# 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. T.M., 2024 ONCA 496
DATE: 20240621
DOCKET: C70015

van Rensburg, Harvison Young and Sossin JJ.A.

BETWEEN

His Majesty the King

Respondent

and

T.M.

Appellant

T.M., acting in person

Stephanie DiGiuseppe, appearing as duty counsel

Sean Horgan, for the respondent

Heard: June 4, 2024

On appeal from the convictions entered on April 7, 2021 and the sentence imposed on November 10, 2021 by Justice Maria V. Carroccia of the Superior Court of Justice.

REASONS FOR DECISION

## OVERVIEW

[1] The appellant was convicted of sexual assault and overcoming resistance by choking. The appellant was sentenced to a custodial sentence of four years, minus pre-sentence custody credit, and several ancillary orders.

[2] The appellant appeals both the convictions and the sentence.

[3] At the hearing, the appellant sought an adjournment in order to retain counsel, which was denied. The appellant's attempts to secure funding for counsel from Legal Aid Ontario have been exhausted, and the endorsement of Pepall J.A., dated May 3, 2024, setting this appeal to be heard today, was listed as peremptory to the appellant.

[4] For the reasons that follow, we dismiss the appeals.

**FACTS**

[5] The appellant was charged with several offences in relation to alleged assaults and sexual assaults against his domestic partner. The complainant gave evidence of three separate incidents between December 2015 and August 2016 in her evidence at trial. The trial judge found that the evidence of the complainant was not sufficiently reliable with respect to two of the three incidents she described to the court. However, the trial judge made a finding of guilt relating to the incident of July 9th, 2016, which was described as the most serious of the three incidents.

[6] That incident involved forced vaginal and anal sex as well as choking.

[7] The trial judge found the complainant's evidence relating to that incident "detailed and straightforward, and any minor inconsistencies do not concern any material issues." The trial judge added:

> Her evidence was not shaken in cross-examination on the core issues. She maintained that the accused punched her, choked her, and sexually assaulted her. At no time was it suggested to the complainant that her evidence in relation to this incident was fabricated or that the conduct described was consensual. In my view, she was credible.

**ANALYSIS**

[8] The appellant raised a number of grounds of appeal relating to the convictions, including that the sexual assault as alleged was not physically possible, that the trial judge failed to properly consider inconsistencies in the complainant's evidence, improperly accepted the complainant's evidence in the absence of corroboration, and made errors generally in accepting the complainant's credibility. With respect to the sentence appeal, the appellant argues the sentence was overly harsh and the pre-sentence custody credit was insufficient.

[9] In the hearing before us, the appellant, with the assistance of duty counsel, primarily pursued the issue of the trial judge's consideration of inconsistencies in the appellant's evidence.

[10] The appellant himself also raised questions with regard to corroboration and with respect generally to the complainant's credibility, in large part based on the fact she entered into a new relationship shortly after the incidents which formed the basis of the charges. The sentence appeal was not pursued.

[11] Turning to the issue of the trial judge's consideration of inconsistencies, duty counsel highlighted the shifting nature of the complainant's account of the July 9th, 2016 incident giving rise to the convictions. It was described first as an event in which physical control over the complainant, choking, and vaginal penetration all occurred simultaneously, but subsequently, in her evidence and on cross-examination, the complainant described a sequence of events in the assault. Similarly, she first gave evidence that she could not determine the position of the appellant when he was behind her during the forced anal sex but in later evidence, gave details as to his position.

[12] Duty counsel argued that inconsistencies in the very nature of the assault go to the core of the allegation leading to the convictions and were not peripheral questions.

[13] The Crown submitted that the trial judge acknowledged in her reasons that the complainant's memory was fuzzy on some of the specific timelines of the assault, and she accepted the fact that the complainant's police interview shortly after the incident included more detail than her trial evidence. Indeed, the complainant's inconsistencies and gaps in her memory were the basis for why the trial judge concluded the Crown had not proven the alleged assault on the first of the three incidents.

[14] While the trial judge did not specifically address the inconsistencies raised by duty counsel, she acknowledged inconsistencies in the complainant's evidence generally, and the difficulties associated with the complainant's memory of the incident.

[15] We are satisfied the trial judge expressly turned her mind to the issue of the inconsistencies in the complainant's evidence and her finding that those inconsistencies were "minor" and "peripheral" to the core questions before her, is entitled to deference: *R. v. Markell* (2001), 146 O.A.C. 397 (C.A.), at para. 2; *R. v. W.(R.)*, [1992] 2 S.C.R. 122, at p. 134; *R. v. M.G.* (1994), 93 C.C.C. (3d) 347 (Ont. C.A.), at para. 27, leave to appeal refused, [1994] S.C.C.A. No. 390; *R. v. D.P.*, 2017 ONCA 263, at para. 14, leave to appeal refused, [2017] S.C.C.A. No. 261.

[16] We see no basis for appellate interference with the trial judge's conclusions on this issue.

[17] The appellant raised the absence of corroboration as a ground of appeal, but as the Crown pointed out in response, corroboration is not a requirement for the trial judge to convict and therefore cannot on its own constitute an error. In any event, the Crown submitted there was some corroborating evidence before the trial judge. However, since we agree corroboration was not required in order for the trial judge to convict, it is not necessary to address what evidence may have constituted corroboration.

[18] Finally, the appellant raised other concerns with the credibility of the complainant such as entering a relationship shortly after the incidents in question, but we agree with the Crown that the complainant's relationship status after the incidents giving rise to the charges and convictions is irrelevant to the trial judge's finding that the complainant's evidence was credible.

[19] The appeal against sentence was not pursued before us.

**DISPOSITION**

[20] The appeal against the convictions is dismissed. Leave to appeal the sentence is granted and the sentence appeal is dismissed.

[21] We are grateful to the appellant, duty counsel, and the respondent's counsel for their helpful submissions.

"K. van Rensburg J.A."
"A. Harvison Young J.A."
"L. Sossin J.A."