COURT OF APPEAL FOR ONTARIO

CITATION: R. v. K.R., 2025 ONCA 330[1]
DATE: 20250428
DOCKET: COA-23-CR-0800

Miller, Zarnett and Madsen JJ.A.

BETWEEN

His Majesty the King

Respondent

and

K.R.

Appellant

Andrew Furgiuele, for the appellant

Jennifer Epstein, for the respondent

Heard: April 10, 2025

On appeal from the conviction entered by Justice Andrew W. Brown of the Ontario Court of Justice on May 26, 2023.

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.

[1] The appellant was charged with two counts of obstructing justice contrary to s. 139(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, arising from alleged attempts to cover up alleged sexual assaults on her niece, J.D.R., and J.D.R.'s friend, A.S., by her co-accused, D.V. At trial, following the Crown's evidence but before the closing of its case, the Crown sought to amend the information to conform to the evidence. The trial judge granted the amendment.

[2] The trial judge convicted the appellant of the offence in relation to J.D.R. and acquitted her of the charge against A.S.

[3] On appeal, the appellant argues that allowing the amendment caused her irreparable prejudice. She further argues that the trial judge made palpable and overriding errors in his assessment of the complainants' credibility and reliability. The appellant says she is entitled to an acquittal by this court on the original information.

[4] For the reasons that follow, the appeal is dismissed.

Background

[5] On May 20, 2020, D.V., who is the father of one of the appellant's children, was staying at the appellant's home, along with J.D.R. and A.S. (both age 16), and the appellant's children. J.D.R. and A.S. alleged that while they were intoxicated, D.V. digitally penetrated A.S. while choking her, and vaginally penetrated J.D.R., both without consent. J.D.R. recorded a short audio-clip of part of the interaction.

[6] The following day, J.D.R. and A.S. disclosed the assaults to the appellant and provided her with the recording. While initially disgusted, the appellant did not contact the police or the parents of the complainants, and she did not seek medical attention for J.D.R. Over the following days, the appellant took the complainants shopping and purchased clothing for them, including a $300 Gucci scarf for J.D.R. and clothing with a value of approximately $100 for A.S. J.D.R.'s evidence, which the appellant denied, was that the appellant discussed giving J.D.R. money and a car that belonged to D.V., had J.D.R. write and sign a statement that sex with D.V. was consensual, and deleted the recording from J.D.R.'s phone.

[7] D.V. was charged with a number of offences related to the alleged sexual assaults, but he absconded before trial.

[8] The appellant was charged with two counts of obstructing justice. The original charge in relation to J.D.R. read in part as follows:

> "[The appellant] … did intentionally attempt to obstruct, pervert, or defeat the course of justice by offering monies and goods to [J.D.R.] for a statement exculpating [D.V.].

[9] Following the Crown's evidence, the trial judge permitted an amendment to the charge in relation to J.D.R., to read in part as follows:[2]

> [The appellant] … did intentionally attempt to obstruct, pervert, or defeat the course of justice by offering monies

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[2] The trial judge also permitted an amendment to the charge in relation to A.S., which is not challenged on appeal, given that the appellant was acquitted on that charge.

> and goods to [J.D.R.], obtaining a statement exculpating D.V., and/or tampering with evidence.

[10] Although the trial judge invited submissions on remedial steps arising from the amendment, the defence neither sought an adjournment nor sought to recall any Crown witnesses. The defence immediately brought a directed verdict application, which was dismissed.

[11] The appellant testified at trial. The trial judge reviewed her evidence in detail. He did not accept her version of events, finding her to be internally inconsistent, at times evasive, and leaving the "strong impression that she was not telling the truth." He found her to be "almost combative" with the Crown in cross-examination. The trial judge found that while the appellant was angry with D.V., she almost immediately set upon a course of minimizing the allegations of sexual assault. He stated, "I simply do not accept the evidence of the defendant where it conflicts with that of the complainants."

[12] The trial judge accepted the evidence of A.S. and accepted that the Crown had proven the *actus reus* of the offence. However, he found that intent was not proven, as the shopping was pre-planned, there was no clear linkage between the purchases and the silence of A.S., and the purchases may have been a means to extract financial punishment on D.V.

