

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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. M.A., 2012 ONCA 877

DATE: 20121213

DOCKET: C50077

Simmons and Hoy JJ.A. and Speyer J. (*ad hoc*)

BETWEEN

Her Majesty the Queen

Respondent

and

M.A.

Appellant

Aaron B. Harnett and Alice Barton, for the appellant

Nadia Thomas, for the respondent

Heard and released orally: December 4, 2012

On appeal from the conviction entered on July 30, 2008 by Justice V.T. Rosemay of the Ontario Court of Justice, sitting without a jury.

ENDORSEMENT

[1] In our view the trial judge's reasons reflect several errors, but there is one error that is dispositive and that requires, in itself, that we order a new trial.

[2] Shortly after referring to a defence submission that the appellant's statement was not evidence but only a statement to the police, the trial judge said the following:

On the other hand, the court cannot overlook the obvious fact that the complainant's *viva voce* evidence in court was not only supported by all the Crown witnesses, but it was totally uncontradicted.

[3] This was not the case. In the appellant's videotaped statement, which was introduced by the Crown as part of its case, the appellant made several specific denials of conduct attributed to him by the complainant. Further, not only was the trial judge's statement in error, he failed to attempt to resolve the conflicts in the evidence revealed by the appellant's statement and he failed to apply the principles in *W.D.*

[4] In the circumstances, the appeal is allowed and a new trial is ordered.

"Janet Simmons J.A."

"Alexandra Hoy J.A."

"C.M. Speyer J. (*ad hoc*)"