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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. Boodhoo, 2022 ONCA 895
DATE: 20221223
DOCKET: C69136 & C69138

Lauwers, Huscroft and Miller JJ.A.

DOCKET: C69136

BETWEEN

His Majesty the King

Respondent

and

Deshon Boodhoo

Appellant

DOCKET: C69138

AND BETWEEN

His Majesty the King

Respondent

and

Keon Chisholm

Appellant

Matthew R. Gourlay and Sarah Strban, for the appellant Deshon Boodhoo

Chris Rudnicki and Theresa Donkor, for the appellant Keon Chisholm

Deborah Krick, for the respondent

Heard: December 14, 2022

On appeal from the convictions entered by Justice Stephen T. Bale of the Superior Court of Justice, sitting with a jury, on December 15, 2017, and from the sentences imposed on October 5, 2018, with reasons reported at 2018 ONSC 7802.

REASONS FOR DECISION

[1] The appellants were convicted of distributing child pornography, advertising an offer to provide sexual services for consideration, procuring a person under 18 years of age, and receiving a financial or other material benefit from sexual services provided by a person under 18 years of age. They raise two grounds of appeal against their conviction.[1]

[2] First, the appellants argue that the trial judge erred in not giving a *Vetrovec* instruction concerning the complainant's evidence. We do not agree.

[3] The trial judge's decision not to issue a *Vetrovec* instruction was a discretionary decision that is entitled to deference. We see no basis to interfere with it. The complainant was not an unsavory witness. She was a young woman testifying about events that occurred when she was 16 years old. She had no criminal record, was not facing any charges, and gained no legal or financial benefit from testifying. Her testimony was central to the case against the appellants

[1] The appellants contend that ss. 286.2(2), 286.3(2), and 286.4 of the *Criminal Code*, R.S.C. 1985, c. C-46 violate ss. 2(b) and 7 of the *Canadian Charter of Rights and Freedoms* but did not pursue this argument in light of this court's decision in *R. v. N.S.*, 2022 ONCA 160. Their factum states that they reserve their ability to request an appeal.

and it was acknowledged that she lied under oath concerning several matters. But a *Vetrovec* warning was not required on that account.

[4] The jury was well aware of the problems with her testimony. The Crown acknowledged the problems and the complainant's credibility was subject to extensive cross-examination by the defence. The trial judge instructed the jury to consider the inconsistencies in the evidence she gave under oath and added that "significant caution" was required in assessing her evidence. He emphasized that it was for the jury to decide whether to believe the complainant's evidence and reiterated the Crown's burden to prove the elements of the offences beyond a reasonable doubt.

[5] In short, the jury was well equipped to decide the case. Nothing more was required. This ground of appeal fails.

[6] Second, the appellants argue that the trial judge misdirected the jury regarding the essential elements of the offence of procuring a person under 18 years. Specifically, they argue that the trial judge failed to make clear that the jury must believe beyond a reasonable doubt that the appellants exercised control, direction, or influence over the complainant's movements having regard to the nature of the relationship between the appellants and the complainant and the impact of the appellants' conduct on the complainant's state of mind, as set out by this court in *R. v. Ochrym*, 2021 ONCA 48, 69 C.R. (7th) 285. Further, they argue

that the trial judge failed to relate the evidence to the essential elements of the procurement count.

[7] The trial judge did not have the benefit of *Ochrym* when he instructed the jury. Nevertheless, we are satisfied that the instructions were adequate in the circumstances and reveal no error. This court stated in *Ochrym* that it was an error to concentrate on what an accused did without regard to the nature of the relationship between the accused and the complainant, and the impact of the accused's conduct on the complainant's state of mind. However, this court added, at para. 29, that "[s]ometimes, the nature of the relationship and the impact of the accused's conduct on the complainant's state of mind will be evident from what an accused said or did and what the complainant said or did in response." That is the case here.

[8] There was an ample evidentiary basis for the jury to conclude that the appellants exercised control, direction, or influence over the complainant as required under s. 286.3(2) of the *Criminal Code*. We agree with the Crown that the evidence of the appellants' control over the sale of the complainant's sexual services was overwhelming. The complainant was a 16-year-old child who was facing homelessness at the time the offences occurred. She testified that, among other things, the appellants advertised her services, selected and booked the hotels where she worked; decided what services she would provide; and kept her share of the profits from the sale of sexual services. In other words, she had no

choice; that was the nature of the parties' relationship and the impact of the appellants' behaviour. We are satisfied that the jury would have understood the nature of its task. We see no risk that the jury would have convicted simply on the basis that the appellants were doing no more than "helping" the complainant or "affecting" her activities. This ground of appeal fails.

The Sentence Appeal

[9] The appellants also seek leave to appeal the sentences imposed.

[10] The appellants argue that the trial judge erred in making findings of fact that were inconsistent with the jury's verdict. In particular, they argue that it was impermissible for the sentencing judge to rely on the complainant's evidence on the allegations of violence for the purposes of sentencing on the procurement count because the jury acquitted on the trafficking and violence-related charges.

[11] We agree that the trial judge erred in this regard, but we are not satisfied that the error undermines the fitness of the sentence. The trial judge considered that a fit sentence for the convictions on the procurement count was 48 months. This was a serious offence committed against a vulnerable child over a lengthy period of time, with a significant impact on the victim. An appropriate sentence for the convictions on the procurement count, after removing the aggravating factor of violence, is 40 months. The appellants received 24 months concurrent on the conviction for receiving a material benefit from sexual services provided by a

person under 18 years of age, 12 months' concurrent on the conviction for advertising sexual services, and 12 months' for distributing child pornography, which was required to run consecutively. The net result remains the same – global sentences after credit for pre-trial custody of 47 months for Deshon Boodhoo and 38 months, less five days, for Keon Chisholm.

[12] The appellant Mr. Boodhoo sought to introduce fresh evidence that indicates he has already served the majority of his sentence and has only 7 weeks of custody left to serve before his anticipated statutory release. The Crown consented to the admission of the fresh evidence.

[13] The fresh evidence reveals that Mr. Boodhoo is employed in full-time work, lives with his family, and has a partner and young daughter he supports. In our view, reincarceration of Mr. Boodhoo for a very brief period of time is not in the interests of justice.

[14] Accordingly, the fresh evidence is admitted and execution of the remainder of his sentence is stayed.

[15] The appeal from conviction is dismissed.

"P. Lauwers J.A."
"Grant Huscroft J.A."
"B.W. Miller J.A."