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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. Zagrodskyi, 2018 ONCA 34
DATE: 20180117
DOCKET: C62199

Laskin, Trotter and Fairburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Konstiantyn Zagrodskyi

Appellant

Matthew Gourlay and Reem Zaia, for the appellant

Nancy Dennison, for the respondent

Heard: January 9, 2018

On appeal from the conviction entered on January 15, 2016 and the sentence imposed on May 4, 2016 by Justice Paul Currie of the Ontario Court of Justice.

REASONS FOR DECISION

[1] The appellant Konstiantyn Zagrodskyi was charged with domestic abuse of his former wife on three separate occasions: August 27, October 28 and October 31, 2010. After a trial at which the appellant testified and denied that he had abused the complainant, the trial judge convicted him on the August 27 and October 31 incidents and acquitted him on the October 28 incident.

[2] On the August 27 incident the trial judge found the appellant guilty of assault causing bodily harm and sexual assault. He sentenced him to nine months for the assault causing bodily harm conviction and three months concurrent for the sexual assault conviction. On the October 31 incident the trial judge convicted the appellant of sexual assault and sentenced him to six months consecutive to the sentences for the August 27 incident.

[3] The appellant appeals both his convictions and his sentences. On his sentence appeal he seeks leave to introduce fresh evidence showing the immigration consequences of his sentence, consequences the trial judge did not consider in imposing a global sentence of 15 months.

A. CONVICTION APPEAL

[4] On his conviction appeal the appellant's main submission is that the trial judge's reasons were inadequate because he failed to explain why the appellant's denial of abuse was disbelieved. We agree with this submission for the October 31 incident but not for the August 27 incident.

[5] The August 27 incident occurred in the context of the deteriorating relationship between the appellant and his former wife. The catalyst for the incident was a conversation between the complainant and her mother, which the appellant overheard. In the conversation the complainant said that while on vacation a young

man had made overtures to her and kissed her. Having overheard the conversation, the appellant punched a hole in the wall, threw the complainant's laptop to the ground and ripped off her clothes.

[6] The complainant testified that the appellant then slapped her numerous times with his open hand, and that his abuse of her continued throughout the night and into the next morning. The appellant admitted that he slapped the complainant a couple of times. He also admitted that he ripped off her clothes but claimed that he did so to show how easily she could be raped by other men. He denied the balance of her allegations. The appellant also conceded that he was upset. But he maintained he was not angry, by which he meant physically aggressive.

[7] The trial judge's reasons for conviction are brief but they are adequate. He found the complainant's evidence about what occurred on August 27 "compelling", and gave brief reasons for his finding. He rejected the appellant's evidence that he was not angry, and found that the appellant's version of what occurred on August 27 was not in accord with common sense or life experience. He concluded that on all the evidence, including photographs of the complainant's injuries, taken by her, that the guilt of the appellant had been proved beyond a reasonable doubt.

[8] The appellant's main complaint about the inadequacy of the reasons focuses on the trial judge's rejection of the appellant's claim he was not angry. In rejecting the appellant's claim, the trial judge did not explain the distinction the

appellant made in his testimony (given through an interpreter) between being "upset", that is despondent after hearing that his former wife may have been unfaithful, and being "angry", that is physically aggressive. Although it might have been preferable had the trial judge explored this distinction, his rejection of the appellant's claim he was not angry was sufficient. We are satisfied that the appellant knew why his denial of abuse was disbelieved. We therefore dismiss the conviction appeal on the August 27 incident.

[9] By contrast the trial judge's reasons on the October 31 incident are inadequate. The parties agree that on October 31 they had sex: the complainant gave the appellant a "hand job". The underlying issue was whether the sex was consensual. The appellant said it was; he was trying to repair his relationship with his former wife. She said it was not; she did not want to have sex with him and only agreed to do so to calm him down.

[10] In convicting the appellant on this count, the trial judge simply said:

> On that count and count two, the October 31st allegation, I am satisfied on all the evidence, beyond a reasonable doubt, that on that occasion Mr. Zagrodskyi did commit a sexual assault on O.H., and that he did commit an assault of O.H. in the course of that October 31st event as well.

[11] These reasons, in substance, amount to no reasons at all. They do not tell the parties why the appellant's evidence was disbelieved. Nor do they permit this

court to meaningfully review the basis for the appellant's conviction. Thus his conviction for sexual assault on October 31 is set aside and a new trial is ordered on that count.

B. THE SENTENCE APPEAL

[12] The trial judge did not consider the immigration consequences of the sentence he imposed. In fairness to him, no party asked that he do so.

[13] Taking into account these immigration consequences, we adjust the sentences for the August 27 incident as follows:

- Six months less ten days inclusive of pre-sentence custody for the conviction for assault causing bodily harm; and,
- Three months consecutive instead of concurrent for the sexual assault conviction.

[14] In essence we have reduced the sentence for the assault causing bodily harm conviction by three months and converted the three month's sentence for sexual assault from a concurrent sentence to a consecutive sentence.

[15] We think that justice is fairly served by imposing these sentences. Functionally they preserve the overall length of sentence imposed by the trial judge for the August 27 incident, nine months. These adjusted sentences will permit the appellant to appeal his deportation order. As the Supreme Court of Canada and

our court have said, the risk of deportation is a factor to be taken into account in sentencing, and it was not taken into account by the trial judge.

[16] We are mindful that we cannot impose an artificial sentence to circumvent the scheme of the *Immigration and Refugee Protection Act*. But in our view these sentences do not do so, especially as there is a rational basis for imposing consecutive sentences, and we have maintained the trial judge's overall sentence of 9 months.

[17] As well, we have taken into account that the appellant is a compelling candidate for an adjustment of his sentence. The incidents occurred over eight years ago. Since then the appellant has established a relationship with another woman to whom he is engaged to be married, and with whom he has bought a house. He is close to her family. He has a full-time job and the support of his employer. And he has had no further troubles with the law.

C. CONCLUSION

[18] The conviction for sexual assault on October 31, 2010 is set aside and a new trial is ordered on that count. Otherwise the conviction appeal is dismissed.

[19] Leave to appeal sentence is granted, and the sentence appeal is allowed. The sentences imposed on count three (assault causing bodily harm on August

27, 2010) and count four (sexual assault on August 27, 2010) are adjusted as follows:

- Assault causing bodily harm: reduced from nine months to six months less 10 days, inclusive of pre-sentence custody.
- Sexual assault: changed from three months concurrent to three months consecutive.

"John Laskin J.A."
"G.T. Trotter J.A."
"Fairburn J.A."