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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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

(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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. R. D., 2019 ONCA 951
DATE: 20191204
DOCKET: C56617 and C58709

Lauwers, van Rensburg and Hourigan JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

R. D.

Appellant

R. D., in person

Lisa Jørgensen, counsel for the appellant on the sentence appeal and duty counsel on the conviction appeal

Deborah Krick, for the respondent

Heard: November 13, 2019

On appeal from the convictions entered on October 21, 2009 by Justice Robert Maranger of the Superior Court of Justice, sitting with a jury, and the sentence imposed on January 16, 2013.

Hourigan J.A.:

I. Overview

[1] R.D. appeals his convictions and sentence for unlawful confinement, sexual assault causing bodily harm, and choking with intent.

[2] Two grounds of appeal are asserted on the conviction appeal. First, the appellant submits that the trial judge erred in dismissing his application to prohibit Crown cross-examination on his prior convictions, pursuant to *R. v. Corbett*, [1988] 1 S.C.R. 670. Specifically, he argues that the trial judge should not have permitted cross-examination on his previous conviction for attempted murder. Second, the appellant argues that the trial Crown's cross-examination and closing argument compromised his right to a fair trial.

[3] For reasons I will explain, I would not give effect to either ground of appeal. On the facts of this case, where the defence mounted an all-out attack on the complainant's credibility and character, the trial judge properly exercised his discretion to allow cross-examination on the attempted murder conviction. Further, the Crown's cross-examination and closing were not improper and did not compromise the appellant's right to a fair trial.

[4] Regarding the sentence appeal, the Crown concedes that the trial judge erred in conducting the dangerous offender application pursuant to provisions in the *Criminal Code*, R.S.C., 1985, c. C-4, that had been repealed and replaced. However, the Crown submits that the trial judge applied the correct legal test for the designation, since the legislative amendments did not change the criteria for a dangerous offender designation. It relies on the curative proviso and argues that the dangerous offender designation should remain in place. The Crown

acknowledges that a new hearing should be ordered to consider the issue of sentence.

[5] I conclude that the curative proviso is unavailable. It would be fundamentally unfair to the appellant to limit his submissions on a new hearing to sentence. The fresh evidence on sentence will undoubtedly touch on some of the same issues as the original dangerous offender hearing. It is unclear whether this fresh evidence will conflict with the evidence that was relied on in making the original designation approximately eight years ago. In the circumstances, it cannot be said that the trial judge's error was inconsequential. I would order a new hearing on the dangerous offender designation and sentence.

II. Analysis

(a) Conviction Appeal

(i) *Corbett* Application

[6] Credibility was a critical issue in this case because the complainant and the appellant testified and gave diametrically opposing accounts of what happened in the early morning hours of August 2, 2008.

[7] The complainant's evidence was that she went out with the appellant and a group of friends and ended up at the appellant's apartment. She says that she passed out at about 4 a.m. and awoke to the appellant choking her. The complainant testified that over the course of a lengthy assault, the appellant

repeatedly forced vaginal intercourse and attempted anal intercourse. Police photographs of the complainant show extensive bruising.

[8] The appellant testified that it was the complainant who initiated the sexual activity. His evidence was that they engaged in consensual vaginal and anal intercourse. According to the appellant, when he and the complainant parted, she did not look like she did in the police photographs.

[9] The appellant brought a *Corbett* application to prohibit cross-examination on certain convictions. In 1993, he was convicted of attempted murder, possession of a weapon, break and enter to commit assault, and sexual assault. Defence counsel's submission was that because the previous violent offences were very similar to the charges then before the court, the record's prejudicial effect far outweighed any probative value.

[10] In his reasons on the application, the trial judge quoted extensively from *Corbett*, including a review of the factors to consider on the application. He noted that the complainant's credibility and character had been "front and centre". The trial judge concluded that excluding the convictions in their entirety would leave the jury with the mistaken impression that the appellant had an unblemished record.

[11] The trial judge noted that there was some prejudice in allowing the criminal record to go before the jury, but he found that "a strong direction to the jury and a limited amount of the criminal record to go before the jury is the fairest way to deal

with this matter." He ruled that the conviction for attempted murder could be the subject of cross-examination and that all other entries on the record should be excluded.

