

Her Majesty the Queen v. D.M.G.

[Indexed as: R. v. G. (D.M.)]

105 O.R. (3d) 481

2011 ONCA 343

Court of Appeal for Ontario,
O'Connor A.C.J.O., Simmons and Watt JJ.A.
May 2, 2011

Criminal law -- Counsel -- Incompetence -- Accused charged with sexual interference and sexual assault -- Defence counsel not transcribing or reviewing videotaped interviews of complainant and other witnesses before trial, not preparing any outline of proposed cross-examinations and not preparing accused to give evidence -- Accused consistently denying allegations before trial and pleading not guilty at trial -- Accused expressing desire that complainant not have to testify -- Defence counsel informing trial judge that accused would not be disputing allegations and that he was content to be convicted on one count -- Trial judge entering conviction after Crown read out allegations -- Accused's appeal allowed -- Proceedings unfair and resulting in miscarriage of justice.

Criminal law -- Pleas -- Accused consistently denying allegations of sexual assault -- Defence counsel informing trial judge that accused would not be disputing allegations and that he was content to be convicted on one count -- Accused pleading not guilty -- Crown reading out allegations -- Neither defence counsel nor Crown making submissions -- Trial judge entering conviction -- Accused's appeal allowed -- Proceedings being functional equivalent of guilty plea -- Trial judge

failing to comply with obligation to inquire into accused's understanding of nature and effect of proceedings

-- Allegations read out by Crown not constituting evidence and not amounting to formal admission under s. 655 of Code -- Trial judge's failure to conduct inquiry and manner in which Crown discharged her burden of proof after plea of not guilty causing miscarriage of justice -- Criminal Code, R.S.C. 1985, c. C-46, s. 655.

The accused was charged with two counts of sexual assault and two counts of sexual interference, all involving the same young complainant. He denied the allegations and made it clear that he intended to plead not guilty, although he was concerned about requiring the complainant to testify. Defence counsel did not explain any of the procedural provisions available to assist the complainant in giving her evidence. The accused thought that he would have a chance to testify to tell his side of the story. Although he had not watched the untranscribed videotaped interview of the accused, at a pre-trial defence counsel advised that he would be conceding that it was voluntary. At trial, defence counsel informed the trial judge that the accused would not be disputing the allegations and that he was content to be convicted on one count. The accused pleaded not guilty, and the prosecutor read out the allegations against him. Neither defence counsel nor the Crown made any submissions and defence counsel did not admit the accuracy of the allegations read out by the Crown. The trial judge entered a conviction. The accused appealed, arguing that his conviction was a miscarriage of justice because of the incompetence of trial counsel.

Held, the appeal should be allowed.

The record on appeal was supplemented by materials obtained after the issue of incompetence of trial counsel was raised. In those materials, the accused [page482] asserted that he was asked to sign a paper by defence counsel attesting that defence counsel was "doing a good job" for him. In fact, the accused signed written instructions approving a resolution of the charges in which he would not contest the allegations and that, on that basis, the Crown would ask for 15 months' imprisonment

minus time for pre-trial custody and other ancillary orders. The accused denied that he had signed the resolution agreement. The accused was hearing impaired and the matter proceeded despite difficulties with the amplification device that court staff had tried to put into place.

The proceedings that followed the accused's plea of not guilty were sufficiently flawed that the conviction had to be set aside. Despite the accused's plea of not guilty, a plea by which he denied having committed the offences charged and required the prosecutor to prove the essential elements of the offences beyond a reasonable doubt by admissible evidence, the procedure followed was the functional equivalent of a plea of guilty. Prosecutorial allegations are not evidence, and the reading of the allegations in this case did not amount to a formal admission under s. 655 of the Criminal Code. Plea inquiries are mandatory where pleas of guilty have been entered, even where an accused is represented by counsel. Where what occurs is the functional equivalent of a guilty plea, an inquiry should be conducted to ensure that the accused understands the nature and effect of the procedure and has voluntarily participated in it. The manner in which the Crown discharged her burden of proof after the plea of not guilty and the failure of the trial judge to conduct the required inquiry led to a miscarriage of justice. Persons who deny their guilt should plead not guilty and a trial will follow. Persons who wish to admit their guilt should plead guilty. The procedure in this case blurred the distinctions between the two pleas and failed to ensure that the accused was knowingly and voluntarily agreeing to the functional equivalent of a guilty plea.

