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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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
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> (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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. D.D., 2022 ONCA 786
DATE: 20221117
DOCKET: C66513

Doherty, Hoy and Paciocco JJ.A.

BETWEEN

His Majesty the King

Respondent

and

D.D.

Appellant

Laura Metcalfe, for the appellant

Alysa Holmes, for the respondent

Heard: October 28, 2022

On appeal from the conviction entered on April 9, 2018 by Justice Alan C.R. Whitten of the Superior Court of Justice.

REASONS FOR DECISION

[1] D.D. was convicted of sexual interference committed against the complainant when she was a child between 5 and 11 years of age. The complainant, who was 18 years of age when she testified at trial, is the daughter of a woman (the "complainant's mother") with whom D.D. was in an intimate relationship at the time of the alleged events.

[2] D.D. testified and denied the allegations. He also said he was never left alone with the complainant. This claim was supported by the testimony of the complainant's mother.

[3] D.D. appeals this conviction and the accompanying finding that he was guilty of sexual assault, an overlapping charge that was stayed to avoid double jeopardy. We allow his appeal. The trial judge erred by assessing the complainant's credibility as if she were a child at the time that she testified.

[4] In *R. v. W. (R.)*, [1992] 2 S.C.R. 122, it was affirmed that the evidence of children must be approached on a common sense basis bearing in mind their mental development, understanding and ability to communicate. "Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection": *R. v. W. (R).*, at para. 25. By way of illustration, the inability of the child complainant in *R. v. W. (R.)* to accurately describe the location of bedrooms in a house, a peripheral matter, was not significant to her credibility or reliability, since a child may not attend to such details: *R. v. W. (R.)*, at para. 30.

[5] Even when adults testify about events that allegedly occurred when they were children, such considerations remain relevant. This is logical. If a witness would not likely have noted the thing as a child, their failure to relate that thing years later while testifying as an adult cannot meaningfully unsettle the credibility

or reliability of their evidence. Therefore, “the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying” (emphasis added): *R. v. W. (R.)*, at para. 27.

[6] However, “[in] general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness”: *R. v. W. (R.)*, at para. 27. The trial judge cited this principle correctly but misapplied it.

[7] The trial judge summarized his reasoning as follows:

> No doubt, from this court’s review of the evidence, it is obvious that the court is touched by the logic of [the complainant’s] evidence. Her evidence has the quality of a child bearing witness to a progressive sexual abuse by herself [*sic*]. There are plenty of childlike details such as taste, the sound of photographs; [*sic*] the sound of the zipper, the yellow couch, and the concrete floor and the puddles of semen on the floor, which are so compelling, there is no reasonable doubt as to what she attests to. [Emphasis added.]

[8] 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. Reading this passage alone, we might have concluded that the trial judge was struggling to convey that these vivid details recounted by the now adult witness were compelling and were ones he believed would have registered in a child’s memory. If that were the case, we would not interfere. However, other portions of his reasons lead us

to conclude that he erred in his approach and evaluated the credibility of the complainant as if she were a child at the time that she testified. To be clear, there can be no issue taken with a trial judge finding that details provided by an adult witness about a childhood experience are the kinds of things a child would remember, or that details recounted by the adult witness provide plausibility or coherence to the account. But what a trial judge cannot do is infer that such details, being provided by an adult witness, must be true because a child would not have the intelligence or experience to concoct those details. That is what the trial judge did in this case. The following examples from the decision illustrate the problem:

(1) The complainant testified that D.D. asked her to slowly undress. The trial judge found this compelling because “these assertions do not present as a fantasy in a child’s world, but as child relating a memory of a strange thing of an adult doing”. The problem of course is that the complainant was not a child when relating these assertions. She was a mature witness.

(2) The complainant testified that she was blind-folded and sat on a toilet during sexual assaults. The trial judge said, “[t]his is a scene so far removed from the natural events of a child it has a certain stand out quality.” Once again, this event was not being related by a child who may have difficulty conjuring such a scenario. It was related by a mature witness.

(3) The complainant testified that D.D. would take photographs. The trial judge said, “it just seems so out of sync with a child’s story unless it was a detail that the child remembered.” With respect, the judge was not hearing a child’s story.

(4) The complainant testified that he would say things about her vagina like “it’s cute”. The trial judge said, “This is not the language of a child. This is a child recounting what the adult said.” Once again, it was not a child using this language or recounting what the adult had said. The witness using this language and recounting this story was an adult.

(5) The complainant testified that she was unsure whether D.D. ejaculated during oral sex but that “it didn’t taste good”. She had told the police in her October 30, 2015 statement that D.D. had ejaculated, and it tasted gross. When asked to explain the difference in her testimony, she said she was unsure whether the taste was semen or the taste of his penis mixing with her saliva. In explaining why this evidence was unimportant the trial judge said, “This discrepancy, if it really is one, appears consistent with what impressions a 10 years or younger child would have with respect to such an event.” In fact, the discrepancy, such as it was, was being explained by a mature witness, not a child.

[9] There are other examples, but the point has been made. The trial judge did not simply rely on the witness’s immaturity at the time of the event to put flaws in

the witness's evidence into perspective, an entirely appropriate mode of reasoning. He went further and evaluated the credibility of the adult complainant as if she were a child at the time she testified. This was not a secondary feature of the decision. Reading the credibility analysis undertaken by the trial judge, one would be hard pressed to appreciate that the complainant was 18 years of age when she testified, and not a young child. This was a serious error that was central to the trial judge's decision to accept the testimony of the complainant.

[10] We would therefore allow the appeal on this ground alone. It is unnecessary to address the remaining grounds of appeal that were argued.

"Doherty J.A."
"Alexandra Hoy J.A."
"David M. Paciocco J.A."