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), (2.1), (2.2), (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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (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 victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, 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); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..

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.L., 2015 ONCA 839
DATE: 20151202
DOCKET: C59605

Feldman, Gillese and Watt JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

J.L.

Respondent

Peter Scrutton, for the appellant

Vincenzo Rondinelli, for the respondent

Heard and released orally: November 30, 2015

On appeal from the acquittal entered on October 14, 2014 by Justice A. Donald K. MacKenzie of the Superior Court of Justice, sitting without a jury.

ENDORSEMENT

[1] The Crown appeals from the decision of the trial judge dismissing the charges of sexual assault, sexual interference and sexual exploitation (ss. 271, 151 and 153(a) of the *Criminal Code*, R.S.C. 1985, c. C-46) by the respondent on his daughter, who was four years old at the time of the alleged offences. The basis of the appeal is that the trial judge erred in law by misapprehending the

forensic evidence as well as mischaracterizing it as incapable of being confirmatory of the evidence of the complainant.

[2] The report of the forensic science witness, Mr. Peck, indicated that a large deposit of the complainant's saliva was found in the crotch of the appellant's underwear. There was no issue taken by the defence at trial that the saliva belonged to the complainant. The forensic science report stated:

> Conclusions:
>
> The DNA profile from the amylase positive area on the front/crotch area of the underwear (1-1) from [the respondent], is a mixture of the DNA from at least 2 individuals, at least one of whom is female and one of whom is male:
>
> - A major female DNA profile (Profile #1) has been determined, at 15 STR loci, and is suitable for comparison. [The complainant] cannot be excluded, at 15 STR loci, as the source of this DNA profile.
>
> *The probability that a randomly selected individual unrelated to [the complainant] would coincidentally share the observed DNA profile is estimated to be 1 in 400 quadrillion.*
>
> - The minor amount of DNA detected is not suitable for comparison due to the low amount present and uncertainty with respect to the total number of contributors.
>
> [Emphasis in original; footnotes omitted.]

[3] The trial judge stated, however, at p. 26 of his transcribed reasons:

> … [T]he saliva constituent on the pyjama shirt and the underwear contained a mixture of DNA from one female and one male person. The male person was identified as the accused while the female person, being the complainant, could not be excluded. Finally, the minor amount of DNA detected was not suitable for comparison due to the low amount present and uncertainty with respect to the total number of contributions. In the result, there was no physical or forensic evidence that could buttress the Crown's theory that the accused admitted [committed] the alleged offences against his daughter. As previously noted, both counsel have agreed that this case will turn on the credibility of the fact witnesses.

[4] This statement reflects a misunderstanding of the forensic evidence and, in particular, the fact that the complainant's saliva was positively identified on the appellant's underwear. It also reflects a misunderstanding of the ability of that evidence to confirm the evidence of the complainant that the respondent put his penis into her mouth.

[5] The result of this error is that the appeal must be allowed, the acquittal set aside and a new trial ordered. A warrant of arrest will be issued if required.

"K. Feldman J.A."
"E.E. Gillese J.A."
"David Watt J.A."