The matter had been set for two days of trial. The Crown's correspondence to defence counsel in relation to the procedure she wished to follow to facilitate the child's evidence (including introducing her s. 715.1 statement, having her testify behind a screen and with a support person present) went unanswered. As of the date of the trial, defence counsel had not reviewed or had transcribed the videotaped statements of the complainant and other witnesses, had not developed any meaningful strategy to defend the case or an outline of potential cross-examination of Crown witnesses and had not

prepared the accused to testify. There was a clear connection between the lack of preparation and the fortuitous turn of events that terminated the trial proceedings by a de facto guilty plea, a procedure of which the accused was not fully informed. A miscarriage of justice resulted.

Cases referred to

R. v. Adgey, [1975] 2 S.C.R. 426, [1973] S.C.J. No. 159, 39 D.L.R. (3d) 553, 13 C.C.C. (2d) 177, 23 C.R.N.S. 298; R. v. B. (G.D.), [2000] 1 S.C.R. 520, [2000] S.C.J. No. 22, 2000 SCC 22, 184 D.L.R. (4th) 577, 253 N.R. 201, [2000] 8 W.W.R. 193, J.E. 2000-919, 81 Alta. L.R. (3d) 1, 261 A.R. 1, 143 C.C.C. (3d) 289, 32 C.R. (5th) 207, 45 W.C.B. (2d) 567; R. v. B. (M.), [2009] O.J. No. 2653, 2009 ONCA 524, 192 C.R.R. (2d) 135, 251 O.A.C. 81, 68 C.R. (6th) 55; R. v. Joannis, [1995] O.J. No. 2883, 85 O.A.C. 186, 102 C.C.C. (3d) 35, 44 C.R. (4th) 364, 28 W.C.B. (2d) 471 (C.A.) [Leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 347]; R. v. T. (P.) (2002), 59 O.R. (3d) 577, [2002] O.J. No. 2142, 160 O.A.C. 118, 165 C.C.C. (3d) 281, 4 C.R. (6th) 369, 54 W.C.B. (2d) 237 (C.A.) [page483]

Statutes referred to

Criminal Code, R.S.C. 1985, c. C-46, Part XX [as am.], ss. 606(1), (1.1), (1.2), (4), 655, 715.1 [as am.]

Rules and regulations referred to

Federal Rules of Criminal Procedure, rules 11(a)(1), (3), (b) (1), (2)

28 U.S.C. 2072

APPEAL by the accused from a conviction of sexual interference entered by Richards J. of the Ontario Court of Justice dated February 21, 2008.

Wayne A. Rumble, for appellant.

Alexander Hrybinsky, for respondent.

The judgment of the court was delivered by

[1] WATT J.A.: -- By pleading not guilty, an accused formally denies having committed the offence charged and requires the prosecutor to prove each essential element of the offence with which the accused is charged beyond a reasonable doubt. To do so, the prosecutor introduces evidence that is relevant, material and admissible. The trier of fact, whether judge or jury, assesses the evidence and decides whether the prosecutor's proof meets or falls short of the standard required of it.

[2] G. (D.M.) (the appellant) pleaded not guilty to a charge of sexual interference. He thought he would have a trial where he could tell his side of the story. He had a lawyer to help him out. But the appellant didn't have a trial. He didn't get to tell his side of the story. And he didn't see or hear anyone else testify either.

[3] As soon as the appellant's lawyer pleaded not guilty on the appellant's behalf, the prosecutor read out the allegations against him. The appellant's lawyer said that he had no submissions. The prosecutor made no submissions either. The judge convicted the appellant and remanded him in custody for sentencing.

