

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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. J.D., 2014 ONCA 58

DATE: 20140123

DOCKET: C56628

Feldman, MacFarland and Pepall JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

J. D.

Appellant

Vincenzo Rondinelli, for the appellant

Suhail Akhtar, for the respondent

Heard and released orally: January 15, 2014

On appeal from the convictions entered on October 27, 2011 by Justice Peter J. Wright of the Ontario Court of Justice, sitting without a jury.

ENDORSEMENT

[1] The Crown concedes that there were material misapprehensions of evidence in relation to counts 2 and 3 and that there must be a new trial on those counts. We agree. However, the Crown disputes that there was a misapprehension of evidence in relation to count 1 and that the misapprehensions of evidence in relation to counts 2 and 3 have no bearing on count 1.

[2] At para. 54 of his reasons for judgment in relation to count 1, the trial judge said:

His concluding comments on this incident were that had he hit her in the fashion described he would have done far more injury to her head and face than that of which [J.] spoke and is demonstrated in Exhibits 1 and 2.

[3] Although his counsel made a submission to that effect in oral argument, there was no evidence from the appellant to that effect. In the very next para. 55, the trial judge said:

In short, I conclude the defendant's explanation with respect to what occurred in the bedroom is no explanation at all and I reject it preferring instead the evidence of [J.D.].

[4] It is clear that his misapprehension of the evidence relates directly to his credibility finding leading to the appellant's conviction. While standing alone this misapprehension of evidence on count 1 may not result in a new trial, when taken together with the conceded misapprehension on the other two counts, and where credibility is the central issue on all three counts, the cumulative effect of the three renders the verdict unreliable on all three counts.

[5] The appeal is allowed and there will be a new trial on all three counts.

"K. Feldman J.A."

"J. MacFarland J.A."

"S.E. Pepall J.A."