COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Singh, 2025 ONCA 460 [1]
DATE: 20250625
DOCKET: COA-24-CR-0482

Simmons, George and Pomerance JJ.A.

BETWEEN

His Majesty the King

Appellant

and

Manmeet Singh

Respondent

Emily Bala, for the appellant

Bally Hundal, for the respondent

Heard: February 28, 2025

On appeal from the acquittal entered on December 28, 2023 by Justice Stephen Raymond Bernstein of the Ontario Court of Justice.

George J.A.:

[1] The trial judge acquitted the respondent of sexual assault but convicted him of the included offence of common assault.[2] The Crown appeals the acquittal on

[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] The conviction for common assault is not a subject of this appeal.

the basis that the trial judge relied on myths and stereotypes. If successful, the Crown seeks a new trial.

Background Facts

[2] The respondent and the complainant met on an online dating application. During their first in-person meeting the respondent helped the complainant and her friend, S.T., move into a new apartment. They later attended a party at the respondent's home, a rooming house, with his friends and roommates.

[3] The complainant testified that at one point during the evening she went upstairs to rest. According to her testimony, the respondent followed her, pushed her against the wall, and touched her breast under her blouse without her consent. In her police statement, however, she indicated that they "made out" during this encounter. The complainant subsequently went downstairs and told S.T. what had just occurred. S.T. did not seem too concerned.

[4] The complainant testified that after another hour or so, she was ready for bed. The plan was that the complainant and the respondent would sleep in the same room, and that S.T. and one of the respondent's friends, Harman, would sleep together in an adjacent room. The complainant said that S.T. and Harman joined her in the room she was going to sleep in. The respondent was not there. The complainant was on the bed while S.T. and Harman talked. After about a half hour the respondent entered the room. S.T. and Harman then left.

[5] The complainant testified that the respondent forced her to perform oral sex and engage in vaginal intercourse – first in the missionary position, followed by the respondent penetrating her from behind, and lastly with her on top of him. In her statement to the police the complainant did not say that they had sex while the respondent was behind her. The complainant also testified that the respondent bit her on the neck and slapped her.

[6] The respondent testified that the two had consensual sexual intercourse and that he sought explicit consent at each stage of the sexual activity. According to the respondent, he and the complainant had sex in the missionary position and while the complainant was on top of him.

After the Sexual Intercourse

[7] The complainant testified that after the respondent fell asleep she texted S.T. to tell her that she was hurt. She asked to meet her in the bathroom. S.T. did as asked and when she entered the bathroom she noticed that the complainant had a swollen red face and bite marks on her neck. They took photos of the injuries. The complainant testified that while she and S.T. discussed what to do, including just leaving the residence, they decided not to as their valuables, including passports, jewellery, and laptops, were in the respondent's car. They were also afraid of the men in the home doing them harm if they tried to leave.

[8] After the conversation in the bathroom, the complainant testified that she went to S.T. and Harman's room where she stayed for 10 to 15 minutes. Feeling "uncomfortable" as Harman "was being … weird", she returned to the bedroom she was sharing with the respondent and fell asleep next to him. S.T. did not recall the complainant attending in her and Harman's room that night.

[9] The complainant and S.T. spent the next day at the respondent's home. Later that evening the respondent, Harman, another roommate, S.T., and the complainant went to get food and emergency contraception. The complainant and S.T. stayed at the respondent's home for a second night. The complainant and S.T. slept together in the same bed.

Cross-Examination of the Complainant

[10] During cross-examination defence counsel asked the complainant why, given what she says the respondent had just done to her, she went back to sleep in the same bed with him. The complainant explained that she did so "because I didn't want anyone else to understand what happened, I was feeling scared if they all know and if [the respondent] gets mad at me and if he does something bad to me with all his friends because I was afraid. So I just wanted to hide it as much as I can." The complainant also testified that she went blank immediately after the sexual assault and that she woke up feeling shattered and paranoid. She was also

worried about what would happen to her and her family if people in her home country found out that she had been raped.

The Trial Judge's Error

[11] While the trial judge repeatedly cautioned against relying on myths and stereotypes, and reminded himself that one cannot expect a sexual assault victim to act in a particular way, he did not follow this advice. He relied on passages from an unreported trial decision, as they appeared in the appeal decision of *R. v A.R.D.*, 2017 ABCA 237, 422 D.L.R. (4th) 471, stating:

> I am aware that cases such as [*R. v. DD*, 2000 SCC 43, [2000] 2 S.C.R. 275] instruct me that "there is no inviolable rule on how people who are the victims of trauma and sexual assault will behave" see para. 65. As stated in *A.R.D.* … and affirmed 2018 SCC 6:
>
> > I do not discount the complainant's credibility because she delayed [reporting] or because she did not cry out, or search for help from her mother or other family members. To judge her credibility against those myths of appropriate behaviour is not helpful. The supposedly expected behaviour of the usual victim tells me nothing about this particular victim.
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> Later in the judgment, at paragraph 53 it states:
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> > <u>As a matter of logic and common sense, one would [expect] that a victim of sexual abuse [would] demonstrate behaviours consistent with that abuse or at least some change of behaviour such as avoiding the perpetrator</u>.

