

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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(iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. S.G., 2022 ONCA 727

DATE: 20221024

DOCKET: C69331

Doherty, Benotto and Copeland JJ.A.

BETWEEN

His Majesty the King

Respondent

and

S.G.

Appellant

Mark C. Halfyard, for the appellant

Rebecca De Filippis, for the respondent

Heard: October 11, 2022

On appeal from the conviction entered on August 25, 2020 by Justice Allison Dellandrea of the Ontario Court of Justice.

Copeland J.A.:

[1] The appellant appeals his convictions on one count of sexual assault and two counts of assault. The complainant was the appellant's wife. The only witnesses at trial were the complainant and the appellant. The central issue at trial was credibility.

[2] The appellant raises two grounds of appeal. The first ground raises a number of alleged material misapprehensions of evidence by the trial judge relating both to the appellant's evidence and to the complainant's evidence. The second ground raises an argument that the trial judge applied uneven standards of scrutiny to her review of the appellant's and the complainant's evidence.

[3] The respondent to some extent concedes that the trial judge misapprehended aspects of the complainant's evidence, but takes the position that the misapprehensions were not essential to the trial judge's reasoning leading to conviction and did not cause a miscarriage of justice. With respect to uneven scrutiny, the respondent notes that this is a notoriously difficult ground of appeal, and submits that the appellant has not identified any errors that would justify overturning the trial judge's credibility assessments on this basis.

[4] I would allow the appeal, set aside the convictions, and order a new trial. For reasons I explain below, I conclude that the trial judge misapprehended the complainant's evidence in two areas that bore on her assessment of the complainant's credibility. In my view, the misapprehensions were on matters of substance, related to material issues at trial, and played an essential role in the trial judge's reasoning process – in particular, in her assessment of the credibility of the complainant's evidence. In light of my conclusion that the impact of the trial judge's misapprehensions of two areas of the complainant's evidence is sufficient to require a new trial, it is not necessary to address the other alleged

misapprehensions of evidence or the uneven scrutiny argument raised by the appellant.

Background

[5] The appellant and the complainant met on an online marriage website. With their families' approval, they pledged to be married. In February 2016, the appellant and his family travelled to India, where he and the complainant were married. The complainant came to Canada in February 2017, sponsored by the appellant. Without getting into detail, the relationship appears to have quickly gone downhill after the complainant arrived. The appellant moved out of the condominium that he and the complainant shared with his parents in September 2017. The complainant moved shortly after, also in September 2017. The complainant made her first statement to police, which was video-recorded, on September 28, 2017, alleging one incident of assault.

[6] The dates of the alleged assaults and sexual assault that formed the subject matter of the three counts at trial were as follows:

- The complainant alleged that the appellant sexually assaulted her on or about March 20, 2017. She alleged that he forced her to perform fellatio and anal intercourse.
- The complainant alleged that the appellant assaulted her on or about July 5, 2017. She alleged that he pushed her 6 or 7 times during the course of an argument. Her evidence was that he used his hands to push on her upper chest to push her down onto the couch each time she stood up to face him.

- The complainant alleged that the appellant assaulted her between August 14 and 17, 2017. She alleged that he choked her for 5-10 seconds during an argument after she woke him in the night to help her find some Tylenol.

[7] Because it was an important issue at trial and also on appeal, I set out a chronology of the disclosure of allegations by the complainant. At trial, a central plank of the defence was that the complainant had a motive to fabricate the allegations. More than one motive was put forward, including to get back at the appellant after the relationship ended badly, and in order to seek advantage in family court proceedings in India. I focus primarily on the issue of the motive related to the proceedings in India. That theory was based on inconsistencies in the complainant's evidence about abuse by the appellant, and the timing of her reporting of various of the allegations.

