WARNING

THIS IS AN APPEAL UNDER THE

YOUTH CRIMINAL JUSTICE ACT

AND IS SUBJECT TO:

110(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

(2) Subsection (1) does not apply

(a) in a case where the information relates to a young person who has received an adult sentence;

(b) in a case where the information relates to a young person who has received a youth sentence for a violent offence and the youth justice court has ordered a lifting of the publication ban under subsection 75(2); and

(c) in a case where the publication of the information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.

(3) A young person referred to in subsection (1) may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to either Act at the time of the publication.

111(1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

138(1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published), 118(1) (no access to records unless

authorized) or 128(3) (disposal of R.C.M.P. records) or section 129 (no subsequent disclosure) of this Act, or subsection 38(1) (identity not to be published), (1.12) (no subsequent disclosure), (1.14) (no subsequent disclosure by school) or (1.15) (information to be kept separate), 45(2) (destruction of records) or 46(1) (prohibition against disclosure) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. H.C., 2018 ONCA 779
DATE: 20180925
DOCKET: C64372

Strathy C.J.O., Doherty and Roberts JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

H.C.

(A young person in the meaning of the *Youth Criminal Justice Act*)

Appellant

Lauren M. Wilhelm, for the appellant

Andrew Hotke, for the respondent

Heard: September 18, 2018

On appeal from the conviction entered by Justice Robert Main of the Ontario Court of Justice, dated July 17, 2017.

REASONS FOR DECISION

[1] This was essentially a two-witness case. The complainant, the appellant's half-sister, alleged that the appellant sexually assaulted her when she was 5 and the appellant was 13. The appellant testified and denied the allegations.

[2] The trial judge found the appellant guilty on all charges arising out of the alleged sexual activity. The appellant appeals from conviction.

[3] The appellant raises three grounds of appeal. We need address only the argument that the trial judge misapplied the burden of proof. In considering this submission, the reasons for judgment must be read as a whole. We also proceed on the assumption that trial judges understand and properly apply fundamental legal principles unless the appellant clearly demonstrates to the contrary.

[4] We are satisfied that the appellant has met that burden in this case. The trial judge believed the complainant and gave detailed reasons for coming to that conclusion. However, having made that credibility assessment, the trial judge effectively moved directly to convictions without regard to the burden of proof and without any explanation for his outright rejection of the appellant's denial.

[5] Two passages from the trial judge's reasons are important. The first appears at the beginning of his analysis. The trial judge observed:

> This decision is uniquely challenging, as the analytical tools of *R. v. W.D.* are not readily available, even though this is a case involving straight credibility.

[6] The trial judge offered no explanation for his conclusion that the "analytical tools of *R. v. W.D.*" had no application. Both counsel had urged the trial judge to apply that analysis to the evidence.

[7] In *R. v. W.D.*, [1991] 1 S.C.R. 742, the court emphasized that, given the burden of proof on the Crown, criminal cases cannot be reduced to credibility contests. The court offered a three-step formula to assist triers of fact in the proper application of the burden of proof in cases which turn on the credibility of witnesses who have given different versions of the relevant events.

[8] As acknowledged by the trial judge, this was a “straight credibility” case. It was exactly the kind of case that required an application of the principles set down in *W.D.*

[9] The Crown submits that the trial judge was not disavowing any reliance on the *W.D.* principles, but was indicating that the optional three-step formula used in *W.D.* to describe those principles was inappropriate to this case. We cannot accept that submission. Nowhere in his reasons does the trial judge address the *W.D.* principles. Specifically, he does not consider whether, despite his finding that the complainant was credible and the appellant was not, the Crown had proved the case beyond a reasonable doubt. The trial judge treated his credibility assessments as determinative of the outcome.

[10] A further indication that the trial judge misapplied the burden of proof is found in his observations about the evidence of the accused. These observations were made after a full review of the complainant’s evidence. Without reference to the substance of the appellant’s evidence, the trial judge said the following:

> We must start off with an acknowledgement that some denials may be valid, where someone is accused of something they did not do. The accused's denial must be looked at in the context of all of the evidence. As such, it is truly implausible that he did not initiate contact with his little sister. That is not to say that, in the balance, her evidence is better than the accused's denial. If her evidence is better, it is because it is true, and leads to an inevitable conclusion. Here I am repeating myself, but I do reject the accused's denial.

[11] With respect, the first sentence in the above passage misstates the burden of proof. One does not begin the assessment of an accused's evidence from the premise that he might be telling the truth. One begins from the premise that the accused is presumed innocent. It is for the Crown to prove beyond a reasonable doubt that the accused's denial is false.

[12] The remainder of the above-quoted passage strongly suggests that the trial judge decided the case by assessing the credibility of the competing versions of events. He described the appellant's version as "truly implausible" without any explanation for why he came to that conclusion, and he described the complainant's evidence as "true". As the trial judge said, those credibility assessments led to the "inevitable conclusion" that the appellant was guilty. That approach failed to take into account the burden of proof and the possibility of an acquittal, even if the credibility assessments favoured the complainant.

[13] As the court indicated at the end of oral argument, the error with respect to the burden of proof is fatal to the convictions. The convictions on counts two and

three are quashed and the provisional stay on count one is set aside. A new trial is ordered on all counts.

"G.R. Strathy C.J.O."
"Doherty J.A."
"L.B. Roberts J.A."