> The incongruity between the nature of the relationship, and the case at bar, the seriousness of the allegation, and the lack of support by [S.T.] are significant enough to leave me with concern about these allegations. [Emphasis added.]

The underlined passage, however, was found to demonstrate a reversible legal error on appeal: *A.R.D.*, paras. 58-68, aff'd 2018 SCC 6, [2018] 1 S.C.R. 218.

[12] The fact that the complainant returned to the respondent's bed after she says he sexually assaulted her caused the trial judge "concern…especially so when [he] evaluate[d] the reliability and credibility of the rest of [the complainant's] evidence".

[13] While this has not always been well understood in our society, we all now know that there is no specific or right way for a sexual assault victim to behave. Everyone reacts differently to a traumatic event, and the trial judge erred by not recognizing this.

Positions of the Parties

[14] The Crown argues that not only did the trial judge improperly rely on the stereotype that a sexual assault victim would not return to bed with the person who had just sexually assaulted them, he ignored the complainant's explanation for why she did return. It argues that this error had a material bearing on the acquittal.

[15] The respondent argues that the trial judge did not rely on impermissible stereotypes and that, in any event, there were other problems with the

complainant's evidence that left him with a reasonable doubt. In other words, even if we accept the argument that the trial judge relied on myths and stereotypes in not accepting the complainant's evidence the Crown has not established with a "reasonable degree of certainty" that the outcome "may well have been affected": *R. v. Morin*, [1988] 2 S.C.R. 345, at p. 375; *R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595, at para. 2.

Discussion

Governing Principles

[16] Section 676(1)(a) of the *Criminal Code* provides that:

> The Attorney General or counsel instructed by him for the purpose may appeal to the Court of Appeal:
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> > Against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone. [Emphasis added.]

[17] In *R. v. Hodgson*, 2024 SCC 25, 494 D.L.R. (4th) 501, the Supreme Court discussed the limited scope of a Crown appeal and the rationale for unequal access to the appellate process. One of the reasons for limiting a Crown appeal to a question of law alone is to ensure that someone is not placed in jeopardy twice for the same matter: at paras. 29-31. The distinction between a trial judge's (and jury's) unique duty to find facts, which should not be revisited after an acquittal, and pure questions of law, which in some instances can, serves to protect

acquitted persons from “the repeated exercise of [the power to deprive their liberty] on the same facts unless for strong reasons of public policy”: at para. 30, quoting *Cullen v. The King*, [1949] S.C.R. 658, at p. 668, *per* Rand J., dissenting. Put another way, restricting the Crown’s right of appeal is to ensure that legal errors are rectified when necessary, but not to allow a reconsideration of the facts.

[18] As the majority in *Hodgson* explains, a legal error is generally “a purely legal conclusion drawn from the evidence without calling into question the trial judge's evaluation of the evidence”: at para. 33, citing M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales 2023* (30th ed. 2023), at para. 51.55.

[19] Even when the Crown successfully argues that a trial judge committed an error in law, it bears the “heavy onus” of “establish[ing] that the [error] might reasonably have had a material bearing on the acquittal”: *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14; *R. v. Vaillancourt*, 2019 ABCA 317, 93 Alta. L.R. (6th) 98, at para. 14.

Application of the Principles

[20] I agree with the Crown that the trial judge erred by reasoning that, as a matter of common sense, a sexual assault victim would take steps to avoid the person who sexually assaulted them, and by applying that standard to the complainant. In other words, he assessed her evidence based on a wrong legal

principle, which is an error of law: *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 24 and 29-30; *Hodgson*, at para. 35.

[21] The trial judge did not simply misquote from *A.R.D*. He was clearly concerned by the complainant's return to the respondent's bed for the night after meeting her friend in the bathroom, reflecting an assumption that a real victim would take steps to avoid the perpetrator:

> The relationship between [the respondent] and [the complainant] is not a relationship that had been forged in the past. These were basically strangers who met each other that very day. Although I cannot say how the complainant would react the next day, and I make no findings in relation to her behaviour the day after the incident, I do find that given the nature of the relationship, the brutal nature of the sexual assault described, along with other evidence, I find that her return to the same bed causes this court concern. This is especially so when I evaluate the reliability and credibility of the rest of the evidence.

[22] In this case the legal error is compounded by the fact that the complainant actually explained why she returned to the respondent's bed, evidence that the trial judge largely ignored. The trial judge did not address the complainant's evidence about being scared of what the respondent and his friends might do to her, or her worry about what might happen once it became known that she had been raped. The trial judge stated that "one of the primary reasons" the respondent did not leave immediately was because she had valuables in the respondent's car. Without making an explicit finding, the trial judge noted that the two women "ended

up staying yet another night" and that, according to the respondent's testimony, he had already removed a bag of their belongings from the car at their request before the party and the alleged assault.