[8] As noted above, the charges were based on a sequence of three events: a sexual assault alleged to have happened in March 2017, a physical assault involving pushing alleged to have happened in July 2017, and a physical assault involving choking that was alleged to have happened in August 2017. The chronological sequence of the complainant's statements or potential statements, and the various proceedings, was as follows:

- The complainant called 911 in July 2017. When the police arrived (at which point the appellant was not present, having left the home), she told them it was only a verbal argument and she had overreacted. (At trial, the complainant testified that she called 911 after the pushing incident. She testified that after calling 911, but before the police arrived, she spoke to a friend,

who told her that an assault allegation would ruin her marriage, so she lied when the police arrived.)

- The complainant went to the police after moving out of the appellant's parents' condominium in September 2017. She provided a videotaped statement to police on September 28, 2017 (the "first police statement"). In this statement to police, the only allegation the complainant disclosed was the August 2017 choking assault. The appellant was charged with one count of assault.
- The complainant returned to India in December 2017. The exact duration of her visit there is unclear from the trial record, but it appears to have been several months. In March 2018, the complainant began family court proceedings in India, which included seeking financial compensation. As part of the proceedings in India she provided an affidavit which contained several allegations against the appellant (the "Indian proceedings affidavit"). The exact date of the affidavit is unclear, but it appears to have been common ground at trial that it was before she made additional allegations to the police in Canada in September 2018. I address the portions of this statement relevant to the appeal in the analysis below.
- The trial on one count of assault involving the August 2017 choking allegation was scheduled to proceed in August 2018. For some reason it was not reached. After the trial was not reached, the complainant approached the officer-in-charge about additional allegations, and arrangements were made for her to provide a second statement. The complainant provided a second videotaped statement on September 3, 2018, in which she made allegations not previously disclosed (the "second police statement"). In that statement, the complainant alleged the March 2017 sexual assault and the July 2017 pushing assault. As a result of these new allegations, the appellant was charged with one count of sexual assault and a second count of assault (totalling the three counts that were the subject of the trial).

[9] The complainant was cross-examined extensively on the sequence of reporting allegations, and on alleged inconsistencies in her statements to police

and in the Indian proceedings. Her explanations for inconsistencies varied. As I would order a new trial, I do not summarize the explanations in detail. I refer to the explanations below only to the extent they are relevant to the analysis of the misapprehensions of evidence.

Reasons for judgment

[10] The trial judge noted that the case turned on credibility, and instructed herself in accordance with *R. v. W.(D.)*, [1991] 1 S.C.R. 742. She did not accept the appellant's evidence, and it did not leave her with a reasonable doubt. She then considered the complainant's evidence. She found that the complainant's evidence was credible, and satisfied her beyond a reasonable doubt of the allegations. I will not summarize the reasons for judgment in detail at this stage. I address the reasons as they relate the misapprehensions of evidence in the analysis below.

Analysis

[11] There is no dispute between the parties about the applicable law in relation to misapprehension of evidence as a ground of appeal. The misapprehension must of substance rather than detail; it must be material, rather than peripheral, in the reasoning of the trial judge. In addition, it must not merely be part of the narrative of the judgement, but an essential part of the reasoning process resulting in

conviction: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 541; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 2.

[12] Where the misapprehension is in relation to evidence used by the trial judge to assess credibility, whether a miscarriage of justice has occurred “turns on the extent to which the misapprehended evidence played a role in the trial judge’s credibility assessment”: *R. v. S.R.*, 2022 ONCA 192, at para. 15; *R. v. Alboukhari*, 2013 ONCA 581, 310 O.A.C. 305, at paras. 36-38. Ultimately, the concern is that where it is shown that there are misapprehensions of substance about material parts of the evidence, and which play an essential part of a trial judge’s reasoning process, the resulting conviction “is not based exclusively on the evidence and is not a ‘true’ verdict”: *Morrissey*, at p. 221.

