

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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(iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. A.P., 2022 ONCA 818

DATE: 20221124

DOCKET: C69854

Fairburn A.C.J.O., Huscroft and Coroza JJ.A.

BETWEEN

His Majesty the King

Respondent

and

A.P.

Appellant

James Foord, for the appellant

Emily Marrocco, for the respondent

Heard and released orally: November 16, 2022

On appeal from the conviction entered by Justice Diane M. Lahaie of the Ontario Court of Justice on December 1, 2020, and the sentence imposed on January 25, 2021.

REASONS FOR DECISION

[1] This is an appeal from convictions of sexual interference, invitation to sexual touching and sexual exploitation. The convictions all arise from the appellant's repeated sexual abuse of his stepdaughter over many years, spanning from when she was around 10 years old and continuing until she was around 18 years of age. The abuse involved all manner of sexual abuse, including oral, vaginal and anal penetration.

[2] The conviction appeal is rooted in the trial judge's credibility assessments. In particular, the appellant contends that the trial judge erred by imputing to him a motive to lie, specifically that he fabricated his evidence in an effort to narrow the opportunities available for the crimes to have been committed. Tied to that submission is the suggestion that the trial judge also erred by finding that the appellant tailored his evidence in response to the Crown's case.

[3] Despite the capable submissions made on behalf of the appellant, we do not accept that the trial judge erred in this way.

[4] The trial judge's reasons are entirely responsive to how the defence was advanced. The fact is that the appellant's evidence at trial had the effect of narrowing the opportunities for the crimes to have been committed. And in closing submissions, the appellant submitted that the complainant's evidence seemed "improbable" based upon the "opportunities" that were available.

[5] Accordingly, when the trial judge commented in her reasons upon the appellant's efforts to distance himself from any opportunity to commit the crimes, she was merely responding to the defence position at trial, a position that she rejected. Moreover, the trial judge's credibility assessment does not turn on this finding. Her assessment of the appellant's credibility turns on her finding that his evidence was "illogical" and "inconsistent". She carefully explained her reasons for describing his evidence as such.

[6] Turning to the sentence appeal, the Crown concedes that there was an error in the sense that the trial judge sentenced the appellant using sentencing legislation that was

not in force at the time that the offences were committed. No one, including trial counsel, adverted to that fact during the sentencing proceeding.

[7] Using the new sentencing legislation, where the maximum period of incarceration for the sexual offences rose from 10 to 14 years, the trial judge sentenced the appellant to a global sentence of 11 years (10 years and 9 months for the sexual offences, running concurrently, and 3 months consecutive for a breach of conditions offence). Accordingly, the Crown concedes on appeal that the sentence must be set aside as it relates to the sexual offences.

[8] We agree. We must now resentence the appellant.

[9] The Crown asks for a sentence of nine years on the sexual offences. The appellant asks for a sentence of eight years.

[10] There is no need to review the aggravating factors in detail as that has been done by the trial judge. These were egregious offences, involving a breach of trust, committed repeatedly over many years, in what should have been the safety of this young child's home. The appellant denied her that safety. As expected, there is profound victim impact here.

[11] There are few mitigating factors, although we do note the absence of a prior criminal record, a guilty plea to the breach charge, community support and the appellant's health conditions.

[12] In these circumstances, we find a fit global sentence is one of nine years. This means that the sentences on the sexual offence convictions will all be set aside. A

sentence of eight years and nine months will be substituted on the conviction for sexual exploitation. The same term will be imposed in relation to the convictions for sexual touching and sexual interference, both of which will run concurrent to the sentence for sexual exploitation.

[13] The 90 day consecutive sentence for breach will remain as is, giving rise to a total sentence of 9 years.

[14] The ancillary orders remain in place.

[15] The conviction appeal is dismissed. Leave to appeal sentence is granted. The sentence appeal is allowed and the sentence is varied in accordance with these reasons.

“Fairburn A.C.J.O.”
“Grant Huscroft J.A.”
“S. Coroza J.A.”