[4] The appellant seeks a new trial. He says that his conviction was a miscarriage of justice because his lawyer didn't do his job properly. The respondent disputes the claim of ineffective assistance of counsel, but expresses some concern about the manner in which the proceedings played out on the trial date and their effect on the validity of the appellant's conviction.

[5] For reasons that I will develop, I would allow the appeal, set aside the conviction and order a new trial.

[page484]

The Background Facts

[6] The issues that we are required to decide have nothing to do with the substance of the allegations made against the appellant, whether truthful or spurious. It is enough to say that the appellant and complainant were related and living in

the same home. The allegations involve several incidents of similar conduct.

[7] The procedural history of this case is of some importance to the issues raised. The sparse trial record has been supplemented, to our considerable advantage, by the materials required where ineffective assistance of trial counsel is raised as a ground of appeal.

The charges

[8] The information laid against the appellant contained four counts. The counts, two of sexual assault and two of sexual interference, referred to the same dates and place and involve the same complainant.

[9] The complainant provided a videotaped statement that the prosecutor proposed to introduce at trial under s. 715.1 of the Criminal Code, R.S.C. 1985, c. C-46. Other witnesses also provided videotaped statements to investigators, but it is unclear whether those statements were ever transcribed for disclosure purposes.

[10] The appellant was arrested with a warrant. After speaking with duty counsel, he was interviewed by the investigating officer. The interview was videotaped but not transcribed. During the interview, the appellant repeatedly denied the allegations.

The appellant retains trial counsel

[11] The appellant took the advice of a fellow inmate and retained a lawyer the inmate recommended to defend him on the charges. The retainer was completed about one month after the appellant's arrest.

The judicial interim release hearing

[12] The appellant is over 60 years old, with impaired hearing and several other health problems. As soon as the complainant reported her allegations, the appellant was evicted

from the home where the offences were alleged to have occurred. He moved to northern Ontario, where he was arrested about five months after the complainant had reported her allegations.

[13] Trial counsel for the appellant concluded early on that the appellant had "no suitable release plan". On the instructions of trial counsel, duty counsel waived the judicial interim release [page485] hearing to which the appellant was entitled. The appellant remained in custody.

The appearance of trial counsel

[14] About one month after the appellant's arrest, trial counsel first appeared on his behalf before a justice of the peace. He consented to a detention order and made inquiries about available dates for a two-day trial.

The trial dates are fixed

[15] On December 3, 2007, trial counsel and the prosecutor appeared at a pre-trial before a judge of the Ontario Court of Justice. They were unable to agree on a suitable resolution of the charges.

[16] The prosecutor elected to proceed by indictment and counsel elected trial by provincial court judge on the appellant's behalf. The trial dates selected were February 21 and March 4, 2008. The prosecutor indicated that she would be calling four witnesses and relying on s. 715.1 of the Criminal Code to introduce the complainant's videotaped interview. Videotaped interviews of prosecution witnesses other than the complainant had not yet been disclosed to trial counsel.

[17] Trial counsel for the appellant asked that a speaker system be provided for the appellant's trial so that the appellant would be able to hear the proceedings. He also acknowledged that the appellant's videotaped interview following his arrest was voluntary. The interview had not been transcribed nor had counsel viewed it.

The position of the appellant

[18] In his police interview and discussions with trial counsel, the appellant was adamant that he had not committed the offences alleged. If any touching had occurred, it was inadvertent as he attempted to prevent the complainant from jumping up and down on the bed in his room.

[19] According to trial counsel, the appellant also expressed some concern about requiring the young complainant to testify. That said, the appellant never wavered from his denial of guilt and desire for a trial. Counsel did not explain to the appellant any of the procedural provisions available to assist the complainant in giving her evidence in trial proceedings.

The resolution proposal

[20] On January 15, 2008, about five weeks before the first day scheduled for trial, the appellant's trial counsel wrote to the [page486] prosecutor. Trial counsel proposed that the outstanding charges be resolved on the basis that the appellant would not contest the allegations of sexual interference in return for a sentence of imprisonment of six months, to be served in the community, followed by a probation order for 18 months. Trial counsel also pointed out that the appellant did not wish to put the complainant through the stresses associated with a criminal trial.