[13] The trial judge accepted the evidence of J.D.R., finding that the clothing purchases and offers of money and goods together had the effect of dissuading

her from reporting the sexual assault and in this manner did obstruct, pervert, or defeat the course of justice. He noted that the "extent and quantum of the shopping was much greater than that in regard to A.S.", that the appellant spoke to J.D.R. about receiving "perhaps as much as $10,000" from D.V. in addition to his grey Lexus. He accepted J.D.R.'s evidence that the appellant had her write and sign a contract to the effect that the sex with D.V. was consensual, and that the appellant deleted the recording from J.D.R.'s phone.

Issues on Appeal

[14] The appellant raises two issues on appeal:

1. whether the trial judge erred in allowing the Crown's application to amend the information; and
2. whether the trial judge erred in his assessment of the complainants' credibility and reliability.

Analysis

(1) The trial judge did not err in allowing the Crown's application to amend the Information.

[15] The appellant argues that the trial judge erred in granting the application to amend the information at the conclusion of the Crown's evidence. She says that in so doing, the trial judge fundamentally altered the impugned transaction, thereby transforming the case the appellant had to meet. The appellant says that by

removing the element of "*quid pro quo*" from the original charge, whereby the Crown had to prove that monies or goods were offered for an exculpating statement, to a charge embedding three alternative actions—offering monies or goods, obtaining an exculpating statement, and/or tampering with evidence—the required connection between the offer of goods and the exculpatory statement was removed, and the deletion of the video, without more, became a route to liability. These changes, the appellant says, caused irreparable prejudice and resulted in an unfair trial.

[16] We do not accept these arguments.

[17] The power to amend an indictment or information under s. 601(2) of the *Criminal Code* is broad, as wide powers of amendment promote the determination of criminal cases on their merits and avoid a multiplicity of proceedings: *R. v. R.S.,* 2023 ONCA 626, at para. 24, citing *R. v. Irwin* (1998), 38 O.R. (3d) 689 (C.A.), at paras. 9-10. Provided there is no irreparable harm to the accused and the fairness of the trial will not be adversely affected, the amendment may be granted: *R.S.*, at para. 24, citing *R. v. Bidawi*, 2018 ONCA 698, 142 O.R. (3d) 520, at para. 33, leave to appeal refused, [2019] S.C.C.A. No. 145. Such amendment may be made "at any stage of the proceedings": *Criminal Code*, s. 601(3). A decision to amend that is based on a determination of whether there is prejudice to the accused should not be interfered with lightly, since the trial judge is in a privileged position to

determine the effect on the fairness of the trial of events happening in the courtroom: *R.S.*, at para. 25, citing *R. v. Côté*, [1986] 1 S.C.R. 2, at p. 29.

[18] As set out by Doherty J.A. in *Irwin*, at para. 25:

> On a plain reading, the section contemplates any amendment which makes a charge conform to the evidence. The limits on that amending power are found, not in the nature of the change made to the charge by the amendment, but in the effect of the amendment on the proceedings, and particularly, on the accused's ability to meet the charge. The ultimate question is not what does the amendment do to the charge, but what effect does the amendment have on the accused?

[19] The trial judge made no palpable and overriding error in his determination that the amendment would not cause irreparable harm to the accused. He noted that all of the alleged interactions were explored with the Crown witnesses in "considerable detail", including the allegations with respect to the handwritten contract, the allegations with respect to the recording, and the evidence regarding shopping trips and purchases. He noted that the cross examinations were "lengthy, probing and pointed" and that defence counsel was alert to the "entirety of the evidence". He observed that "few stones appeared to have been left unturned" with respect to the defence counsel's approach to the evidence. He concluded that the defence had not been misled and that no prejudice was occasioned at all, let alone irreparable prejudice.