[13] In considering this ground of appeal, I am cognizant of the direction of the Supreme Court that findings of credibility by trial judges are entitled to deference, and that appellate courts should not “finely parse trial judge’s reasons in a search for error”: *R. v. G.F.*, 2021 SCC 20, [2021] S.C.J. No. 20, at paras. 69-82.

(i) Misapprehensions in relation to inconsistent statements by the complainant in the Indian proceedings affidavit

[14] The first area of misapprehension of evidence relates to statements by the complainant in the Indian proceedings affidavit which were inconsistent with her trial evidence. In considering, and rejecting, the defence submission at trial that

the complainant fabricated the allegations to bolster her claim in the Indian proceedings, the trial judge found that the complainant's recitation of events in the Indian proceedings affidavit "did not include any material inconsistencies from her account at trial."

[15] The appellant argues that this finding shows a material misapprehension of the evidence. According to the appellant, the Indian proceedings affidavit, which the complainant was cross-examined on at trial, contains two inconsistencies with her trial evidence which are significant and relate to material aspects of the case.

[16] I pause to note that the record at trial makes clear that the Indian proceedings affidavit on which the complainant was cross-examined was a prior statement by her. The complainant agreed in cross-examination that it was her statement and that she had signed it. Indeed, in ruling on whether it was a prior statement on which the complainant could be cross-examined, the trial judge found that significant portions of the document were an affidavit of the complainant, and as such were a prior statement of the complainant. Because these portions of the affidavit were a prior statement, the trial judge ruled that they could be the subject of cross-examination with respect to perceived inconsistencies. The respondent does not contest that ruling on appeal.

[17] The two inconsistencies raised by the appellant on appeal (and which were the subject of cross-examination of the complainant at trial) are the following.

[18] The first inconsistency relates to whether the appellant displayed any assaultive behaviour in India, before the complainant came to Canada in February 2017. In examination-in-chief, the complainant testified that before she came to Canada, “everything was fine” with the appellant. She said that she did not have any problems with the appellant in India, except for small arguments.

[19] This evidence was inconsistent with a statement the complainant made in the Indian proceedings affidavit. In the affidavit, she said that during a visit to India in September 2016, when the appellant stayed at her parental home for a month, the appellant fought with the complainant “and even beat her several times”. She added that she was “saved many times by the timely intervention by her parents.”

[20] The second inconsistency in the Indian proceedings affidavit is that it contains an allegation that the appellant “mercilessly beat and thrashed the complainant” in May 2017, in Canada. The complainant did not disclose this allegation of an assault in May 2017 in either of her statements to police, or in her evidence in examination-in-chief at trial.

[21] The complainant was cross-examined on both of these inconsistencies at trial, and was shown the relevant portions of the Indian proceedings affidavit during the cross-examination. I return to the issue of her responses in that cross-examination below, but for now it suffices to say that the issue of the inconsistencies was raised at trial.

[22] Counsel for the respondent focused her oral submissions on the position that even if there was inconsistency between the complainant's statements in the Indian proceedings affidavit and her trial evidence, it was open to the trial judge to find that any inconsistency was not material.

[23] In my view, the two inconsistencies identified by the appellant are material inconsistencies between the complainant's prior statements and her trial evidence. The complainant testified in examination-in-chief that apart from minor arguments, everything was fine with the appellant before she came to Canada. The statement in Indian proceedings affidavit – that the appellant beat her several times in September 2016 in India – contradicts her trial evidence. Further, in examination-in-chief, the complainant made no mention of a beating by the appellant in Canada in May 2017, nor had she previously disclosed such an incident in her two police statements. Yet the Indian proceedings affidavit makes such an allegation.

[24] Thus, the trial judge's statement that there were "no material inconsistencies" between the complainant's trial evidence and the prior statements rests on a misapprehension of evidence.

[25] I am of the view that the misapprehensions are on matters of substance on material aspects of the evidence. In light of the live issues at trial regarding motive to fabricate and the sequence of the complainant's disclosure of various allegations, in this trial where credibility was the pivotal issue, the failure of the trial

judge to appreciate the significant inconsistencies undermines her assessment of the complainant's credibility.