[21] About one week later, the prosecutor responded to trial counsel's proposal. The prosecutor agreed to resolve the outstanding charges on the basis of a plea of guilty to sexual interference, a sentence of imprisonment of 15 to 18 months, a period of probation for three years and several ancillary orders. The prosecutor did not make her proposed resolution contingent on a joint submission, rather expressly left it open for trial counsel to advocate for a conditional sentence.

[22] About one week before the first date set for trial, the prosecutor repeated her intention to introduce the interview of the complainant under s. 715.1 and advised trial counsel that she would also apply to have the complainant testify from behind a screen with a support person seated beside her.

[23] Trial counsel did not respond to the prosecutor's correspondence.

The trial date

[24] On February 21, 2008, the first date scheduled for trial, the appellant and trial counsel met before proceedings began. Their accounts about what happened during their discussions diverge remarkably.

[25] Trial counsel recalls that he spoke with the prosecutor prior to meeting with the appellant. The prosecutor agreed that she would not seek a sentence of more than 15 months' imprisonment if the case were to be resolved. Counsel conveyed this information to the appellant, who repeated his desire not to put the complainant through a trial. According to trial counsel, the appellant agreed to resolve the outstanding charges on this basis.

[26] Contrary to his usual practice, and at the suggestion of the prosecutor, trial counsel handwrote instructions for the appellant to sign:

I, [D.G.], hereby instruct you to resolve this matter on the basis that I will not dispute the Crown's allegations regarding my conduct between Oct. 1/06 and May 23/07.

I understand that the Crown will ask for 15 mos less pretrial time (2:1), probation (3 yrs), 20 years in the sexual registry, firearm prohibition and DNA sample.

[page487]

According to trial counsel, the appellant signed these instructions.

[27] The appellant's recollection is different. In the holding cells at the courthouse, the appellant told trial counsel that he was not guilty and wanted to testify on his own behalf. Trial counsel asked the appellant whether he thought he (trial counsel) was doing "a good job" for him (the

appellant). Trial counsel then asked the appellant to sign a handwritten memo that counsel had prepared attesting to the adequacy of counsel's efforts on the appellant's behalf. The appellant signed the memo. He did not sign the two-page direction about resolution of the charges.

The trial proceedings

[28] On February 21, 2008, the appellant appeared with counsel before a judge of the Ontario Court of Justice. It was the first date scheduled for trial. The audio enhancement system functioned intermittently, if at all. As the proceedings were about to begin, the appellant's trial counsel said:

Your Honour, my client [D.G.] will be entering a plea of not guilty to count 3 on the information. My client has instructed me that he is content that the Crown read in the allegations with respect to this matter, that he will not be disputing the allegations. He understands that normally the Crown would have to call witnesses to prove their case. He is content that no witnesses be called in this matter, and he's content that -- that this court will find that, based on the allegations, that he is guilty of count 3, and that there will be later a conviction with respect to these offences, or that offence, in connection with the subject charge. Mr. -- I've spent a good deal of time with Mr. [G.]. So, he understands he's giving up his right to a full trial in connection with this matter. My instructions re that he wishes to resolve the matter. And he is also aware of all the further -- further positions of the Crown in connection with this matter with respect to the appropriate sentence, with respect to the fact that he's going to be placed on a sexual registry in the future, and that there's going to be other requests by the Crown in connection with this matter. So, Mr. [G.] is prepared to proceed on that basis.

No one asked the appellant to confirm his understanding of and agreement with the proposed procedure.

[29] Counsel entered a plea of not guilty on the appellant's behalf and the appellant confirmed his plea.

