COURT OF APPEAL FOR ONTARIO

CITATION: R. v. P.V.T, 2025 ONCA 96[1]
DATE: 20250212
DOCKET: C70595

Trotter, Gomery and Madsen JJ.A.

BETWEEN

His Majesty the King

Respondent

and

P.V.T

Appellant

Raymond Boggs, for the appellant

Joanne Stuart, for the respondent

Heard: January 20, 2025

On appeal from the conviction entered on February 12, 2021 and the sentence imposed on May 12, 2022 by Justice Joseph F. Kenkel of the Ontario Court of Justice.

REASONS FOR DECISION

[1] This appeal is subject to a publication ban pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.

A. OVERVIEW

[1] On February 12, 2021, following a five-day trial, the appellant was convicted of one count of sexual assault (s. 271), and one count of uttering threats to cause death (s. 264.1(a)). He was sentenced to a period of incarceration of four years and six months. The appellant appeals his conviction only, having abandoned his sentence appeal.

[2] The two charges arose from conduct by the appellant against his wife, the complainant, over a ten-year period, between 2008 and 2018. At trial, the only witnesses were the complainant, and K.T., the parties' son, called as a witness by the defense. The appellant did not testify.

[3] The appellant raises two main grounds of appeal, neither of which we are able to accept: first, that the appellant's right to a fair trial was compromised by his inability to hear the proceedings; and second, that the trial judge erred in his credibility assessment of K.T. and ignored the "obvious plain reading" of a particular text exchange between K.T. and the complainant. In addition, the appellant submits that the appeal is compromised by an incomplete record.

[4] The appellant brought a motion seeking to adduce fresh evidence on appeal. That evidence relates to three areas: 1) the appellant's hearing difficulties; 2) the appellant's difficulties in obtaining and transcribing the evidence heard during the hearing of January 6, 2021; and 3) K.T.'s use of English in texts to the complainant.

As set out below, only the proposed fresh evidence related to hearing difficulties and the transcript are admitted.

B. APPELLANT'S HEARING ISSUES

[5] The most significant issue on appeal is the appellant's claim that he was unable to hear most of the trial, which took place in person and on Zoom over a five-day period between August 26, 2020, and January 6, 2021. The appellant argues that he was effectively denied the right to be present at his trial as required by s. 650 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[6] The appellant seeks the admission of his affidavit sworn July 26, 2023, setting out his hearing difficulties, including the results of an auditory assessment confirming his hearing loss. In that affidavit, he states that he did not hear between 85% to 90% of the complainant's evidence, and that he had difficulty hearing both the evidence of defense witness, K.T., and the submissions of counsel. We admit this proposed fresh evidence as it relates to a ground of appeal concerned with the validity of the trial process itself: *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307, at para. 76, 77; *R. v. Ruthowsky,* 2024 ONCA 432, 439 C.C.C. (3d) 137, at para. 61, citing *R. v. Widdifield* (1995), 25 O.R. (3d) 161 (C.A.). We have also reviewed the transcript of cross-examination of the appellant on his July 26, 2023 affidavit.

[7] However, while the evidence is admitted, we find that it is simply not credible.

[8] Although it is evident that the appellant struggled with hearing at various points during the trial, his assertion on appeal that he had such profound difficulty that he was effectively not present at his trial, is wholly belied by the record.

C. ACCOMMODATIONS MADE DURING THE TRIAL PROCESS

[9] The following efforts made during the trial process to accommodate the appellant's hearing difficulties, and he or his counsel repeatedly confirmed that the accommodations were effective:

a. About an hour after the complainant began to testify on August 26, 2020, when the appellant expressed that he had difficulty hearing the complainant's testimony in chief, the trial was immediately adjourned and the appellant and his counsel were provided with the complete audio recording of that evidence to review overnight. The following morning, August 27, 2020, defense counsel confirmed that the appellant was "all caught up and ready to proceed."
b. The court then confirmed that the audio amplification in court was functioning properly. Defense counsel said, "We are ready to go." The court sought confirmation that the appellant knew to raise his hand if he couldn't hear something, to which defense counsel responded: "I told him he has to." The evidence that day was heard without apparent issues. At the end of the

day, responding to the court's enquiry, defense counsel confirmed that there was nothing to be addressed in advance of the following day.

c. On September 14, 2020, cross-examination of the complainant resumed. While there were initially difficulties with the appellant's ability to hear the interpreter, those issues were promptly rectified. Defense counsel also confirmed that "last time, he, he[sic] heard her fine." That morning, the appellant raised no concerns.

d. When, after the lunch break on the same day, defense counsel advised that the appellant had again reported that he had difficulties hearing the complainant's testimony that morning, the trial judge again stopped the proceedings immediately. He explained to the appellant that he must tell the court "right away" if the issue were to arise again, stating: "if there's anything you don't hear, you need to tell me right away. Just stop, stand up, put your hand up. That's okay with me, I want you to do that, and I will pause the trial, and we will fix the problem when it can be fixed, not two hours later." The appellant confirmed that he understood. Further emphasizing the importance of raising any hearing issues in a timely way, the trial judge told the appellant that if he did not alert the court to hearing issues, he would infer that the appellant had chosen to absent himself. The trial judge then ordered that the day's recording be provided to appellant's counsel, and the trial was adjourned to October 13, 2020, one month hence.

