

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 or 486.6 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 162.1, 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

(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) as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;

(b) on application made by the victim, the prosecutor or any such witness, make the order; and

(c) if an order is made, as soon as feasible, inform the witnesses and the victim who are the subject of that order of its existence and of their right to apply to revoke or vary it.

(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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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;

- (b) on application of the victim or the prosecutor, make the order; and

- (c) if an order is made, as soon as feasible, inform the victim of the existence of the order and of their right to apply to revoke or vary it.

(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.

(3.1) If the prosecutor makes an application for an order under paragraph (2)(b) or (2.2)(b), the presiding judge or justice shall

- (a) if the victim or witness is present, inquire of the victim or witness if they wish to be the subject of the order;

- (b) if the victim or witness is not present, inquire of the prosecutor if, before the application was made, they determined if the victim or witness wishes to be the subject of the order; and

- (c) in any event, advise the prosecutor of their duty under subsection (3.2).

(3.2) If the prosecutor makes the application, they shall, as soon as feasible after the presiding judge or justice makes the order, inform the judge or justice that they have

(a) informed the witnesses and the victim who are the subject of the order of its existence;

(b) determined whether they wish to be the subject of the order; and

(4) An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or

(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

(5) An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

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.

(1.1) A prosecutor shall not commence or continue a prosecution against a person who is the subject of the order unless, in the opinion of the prosecutor,

(a) the person knowingly failed to comply with the order;

(b) the privacy interests of another person who is the subject of any order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that person have been compromised; and

(c) a warning to the individual is not appropriate.

(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. J. Y. L., 2024 ONCA 308

DATE: 20240423

DOCKET: COA-23-CR-0563

Sossin, George and Monahan JJ.A.

BETWEEN

His Majesty the King

Respondent

and

J. Y. L.

Appellant

Mark Ertel, for the appellant

Katie Doherty, for the respondent

Heard: April 19, 2024

On appeal from the convictions entered on December 9, 2022 by Justice Jean-Gilles Lebel of the Ontario Court of Justice.

REASONS FOR DECISION

[1] The appellant was convicted of historical sexual offenses involving two complainants, L.S. and D.H. The offences took place in the early 1970s when the complainants were 14 or 15 years old. The appellant appeals his conviction in relation to D.H. on the basis that the trial judge failed to determine whether it was

physically possible for the assault to have occurred in the manner that D.H. had described.¹

[2] At the conclusion of submissions, we advised that the appeal was dismissed with reasons to follow. These are our reasons.

[3] The appellant argues that the trial judge erred in his consideration of D.H.'s evidence regarding the manner in which she was sexually assaulted. D.H. testified that during the sexual assault, the appellant had a hand over her mouth and, with the other hand, was pushing her underwear aside. At the same time, D.H. said that she did not recall the appellant's weight on her during the assault. The appellant says that it was physically impossible for the assault to have occurred in this way.

[4] The trial judge indicated that he could not say whether or not it was physically impossible for the assault to have occurred in the particular manner described by D.H. The trial judge also acknowledged that "[t]here is no question that in certain areas her memory may not have been the best" but this was only to be expected given the passage of time. The trial judge nevertheless accepted D.H.'s evidence, finding that she was responsive to questions put to her, was candid, and was not careless with the truth. He found that "there is nothing in what

¹ We note that in his Notice of Appeal, the appellant had also appealed the trial judge's finding that the appellant and his spouse had colluded with each other so that their evidence would be aligned, but in oral submissions his counsel abandoned this ground of appeal.

she said which would lead me to conclude that she was not a credible and trustworthy witness.”

[5] The appellant argues that the trial judge erred by focusing only on D.H.’s credibility, without considering whether her evidence was reliable.

[6] We do not agree. In this case, the trial judge was faced with the challenging task of assessing the credibility and reliability of D.H.’s evidence describing an assault that had occurred 50 years ago. As the Supreme Court noted in *R. v. Kruk*, 2024 SCC 7, at para. 84, appellate courts must be mindful of the “acute practical difficulties trial judges face in articulating why a particular witness was believed or disbelieved, tasked as they are with interpreting the various impressions and inferences that arise from the evidence.”

[7] In our view, it was open to the trial judge to conclude that any concerns arising from D.H.’s evidence regarding the appellant’s physical positioning were not so significant as to materially undermine her evidence. He therefore did not find it necessary to make a finding as to whether, in committing the assault, the appellant had placed his hands or distributed his body weight in the particular way described by D.H.

[8] In the circumstances of this case, particularly the fact that the incident took place over 50 years ago, it was open to the trial judge to proceed in this manner.

We see no reversible error in his analysis or his ultimate acceptance of D.H.'s evidence. Accordingly, the appeal is dismissed.

"L. Sossin J.A."

"J. George J.A."

"P.J. Monahan J.A."