[30] The prosecutor read a summary of the allegations. The appellant was not asked to confirm the accuracy of what the prosecutor had read to the judge. Apart from trial counsel's acknowledgement that the prosecutor's summary of allegations "would be the evidence for the Crown in this matter", neither the appellant's trial counsel nor the prosecutor made any submissions. The presiding judge entered a conviction and remanded the appellant in custody for sentencing on the second scheduled trial date of March 4, 2008. [page488]

The sentencing proceedings

[31] Before sentencing proceedings started on March 4, 2008, court staff encountered significant difficulty with the audio enhancement system in the courtroom. The difficulties continued during the sentencing hearing.

[32] When asked whether he wished to say anything before the judge imposed sentence, the appellant said:

Just that I'm sorry, Your Honour. I truthfully am. And I know her mom is in the court, so [K.] you can tell [E.] I've never been mad at her, and I'm truthfully sorry for hurting you. That's all, Your Honour.

[33] The trial judge concluded that a sentence of 15 months in jail followed by a three-year period of probation and several ancillary orders was a fit sentence. After deducting a credit for pre-sentence custody, calculated on a 2:1 basis, the custodial sentence imposed was 168 days in jail.

The notice of appeal

[34] About three weeks after the sentencing, the appellant, who again relied on the advice of a fellow inmate, filed an inmate's notice of appeal against sentence only. When the inmate appeal later became a solicitor's appeal, the appellant challenged the validity of his conviction.

The Grounds of Appeal

[35] The only ground of appeal advanced on the appellant's

behalf by Mr. Rumble (who was not counsel at trial) was that the appellant's conviction was a miscarriage of justice because he was denied the effective assistance of trial counsel. As a result of trial counsel's ineffective assistance, Mr. Rumble says, the procedure followed at trial was unfair to the appellant and yielded a verdict that is unreliable.

[36] For the respondent, Mr. Hrybinsky takes the position that the appellant suffered no prejudice at trial, thus it is neither necessary nor desirable to evaluate the adequacy or otherwise of the conduct of trial counsel.

[37] Mr. Hrybinsky, in the best traditions of counsel for the Crown, invites us to examine critically the procedure followed at trial and determine its effect on the validity of the appellant's conviction. After the appellant pleaded not guilty, the prosecutor read the allegations, but neither adduced evidence nor proposed that the allegations be taken as a formal admission under s. 655 of the Criminal Code. Neither counsel made submissions. The trial judge entered a conviction. Mr. Hrybinsky invites us to [page489] consider the propriety of this procedure and its effect on the validity on the appellant's conviction.

Analysis

Ground #1: The trial procedure

The governing principles

[38] The issue raised by Crown counsel in his factum and oral argument requires us to examine critically the authority for the procedure followed here and whether that procedure caused a miscarriage of justice. No specific statutory authority either permits or prohibits the procedure followed. A brief reminder of some general principles is a helpful place to begin.

The available pleas

[39] The Criminal Code describes the pleas available to an accused. A plea represents an accused's formal response to the allegations contained in an indictment or information. The only

pleas available to an accused are the general [See Note 1 below] or special pleas authorized in Part XX of the Criminal Code. No other pleas are permitted: Criminal Code, s. 606(1).

[40] A general plea of not guilty is or represents an accused's formal, in-court denial of having committed the offence to which the plea has been entered. A plea of not guilty provides notice to the prosecutor and to the trier of fact that the person charged requires the prosecutor to prove each essential element of the offence charged by evidence that is relevant, material and admissible at trial. [See Note 2 below] A general plea of not guilty does not involve any admission about any essential element of any offence charged or its proof.

[41] On the other hand, a plea of guilty is a formal, in-court admission by an accused that she or he committed the offence to which the plea has been entered. An accused who pleads guilty consents to entry of a finding of guilt, or conviction without a trial and relieves the prosecutor of the burden of proving guilt, by relevant, material and admissible evidence, beyond a reasonable doubt. An accused who pleads guilty abandons his or her non-compellability as a witness, as well the right to remain silent, and surrenders his or her right to offer full answer and [page490] defence to the charge: *R. v. Adgey*, [1975] 2 S.C.R. 426, [1973] S.C.J. No. 159, at p. 440 S.C.R., per Laskin J., in dissent on other grounds.

