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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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. P.F., 2012 ONCA 807
DATE: 20121123
DOCKET: C53102 & C53370

Doherty, Epstein JJ.A. and Cavarzan J. (a*d hoc*)

BETWEEN

Her Majesty the Queen

Respondent

and

P.F.

Appellant

and

M.F.

Appellant

Neil Jones, for the appellant, P.F.

Crystal Tomusiak, for the appellant, M.F.

Robin Flumerfelt, for the respondent

Heard: October 24, 2012

On appeal from the conviction entered by Justice Douglas K. Gray of the Superior Court of Justice on August 25, 2010, with reasons reported at 2010 ONSC 4018, and from the sentence imposed on October 28, 2010.

By the Court:

[1] The appellants, who were married at one time, were charged with a series of sexual assaults against three young girls who lived in their home from time to time. According to the dates in the indictment, the assaults occurred sometime between November 2000 and March 2005.

[2] Some of the charges involved only P.F., some involved only M.F., and some involved both. The Crown's case was based largely on the evidence of the three complainants. The trial judge ultimately convicted the appellants on most charges. He did, however, acquit M.F. on the allegations on which she was charged alone.

[3] The appellants appeal their convictions and the sentences imposed at trial. Counsel for the appellants advised during oral argument that they would make no submissions in support of the sentence appeals.

[4] P.F. testified and M.F. did not testify. According to P.F.'s testimony, there was no sexual activity with the complainant T.K., and the alleged assault on the complainant A.L. involved an inadvertent touching. Most of P.F.'s evidence related to the complainant A.P. He testified that he did engage in sexual activity with A.P. and that M.F. was involved in some of that sexual activity. It was P.F.'s evidence, however, that all of the activity was consensual and some of it was initiated by A.P. At the time of the alleged assaults, A.P. was 15 years old, was living in the appellants' home and was the girlfriend of M.F.'s son who also lived in the home.

[5] Counsel for the appellants' raised several grounds of appeal. In oral argument, they helpfully distilled their arguments down to two main submissions. First, counsel submit that the trial judge erred in drawing an adverse inference against the credibility of P.F. because the complainant A.P. was not cross-examined about certain documents referred to and relied on by P.F. in his testimony to demonstrate the consensual nature of the sexual activity with A.P. This submission raises the proper application of the so-called rule in *Browne v. Dunn*, [1893] 6 R. 67 H.L. (Eng.).

[6] The second argument raised by counsel for M.F. rests on the contention that the trial judge failed to give adequate, separate consideration to the case against M.F. and misapprehended evidence relevant to her defence. Counsel submits that the trial judge moved directly from findings of fact made against P.F. to the same findings against M.F. Counsel acknowledges that M.F. relied on P.F.'s testimony but submits that she had defences that were distinct from those advanced by P.F. in his evidence. Counsel contends that the trial judge failed to address those issues.

THE *BROWNE V. DUNN* COMPLAINT

[7] P.F. testified that on several occasions, A.P. signed documents consenting to sexual activity with him. It is unclear whether those consents extended to M.F. According to P.F., he took the precaution of obtaining written consents because

he had been accused of sexual assault in the past. P.F. also testified that the documents had been lost some time prior to trial.

[8] A.P. had testified during the case for the Crown. She was cross-examined at length. She was not, however, asked any questions about the alleged consent forms and it was not suggested to her that she had signed anything at any time agreeing to sexual activity with the F.s.

[9] The defence did not seek to recall A.P. after P.F. had testified. The Crown did not attempt to call A.P. in reply.

[10] In the course of closing submissions, the trial judge raised the question of the effect, if any, of the failure to cross-examine A.P. on the written consents she had allegedly given to P.F. The trial judge indicated that the failure to cross-examine A.P. raised "a real dilemma". He suggested various possibilities, including the possibility of drawing an inference against the credibility of P.F.'s testimony that A.P. had signed the consents. Defence counsel argued that no such inference should be drawn. In contrast, Crown counsel urged the trial judge to draw that adverse inference. No one suggested that the evidence should be reopened to recall A.P.

[11] The trial judge ultimately determined, at para. 29 of his reasons, that "the failure of counsel for the accused to cross-examine [A.P.] on certain matters

testified to by Mr. [F.] does effect, to some extent, the credibility of the evidence given by Mr. [F.]."

[12] In his oral submissions, counsel for P.F., properly in our view, conceded that the nature of P.F.'s evidence about the consents and the failure to cross-examine A.P. on those consents could, in law, attract a negative inference against the credibility of that part of Mr. F.'s evidence. Counsel submits, however, that the drawing of that adverse inference in this case rendered the trial unfair.

[13] Counsel submits that the unfairness to the appellants flowing from the trial judge's ruling lies primarily in the drawing of an adverse inference against P.F.'s testimony after denying him the opportunity to put the contested evidence to A.P. Counsel further submits that unfairness also flows from the drawing of an adverse inference when the Crown did not object to P.F.'s evidence about the consents during his examination-in-chief.

