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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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. S.D.S., 2014 ONCA 4
DATE: 20140103
DOCKET: C51940

Rosenberg, Rouleau and Pardu JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

S.D.S.

Appellant

Mark Halfyard, for the appellant

Alison Wheeler, for the respondent

Heard: November 28, 2013

On appeal from the conviction entered on April 17, 2009, and the sentence imposed on September 18, 2009, by Justice Laurence A. Pattillo of the Superior Court of Justice, sitting without a jury.

ENDORSEMENT

[1] The appellant was convicted of sexual assault and touching for a sexual purpose of an eight year old boy. He appeals from his convictions, arguing that the trial judge ought to have assessed credibility differently. He submits that the trial judge gave too much latitude to a 12 year old child witness testifying about events occurring four years earlier, did not give enough weight to inconsistencies

in the child's evidence, gave too much weight to the child's demeanour and misapprehended the appellant's evidence about the number of times he had babysat the boy. He also submits that errors by an interpreter made the trial unfair.

[2] The child complained of two incidents of anal intercourse, and two incidents of fellatio, all said to have occurred when his mother and older brother went out and left him in the care of the appellant.

[3] As observed in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 32, citing *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788:

> [W]here credibility is a determinative issue, deference is in order and intervention will be rare (para. 26). While the reasons must explain why the evidence raised no reasonable doubt, "there is no general requirement that reasons be so detailed that they allow an appeal court to retry the entire case on appeal. There is no need to prove that the trial judge was alive to and considered all of the evidence, or answer each and every argument of counsel" (para. 30).

[4] Here the trial judge correctly set out the law about child witnesses:

> I am mindful that the evidence of children should not be assessed on the same standard as adult witnesses. Rather, consideration of a child's evidence should be approached on a "common sense" basis. While it is still important to take into account the strength and weakness of a child's evidence, regard must also be had to the child's mental development, understanding and ability to communicate, both at the time the events occurred and at the time of giving testimony in court.

[5] The trial judge concluded that the complainant was a credible witness. He evaluated the inconsistencies in detail but did not consider them significant. One of the inconsistencies advanced in argument on appeal, by way of example, was that the complainant was inconsistent when he said at trial that he saw blood in his faeces, when at the preliminary inquiry he said he did not see blood. In the course of the cross-examination, defence counsel put this prior statement to the complainant:

> Okay. You told us that it hurt quite a bit when he put his wiener.
>
> And you said: Yes.
>
> And the lawyer said: And did you bleed a little?
>
> And you said: No.
>
> And the lawyer said: No blood on your bed sheets?
>
> You said: No.
>
> And the lawyer said: You didn't see any?
>
> And you said: No.

[6] It was open to the trial judge to conclude that there was no inconsistency here, as the complainant was talking about two different things: blood in the toilet and blood on the sheets. A trial judge is in a better position than an appellate court to evaluate whether there was an inconsistency, and any effect it might have on the assessment of the complainant's credibility and reliability.

[7] Similarly, the trial judge concluded that new details that emerged in the course of the trial were not of a nature as to undermine the complainant's credibility.

[8] The trial judge concluded that the complainant was a credible witness, indicating:

> The real issue for consideration in respect of the inconsistencies, is whether, when considered as a whole, such additions or inconsistencies, to the extent they are major, indicate that [the complainant] has fabricated his story concerning the incidents, or simply reflects the frailties of such testimony given his age at the time of the incidents, the time which has transpired since the events and the impact of the forum he found himself in.
>
> …
>
> I found [the complainant]'s evidence of what happened credible. While [the complainant]'s evidence on certain points was clearly different between earlier testimony, the evidence of other witnesses or between direct and cross, in my view the points were not major or were explained, particularly having regard to [the complainant]'s age and development. In my view, they do not diminish overall what he said happened to him. I accept, therefore, [the complainant]'s evidence of what he said the accused did to him. I do not believe he misconceived what happened nor do I believe that he was lying or that there was any form of conspiracy … to fabricate a story to keep the accused away from [F.]
>
> [The complainant]'s description of the events is not something that is known to every eight or nine-year old boy. I do not accept the defence's submission that [the complainant] learned of it off the Internet or from watching movies on T.V. which the boys had in their

> room. While [the complainant] and [his brother] said they had seen brief sex scenes between men and women during movies which they watched, they both denied they had ever seen male with male sex on the Internet or on T.V. I accept that evidence.
>
> At the conclusion of his cross-examination, counsel for the defence suggested to [the complainant], in a series of long questions, that he was upset with the accused and did not want him to go back with his mom. [The complainant] answered that that was true. Counsel then suggested he was lying about what happened and that it had never happened. [The complainant] said that was not true and that he was telling the truth about what happened. In my view, I accept that [the complainant] was telling the truth about what happened.

[9] The appellant has not demonstrated that the trial judge made any palpable and overriding error justifying appellate intervention in his assessment of the complainant's evidence.

[10] The appellant testified in examination-in-chief that he used to babysit the complainant once or twice a month. In cross-examination, however, he repeatedly said that he looked after the complainant only one or two times in the two year period in issue. The trial judge drew an adverse inference from this change and other aspects of his testimony and concluded that "the appellant tried to understate many matters and thereby distance himself from the allegations." He rejected the appellant's evidence and concluded that it did not leave him with a reasonable doubt.

[11] Again, no error has been demonstrated in the way in which the trial judge assessed credibility.

[12] These assessments were the trial judge's to make and there is no reason to depart from the deference customarily accorded to findings of credibility.

[13] There were some difficulties with the interpreters at trial. Fresh evidence admitted on appeal demonstrates that the errors were minor and did not suggest that the interpreters were not competent. The appellant's counsel was fluent in Portuguese, and objected at times to the accuracy of the interpretation. The trial judge seemed to treat this as if counsel was offering a personal, competing expert opinion and instructed him to refrain from correcting the interpreter. The trial judge should not have discouraged these interventions. In the end, the mistakes were dealt with appropriately as they arose and the fresh evidence does not establish that there was any other material error.

[14] For these reasons, the appeal is dismissed.

"M. Rosenberg J.A."

"Paul Rouleau J.A."

"G. Pardu J.A."