[42] The nature and effect of a plea of guilty makes it essential that the plea be unequivocal, voluntary and informed. To ensure that pleas of guilty meet these requirements, s. 606(1.1) imposes an obligation on the presiding judge to satisfy him or herself of the voluntary and informed nature of the plea. For the plea to be informed, the accused must understand that the plea is an admission of the essential elements of the offence and that the presiding judge is not bound by any agreement made by the accused and the prosecutor. The accused must also understand the nature and consequences of a guilty plea. Under s. 606(1.2), the failure of the trial judge to fully inquire about the voluntary and informed nature of the accused's plea does not affect the validity of that plea. But an inquiry is mandatory nonetheless.

[43] The exclusive language of s. 606(1) forecloses any formal pleas other than the general and special pleas authorized in Part XX. This language prohibits entry of formal pleas, for example, of nolo contendere or of not criminally responsible on account of mental disorder.

[44] Nolo contendere is a formal plea available in some jurisdictions by express inclusion in the governing procedural law. Translated literally from the Latin, nolo contendere means "I do not wish to contend". By entry of the plea, a defendant neither contests nor admits guilt of the offence to which the plea relates.

[45] The Federal Rules of Criminal Procedure, passed pursuant to s. 2072 of Title 28, United States Code, govern procedure in the United States District Court (Fed. R. Crim. P.). A defendant may plead nolo contendere only with the consent of the court: rule 11(a)(1). Before accepting a plea of nolo contendere, the court must consider the parties' and the public interest in the effective administration of justice: rule 11(a)(3).

[46] Under rule 11(b)(1) and (2), a court must conduct a plea inquiry before acceptance of a plea of guilty or a plea of nolo contendere. The same inquiry is required for both pleas and may involve requiring the defendant's answers to be given under oath.

The relationship between the general pleas and admissions

[47] In criminal proceedings, we recognize two kinds of formal admissions: [page491]

- (i) a plea of guilty, other than an unaccepted plea of guilty under s. 606(4); [See Note 3 below] and
- (ii) an admission of specific facts under s. 655 of the Criminal Code.

[48] After a plea of guilty has been entered, and where necessary accepted by the prosecutor, the usual practice in this province is that the prosecutor reads into the record the

allegations relied upon to establish the essential elements of the offence the accused is alleged to have committed. Defence counsel is asked whether the allegations read are correct or substantially correct. [See Note 4 below] Provided there is no dispute about the essential elements of the offence, and the judge is satisfied after inquiry of the accused that the plea of guilty is unequivocal, informed and voluntary, the trial judge enters a finding of guilt and records a conviction of the offence to which the plea of guilty was entered. Apart from the requirement of a plea inquiry, the Criminal Code says nothing about the procedure to be followed after entry of a plea of guilty.

[49] Where an accused pleads not guilty, the prosecutor bears the onus of proof. The manner in which the prosecutor chooses to prove the allegations contained in an information or indictment is up to the prosecutor, but subject to the supervision of the trial judge, who must ensure that any evidence adduced is relevant, material and admissible. The prosecutor's case may include or consist entirely of admissions of fact under s. 655 of the Criminal Code.

The principles applied

[50] In my view, for reasons that I will develop, the proceedings that followed the appellant's plea of not guilty were sufficiently flawed that the conviction entered by the trial judge must be set aside and a new trial ordered.

[51] No statutory provision or common law principle prohibits a procedure similar to what was followed here after an accused has entered a plea of not guilty. The flaw here was in the execution. [page492]

[52] A plea of not guilty is an accused's formal denial of having committed the offence charged. By this plea, an accused requires the prosecution to prove each essential element of the offence beyond a reasonable doubt by evidence that is relevant, material and admissible.

[53] The manner in which the prosecutor attempts to establish

an accused's guilt varies. In some instances, the prosecutor may rely on an agreed statement of facts, tendered as a formal admission under s. 655 of the Criminal Code. Formal admissions, whether stated orally or reduced to writing, require agreement by or on behalf of an accused under s. 655 of the Criminal Code.

