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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. U. A., 2019 ONCA 946
DATE: 20191203
DOCKET: C64015

Strathy C.J.O., Harvison Young and Jamal JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

U. A.

Appellant

Nicholas St-Pierre, for the appellant

E. Nicole Rivers, for the respondent

Heard: November 25, 2019

On appeal from the conviction entered on January 27, 2017 and the sentence imposed on June 20, 2017 by Justice Julie Bourgeois of the Ontario Court of Justice.

REASONS FOR DECISION

[1] The appellant was convicted of sexually assaulting the complainant, his cellmate, at the Ottawa Carleton Regional Detention Centre, by forcing him to engage in oral sex on three occasions on November 5, 2015. The appellant was sentenced to four years' imprisonment, together with certain ancillary orders. He now appeals his conviction and sentence.

The Trial

[2] The only live question at trial was consent, which turned on credibility.

[3] The trial judge disbelieved the appellant and found that his evidence did not raise a reasonable doubt. She concluded that the appellant's evidence "varies, changes or is imprecise and at times clearly contradicts itself, precisely on the issue of consent." She also accepted the complainant's evidence that he did not consent. She therefore concluded that the Crown had proved its case beyond a reasonable doubt and found the appellant guilty of sexual assault.

The Appeal from Conviction

[4] On appeal from conviction, the appellant seeks to challenge the trial judge's credibility assessments on several grounds. He argues that the trial judge applied uneven scrutiny, failed to articulate sufficiently how credibility concerns were resolved, and misapprehended the evidence relevant to credibility. In essence, the appellant invites this court to reevaluate the witnesses' credibility based on the transcripts and to reach conclusions contrary to those of the trial judge.

[5] We decline to do so. Credibility assessments are the domain of the trial judge, who has the benefit of seeing and hearing the witnesses in the context of all the other evidence adduced at trial. A trial judge's credibility assessments are therefore afforded substantial deference on appeal: *R. v. Aird*, 2013 ONCA 447, 307 O.A.C. 183, at para. 39.

[6] Here, the trial judge recognized that the main question at trial was credibility. She gave detailed and cogent reasons for rejecting the appellant's evidence and accepting the complainant's evidence on the issue of consent, reasons which amply permit meaningful appellate review. The trial judge also understood from the complainant's own testimony that the complainant suffered from conditions affecting his attention span, mental development, and memory, and therefore carefully considered his evidence in that light. Far from applying uneven scrutiny to the evidence, the trial judge properly assessed the complainant's credibility and evidence "by reference to criteria appropriate to [his] mental development, understanding and ability to communicate": *R. v. R.W.*, [1992] 2 S.C.R. 122, at p. 134. We see no basis for this court to intervene.

[7] The appeal from conviction is therefore dismissed.

The Appeal from Sentence

[8] The trial judge sentenced the appellant to four years' imprisonment, less 267 days' credit for pre-sentence custody (178 days credited at 1.5:1), resulting in 39 months to be served.

[9] The appellant seeks leave to appeal his sentence on three grounds.

[10] First, the appellant asserts that the trial judge's decision involves a significantly higher sentence than prior cases for similar offences.

[11] We disagree. Although the circumstances of each case are different, numerous offenders have been sentenced in the three- to five-year range for sexual assault involving forced oral sex in analogous circumstances: see, for example, *R. v. S.A.*, 2014 ONCA 266, affirming *R. v. Ajimotokan*, 2013 ONSC 1961, at paras. 3-6, 39; *R. v. Allen*, 2017 ONCJ 405, at paras. 5-11, 43-44; *R. v. Allard*, 2011 BCSC 915, at paras. 4, 9, 24-25; *R. v. Dyck*, [1986] B.C.J. No. 3278 (S.C.), at paras. 3, 6; *R. v. W.N.C.*, [2005] B.C.J. No. 1389 (C.A.), at paras. 2, 4, 19; and *R. v. Nadeau*, 2017 BCPC 158, at paras. 6-11, 24-28, 80.

[12] Second, the appellant asserts that the trial judge inappropriately applied the step principle (which provides that a subsequent sentence for the same type of offence should generally be higher than the previous sentence), as the appellant was still awaiting sentence for an unrelated sexual assault on another person.

[13] Again, we disagree. The trial judge concluded that the sentence imposed was fit “with or without the step principle” — she therefore did not rely on the step principle. The trial judge also noted that the appellant had recently been convicted of another sexual offence for which he was later sentenced to three years’ imprisonment. Although the appellant did not know his sentence at the time he committed the sexual assault at issue in this appeal, the trial judge stated that “[o]ne would think that his detention ought to have triggered some sense of behavioural acknowledgement and nexus or a link between his status and his

sexualized behaviour." She thus properly treated this prior conviction as an aggravating factor. We see no basis to impugn this conclusion.

[14] Finally, relying on *R. v. Duncan*, 2016 ONCA 754, at para. 6, the appellant asserts that this court has held that "in the appropriate circumstances, particularly harsh presentence incarceration conditions can provide mitigation apart from and beyond the 1.5 credit referred to in s. 719(3.1)" of the *Criminal Code*, R.S.C. 1985, c. C-46, and that sentencing courts should consider "both the conditions of the presentence incarceration and the impact of those conditions on the accused." The appellant asserts that he should have received enhanced credit here because he was in segregation for his entire pre-sentence custody.

[15] Once again, we disagree. The decision as to whether to award enhanced credit for harsh pre-sentence incarceration conditions is a highly discretionary determination to which considerable deference is owed: *R. v. Deaico*, 2019 ONCA 12, at para. 4; *Duncan*, at paras. 6-7; and *R. v. Ledinek*, 2018 ONCA 1017, at para. 13.

[16] Here, the trial judge exercised her discretion to reject the appellant's claim for enhanced credit because: (1) the appellant was placed in segregation as a result of his own behaviour in sexually assaulting his cellmate; (2) she concluded that the appellant's "evidence about his time in segregation, the conditions and how it impacted him to be exaggerated", and he had "declined each and every

offer of yard time and fresh air"; and (3) most importantly, the appellant had refused several alternatives to segregation that were offered to him. We see no basis to intervene with these reasons for refusing enhanced credit.

[17] In the final analysis, we see no error in principle, failure to consider a relevant sentencing factor, or erroneous consideration of an aggravating or mitigating factor that might justify appellate intervention: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 44. The sentence imposed was not demonstrably unfit, but rather properly reflected the principle of proportionality, namely, that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Disposition

[18] The appeal from conviction is dismissed. Leave to appeal sentence is granted, but the appeal from sentence is dismissed, except that the victim surcharge imposed at trial is set aside.

"G.R. Strathy C.J.O."

"A. Harvison Young J.A."

"M. Jamal J.A."