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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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. Wierzbicki, 2012 ONCA 794
DATE: 20121120
DOCKET: C55083

Doherty, LaForme JJ.A. and Glithero J. (*ad hoc*)

BETWEEN

Her Majesty the Queen

Appellant

and

Thomas John Wierzbicki

Respondent

Christine Bartlett-Hughes, for the appellant

Andrew Furgiuele, for the respondent

Heard and released orally: November 13, 2012

On appeal from the acquittal entered by Justice I.S. McMillan of the Superior Court of Justice, dated January 27, 2012.

ENDORSEMENT

[1] The respondent was acquitted on a single charge of sexual assault. The Crown appeals raising four grounds of appeal.

ISSUE #1 – WAS THE CROSS-EXAMINATION ON SEXUAL ACTIVITY BETWEEN THE COMPLAINANT AND THE RESPONDENT FORECLOSED BY S. 276?

[2] Assuming that the few questions put to the complainant concerning the alleged sexual activity with the respondent offered to potentially explain his DNA found in the rape kit analysis engaged s. 276, we see no prejudice from the failure to comply with the procedural requirements of the section. We reach that conclusion for four reasons.

- The cross-examination, even if it fell within s. 276, did not invoke either of the "twin myths" against which the section is intended to protect (see s. 276(1)).
- Had the s. 276 procedure been followed, the questions put to the complainant which went directly to the only evidence incriminating the respondent (the DNA evidence) would inevitably have been permitted.
- There was no suggestion by the Crown at trial that s. 276 had any application to the questions and no objection raised by the Crown to the questions.

- There is no support in the record for the contention that the questions put to the complainant in any way caught her by surprise, confused her, or otherwise impaired her ability to respond to the questions. Her responses to those questions were entirely consistent with the quality of her responses to most of the questions put to her by both the Crown and counsel for the respondent.

[3] If the failure to comply with s. 276 was an error in law, it did not result in the kind of prejudice to the Crown needed to justify an order quashing the acquittal and granting a new trial.

ISSUE #2 – WAS THE CROSS-EXAMINATION IN RESPECT OF SEXUAL ACTIVITY WITH MR. HORNE IMPROPER?

[4] The questions concerning the complainant's involvement with Mr. Horne, who was present in the bar on the evening of the alleged assault, did not offend s. 276 to the extent that those questions went to show an inconsistency between the complainant's testimony and her statement to the police. We do agree with Crown counsel's submission that the questioning, to a limited degree, went beyond that narrow purpose. As we read the cross-examination, one or perhaps two questions were addressed to the prior sexual activity between Mr. Horne and the complainant. Those questions should not have been allowed without a s. 276 vetting.

[5] We are satisfied, however, that no prejudice flowed to the Crown from these questions. The trial judge made no mention of Mr. Horne or any activity involving Mr. Horne in his reasons for judgment. The evidence was, in our view, so peripheral as to be close to irrelevant. Certainly, it could not have produced the level of prejudice needed before this court will set aside an acquittal and order a new trial.

ISSUE #3 – THE ADMISSIBILITY OF THE COMPLAINANT'S OUT-OF-COURT STATEMENT

[6] The Crown argues that a statement made by the complainant almost immediately after the alleged assault to a passing motorist should have been admitted not for its truth, but as part of the narrative and as consistent with the credibility of her allegation. This basis for admitting the statement was not advanced at trial.

[7] The statement was effectively put before the trial judge during the cross-examination of the complainant. It was common ground, based on that cross-examination, that the complainant did make an allegation of "rape" very shortly after the alleged assault. In our view, nothing would have been added to the narrative by allowing the recipient of that complaint to testify as to the substance of the complaint.

ISSUE #4 – DID THE TRIAL JUDGE MISUSE EVIDENCE OF THE ALLEGED ABSENCE OF AN IMMEDIATE COMPLAINT?

[8] The Crown contends that in his reasons, the trial judge referred to the absence of any immediate complaint by the complainant and used the absence of that complaint to make an adverse inference against the complainant. The Crown contends that in doing so, the trial judge returned to the days where complainants in sexual assault cases were effectively penalized if they did not make an immediate complaint concerning the alleged assault.

[9] At the outset of his reasons, in the course of providing a brief narrative of the relevant events, the trial judge indicated that there was an absence of an immediate complaint by the complainant. While it is not entirely clear what the trial judge meant by this comment, it is certainly open to the interpretation that the trial judge misapprehended the evidence. The complaint to the passing motorist qualified as an immediate complaint on any reasonable view of the evidence.

[10] We are satisfied, however, that if the trial judge did misapprehend the evidence, that misapprehension played no role in his analysis of the evidence and his ultimate determination that the Crown had failed to prove the respondent's guilt beyond a reasonable doubt. Quite frankly, this was a very weak case for the Crown. Even if the trial judge mistakenly thought that the

complainant had not made an immediate complaint, that error did not have any effect on the trial judge's analysis of the evidence relevant to his determination that the evidence simply failed to meet the high probative standard required by the reasonable doubt standard of proof.

[11] The appeal is dismissed.

"Doherty J.A."
"H.S. LaForme J.A."
"C. Stephen Glithero"