

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Addo-Binney, 2012 ONCA 792

DATE: 20121119

DOCKET: C53834

O'Connor A.C.J.O., Cronk and Juriensz JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Bismark Addo-Binney

Appellant

A. Herscovitch, for the appellant

G. Choi, for the respondent

Heard and released orally: November 9, 2012

On appeal from the conviction entered on April 8, 2011 and the sentence imposed on June 15, 2011 by Justice Anne M. Molloy of the Superior Court of Justice sitting without a jury.

ENDORSEMENT

[1] On April 8, 2011, the appellant was convicted of sexual assault. He was sentenced to 12 months imprisonment and two years' probation. The appellant appeals his conviction only to this court.

[2] The appellant submits that the trial judge improperly took judicial notice that men are stronger than women, misapprehended the evidence of the relative

levels of the complainant's and appellant's physical fitness and effectively shifted the burden of proof by considering whether the inferences the defence asserted should be drawn from the evidence were possible rather than whether they raised a reasonable doubt.

[3] The appellant argues that these errors were material to the trial judge's reasoning and that she failed to properly apply the principles of *R. v. W.(D.)*, [1991] 1 S.C.R. 742. We do not accept these arguments. At various points in her reasons, the trial judge stated the governing *W.(D.)* principles correctly. We are satisfied when her reasons are read as a whole that she properly applied the *W.(D.)* principles to the entirety of the evidence. This is made particularly clear by paras. 94-95 of her reasons.

[4] While a generalization about the relative physical strength of men and women may have questionable relevance in a case like this, where the woman is much bigger than the man, we are not satisfied that the trial judge's comment was material to her conclusion as to the appellant's guilt. There was ample evidence in the record to support the trial judge's findings of credibility. As she observed, the text messages between the parties immediately after the encounter and the e-mail exchange a few days later strongly corroborated the complainant's version of what happened. In our view, those text messages were tantamount to an acknowledgement of guilt.

[5] We are not persuaded that there is any basis to interfere with the trial judge's conclusion. The appeal is dismissed.

"D. O'Connor A.C.J.O."

"E.A. Cronk J.A."

"R.G. Juriansz J.A. »