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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. H. M. R. S., 2020 ONCA 209
DATE: 20200316
DOCKET: C62971

Watt, Paciocco and Fairburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

H.M.R.S.

Appellant

H.M.R.S., in person by video conference

Amy Ohler, duty counsel

Jessica Smith Joy, for the respondent

Heard: March 11, 2020

On appeal from the conviction entered on November 20, 2015 and the sentence imposed on October 14, 2016 by Justice John S. Fregeau of the Superior Court of Justice.

REASONS FOR DECISION

[1] The appellant was convicted of aggravated sexual assault contrary to s. 273(1) of the *Criminal Code*. He was sentenced to ten years' incarceration, less credit for presentence custody. He appeals from conviction and sentence.

[2] The complainant testified that she was in the company of a few people, including the appellant, on the evening of the alleged offence. A lot of alcohol had been consumed. They eventually ended up at the appellant's residence, where even more alcohol was consumed. The complainant fell asleep fully clothed but awoke to find the appellant removing her clothes. She was turned onto her stomach and vaginally penetrated from behind, while being strangled with what she believed to be a cloth. She thought she was going to die, saw stars and then everything went "black". She reported the incident to the police the following day.

[3] The first police officer who saw the complainant when she arrived at the police station testified that she immediately noticed that the complainant's "eyes were bleeding or they looked like they were bleeding." The officer also said that the complainant had such "severe petechial hemorrhaging" that the officer had only previously seen that condition in sudden death cases.

[4] In appealing his conviction, the appellant argues that his trial counsel was ineffective and that this resulted in a miscarriage of justice. He raises numerous examples of that ineffectiveness, which can be grouped under the following categories. He contends that his counsel failed to:

- conduct proper cross-examinations of Crown witnesses;
- call certain witnesses to rebut the Crown evidence, including the evidence of a cab driver and others who could have testified about prior sexual encounters between the appellant and complainant;

- elicit an expert opinion to rebut the Crown expert; and
- explore whether photos of the complainant's injuries had been tampered with.

[5] The appellant also suggests that his counsel, Crown counsel and the trial judge may have discussed matters outside of his presence. Finally, he suggests that trial counsel may well have had a conflict of interest in representing him because she may have been involved in a previous unrelated case involving a family member of his.

[6] We see no basis upon which to set aside the conviction. The record does not support the appellant's suggestions of incompetence. This was a strong Crown case that rested on credibility findings that were open to the trial judge to make. The complainant's credibility was entirely supported by the forensic evidence, including the facial and neck injuries resulting from strangulation. Moreover, much of the evidence that the appellant suggests should have been elicited by his counsel, either through cross-examination or through the calling of other witnesses, was inadmissible pursuant to the collateral facts rule, or constituted presumptively inadmissible evidence of hearsay or prior sexual history evidence.

[7] The expert evidence was non-controversial. The witness testified about how strangulation can cause death and secondary injuries, such as subconjunctival hemorrhages, ligature bruising and facial petechiae, all of which are seen in the photos of the complainant's injuries.

[8] We see no basis upon which to suggest that the photos of the complainant, on which the expert based his opinion, have been tampered with. Indeed, what is seen in the photos is supported by the testimony of the police officer who saw the complainant upon her arrival at the police station.

[9] There is no evidence to support the suggestion that defence counsel met with the Crown and trial judge outside of the appellant's presence. As for the suggestion of conflict, it is the appellant's onus to establish one. The record does not support his position on conflict.

[10] Duty counsel assisted the appellant with his sentence appeal, arguing that the trial judge erred in treating the appellant's lack of remorse as an aggravating factor. There is no dispute that an absence of remorse does not constitute an aggravating factor. Crown counsel argues that, reading the reasons as a whole, the trial judge should be interpreted as suggesting that the appellant's lack of remorse and lack of insight into the offence demonstrated his poor rehabilitative prospects.

[11] While it is not entirely clear to us how the trial judge was using the reference to the "absence of remorse", the appellant's submission is not without some force, particularly given that the reference to the lack of remorse falls squarely within the list of aggravating factors. In our view, though, even if the trial judge incorrectly used the lack of remorse in this way, it had no impact on the sentence: *R. v. Lacasse,* 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 11 and 44. There were six

other serious aggravating factors, the most serious being that the victim was strangled so badly that she was at risk of dying. Considering the seriousness of the offence, the global sentence of ten years was appropriate.

[12] Duty counsel also submitted that the judge erred in identifying the primary sentencing objectives as deterrence and denunciation. She argues that these objectives are not entirely consistent with the judge's acknowledgment of the serious *Gladue* factors relevant to the appellant's case. The appellant himself also submitted that the sentencing judge had not read the *Gladue* report. There is nothing to support the appellant's submission that the judge had not read the report. Given the seriousness of the offence, deterrence and denunciation were appropriate sentencing objectives, and the trial judge's acknowledgment of this did not render the sentence unfit.

[13] The conviction appeal is dismissed. Leave to appeal sentence is granted, but the sentence appeal is dismissed.

"David Watt J.A."
"David M. Paciocco J.A."
"Fairburn J.A."