

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. M.W., 2024 ONCA 499

DATE: 20240621

DOCKET: COA-23-CR-0784

Benotto, Favreau and Madsen JJ.A.

BETWEEN

His Majesty the King

Appellant

and

M.W.

Respondent

Michael S. Dunn, for the appellant

Brendan Coffey, for the respondent

Heard: June 5, 2024

On appeal from the acquittal entered on June 22, 2023 by Justice Sally A. Gomery of the Superior Court of Justice, sitting without a jury, with reasons reported at 2023 ONSC 3753.

REASONS FOR DECISION

[1] The Crown appeals the respondent's acquittal on seven charges including assault, sexual assault, choking the complainant while committing a sexual assault, and forceable confinement. For the reasons that follow, we allow the appeal.

[2] The complainant and the respondent had been in a relationship and were the parents of a young child. The complainant alleged that, after an argument, the respondent followed her to their bedroom and continued yelling. While she was on the bed, he climbed on top of her and flipped her over so she was facedown. He started to take off her shorts as she was "kicking and screaming and telling him to stop". She pulled out her phone and started to record what was happening.

[3] The video was eight seconds long. It shows the complainant holding the phone and not smiling; she says "off" as the respondent is pulling off her undergarment and exposing her genital area; she says "get off me" and tries to push him away with her hand and legs and says "stop trying to hurt me." The complainant testified that after the recording stopped, he vaginally penetrated her and choked her.

[4] The trial judge deemed the complainant's testimony generally unreliable due to multiple inconsistencies. At para. 51 she concluded:

Based on the many serious and material problems with K.L.'s testimony, I find I cannot rely on any of it.

[5] The trial judge then turned to consider the video and concluded that, in light of her findings on reliability, she could not rely on the video. At para. 58:

I do not find that the eight second video, on its own, is a sufficient basis to find, beyond a reasonable doubt, that the interaction between K.L. and M.W. was an assault or a sexual assault. There is potentially an innocent explanation. Because of the consistent unreliability of the complainant's testimony, I cannot place any weight on her evidence about what is happening in the video, or whether her words heard on the video were honest and sincere. Because there is no reliable evidence about the context and creation of the video, I am not sure that an assault or sexual assault occurred.

[6] The trial judge's conclusion reflected a so-called "piecemeal" approach to assessing the evidence. It was an error of law for the trial judge to consider the probative force of the video only after she concluded that she could not rely on any of the complainant's testimony: see *R. v. Rudge*, 2011 ONCA 791, 108 O.R. (3d) 161, leave to appeal refused, [2012] S.C.C.A. No. 64; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 31; *R. v. Button*, 2019 ONCA 1024, at paras. 9-10.

[7] The trial judge's approach to the assessment of the evidence was a legal error. On appeal, the burden is on the Crown to establish, with a reasonable degree of certainty, that the error of law might reasonably have had a material bearing on the acquittal: *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at paras. 14-16; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at para. 135; *Button* at para. 15.

[8] A trial judge's assessment of the evidence attracts significant deference on appeal, absent a legally flawed approach that realistically affected the result. Here,

the video provided confirmatory evidence of the complainant's testimony and also contained all the elements of the offence of sexual assault. Consequently "the persuasive effect of the totality of the evidence – the strength of the Crown's case – was taken out of play": *Rudge*, at para. 66. The error of law might reasonably have had a material bearing on the acquittal.

[9] The appeal is allowed, and a new trial is ordered on all counts in the indictment.

"M.L. Benotto J.A."

"L. Favreau J.A."

"L. Madsen J.A."