[23] The trial judge, at the very least, discounted the complainant's evidence on the basis that a true victim of sexual assault would have taken steps to avoid the perpetrator.

[24] The question that remains is whether this error had a material bearing on the acquittal. In my view, it did not. For the other reasons given by the trial judge – which I address below – an acquittal would have been warranted.

[25] Before explaining why I have arrived at that conclusion, it is important to note that the trial judge did not accept the respondent's evidence that the sexual activity was consensual, and he therefore did not acquit him on the first prong of *W.(D.)*.[3] The trial judge said he "must transition to the second prong of *W.(D.)*" and then asked himself this question: "[d]oes [the respondent's] evidence, in combination with the other evidence which I do accept, leave me in a state of reasonable doubt." In the end, the trial judge found that while the respondent was "probably guilty" of sexual assault, "the totality of the evidence [left him] short of being sure of his guilt."

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[3] *R. v. W.(D.)*, [1991] 1. S.C.R. 742.

[26] I turn now to the other reasons the trial judge provided for having a reasonable doubt.

[27] The trial judge had two concerns with the complainant's account of the alleged sexual assault. First, he was concerned with her description of what occurred when the respondent followed her upstairs. The trial judge recounted the complainant's allegation that the respondent touched her breast without consent and noted its inconsistency with her police statement:

> Upon being confronted in cross-examination [the complainant] admitted that she did not tell the police in her statement about these details and had only indicated that they "made out". She took the position that the inappropriate behavior was subsumed within that term and that English is her second language.

[28] These differing accounts – one which had the respondent making unwanted advances and touching the complainant without her consent, and the other which had them "making out" – were significant to the trial judge. He ultimately rejected the complainant's explanation of what she meant by "making out":

> [The complainant's] evidence is somewhat troubling, given her position that the term "making out" encompasses [the appellant] putting his hand under her shirt and feeling her breast. My assessment of her understanding of the term making out, having observed her testify in English at this trial, suggests to me that she would have known what the term meant when speaking to the police, and I do not accept the reason as to why she did not tell the police about the details of the first encounter, including the touching. She struck me as a detail-oriented person during her testimony.

[29] The trial judge essentially found that the complainant was untruthful about this incident. This finding was open to the trial judge, which was capable of casting the entirety of the complainant's evidence into doubt.

[30] With respect to what occurred in the bedroom, the complainant testified that there were three different positions of intercourse: at first, the respondent had sex with her while he was on top; then he entered her from behind; and lastly the respondent pulled her on top of him. The trial judge took note of, and had serious concerns with, how this was different from what she had described to the police:

> [The complainant] testified that after oral sex the two engaged in the missionary position, and that she was then flipped on her stomach and intercourse occurred, and then that she was forced to ride on top of him. It is somewhat troubling to this court that [the complainant] did not tell the police about the flipping, or the penetration from behind aspect of the sexual assault. [Emphasis added.]

[31] The trial judge recognized that memories fade over time and cautioned that: 1) "sexual assault victims react differently in different situations"; 2) one cannot be expected to act in a particular way; and 3) "peripheral details of a traumatic event can be difficult to recall and accurately described at a later date". However, in the end the trial judge concluded that this was not a peripheral detail, but rather a significant part of the complainant's narrative of the sexual assault. He found that the complainant did not just confuse the order of events but omitted a salient detail altogether. It was open to the trial judge to find that this omission in the police

statement, taken when the events would have been fresh in the complainant's memory, was "a significant inconstancy which cause[d] [him] to question the reliability of [her] evidence."

[32] Apart from the improper reliance on stereotypes, the trial judge, by noting the inconsistencies above, clearly found the complainant to be an unreliable witness which, in his view, was reinforced by her testimony that she had recalled events in "flashbacks". It was open to the trial judge to find that the recounting of important details through flashbacks had at least some impact on the complainant's reliability.

[33] Furthermore, while the trial judge did not ultimately accept the respondent's evidence, he did find that, unlike the complainant's, it was detailed. It was open to the trial judge to assess the competing testimony in this way, which yet again speaks to his overall concerns about the complainant's reliability.

[34] In my view, because these concerns operated independently from the trial judge's reliance on stereotypes – concerns which, in and of themselves, could give rise to a reasonable doubt – I reject the Crown's submission that we can be satisfied with reasonable certainty that the error had a "material bearing" on the acquittal.

[35] Finally, I do not find helpful the Crown's emphasis on the trial judge's indication that deciding this case was "an agonizing exercise" nor his comment that

the respondent is “probably guilty”. Neither the reasons nor the record makes clear what the trial judge was agonizing over, and I will not speculate; and his comment that the respondent was “probably guilty” does nothing more than reflect an understanding of the Crown’s burden of proof in a criminal trial.

Conclusion

[36] For these reasons, I would dismiss the appeal.

Released: June 25, 2025 “J.S.”

“J. George J.A.”

“I agree. Janet Simmons J.A.”

“I agree. R. Pomerance J.A.”