[54] On the other hand, where an accused pleads guilty, the presiding judge must conduct an inquiry to ensure that the plea is voluntary and informed. The plea itself must be unequivocal. The plea inquiry must satisfy the judge that the accused understands that the plea is an admission of the essential elements of the offence and that the judge is not bound by any agreement that may have been made between the accused or counsel and the prosecutor. The judge must also be satisfied that the accused understands the nature and consequences of the plea, for example, that there will be no trial or challenge to the prosecutor's case or right to testify in answer to the charge.

[55] This case proceeded on the basis of a plea of not guilty, a plea by which the appellant denied having committed the offence charged and required the prosecutor to prove the essential elements of that offence by relevant, material and admissible evidence beyond a reasonable doubt.

[56] After the plea of not guilty, the prosecutor adduced no evidence. No viva voce testimony. No real evidence. As a surrogate for evidence, the prosecutor read the allegations made against the appellant. It is fundamental that prosecutorial allegations are not evidence. Nor did they become admissions under s. 655 of the Criminal Code by the failure of the appellant's trial counsel to make submissions.

[57] To some it may seem a mere quibble, a swap of form for substance, to conclude that what occurred here was not at least a reasonable facsimile of a formal admission under s. 655. I do not agree. To admit something is to accept it as valid or as true. By an admission under s. 655, an accused admits a fact or the facts alleged as true.

[58] The allegation of ineffective assistance of counsel has provided us with information not available to the trial judge. That information makes it plain and obvious that the appellant consistently denied that the complainant's allegations ever [page493] occurred, a position inconsistent with their formal admission before the trial judge. The appellant was never asked, nor did his counsel ever expressly admit on his behalf, the prosecutor's allegations. What occurred here did not amount to an admission of fact under s. 655.

[59] The circumstances of this case also required the trial judge to conduct an inquiry of the appellant to ensure his (the appellant's) understanding of the nature and effect of the procedure being followed after his plea of not guilty.

[60] The procedure followed here was the functional equivalent of a plea of guilty (or, in other jurisdictions, a plea of nolo contendere). The appellant's conviction, despite his plea of not guilty, was a certainty. Plea inquiries are mandatory where pleas of guilty have been entered, even where an accused is represented by counsel. Where what occurs is the functional equivalent of a guilty plea, an inquiry should be conducted to ensure that the accused understands the nature and effect of the procedure and has voluntarily participated in it. It is all the more so in the case of an accused who is hearing impaired.

[61] In my view, at least in combination, the manner in which the prosecutor discharged her burden of proof after the appellant's plea of not guilty, and the failure of the trial judge to conduct any inquiry into the voluntariness of the appellant's participation and his understanding of the nature and effect of the procedure, caused a miscarriage of justice.

[62] To determine whether the procedure followed here caused a miscarriage of justice requires an examination of all the circumstances, including those revealed by the fresh evidence.

[63] The procedure followed in this case was proposed by trial counsel for the appellant. In the minimal contact that occurred between the appellant and trial counsel prior to the

controverted "instructions" of February 21, 2008, the appellant had been consistent in his denial of guilt and insistent on pleading not guilty and testifying at his trial.

[64] The appellant did express concern to his trial counsel about subjecting the complainant to the trial process, yet remained constant in his denial of guilt. Trial counsel never explained to the appellant the procedural mechanisms available to accommodate the testimony of the young complainant that counsel knew the prosecutor intended to invoke.

[65] The appellant had previously rejected a proposed resolution based on a guilty plea and a joint or individual submissions on sentence. The judge presiding at the pre-trial, after hearing the positions proposed by counsel, indicated that he would have [page494] imposed a sentence of 12 months on a plea of guilty. The appellant rejected this resolution.