[12] The appellant submits that the trial judge erred in permitting cross-examination on his conviction for attempted murder. He argues that its admission was highly prejudicial because it would lead to propensity reasoning by the jury that could not be cured by a direction. This ruling is also said to be prejudicial because it involved his most serious conviction and because the complainant testified that she feared for her life during her encounter with the appellant.

[13] The legal principles underlying *Corbett* applications are well settled and need not be repeated here. However, two points are worth emphasizing for present purposes. First, there is no presumption that an accused will not be cross-examined on his or her record. To the contrary, cross-examination on the accused's criminal record will be the usual course: *R. v. N.A.P.* (2002), 167 O.A.C. 176, at para. 20. Second, deference is owed to a trial judge's determination of a *Corbett* application, except where there is an error in principle, misapprehension of the material facts, or unreasonable exercise of discretion: *R. v. McManus*, 2017 ONCA 188, 353 C.C.C. (3d) 493, at para. 84; *R. v. Paul*, 2009 ONCA 443, 249 O.A.C. 199, at para. 13, leave to appeal refused, [2009] S.C.C.A. No. 45.

[14] In considering whether the trial judge erred in exercising his discretion, this court's decision in *N.A.P.* is instructive. In that case, the accused was charged in a ten-count indictment with various offences against his wife and daughter, including assault, threatening death, and unlawful confinement. The defence brought a successful *Corbett* application to exclude his criminal record, which included an attempted murder conviction. The accused was convicted on only one count and the Crown appealed.

[15] On appeal, Doherty J.A., writing for the court, ruled that the trial judge made an error in principle in her ruling on the *Corbett* application, which necessitated this court reviewing the merits of the application afresh. Doherty J.A. referenced *R. v. Saroya* (1994), 76 O.A.C. 25, (Ont. C.A.) for the proposition that a conviction for attempted murder has significant probative value in a credibility analysis. Attempted murder is such a serious offence that it may indicate a conviction for perjury is unlikely to keep the witness honest. It is also open to the jury to find that the witness is unlikely to have more respect for the truth than he or she has shown for human life.

[16] Doherty J.A. balanced the conviction's probative value against the risk that the jury would conclude that "someone who had actually tried to kill another person was dangerous and would certainly not hesitate to threaten and assault others": *N.A.P.*, at para. 25. He noted that in cases where credibility is central to the outcome of a trial, the balance may favour cross-examination where the accused

mounts an all-out attack on the credibility and character of the Crown witnesses. Doherty J.A. found that the defence had made such an attack on the complainants. However, that factor was neutralized because the Crown had presented a great deal of evidence that established that, throughout an eighteen-year marriage, the accused had physically and emotionally abused his wife and children. Accordingly, there was no risk that the failure to permit cross-examination on the attempted murder conviction would leave the jury with the mistaken impression that the accused had an unblemished record. Doherty J.A. concluded that although it was a close case, the proper exercise of discretion favoured prohibiting cross-examination on the attempted murder conviction.

[17] In the case at bar, similar to the situation in *N.A.P.*, the defence mounted an all-out attack on the complainant's credibility and character. The nature and extent of that attack is best captured in the following excerpt from the defence's closing argument:

> But the fact of – of a conviction for an assault, especially one that's described by her, certainly shouldn't make you think in terms of truthfulness. But it's interesting because it shows the type of behaviour she was exhibiting during that time period, and her attitude towards the police, and some of the outrageous things she said to them. Now another factor in her evidence is she talks about how she had chlamydia from some previous incident. That's of some interest when we get to -to the actual incident itself. She talks about that that's probably from a – a abusive boyfriend she used to live with.

[18] It is evident that the defence strategy was to attack the complainant's character and credibility. Her previous conviction for assaulting a police officer and her lifestyle were relied on to paint her as a person whose testimony was unworthy of belief.

[19] Unlike the situation in *N.A.P.*, however, in this case there was no other evidence about the appellant to neutralize his attack on the complainant's character and credibility. In these circumstances, the trial judge did not err in principle in failing to exclude cross-examination on the attempted murder conviction. In my view, its inclusion permitted a more informed credibility assessment of the competing versions of events.

