COURT OF APPEAL FOR ONTARIO

CITATION: R. v. D.C., 2025 ONCA 199 [1]
DATE: 20250311
DOCKET: COA-23-CR-0059

Simmons, Miller and Pomerance JJ.A.

BETWEEN

His Majesty the King

Respondent

and

D.C.

Appellant

Nicholas Xynnis, for the appellant

Philippe G. Cowle, for the respondent

Heard: February 27, 2025

On appeal from the conviction entered on March 13, 2020 by Justice A.D. Kurke of the Superior Court of Justice, sitting without a jury.

REASONS FOR DECISION

[1] After oral argument, we dismissed this appeal for reasons to follow, without calling on the respondent. These are our reasons.[2]

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[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.

[2] We note as well that, at the outset of oral argument, the appellant abandoned his ground of appeal concerning inadmissible bad character evidence.

[2] The appellant was charged with various historical offences against the complainant. The two met when the complainant was 14 years old. She was an aspiring sprinter, and the appellant was her 20-year-old coach. The two married in 1985 after the complainant turned 18. The relationship ended when the complainant left in January of 1993.

[3] The appellant was charged with three counts of sexual assault, one count of assault causing bodily harm, and one count of simple assault. The trial judge found the appellant not guilty of the two earliest sexual assaults, but found him guilty of the third. The trial judge also convicted the appellant of the assaults said to have occurred during the course of the marriage.

[4] The appellant challenges his convictions. He argues that the trial judge erred in failing to declare a mistrial. The appellant also alleges various legal errors in the trial judge's assessment of the evidence.

The mistrial application

[5] The trial judge released his reasons for conviction on March 13, 2020. He acquitted on two counts of sexual assault, finding that, while they "probably occurred", he was not satisfied beyond a reasonable doubt. As it related to the sexual assault at the President's Hotel and the physical assaults, the trial judge was satisfied of the appellant's guilt beyond a reasonable doubt.

[6] The trial judge found the complainant to be “compelling, candid, and credible overall”. Among the factors that he considered was the complainant’s “apparently spontaneous” testimony that, on one occasion, she attacked the appellant with a knife. The complainant spoke of the knife incident in cross-examination. In re-examination, the Crown asked whether she had mentioned this incident before. She responded that she had not, though she was not sure whether she discussed it in her police statement.

[7] The trial judge saw the evidence of the knife incident as enhancing the complainant’s credibility. The complainant offered the testimony despite the fact that it cast her in a negative light. As he put it:

> [98] Certain aspects of the complainant’s account that might cause concern about recent invention are in fact corroborated by the accused’s own account. So, although the complainant did not tell police that, after she left her parents’ home, she lived at the accused’s home for three months, the accused himself confirmed that account. And although the complainant did not need to bring up the incident in which she held a knife to the accused’s throat, she did so, as she considered it important to her narrative, even if it portrayed her in a bad light. While it appears to have been only now revealed, it too is confirmed by the accused. The complainant’s apparently spontaneous admission of such an incident demonstrates her desire to be truthful and complete.

[8] This aspect of the reasons led the appellant to request a mistrial some ten months later, after sentencing submissions had been made but prior to sentencing. The appellant asked that the trial be reopened and a mistrial declared because,

according to the preliminary inquiry transcript, the disclosure of the knife incident was not “spontaneous”. The appellant argued that, while the complainant believed that she had not mentioned the knife incident before, she had testified about it at the preliminary inquiry. Therefore, the trial was not the first time she mentioned it. On that basis, the appellant argued that it was not “spontaneous”, so the foundation for the trial judge’s credibility finding was in doubt.

[9] The trial judge dismissed the mistrial application, holding that his reasons were not undermined by the preliminary inquiry transcript. The trial judge explained that he did not use the word “spontaneous” in the manner the appellant suggested. He did not mean to convey that it was the first time the evidence was mentioned. Rather, he found the testimony “spontaneous” because the complainant volunteered it without being asked to do so. She spoke about it without prompting. As he put it, referring to the dictionary definition of “spontaneous”: “[t]hat is and was a statement made as a result of an unpremeditated inner impulse and without the external stimulus of a leading question from the cross-examiner”.

