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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 subpara. 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 subpara. (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 (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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 para. (a).
>
> (2) In proceedings in respect of the offences referred to in para. (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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. Pascal, 2020 ONCA 501
DATE: 20200806
DOCKET: C53388

Watt, Miller and Fairburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Stewart Pascal

Appellant

Stewart Pascal, appearing via videoconference

James Lockyer and Catriona Verner, for the appellant

Craig Harper, for the respondent

Heard: September 11-12, 2019

On appeal from the conviction entered on January 8, 2009 and the sentence imposed on June 11, 2010 by Justice Terrence A. Platana of the Superior Court of Justice, with reasons reported at 2010 ONSC 3187.

ADDENDUM

[1] After a trial before a judge of the Superior Court of Justice sitting without a jury, the appellant was convicted of sexual assault causing bodily harm. He also pleaded guilty to two counts of failure to comply with an undertaking. The Crown instituted dangerous offender proceedings. The trial judge found the appellant to be a dangerous offender and imposed an indeterminate sentence.

[2] The appellant appealed his conviction of sexual assault causing bodily harm. He also appealed the decision that he was a dangerous offender and the sentence of detention in a penitentiary for an indeterminate period imposed as a result of that finding. He did not appeal his convictions of failure to comply with an undertaking.

[3] On May 6, 2020, the court allowed the appellant's conviction appeal and ordered a new trial.

[4] As a result of our decision to quash the conviction and order a new trial on the count of sexual assault causing bodily harm, there remained no conviction of a serious personal injury offence upon which the DO (dangerous offender) designation could be grounded. In our view, setting aside the conviction of the predicate offence rendered it unnecessary for us to consider the DO finding and sentence. Thus, we did not set aside that finding or that sentence.

[5] The trial judge grounded his finding that the appellant was a DO and imposed the sentence of detention in a penitentiary for an indeterminate period not

only on the basis of the conviction of sexual assault causing bodily harm, but also on the basis of the convictions of failure to comply with an undertaking.

[6] Failure to comply with an undertaking is not a serious personal injury offence. It cannot serve as a predicate offence for a finding that an accused is a DO. Nor can it be a lawful basis upon which to impose an indeterminate sentence. To the extent the sentence imposed was made applicable to the convictions of failure to comply with an undertaking, the sentence was unlawful. Discrete sentences should have been imposed for the convictions on those counts to be served concurrently with the indeterminate sentence.

[7] Counsel on both sides ask that we rectify the situation by setting aside the dangerous offender finding on the counts of failure to comply with an undertaking and substitute a sentence of 30 days on each count, the sentences to be served concurrently with each other and with any sentence the appellant may now be serving.

[8] In our view, when we quashed the conviction of sexual assault causing bodily harm, the DO finding and sentence imposed as a consequence dissolved. The convictions of failure to comply with an undertaking remained, as did the overarching appeal from sentence. The existence of that appeal provides us with the necessary authority to implement the agreement of the parties.

[9] For these reasons, we set aside the DO finding and sentence of indeterminate detention imposed as a result. The indeterminate sentence was also imposed on the convictions of failure to comply with an undertaking. That sentence was not lawful. We substitute a sentence of imprisonment for 30 days on each count of failure to comply with an undertaking. The sentences are to be served concurrently with one another and with any sentence to which the appellant is now subject.

"David Watt J.A."
"B.W. Miller J.A."
"Fairburn J.A."