Indigenous women and girls. This instruction would go beyond a more generic instruction to reason impartially and without sympathy or prejudice" (at paragraph 200).

The Supreme Court held that in "a case like the present, the trial judge might consider explaining to the jury that Indigenous people in Canada — and in particular Indigenous women and girls — have been subjected to a long history of colonization and systemic racism, the effects of which continue to be felt. The trial judge might also dispel a number of troubling stereotypical assumptions about Indigenous women who perform sex work, including that such persons" (at paragraph 201):

- are not entitled to the same protections the criminal justice system promises other Canadians;
- are not deserving of respect, humanity, and dignity;
- are sexual objects for male gratification;
- need not give consent to sexual activity and are "available for the taking";
- assume the risk of any harm that befalls them because they engage in a dangerous form of work; and
- are less credible than other people.

LANGUAGE USED TO ADDRESS MS. GLADUE AT TRIAL:

The Supreme Court noted that at the trial, "[w]itnesses, Crown counsel, and defence counsel all repeatedly referred to Ms. Gladue as a 'Native girl' or 'Native woman.'" The Court held that "it is almost always preferable to call someone by his or her name. There may be situations where it would be appropriate for the trial judge to intervene to ensure this principle is respected" (at paragraph 207):

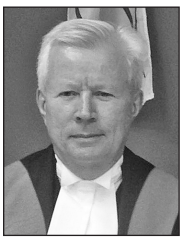
> Being respectful and remaining cognizant of the language used to refer to a person is particularly important in a case like this, where there was no suggestion that Ms. Gladue's status as an Indigenous woman was somehow relevant to the issues at trial. While there is nothing to suggest that it was anyone's deliberate intention in this case to invoke the kind of biases and prejudices against Indigenous women discussed above, the language used at trial was nevertheless problematic. At the end of the day, her name was "Ms. Gladue", not "Native woman", and there was no reason why the former could not have been used consistently as a simple matter of respect.

COMMENTARY:

The Supreme Court's comments in *Barton* might seem self-evident, but they were not to the judge and counsel who participated in the trial. *Barton* serves, at least, as a reminder to all of us of the necessity of treating those who appear before us, or those who cannot, with respect and dignity. From a larger perspective, *Barton* calls upon us to intervene to ensure that all participants treat those involved in the judicial process with respect.

CONCLUSION:

As we have seen, the Supreme Court of Canada considered a number of diverse and important criminal-law issues in 2019. The Court has shown a willingness to make broad pronouncements concerning public policy issues when they arise in constitutional and non-constitutional cases. The Court's decision in *Le* is, in my view, going to be a challenging one for trial judges to apply. The type of studies and reports considered by the Supreme Court are not routinely filed before Canadian trial judges. We are going to be asked to take judicial notice of the conclusions reached in the reports and studies filed in *Le*. It will be interesting to see how this unfolds.



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