

## 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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. Adu, 2015 ONCA 525

DATE: 20150710

DOCKET: C57585

Weiler, Tulloch and van Rensburg JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Francis Adu

Appellant

Najma Jamaldin and Paul Genua, for the appellant

Amanda Rubaszek, for the respondent

Heard: June 4, 2015

On appeal from the conviction entered on April 5, 2013 by Justice Janet Wilson of the Superior Court of Justice, sitting without a jury.

ENDORSEMENT

[1] The appellant appeals his conviction for sexual assault. He submits that the complainant was so lacking in credibility that the verdict was unreasonable and cannot stand. He further submits that the trial judge misapprehended the evidence and that she did not submit the complainant's testimony to the same level of scrutiny as that of the appellant.

[2] We disagree. The inconsistencies and frailties in the complainant's evidence on which the appellant relies were addressed in the trial judge's reasons which ran to 398 paragraphs. The reasons make it clear that the trial judge was alive to the inconsistencies and problems with the complainant's evidence including her criminal record which included crimes of dishonesty, her history of drug abuse, her evidence as to how she got to the appellant's apartment (which the trial judge ultimately rejected), her motive to lie or fabricate, and the various phone calls that were made from the complainant's cell phone.

[3] Although the appellant's counsel relied on the decision of this court in *R. v. Rhayel*, [2015] O.J. No. 2675, in support of her argument that the trial judge applied different levels of scrutiny to the evidence of the appellant and the complainant, in this case, unlike in *Rhayel*, the trial judge meaningfully addressed the difficulties in the complainant's evidence and provided reasons why on the whole of the evidence she was satisfied that the appellant was guilty beyond a reasonable doubt.

[4] This case turned on credibility. There was no issue that the appellant and the complainant had had sex. The appellant's DNA was found in the complainant's vagina. The defence position was that the complainant, a complete stranger to Mr. Adu, came to his apartment with another man, that she came on to him, was attracted to him, and that, after smoking cocaine, she was capable of

consenting and did consent to having sex with him or that he had an honest belief in her consent.

[5] The complainant's evidence was that her first memory in the apartment was that she awoke or came to and realized that she was naked, lying face down on a bed and being penetrated vaginally from behind. She made it clear that she did not consent to this activity. The man had his hand on the small of her back applying pressure. She told him she "did not want to do this" and he told her to calm down that "it would be worse for her if he was uncomfortable and that she should relax."

[6] Having regard to the frailties in the complainant's evidence, the trial judge looked for confirmation of the complainant's account and found it in other parts of the evidence including, that Mr. Adu was a total stranger over 20 years older than the complainant; the complainant reported the sexual assault to the Shoppers Drug Mart security guard and the police within minutes of leaving the appellant's apartment and her highly emotional state at this time; when examined by the sexual assault nurse at the hospital the complainant had injuries to her genitals consistent with a sexual assault and although these injuries were also consistent with vigorous consensual sex, the complainant had recent bruising on other parts of her body including her arms.

[7] Contrary to the submission of the appellant, the trial judge did not misapprehend the evidence in any material respect that was essential to her credibility assessment.

[8] It was open to the trial judge to find, as she did, that the frailties in the complainant's evidence did not undermine the overall veracity of her account of being sexually assaulted by the appellant and to find him guilty of sexual assault. The verdict is reasonable.

[9] Accordingly, the appeal is dismissed.

"K.M. Weiler J.A."

"M. Tulloch J.A."

"K. van Rensburg J.A."