[10] We see no error in the trial judge’s approach. He was in the best position to evaluate whether the “new” evidence – the preliminary inquiry transcript – had any impact on his deliberation and reasoning process. His explanation of what he meant by the word “spontaneous” is reasonable. It is consistent with both the dictionary definition of the term, and the meaning ascribed to it in common usage.

It also makes the most sense in the context of a credibility determination. The complainant made an admission against interest without being asked to do so. The trial judge reasonably saw this as the mark of an honest witness who is doing her best to offer relevant evidence to the court.

[11] The appellant challenges this ruling, saying that the trial judge's finding of spontaneity must have been based on the perception that the disclosure was being offered for the first time. We do not agree. First, the appellant's interpretation does not accord with the usual meaning of the word "spontaneous". Second, spontaneity in that sense would detract from the complainant's credibility, not enhance it. In the normal course, if evidence is mentioned for the first time at trial, this raises questions about why it was not disclosed earlier. Here, the trial judge rejected that potential negative inference about the complainant's revelation because the appellant confirmed her account. Finally, the trial judge was obviously in the best position to explain what he meant when he used the word "spontaneous" in his reasons. The appellant has given us no reason to doubt the trial judge's interpretation of his own words. We would dismiss this ground of appeal.

The pattern of verdicts is sustainable

[12] On the second ground, the appellant argues that the trial judge, having acquitted the appellant on counts 1 and 3, could not reasonably have convicted on the other counts. We do not agree. It was open to the trial judge to accept all,

some, or none of the evidence. The trial judge did not disbelieve the complainant on counts 1 and 3. Rather, he found that while the events “probably occurred”, he could not be satisfied beyond a reasonable doubt. The pattern of verdicts does not disclose error. If anything, it signals that the trial judge was careful to consider each count separately, as required by law.

[13] In connection with the acquittals on counts 1 and 3, the trial judge stated that he “need not decide” whether he believed the appellant’s evidence or whether it “merely left [him] in doubt”. the appellant argued that the trial judge was required to choose between those options. We do not agree. The trial judge was signalling that, as it related to those counts, he could not be sure of who to believe. That is an entirely proper basis on which to acquit.

The sexual assault in the President’s Hotel.

[14] A further ground of appeal challenges the verdict of guilt on count 2, which alleged a sexual assault at the President’s Hotel. In her evidence, the complainant asserted that she did not consent to sexual activity on that occasion. She described a series of non-consensual acts. The appellant testified that the complainant consented to the sexual activity at the hotel. The trial judge was entitled to accept the complainant’s testimony and to find that the appellant’s did not raise a reasonable doubt.

[15] This is particularly so given that the appellant's testimony consisted of a bald assertion that the complainant consented, with no specifics as to how events unfolded in the hotel room. Nor did the appellant offer any evidence to support an honest but mistaken belief in communicated consent: see *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at paras. 121-22. The appellant's counsel argued that the only reason that the parties retired to a hotel room was for sexual relations. Even if true, that says nothing about consent. Canadian law does not recognize advance or implied consent, Consent must be assessed at the time of the sexual activity. Consent can be rescinded, withdrawn, or varied. By itself, the complainant's attendance at the hotel room could not support an inference of consent: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 26, 31; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 34. Nor could a bald assertion of consent by the appellant, without further detail, serve as a viable defence in the circumstances of this case.

Other grounds of appeal

[16] The other grounds of appeal allege error in the trial judge's assessment and evaluation of the evidence. They amount to an effort to retry the case on appeal. The trial judge engaged in a careful and thorough analysis of the evidence and the legal principles that applied. He acquitted the appellant when he could not be sure of guilt. His findings of guilt were amply supported by the evidence. We see no basis for appellate intervention.

[17] For all of these reasons, the appeal is dismissed.

“Janet Simmons J.A.”

“B. W. Miller J.A.”

“R. Pomerance J.A.”