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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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
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> (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
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> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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).
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> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
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> (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
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> (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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. M.S., 2019 ONCA 869
DATE: 20191105
DOCKET: C64100

Benotto, Brown and Paciocco JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

M.S.

Appellant

Mark Halfyard, for the appellant

Elena Middelkamp, for the respondent

Heard: October 29, 2019

On appeal from the conviction entered on May 8, 2017 by Justice Jamie Trimble of the Superior Court of Justice.

REASONS FOR DECISION

[1] The appellant was convicted of sexual interference and invitation to sexual touching but acquitted of sexual assault. The counts flow from three separate incidents involving his stepdaughter at the family home.

[2] At trial, the appellant denied the allegations. During his examination, defence counsel (not appellate counsel) asked the appellant if he was aware of

why the complainant would “come forward and make these allegations”. The appellant responded that he did not know why. The Crown confronted him with a prior police statement in which he stated that she made up the allegations because of an incident involving her boyfriend and established the inconsistency. The appellant acknowledged the statement.

[3] The Crown then cross-examined the appellant extensively regarding the complainant’s motive to fabricate generally. Specifically, the Crown asked the appellant:

- What possible reason she would have to “make all this up”;
- Was there any reason why she would go to the police, make a statement, and come to court twice to testify;
- What was her reason for making up the first and second incident;
- What was her motive; and,
- Why was she going to the police?

[4] The trial judge also asked the appellant: “…was there some specific reason, some event, something happened, that you think caused [her] to lie about that and make up that story back then”. The appellant responded that he did not remember exactly but she was being punished for something. At this point, the Crown continued the cross-examination about the complainant’s discipline and other reasons she may have had to make the allegations.

[5] The trial judge referred to the evidence of motive in his reasons when he assessed the credibility of the appellant and the complainant.

[6] The appellant submits that by allowing cross-examination on the motive to fabricate and then using the evidence to discredit the appellant and enhance the evidence of the complainant, the trial judge shifted the burden of proof and erred in law.

[7] We accept the appellant's submission and it is not necessary to address the other grounds of appeal.

[8] It is well-established that there is no onus on the accused to comment on the credibility of the accuser. The Crown submits, and we agree, that there were inconsistencies in the appellant's prior statement which were the proper subject matter of cross-examination.

[9] The Crown also submits that, in addition to the inconsistencies, the further questions were justified because the appellant "open[ed] the door" by raising the complainant's alleged motive to fabricate of his own accord.

[10] We disagree. The evidence the appellant gave in-chief was that he did not know of any reasons why the complainant would make the allegations. There were therefore no claimed motives that required challenge by cross-examination. The Crown was entitled to pursue the inconsistencies in cross-examination and to proceed cautiously on the appellant's response to the question in-chief. However,

the cross-examination went far beyond the inconsistencies and scope of a proper cross-examination. The Crown's questions required the appellant to comment on – and indeed speculate – about the complainant's motive, both generally and with respect to specific incidents. In this way, the questioning went directly against long-standing jurisprudence by improperly placing the onus on the appellant to explain why the complainant would falsely accuse him. This court set out the rationale for limiting the line of questioning about the complainant's motives in *R. v. T.M.*, 2014 ONCA 854, at paras. 37-38:

> The appellant argues that this cross-examination was improper. He relies on the many decisions of this court that have held "it is improper to call upon an accused to comment on the credibility of his accusers": see *R. v. Rose (2001)*, 2001 CanLII 24079 (ON CA), 53 O.R. (3d) 417 (C.A.), at para. 27, per Charron J.A.; and *R. v. L.L.*, 2009 ONCA 413 (CanLII), 96 O.R. (3d) 412, at paras. 15-16, per Simmons J.A.
>
> The concern with this line of questioning is two-fold. First, it is unfair to ask an accused to speculate about a witness's motives. Second, these questions risk shifting the burden of proof. The burden is on the Crown to prove beyond a reasonable doubt that a complainant's allegations are true. Yet questions to an accused about a complainant's motives may cause the trier of fact to focus on whether the accused can provide an explanation for why a complainant would make false allegations, and find the accused guilty if a credible explanation is not forthcoming.

[11] That defence counsel did not object to the line of questioning is not determinative. As this court held in *R. v. L.(L.)*, 2009 ONCA 413, 96 O.R. (3d) 412, at para. 17:

> Contrary to the submissions of the trial Crown, the fact that it may be appropriate for the police to ask such questions as part of an investigation does not mean that portions of an accused's statement in which such questions are asked are properly admissible. This court made that clear in *C.(F.).* In that case, even though no objection was raised at trial, this court held that portions of an accused's statement to the police asking him to explain why the complainant made the allegations and why some people believed the complainant should not have been placed before the jury.

[12] The trial judge's reasons disclosed that he used the evidence adduced from the appellant on cross-examination to enhance the complainant's credibility. Although he instructed himself not to equate credibility with an absence of motive to fabricate, he relied on the absence of motive to enhance the complainant's credibility. At two different points in the reasons, the trial judge stated that "there is no evidence" that the complainant had any reason to fabricate these complaints. Moreover, he found, at para. 107:

> Finally, there is no evidence that [the complainant] had any reason [to] fabricate these complaints against [the appellant]. <u>There was no ulterior motive.</u> [Emphasis added.]

[13] The trial judge erred by using the evidence to enhance his assessment of the complainant's credibility. He fell into the error articulated in *R. v. Bartholomew,*

2019 ONCA 377, at para. 23 and "transformed" the absence of a proven motive to fabricate into a proven lack of motive. A proven absence of motive may provide a "platform to assert that the complainant must be telling the truth": *Bartholomew*, at para. 21. But, the absence of evidence of motive does not mean that the complainant must be telling the truth.

[14] The danger in relying on this factor to bolster the complainant's credibility is that an absence of proved motive is often unreliable. This court has raised this concern repeatedly:

> There are simply too many reasons why a person might not tell the truth, most of which will be unknown except to the person her/himself, to use it as a foundation to enhance the witness' credibility. Consequently, [a motive to fabricate] is an unhelpful factor in assessing credibility: *R. v. Sanchez*, 2017 ONCA 994, at para. 25, citing *L.(L.)* at para. 44.

[15] To a lesser extent, the trial judge appears to have relied on this evidence in evaluating the appellant's testimony. At para. 104, the trial judge disbelieved the appellant's evidence about the complainant being punished by saying that his explanation for the complainant's motive "makes no sense" and was "vague". Using the appellant's testimony in this way tacitly shifted the burden of proof onto the appellant to demonstrate that the complainant had a motive to fabricate: see *R. v. Batte* (2000), 49 O.R. (3d) 321, at para. 121 (C.A.).

[16] This court has provided ample direction on the permissible use of a motive to fabricate in assessing credibility at the trial level. A misplaced emphasis on motive overlooks the fact that motive is, at best, a secondary consideration, and offers limited assistance to either party when sexual offences are at issue. At trial, the chief task is – and must remain – whether the Crown has met its burden beyond a reasonable doubt.

[17] Accordingly, the appeal is allowed, and a new trial is ordered.

"M.L. Benotto J.A."
"David Brown J.A."
"David M. Paciocco J.A."