[26] I recognize that the complainant gave explanations in cross-examination for the inconsistencies between her statements in the Indian proceedings affidavit and her trial evidence. Had the trial judge appreciated the existence of material inconsistencies, it would have been open to her to consider these explanations, and assess whether she found them to be credible. But because the trial judge concluded that there were "no material inconsistencies" between the complainant's trial evidence and the Indian proceedings affidavit, the trial judge never assessed the complainant's explanations for the inconsistencies.

[27] I next consider the second alleged misapprehension of evidence, before turning to the cumulative effect of the errors.

(ii) Misapprehension by the trial judge about the timing of the complainant's disclosure of the pushing assault

[28] The second misapprehension of evidence raised by the appellant relates to the trial judge's misapprehension about the sequence of the complainant's disclosure of the allegations forming the counts at trial. The appellant submits that this misapprehension played an important role in the trial judge's assessment of the complainant's credibility.

[29] The chronology is not in dispute. In the complainant's first statement to police, in September 2017, the only allegation she made was the August 2017

choking incident. The appellant was, as a result, charged with one count of common assault. That matter was set for trial in August 2018. When that trial was not reached, the complainant made additional allegations to the police. It was in her second statement, in September 2018, that the complainant first alleged the March 2017 sexual assault and the July 2017 pushing assault.

[30] The reasons for judgment are clear that the factual basis on which the trial judge assessed issues relating to the timing of disclosure was that the complainant reported both assault allegations to police in September 2017, and only delayed reporting the sexual assault allegation until September 2018. The trial judge was mistaken in this respect.

[31] The respondent, fairly, concedes that the trial judge misapprehended the evidence on this issue, but argues that the misapprehension was not central to the trial judge's reasoning process regarding the complainant's credibility. The respondent argues that the trial judge gave detailed reasons for accepting the complainant's evidence in relation to the reasons for delayed disclosure.

[32] I accept the appellant's argument that this misapprehension was a misapprehension of substance, on a material part of the evidence, and which played an essential role in the trial judge's reasoning process leading to conviction.

[33] This misapprehension was made in the section of the reasons where the trial judge was explaining her assessment of the complainant's credibility, and in

particular, explaining why she found credible the complainant's explanation for the timing of the disclosure of the allegations.

[34] On the basis of her misapprehension that both assaults had been reported in September 2017, the trial judge explained that she found credible the complainant's explanation for the one-year delay reporting the sexual assault allegation, which was because of the complainant's discomfort in speaking publicly about any matter of sexuality. The trial judge gave detailed reasons in support of her finding about the complainant's discomfort speaking publicly about sexual matters. If this finding had not been based on a misapprehension of the evidence about the timing of the disclosure of the July 2017 pushing assault, it would not be open to criticism.

[35] The problem is that it is based on a misapprehension of the chronology of disclosure. It was not only the March 2017 sexual assault allegation that the complainant did not disclose in September 2017, but also the July 2017 pushing assault allegation.

[36] The trial judge's misapprehension was on a matter of substance – the timing of disclosure of the allegation that was the basis for one of the three counts being tried.

[37] The misapprehension was material in two ways. First, it had the effect that the trial judge failed to consider the complainant's explanation for not reporting the July 2017 pushing incident in her September 2017 statement to police (because

the trial judge wrongly believed it had been reported in September 2017). The complainant gave evidence in cross-examination providing an explanation for not disclosing the July 2017 pushing assault in her first statement to police. But because of the trial judge's misapprehension of the chronology, she never grappled with whether the complainant's explanation was credible based on the actual evidence given at trial. The explanation the trial judge accepted for the late disclosure of the sexual assault allegation – the complainant's discomfort in speaking publicly about sexual matters – would not apply to her not disclosing the July 2017 pushing assault. The pushing assault was not sexual, and in her first statement to police, in September 2017, the complainant disclosed a physical assault – the August 2017 choking allegation.

