Barton, the Twin Myths & the Defence of Honest but Mistaken Belief in Communicated Consent by J Poe

At the heart of sexual assault cases is the presence or absence of consent, and whether the consent was freely given. Unfortunately, this defence often relies on the complainant's prior sexual activities and can make trial for sexual assault victims an even more humiliating and demeaning experience then it needs to be. This defence often relies upon the twin myth reasoning, which is the idea that complainants with a prior sexual history are firstly more likely to have consented and secondly that they are less worthy of belief.[1] While the law may appear to protect victims of sexual assault, it cannot help the victims if the law is not applied properly due to preconceived notions about women as beings that are in a constant sexual state. A current case that shows just how pervasive these myths still are in our society is *R v Barton*. This case reached a decision in the Supreme Court of Canada in 2019, and shows how trial judges, in as well as the Crown, are not willing to debunk the twin myths of sexual assault and apply the law properly to the facts at hand especially when dealing with a sex worker.

The premise of the defence of honest but mistaken belief in communicated consent is that the accused must have an honest but mistaken belief that the complainant actually communicated consent, whether by words or conduct, with consent meaning the voluntary agreement of the complainant to engage in the sexual activity in question.[2] Essentially for this defence the focus shifts to the mental stage of the accused and the question becomes whether the accused honestly believed that the complainant said "yes" through their words or actions. This can be concerning because trying to decipher a complainant's actions, especially when they are under duress, is obviously objective and this lends the defence to think of many reasons, many based on the twin myths, as to why their behaviour constituted a mistaken belief in consent.

When this defence is used in court it is often accompanied with relying on the complainant's prior sexual activities in support of the honest but mistaken belief in consent, with the bulk of the "evidence" relying on past consensual encounters meaning that every encounter from then on will be consensual. While this defence is not supposed to rest upon evidence that a person consented "at some point" in the past, many trial judges have erred in applying the evidentiary rules that come along with this defence.

R v Barton is a sexual assault case that deals with the evidence and admissibility of the complainant' past sexual activity. The facts of this case are that the accused was charged with the first degree murder and death of an indigenous woman and sex worker, and the accused testified that he and the deceased had engaged in similar consensual activity that caused her death on both the night leading up to her death and the previous night.

The errors in this case do not only lie with the trial judge at the lower court, but also with the Crown for failing to mitigate the twin-myth reasoning that underlies this case, since the woman who was murdered happened to also be a sex worker. S. 276(1) of the *Criminal Code* sets out rules for whether evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is admissible by reason of the sexual nature of that activity and sets out

[1] *R v Goldfinch,* 2019 SCC 28 at 62.
[2] *R v Barton* (2019) SCC 33.

conditions for admissibility of this evidence.[3] In *Barton* the accused testified at length about his prior sexual activity with the deceased and the Crown nor the trial judge objected.

The Supreme Court of Canada in *Barton* ordered a new trial but for manslaughter rather than first-degree murder, based on the failure to implement the s.276 regime of the *Criminal Code* and how this carried a significant risk that the jury would engage in impermissible forms of reasoning on the central questions of whether the deceased subjectively consented to the sexual activity in question, and if not, whether the accused honestly but mistakenly believed she communicated her consent to that sexual activity at the time.[4] The reasoning behind the new trial for a lesser charge was based on the fact that the Crown's case turned primarily on its expert evidence of whether the deceased's fatal would was a cut on the inside of her vagina and the jury was not persuaded.[5]

If section 276 of the *Criminal Code* had been applied properly and if all parties in this case, including the Crown, had not relied on the twin-myth reasoning that the victim was a sex worker who therefore must have consented to all sorts of heinous sexual activities because that was her "job", then I believe that the courts would have had a different outcome in this case and that a new trial for first-degree murder would have been warranted.

The dissent in *Barton* highlighted the trial judge's failure to apply any safeguards to the jury to prevent systematic bias. Trial judges have an important role to play in instructing juries so that they can recognize biases, and the inflammatory remarks that were made such as referring to the victim as a "native sex worker" only aide to the stigma that sex workers, and in particular aboriginal sex workers, deserve to be sexually assaulted and murdered because it is in their line of work. There is no point in having safeguards for the admissibility of evidence in sexual assault cases, or the laws governing sexual assault if they are not relied on at all in the court of law. This case shows to me that although the Canadian law might look like it is up to date and current with the laws and views of sexual assault, that the people that are in charge of holding the Canadian society to this standard are not willing to apply the law themselves and break the system of stereotyping.

[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*