[20] The appellant submits that the trial judge should have exercised his discretion differently by excluding cross-examination on the attempted murder and sexual assault convictions but permitting it on the convictions for possession of a weapon and break and enter to commit assault. I would not give effect to this argument. As in *N.A.P.*, the potential probative value and prejudicial effect of cross-examination on the attempted murder conviction were both relatively high. The appellant's desired order would certainly reduce any potential prejudice, but it would also significantly reduce the probative value of the cross-examination on the appellant's record. It was for the trial judge to determine where the appropriate balance should be struck, and that balancing is owed deference on appeal.

[21] I am not satisfied that the trial judge erred in exercising his discretion. Appellate interference is not warranted and I would therefore dismiss this ground of appeal.

(ii) Cross-Examination and Crown Closing

[22] The appellant argues that the trial Crown's cross-examination was improper and that the prejudice arising from it was exacerbated by her closing address. Specifically, the appellant submits that the cross-examination and closing were improper because the trial Crown: (i) required the appellant to explain the evidence against him, thereby suggesting a reverse onus; (ii) insinuated that the appellant was knowledgeable about the criminal justice system; (iii) breached the appellant's right to silence and solicitor-client privilege; and (iv) intimidated the appellant into not giving full answers.

[23] Before analyzing these complaints, some context is helpful. In considering a claim of improper Crown conduct, it is often difficult for an appellate court to understand the dynamics of a trial. A transcript may not accurately convey what was happening in the courtroom. The words are all written down, but the tone is lost. Fortunately, in this case we have the benefit of comments from trial defence counsel. He brought an unsuccessful motion for a mistrial and in the course of his submissions, he commented on the way the trial Crown was prosecuting the case. It was his position that the trial Crown had done nothing improper. He even went

as far to say, “not only is my friend not straddling the line of misconduct, she’s not even close to the line of misconduct.”

[24] With that comment in mind, I turn to the first complaint about the trial Crown’s cross-examination. The appellant submits that the trial Crown was asking the appellant to explain the evidence against him, which suggested to the jury a reverse onus on the appellant. In addition, the appellant argues that the trial Crown, in her closing, continued to suggest to the jury that the appellant had an obligation to explain the evidence against him.

[25] I would not give effect to this argument. In one instance, the trial Crown asked the appellant to comment on what the complainant was thinking. The defence objected and the Crown agreed to rephrase the question. Otherwise, my reading of the impugned questions is that the Crown was challenging the appellant on his version of events. There is nothing improper in that. Indeed, it is part of the Crown’s responsibilities to test the defence evidence. Similarly, the parts of the closing submission contested on this basis are instances where the trial Crown is inviting the jury to reject the appellant’s evidence. Such submissions in criminal trials are commonplace and are not improper.

[26] During a question about what the appellant did as the complainant was leaving, the Crown stated “the reason why you didn’t give her money for a cab was that to keep track of her because you know how it is, and you – you were afraid

she was gonna go to the police because of what had happened on that day?" (emphasis added). The appellant argues that the underlined words suggested he was knowledgeable about the criminal justice system.

[27] I see no merit in this submission. There was no overt reference to the appellant's experience with the criminal justice system and it does not necessarily follow from this question that the appellant was known to the police. In any event, the jury was aware of his previous conviction for attempted murder. The appellant could not have suffered any prejudice by the inclusion of this phrase in the impugned question.

[28] Next, the appellant objects to questions about why the appellant did not speak to his friends after the incident. When answering on this topic, the appellant referenced having a communication with his lawyer. The appellant argues that, at this point, the Crown should have abandoned this line of questions and that the failure to do so breached solicitor-client privilege and his right to remain silent.

[29] I reject this submission. At no point was the appellant questioned about his communications with his lawyer. The Crown was trying to establish that the appellant's post offence conduct was relevant. Accordingly, the Crown was obliged to cross-examine the appellant on his actions and that was the purpose of the questions. There was nothing improper about this area of cross-examination.

[30] As mentioned above, the defence brought an unsuccessful mistrial application. The basis of the application was that the appellant was prevented from making full answer and defence as a result of the manner in which the cross-examination took place. The appellant makes a similar argument before us. To understand that argument some background is required.

