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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 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 from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
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> (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
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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shall not be published in any document or broadcast or transmitted in any way.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.

486.6(1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 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.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Braithwaite, 2023 ONCA 180
DATE: 20230317
DOCKET: C69988

Simmons, Lauwers and Trotter JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Joseph Braithwaite

Appellant

Joseph Braithwaite, in person

Megan Stephens, duty counsel

Jeffrey Wyngaarden, for the Crown

Heard: March 6, 2023

On appeal from the conviction entered on April 29, 2021, by Justice Peter N. Bourque of the Ontario Court of Justice with reasons reported at 2021 ONCJ 421.

REASONS FOR DECISION

[1] Following a judge alone trial, the appellant was convicted of child luring. He appeals against conviction[1].

[1] A charge of communicating with a person for the purpose of obtaining for consideration the sexual services of a person under 18 was stayed pursuant to *Kienapple v. R.*, [1975] 1 S.C.R. 729.

Background

[2] In May 2018, the appellant saw an ad for sexual services from a female claiming to be 19 on a website called leolist.cc. He began a text message conversation with the female, asking for her "list of menu options, restrictions and pricing". After exchanging messages about services and pricing, the female revealed she was under 18. The appellant asked her age. When told she was almost 17, he responded, "so old enough to consent". He added, “as long as you are not 14, I'm good…..I would be good then too, but that could have legal implications.”

[3] The female turned out to be an undercover police officer. The appellant was arrested and charged later the same day, soon after arriving at the agreed upon meeting place.

[4] At trial, the Crown's case proceeded by way of an agreed statement of facts. The appellant testified and claimed he was not trying to obtain sexual services but rather was conducting research for a book. He also asserted that he was suffering from erectile dysfunction issues and could not have engaged in the penetrative activities discussed.

[5] The trial judge rejected the appellant's evidence, holding it did not ring true for several reasons. Among other things, he also found that there are many

varieties of sexual activities and that the appellant’s claim of erectile dysfunction was not in any way determinative of whether other sexual activities were possible.

Discussion

[6] On his own behalf, the appellant argued he received ineffective assistance from trial counsel, and he raises multiple issues in that respect. The appellant's trial counsel responded with a detailed affidavit on which he was cross-examined.

[7] In our view, the appellant's claim of ineffective assistance of counsel must fail. Even assuming the appellant could show that his trial counsel fell below the standard of reasonable professional assistance, none of the appellant's allegations are capable of demonstrating a reasonable probability that the result at trial would have been different. The trial judge disbelieved the appellant's evidence and found it did not raise a reasonable doubt. We are not persuaded that any of the appellant's claims about his counsel's performance raise a reasonable probability that the trial judge’s credibility assessment would have been different.

[8] Although not raised in the court below, duty counsel assisting the appellant submitted that, in light of the recent decision in *R. v. Ramelson*, 2022 SCC 44, the appellant should be allowed to raise the issue of entrapment on appeal. Duty counsel submitted that *Ramelson* establishes clearer parameters for the use of internet sting operations than existed at the time of trial. Further, duty counsel argued that, on the basis of the record that was before the trial court, it is at least

arguable that the police operation in this case amounted to entrapment because the police actions did not demonstrate a reasonable suspicion over a sufficiently precise online space to support a finding of a *bona fide* inquiry.

[9] The Crown relied on *R. v. Stack*, 2022 ONCA 413, in response to duty counsel's submission that the appellant should be entitled to raise entrapment on appeal. In particular, the Crown argued that, as in *Stack*, the Crown would be prejudiced if the appellant is entitled to raise entrapment for the first time on appeal, because the Crown had no opportunity at trial to call evidence in response to the allegation of entrapment. In any event, says the Crown, although the appeal record is not extensive, there are indications that the police actions were targeted at a sufficiently precise online space to satisfy the requirements of a *bona fide* inquiry.

[10] We do not accept the Crown's submissions. Rather, we agree with duty counsel that *Ramelson* provides more detailed guidelines concerning the propriety of online sting operations than were previously in place. Moreover, based on the limited record available on appeal, we are not able to determine that those guidelines were met in this case.

[11] In these circumstances, the appellant should be entitled to pursue the issue in the trial court to avoid the risk of an injustice. Where, as here, the Crown's case in response to the claim of entrapment will consist entirely of evidence concerning the police operation and where the precise guidelines concerning the propriety of

police operations were not available at the time of trial, we reject the Crown's claim of procedural prejudice: see *Guindon v. Canada*, 2015 SCC 41, [2105] 3 S.C.R. 3, at paras. 21-23.

Disposition

[12] In the circumstances, the appeal is allowed, the conviction is quashed, the finding of guilt in the court below is affirmed, and a new trial is ordered limited to the issue of the appellant's motion for a stay based on entrapment: see *R. v. Pearson*, [1998] 3 S.C.R. 620, at para. 16. If possible, the entrapment motion should be heard by the original trial judge.

"Janet Simmons J.A."
"P. Lauwers J.A."
"Gary Trotter J.A."