e. There is no evidence that the appellant's counsel alerted the Crown or the court to any residual concerns from the first three days of evidence at any point during the adjournment period.

f. On October 13, 2020, when the trial resumed for the continued cross-examination of the complainant, defense counsel advised the court that the appellant had obtained hearing aids during the adjournment and confirmed that the appellant was able to hear. She reassured the court that the appellant could hear, stating: "if there will be a problem, he'll let us know." There was no suggestion by defense counsel of any difficulties in reviewing the recording provided by the court of the September 14, 2020 evidence. At no point that day did defense counsel indicate any difficulty with the appellant hearing the remaining testimony of the complainant, which concluded that day.

g. The trial continued several months later on January 6, 2021, with the start of the defense case, this time by Zoom. The trial judge asked the appellant directly if he could hear everything, and he confirmed that he could. The court again instructed the appellant to put up his hand if there was anything he could not hear, and he replied, "Okay, yes." At no time that day did the appellant put up his hand or state that he could not hear. While there were difficulties in the recording of the evidence that day (about which more is said below), again, defense counsel at no time suggested that the

> appellant's ability to hear the evidence was compromised. Nor did defense counsel raise any concern about hearing issues related to the prior days of trial.

[10] The appellant now says he perceived that the judge was "visibly annoyed" with him on September 14, 2020, when for the second time, he stated after a significant period of testimony that he had not been able to hear. He says that he was therefore "extremely reluctant to bring up [his] inability to hear the proceedings because [he] was afraid of potentially antagonizing the judge who would decide [his] case."

[11] This suggestion does not ring true. The appellant was represented throughout the trial. There is no allegation of ineffective assistance of counsel. When defense counsel advised the court that there were hearing difficulties, those difficulties were promptly addressed. The trial judge specifically stated that he wanted the appellant to raise his hand if there was a hearing issue. Defense counsel had many opportunities throughout the trial to advise the court if difficulties continued, and as seen above, frequently confirmed hearing issues that had been addressed. There were several lengthy adjournments during which the appellant had the opportunity to speak with his counsel and alert her to any difficulties.

[12] In these circumstances, the appellant's claim on appeal that he did not hear the vast majority of the evidence is simply not credible. The record reflects that he

was “present” at his trial, within the meaning of s. 650 of the *Criminal Code*, as he was entitled to be. He heard the case against him and had the opportunity to answer it: *R. v. Hertrich* (1982), 67 C.C.C. (2d) 510 (Ont. C.A.), at p. 537, cited in *R. v. S.M.*, 2022 ONCA 765, 164 O.R. (3d) 561, at para. 34; *R. v. M.C.*, 2023 ONCA 611, 430 C.C.C. (3d) 281, at para. 37.

D. UNREASONABLE INTERPRETATION OF EVIDENCE

[13] The appellant challenges the trial judge’s interpretation of a text message exchange between K.T. and the complainant, including the credibility assessment. The defense called K.T. to testify regarding a text exchange with the complainant after her statement to police. The appellant argues that the judge ignored the “obvious plain reading” of the text exchange, which he says contains an admission by the complainant that the allegations against him were false.

[14] The text exchange was entered into evidence. K.T. first texted the complainant on May 8, 2019, stating: “Mom open email, download the tax documents, print, and give to your accountant.” Three messages, two of them threatening, followed shortly thereafter from the same phone, the last of which reads: “You be very careful. If you make lies i will bring in military lawyer. I work for the army u know this. You will lose if you do not tell the truth to police.” Three days later, on May 12, 2019, the complainant wrote “too late now, I’ll get charges for that :(” K.T. testified that he sent the three intervening messages, as well as a

further message on May 12, 2019, in which he stated (in part): “You lie about dad charges you will go to jail…”

[15] The complainant testified that she believed that the threatening texts were actually authored and sent by the appellant using K.T.’s number. She also testified that her text on May 12, 2020, referring to “charges” related to late-charges arising from filing tax documents after the April deadline. She stated that K.T. had never said anything impolite to her and that she believed the appellant, not K.T., sent the threatening texts. She strongly denied the suggestion put to her that this was an “admission” that she had lied about the appellant’s conduct against her which gave rise to the charges.

[16] K.T. was questioned about whether he or his father wrote the threatening text messages. K.T. insisted that he had written them. While initially unsure about whether he saw his father on May 9, 2020, he ultimately testified that he did not see his father on that day. K.T. also testified, however, that he wanted to stay neutral between his parents and didn’t want to get involved. He said he knew nothing about the allegations and nothing about the situation prior.