[31] At trial, the Crown requested a direction be given to the appellant that he answer the questions asked and not get into "tirades about things that are irrelevant to the question". The trial judge directed the appellant to answer the questions asked and not "go on tangents about collateral matters". The appellant submits this direction effectively made him reluctant to give full answers, thus impairing his right to a fair trial.

[32] The trial judge rejected a similar argument on the mistrial application. After reviewing the transcript, he could not find any instance where the appellant was prevented from answering a material question.

[33] I agree with the trial judge's analysis. It is evident from the transcript that the appellant had no difficulty in answering the questions put to him. Indeed, on occasion he was combative with the trial Crown, as he forcefully put his position to her. In support of this argument, the appellant primarily relies on a single example — a question about where the appellant put his shirt that night. The appellant wanted to provide details about the fact that he had earlier in the evening been

wearing a different shirt. He was permitted to do so and ultimately answered the question asked. Again, I fail to see how the appellant's ability to answer questions was compromised.

[34] The appellant next complains that the trial Crown used inflammatory language in both her cross-examination of him and her closing address to the jury. I am not persuaded by this argument. In my view, there was nothing inflammatory in the cross-examination of the appellant. Questions were put to him that challenged his version of events. The challenged portions of the closing are primarily instances where the trial Crown was responding to submissions made by defence counsel. I am not persuaded that the trial Crown in responding to very aggressive defence submissions used inflammatory language.

[35] Finally, the appellant submits that the trial Crown improperly submitted that the complainant had no motive to fabricate her evidence and should therefore be believed. This is a troubling argument. The impugned portion of the closing does not contain any reference to the complainant having no motive to fabricate. Rather, the trial Crown is simply responding to arguments made by the appellant's counsel in his closing as to why the complainant may have lied. The trial Crown quite properly submitted to the jury that defence theories about why the complainant may have lied are just allegations and not evidence.

[36] Overall, the difficulty with the appellant's argument on this ground of appeal is that it fundamentally misconceives the Crown's role, seeking to relegate the Crown's status to that of a passive observer at trial. It is true that the Crown cannot adopt a purely adversarial role towards the defence, but the adversarial process is an accepted tool in our search for truth. The Crown must act as a strong advocate within this process, and "it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability": *R. v. Cook*, [1997] 1 S.C.R. 1113, at para. 21.

[37] Every participant in a criminal trial has a role to play. A Crown attorney's role is not to secure a conviction but to fairly present to the trier of fact credible evidence of an alleged crime. They do so as advocates and they fail in their duty when they do not do their utmost to present as strong a case as possible. The execution of this duty includes cross-examinations that highlight for the trier of fact the weaknesses in the accused's exculpatory evidence. Where a Crown attorney leaves unchallenged what should be challenged, he or she breaches a public obligation to ensure that a clear picture of the evidence is presented to the court. In short, a Crown attorney must vigorously present a case without fear or favour in order for our justice system to function.

[38] I agree with the submission of trial counsel for the appellant, the Crown's conduct in this case did not come close to crossing the line of misconduct. This was a hard-fought trial, where both the defence and Crown presented their

respective cases forcefully. Nothing in Crown counsel's conduct is worthy of censure by this court and nothing she did compromised the appellant's right to a fair trial. For these reasons, I would reject this ground of appeal.

(b) Sentence Appeal

[39] It is common ground between the parties that the appellant's dangerous offender proceeding should have proceeded under the post-2008 dangerous offender legislation. The relevant amendments of the *Tackling Violent Crimes Act*, S.C. 2008, c. 6, came in to force on July 2, 2008. The predicate offences were committed on August 2, 2008. The appellant was convicted on October 21, 2009 and his dangerous offender hearing commenced on September 6, 2011.

[40] Under the previous dangerous offender scheme, a trial judge had discretion to designate an offender as dangerous, but there was no discretion at the sentencing stage. Once a designation was made, an indeterminate sentence had to be imposed.

[41] The current version of the scheme establishes a two-stage process wherein the first stage determines whether a dangerous offender designation will be made. In the second stage, the court considers the appropriate sentence. This new scheme removes the discretionary language from the designation stage, such that if the statutory criteria have been met, the designation must follow. However, there is some discretion at the sentencing stage. A sentencing judge must impose an

indeterminate sentence on a designated offender unless there is a reasonable expectation that a lesser measure will adequately protect the public: *Criminal Code*, s. 753(4.1).