[38] Second, it would be open to a trier of fact to find that the fact that the complainant not only did not report the sexual assault in September 2017, but also did not report the July 2017 pushing assault, undermined the explanation given by the complainant for not initially reporting the sexual assault – that she was not comfortable publicly talking about sexual matters. As I would order a retrial, I refrain from drawing any conclusion on this issue. But it was an issue the trial judge did not address as a result of her misapprehension of the evidence about the timing of the various disclosures.

[39] The misapprehension also played an essential role in the trial judge's reasoning process leading to conviction. The reasons for judgment and the trial

record are clear that the timing of the disclosure of the various allegations was a live issue at trial. It was an issue that the trial judge felt necessary to consider in assessing the credibility of the complainant. And credibility was, in the words of the trial judge, “[t]he pivotal issue” in the trial.

(iii) Cumulatively, the misapprehensions caused a miscarriage of justice

[40] I conclude that, taken together, the misapprehensions of evidence caused a miscarriage of justice in this case. Credibility was the central issue in this trial. The misapprehensions were on matters of substance, about material issues, and played an essential role in central planks of the trial judge’s credibility analysis.

[41] Taken together, there are two major impacts from the misapprehensions. First, they undermined the trial judge’s assessment of inconsistent statements by the complainant. Because the trial judge misapprehended the evidence about the complainant’s prior statements, both in the Indian proceedings affidavit and the timing of reporting the July 2017 pushing assault, the trial judge did not assess these inconsistencies on the actual evidentiary record at trial.

[42] Second, because both of these areas of misapprehension of evidence were central to the defence theory that the complainant had a motive to fabricate the allegations for advantage in the Indian proceedings, the misapprehensions caused the trial judge to assess the defence theory of motive to fabricate on a version of the evidence that was not accurate. The error by the trial judge of assessing the

motive to fabricate based on misapprehensions of the relevant evidence was an essential issue in her assessment of the complainant's credibility. Indeed, the trial judge recognized in the portion of her reasons where she assessed the credibility of the complainant's evidence that the complainant's "explanation with respect to the timing of her disclosure of the allegations was a critical component of her evidence."

[43] Because there will be a retrial, I want to be clear that I express no view on the merits of the defence theory of a motive to fabricate based on seeking advantage in the Indian proceedings. Complainants may delay reporting for a variety of reasons. A delay in disclosure, standing alone, does not give rise to an adverse inference against the credibility of a complainant. For this reason, in assessing the credibility of a complainant, the timing of disclosure of an allegation or allegations is simply one circumstance to consider in the context of all of the evidence: *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 65. However, *D.D.* does not stand for the proposition that timing of disclosure is irrelevant to credibility. Rather, any issues of timing of disclosure must be assessed in the context of the trial evidence as a whole.

[44] In this case, the evidence of the sequence of the complainant making inconsistent statements about the allegations and reporting different allegations at different times was, depending on the findings of the trial judge, capable of supporting the defence theory of a motive to fabricate based on seeking advantage

in the Indian proceedings. Because the trial judge misapprehended the evidence, she failed to assess this defence theory on the actual evidentiary record at trial.

[45] The verdicts of guilt in this case depended on the trial judge's finding that the complainant's evidence was sufficiently credible to meet the burden of proof beyond a reasonable doubt under the third branch of *W.(D.)*. In the circumstances, the misapprehensions of evidence on issues that went to essential elements of the trial judge's assessment of the complainant's credibility caused a miscarriage of justice. The appellant's conviction was not based exclusively on the evidence and is not a "true" verdict.

Conclusion

[46] I would allow the appeal, set aside the convictions, and order a new trial.

Released: October 24, 2022 "D.D."

"J. Copeland J.A."

"I agree. Doherty J.A."

"I agree. M.L. Benotto J.A."