[17] The trial judge did not find K.T. credible. He did not believe his explanation for why he, rather than his father, would have authored the threatening text. The trial judge found that it did not make sense that K.T. would threaten his mother if, as he maintained, he wanted to stay neutral. He found it unlikely that, given K.T.’s

employment with the Canadian military, he would have threatened their involvement in this case since he would know he had no power to intervene in a civilian matter nor order military lawyers to pressure his mother. The trial judge concluded that K.T. did not write the messages, given that they were written in what he described as “broken English” and K.T., unlike the appellant, was educated in Canada. The trial judge also found, however, that whether the messages were written by the appellant on K.T.’s phone, or forwarded by K.T. on behalf of the appellant, K.T. was not a truthful witness and his evidence was not reliable.

[18] The trial judge accepted the complainant’s inference that the texts were written by the appellant, and found the evidence that the statement about “charges” related to late filing of tax documents was “credible and the only reasonable inference to be drawn on the whole of the evidence.”

[19] The appellant asserts the trial judge erred in finding that K.T. did not write the texts. He seeks to adduce fresh evidence in the form of an affidavit from K.T. stating that he often texts in a manner that is not grammatically correct and that could seem to be “broken English.” We decline to admit this proposed fresh evidence, which does not meet the test set out in *Palmer*. The evidence could, by due diligence, have been adduced at trial, and does not bear on a decisive issue, given the trial judge’s finding that the messages could either have been written by the appellant or forwarded by K.T. for the appellant. Nor, given the findings of the

trial judge, could the contents of that affidavit be expected to have affected the result: *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775.

[20] The appellant also asserts that in accepting the complainant's evidence, the trial judge "effectively reversed the burden of proof by accepting a contorted explanation for the text admission, over the plain reading." This submission is without merit. It is the province of the trial judge to find facts and make credibility determinations. Absent palpable and overriding error, it is not the role of this court to intervene: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 25. The conclusion that the complainant's text statement related to the tax filing deadline was available on the evidence. The trial judge was entitled to make the findings he did.

E. ALLEGATION OF INCOMPLETE RECORD

[21] The appellant asserts that the appeal was compromised by an incomplete record. This ground relates principally to the transcript of August 26, 2020, during which a pre-trial application was heard (the "application transcript")[2], and January 6, 2020, when the evidence of defense witness, K.T., was heard. It is clear from both transcripts that there were some difficulties with the recordings on those two dates. The appellant argues that gaps in the transcript, combined with his claimed

[2] This application was heard on the morning of August 26, 2020. The evidence heard on the afternoon of August 26, 2020, being the examination-in-chief of the complainant, is recorded on a separate transcript without recording deficiencies.

inability to hear, renders the trial proceedings unfair and compromises the appeal. In his factum, he asserts that it is “highly probable that one of the 130 pieces of speech [referring to the January 6, 2021 transcript] which we do not have might well have had benefit to the appellant in advancing his appeal.”

[22] In support of this argument, the appellant seeks the admission of the affidavit of Mansi Parmar, a paralegal with the defense counsel’s law firm, sworn February 15, 2024, as fresh evidence on appeal. Part of that affidavit references difficulties obtaining the transcript of evidence for January 6, 2021, and attaches as an exhibit an email from the court transcriptionist who states: “The audio is deficient. There is audio distortion, buzzing/warbling sounds in certain areas, and the interpreter’s voice over-speaking the other parties. The transcript… will not be a full account of everything that was said…” As this proposed evidence goes to the question of overall trial fairness, the affidavit and Exhibit C thereto are admitted on appeal. Exhibits A and B which relate to K.T.’s evidence are not admitted.

[23] While we agree that the August 26, 2020 application transcript has deficiencies, none of the grounds of appeal relate to the application heard that day or the ruling thereon, which was disseminated to counsel in writing. No evidence was heard. The record is comprised of submissions by both counsel.

[24] While the January 6, 2020 transcript also indicates intermittent recording difficulties resulting in notations of “faint audio”, “distortion”, or “over-speaking” in relation to the interpreter, in our view, the transcript is readily comprehensible.[3]

[25] This is not a case where difficulties with the transcript have deprived the appellant of a ground of appeal, or where there is a suggestion that any error or combination or errors “has created any genuine uncertainty as to the substance of the testimony…”: *R. v. Paul*, 2009 ONCA 443, 249 O.A.C. 200, at paras. 40–42; see also *R. v. Hayes*, [1989] 1 S.C.R. 44, at para. 10. The appellant has not been prevented from pursuing a meaningful appeal.

F. CONCLUSION

[26] For the reasons set out above, the affidavit of P.T., sworn July 26, 2024; the affidavit of Mansi Parmar, sworn February 15, 2024; and the transcript of cross-examination of both, are admitted as fresh evidence. The appeal, however, is dismissed.

“Gary Trotter J.A.”
“S. Gomery J.A.”
“L. Madsen J.A.”

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[3] According to the appellant, the transcript of January 6, 2021, reflects 130 instances of compromised audio. By rough count, that transcript has 13,800 words. Were one to generously estimate a loss of three words per instance, this reflects under 3% of the transcript. In many cases, however, where a concern is raised during the testimony, the evidence is subsequently repeated.