[42] The 2008 amendments only changed the opening words of s. 753(1) of the *Criminal Code* to remove a sentencing judge's discretion regarding a dangerous offender designation. The amendments did not impact the criteria that must be established to impose the designation. Since the language for the criteria is the same between the two legislative schemes, the Crown relies on the curative proviso and asks that this court uphold the designation as a dangerous offender. The Crown does not seek to rely on the curative proviso for the imposition of an indeterminate sentence because the 2008 amendments introduced changes to the sentencing of dangerous offenders.

[43] I would not give effect to this submission. My concern is that a hearing focussed only on the issue of sentence could be unfair to the appellant. I say this because of the overlap in the evidence in the two stage process.

[44] In *R. v. Boutilier*, 2017 SCC 64, [2017] 2 S.C.R. 936, the Supreme Court considered several issues regarding the dangerous offender provisions, including their constitutionality. One of the issues before the Court was whether a sentencing judge is entitled to consider evidence of future treatment prospects when deciding whether to designate an offender as opposed to when imposing a sentence. Côté

J., writing for the Court, concluded that a sentencing judge could have regard to future treatment prospects when deciding whether to designate an offender.

[45] In reaching this conclusion, Côté J., at paras. 44 and 45, commented on the overlap in evidence between the two stages of the dangerous offender process:

> Given that a dangerous offender application is typically conducted in one hearing, it would be artificial to distinguish evidence that should be considered to designate an offender as dangerous from evidence that should be considered to determine the appropriate sentence. All of the evidence adduced during a dangerous offender hearing must be considered at both stages of the sentencing judge's analysis, though for the purpose of making different findings related to different legal criteria. During the application hearing, the Crown or the accused must present any prospective evidence concerning risk, intractability, or treatment programs, including the required assessment report addressing prospective treatment options. Many aspects of clinical evaluations provide evidence going to both the assessment of the offender's future risk and the sentence necessary to manage this risk…
>
> The same prospective evidence of treatability plays a different role at the different stages of the judge's decision-making process. At the designation stage, treatability informs the decision on the threat posed by an offender, whereas at the penalty stage, it helps determine the appropriate sentence to manage this threat. Thus, offenders will not be designated as dangerous if their treatment prospects are so compelling that the sentencing judge cannot conclude beyond a reasonable doubt that they present a high likelihood of harmful recidivism or that their violent pattern is intractable. However, even where the treatment prospects are not compelling enough to affect the judge's conclusion on dangerousness, they will still be relevant in choosing the

> sentence required to adequately protect the public. [Citations omitted.]

[46] It is evident from the foregoing that there is significant evidentiary overlap between the two stages of the dangerous offender process. If we accede to the Crown's submission, the decision on the first stage of the process would be based on evidence that was current as of 2011. The second stage would necessarily require fresh evidence that would update the court on what has happened since the designation.

[47] It is possible that a judge conducting a new sentencing only hearing would be placed in a position where fresh evidence would lead the judge to find that the appellant should not be designated a dangerous offender. Yet, the Crown's proposal means that the trial judge's designation, which is based on evidence that may be out of date, would bind the sentencing judge.

[48] In my view, the Crown has not established that the error was harmless such that no substantial wrong or miscarriage of justice would result. Nor has the Crown established that the evidence is so overwhelming that a dangerous offender designation would inevitably follow. To the contrary, we do not know at this stage what the evidence will be regarding the appellant's current and future prospects and cannot say that he would inevitably be designated a dangerous offender. Therefore, this is not a case for application of the curative proviso.

III. Disposition

[49] For the forgoing reasons, I would dismiss the conviction appeal. I would grant leave to appeal sentence and, pursuant to s. 759(3) of the *Criminal Code*, order a new hearing on the issues of the appellant's designation as a dangerous offender and sentence.

Released: "K.M.v.R." December 4, 2019

"C.W. Hourigan J.A."
"I agree. P. Lauwers J.A."
"I agree. K. van Rensburg J.A."