[14] The record does not support the premise underlying the first basis upon which unfairness is alleged. Neither counsel for the Crown nor counsel for the appellants sought to recall A.P. after P.F. had testified. During argument, when the trial judge raised the question of the effect of the failure to cross-examine A.P. on the alleged consents, there was some discussion about the Crown's ability to recall the complainant at that stage of the trial. We do not, however, read that exchange as in any way foreclosing counsel for the appellants from asking that

A.P. be recalled to give evidence concerning the consents. Quite simply, counsel never sought to recall A.P. and the trial judge was never called upon to determine whether A.P. could be recalled.

[15] The second basis upon which the unfairness claim is advanced must also be rejected. It is unclear to us that the Crown had any grounds to object to P.F.'s evidence about the consents. In any event, the Crown may have viewed the evidence as ultimately favourable to the Crown because it was so patently unbelievable. However, whatever the Crown may have thought of the evidence has no relevance to the inference, if any, that the trial judge, as the trier of fact, should draw from the failure to put the consents to A.P. when she was testifying.

[16] We also do not accept counsel's characterization of the trial judge's ruling as effectively placing the burden of a lawyer's tactical error on the appellants. There is nothing in the record to suggest that counsel made any error in judgment in not cross-examining A.P. about the consents referred to in P.F.'s evidence, or in not asking the trial judge to recall A.P. for the purpose of putting P.F.'s evidence about the consents to her. The adverse inference drawn by the trial judge had nothing to do with an assessment of the wisdom of any tactical choices. The inference was drawn in the course of the trial judge's weighing of the evidence that had been placed before him. He was fact finding, not assigning blame for the manner in which the defence was conducted.

[17] Counsel for M.F. submits that even if the trial judge properly drew the adverse inference against P.F., he should not have drawn that inference in respect of the case against M.F. We see no basis for that distinction. P.F.'s evidence was admissible for and against M.F. She relied on large parts of his testimony including his evidence that the sexual activity with A.P. was consensual. To the extent that the failure to cross-examine A.P. on the alleged consents undermined the credibility of P.F.'s evidence that the sexual activity was consensual, it was bound to adversely affect M.F.'s case.

[18] The submissions based on the alleged misapplication of the so-called rule in *Browne v. Dunn* fail.

M.F.'S OTHER ARGUMENTS

[19] Counsel for M.F. argues that the trial judge misapprehended material evidence in finding that M.F. was a party to two assaults against A.P. Counsel further contends that the trial judge failed to give M.F.'s case adequate separate consideration from that of P.F. Counsel contends that the trial judge moved directly from her findings against P.F. to the same findings against M.F. She argues that M.F. was in a somewhat different position as there was evidence, particularly from P.F.'s nephew, to support the contention that M.F. was not involved in the sexual activity with A.P.

[20] In support of the argument that the trial judge misapprehended material evidence, counsel referred to para. 327 of his reasons:

> According to Mr. [F.], there were two consensual "threesomes" involving [M.F.], and the incident involving the dildo was a consensual act that involved only [A.P.] and himself….

[21] Counsel submits that in his evidence P.F. described only one consensual "threesome" and not two.

[22] Counsel is correct in the sense that P.F. referred to only one "threesome" during which M.F. was an active participant in the sexual activity. He did testify, however, M.F. was on the bed with him and A.P. on a second occasion when P.F. and A.P. were engaged in consensual sexual activity. We read the trial judge as referring to these two incidents in his summary of the evidence at para. 327. Read in this way, there was no misapprehension of the evidence.

[23] In any event, even if there was some misapprehension of P.F.'s testimony, that misapprehension was not material to the result. The trial judge did not rely on only P.F.'s evidence to establish the participation of M.F. in the sexual activity involving A.P. The trial judge relied on A.P.'s evidence, which clearly established that participation. Even the most narrow reading of P.F.'s testimony offered strong support for A.P.'s evidence that M.F. was involved in two of the assaults.

[24] We also reject the submission that the trial judge failed to give adequate separate consideration to M.F.'s culpability. While it is true that much of the trial

judge's reasons focused on P.F.'s testimony, that focus was inevitable given that P.F. testified and M.F. did not.

[25] The trial judge's careful credibility findings as they related to the three complainants and P.F., applied to the Crown's case against M.F. Given those findings, any claim that M.F. was unaware of the assaults on A.P. was bound to fail. Having found that M.F. was present during two of the assaults and having accepted A.P.'s evidence that she was actively involved in those assaults, the trial judge implicitly rejected any suggestion based on the evidence of the nephew that M.F. only became aware of the assaults some time after they occurred.

CONCLUSION

[26] The conviction appeals are dismissed. We see no merit to the sentence appeals and they are also dismissed.

RELEASED: "DD" "NOV 23 2012"

"Doherty J.A."
"Gloria Epstein J.A."
"Cavarzan J. (per Doherty J.A.)"

CORRECTED DECISION:

Correction made on March 29, 2021: In light of the publication ban, the appellants' names have been put into initials.