[20] This case is easily distinguished from *R. v. Miners Incorporated* (1949), 93 C.C.C. 118 (Ont. C.A.), at pp. 119-120, cited by the appellant, in which separate

transactions that were months apart were added to the charge. In this case, there is no violation of the single transaction rule set out in s. 581(1) of the *Criminal Code*, as alleged by the appellant: see *R. v*. *Rocchetta*, 2016 ONCA 577, 352 O.A.C. 130, at para. 44. The amendment did not expand the scope of the evidence. Rather, as submitted by the Crown, both the original and amended charges captured events within a week of the disclosures of sexual assault, were disclosed to the defence well in advance, and were relevant to the Crown's theory from the outset. The amendment did not compromise the appellant's knowledge of the case she had to meet or her ability to meet the charge. The fact that the amendment opened up additional routes to liability on the same evidence does not, without more, constitute irreparable prejudice.

[21] We would add that the failure of the defence to seek any remedial step arising from the amendment when invited by the trial judge to do so wholly undermines the claim regarding irreparable prejudice in this case. The Crown's application was brought at the conclusion of its evidence but before the case was closed. The trial judge explicitly noted that he could adjourn "should counsel request", and the Crown noted the possibility that witnesses could be recalled. Yet, the defence requested no remedy and simply moved for a directed verdict. Although in oral submissions opposing the amendment, counsel emphasized that cross-examination of the complainants was focused on the "*quid pro quo*" aspect of the original charge, had defence counsel been of the view that further cross-

examination was required (in effect, that there were further stones to unturn), he would have requested that witnesses be recalled to allow that to occur.

[22] We conclude that the trial judge did not err in his determination that the amendment of the information would not cause irreparable prejudice, nor, therefore, in granting the application to amend.

(2) The trial judge did not err in his credibility and reliability assessment

[23] The appellant alleges that the trial judge's analysis of credibility and reliability was fatally flawed. While the written submissions addressed both complainants' evidence, in oral submissions the focus was on the evidence of J.D.R.

[24] The appellant asserts that the trial judge failed to consider several serious challenges to J.D.R.'s credibility, and, where there were "red flags", addressed those concerns only briefly. Specifically, the appellant argues that the trial judge failed to address important inconsistencies in J.D.R.'s evidence on issues such as whether the appellant had bought gifts for J.D.R. in the past; who wrote the alleged contract in which J.D.R. stated that the sex was with D.V. was consensual; J.D.R.'s allegedly selective memory; and inconsistencies between the evidence of the complainants. In addition, the appellant argues that the mid-trial disclosure of a video, by J.D.R., containing a statement by her cousin, was inadequately

addressed by the trial judge and ought to have enhanced credibility concerns about J.D.R.

[25] We are unable to accept these submissions.

[26] It is trite law that determinations of credibility are the province of the trial judge, and that a trial judge may believe some, all, or none of the testimony of a witness. The trial judge was alive to inconsistencies in J.D.R.'s evidence and was entitled to assign the weight he did thereto. He was not required to detail every element informing his conclusion that J.D.R. was a credible witness whose evidence could be relied upon: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3., at paras. 64-66; *R. v. N.K.*, 2021 ONCA 13, at para. 11.

[27] With respect to the recording disclosed mid-trial by J.D.R., context is relevant. In cross-examination, J.D.R. was challenged that she had never told the appellant that D.V. had "raped" her. Counsel for the defence put to J.D.R. that her ten-year old cousin, who was in the room during the disclosure to the appellant, said in her police statement that J.D.R. told her that D.V. "touched her boobs." J.D.R. insisted in her evidence that she told the appellant that she had been raped. Mid-trial, during cross examination, J.D.R. approached the Officer in Charge ("OIC") to advise that she had a recording of her cousin agreeing that J.D.R. had said she was raped. She emailed the recording to the OIC, following which it was provided to the Crown and defence. While the trial judge did not directly address

the circumstances in which the recording was produced, he was cognizant of potential credibility concerns. He ultimately determined that this did not "diminish [J.D.R.'s] credibility as a witness." This was a determination the trial judge was entitled to make.

Conclusion

[28] We see no error—palpable and overriding, or otherwise—in the trial judge's decision to permit the amendment of the information sought by the Crown, nor in his determinations of credibility and reliability.

Disposition

[29] The appeal is dismissed.

"B.W. Miller J.A."
"B. Zarnett J.A."
"L. Madsen J.A."