[66] The "instructions" of February 21, 2008 are themselves problematic. Neither version as to their origin inspires confidence. The appellant's claim that trial counsel asked him to sign and he signed a single-page "great job" memo makes no sense. His explanations for a signature that bears at least some physical resemblance to his proffered samples vary from outright denial and assertion of a forgery to allowance of the possibility of authorship. On the other hand, the content of the "instructions" provides no fuel for trial counsel's claim that

I am sure that I discussed with him the option whereby a "not guilty" plea is entered, the Crown reads in its case rather than calling viva voce evidence and the defence does not dispute the allegations. This allows for what is effectively plea negotiation without a formal admission of guilt.

[67] After anxious consideration, I am satisfied that the procedure followed in the proceedings of February 21, 2008 caused a miscarriage of justice through procedural unfairness. The appellant's unwavering denial of guilt was sideswiped by a procedure that resulted in a de facto admission of guilt without any inquiry into voluntariness or the appellant's

understanding of the nature and effect of this procedure.

[68] Neither the appellant nor trial counsel ever admitted the truth or accuracy of the prosecutor's allegations. Neither acknowledged that the prosecutor was in a position to adduce credible evidence to establish those allegations. Nor could either do so. The appellant denied the allegations. The materials filed to support the claim of ineffective assistance of counsel make it plain and obvious that trial counsel had not even reviewed the videotaped statements that formed the core of the prosecutor's case and served as the source of the allegations the prosecutor read after the appellant's plea of not guilty.

[69] Persons who admit their guilt should plead guilty. The plea inquiry that s. 606(1.1) requires ensures that the plea is unequivocal, voluntary and informed.

[70] Persons who deny guilt should plead not guilty and have a trial at which proper proof may be offered and its sufficiency or inadequacy assessed by the trier of fact. The cannibalized procedure followed here blurs the distinction between admissions and denials of guilt, is unauthorized and, as this case demonstrates, is capable of great mischief.

Ground #2: Ineffective assistance of counsel

[71] The appellant's submissions concentrated on his claim of ineffective assistance of trial counsel. He alleged several discrete [page495] deficits in the conduct of trial counsel that, in combination, rendered the assistance counsel provided ineffective. The respondent takes the position that the appellant's claim rests on an unsound footing: he seeks to adjudge trial counsel's assessment as if the proceedings were a contested trial, something that never occurred. According to the respondent, the focus should be on the assistance provided in the resolution that actually happened on February 21, 2008.

[72] To determine this ground of appeal requires further background that emerges from the fresh evidence filed in support and in opposition to the claim.

The additional background

[73] The principal sources of the essential background are the affidavits of the appellant and trial counsel, cross-examinations on those affidavits and several documents attached or filed as exhibits.

[74] It is worth observation at the outset, as the respondent points out, that the appellant's affidavits contain innumerable references to conclusions that the appellant has drawn "after lengthy discussions with appellate counsel". These conclusions are neither evidence nor helpful. They constitute argument and have no place in any affidavit, much less one proffered in support of a claim of ineffective assistance of trial counsel.

[75] The appellant's claim of ineffective assistance of trial counsel begins with a complaint about counsel's failure to obtain the appellant's release pending trial, followed by inadequate preparation for trial, a failure to ensure the adequate functioning of a supplementary audio system and concludes with a failure to adhere to the appellant's instructions on the trial date.

The failure to obtain judicial interim release

[76] The appellant was arrested on a warrant of first instance on October 16, 2007. The arrest occurred at the appellant's residence in Kirkland Lake, a significant distance away from the place at which the offences charged are alleged to have been committed.

[77] The appellant retained trial counsel about a week after his arrest, although a legal aid certificate was not issued until November 13, 2007. Trial counsel instructed duty counsel to waive the appellant's bail hearing and consented to a detention order when counsel first appeared on the appellant's behalf on November 13, 2007.

[78] Trial counsel did not seek the appellant's release from custody pending trial. Although the appellant was 62 years old,

[page496] had no previous convictions, lived a considerable distance away from the complainant, didn't drive a car and suffered from several health-related conditions, including a significant hearing impairment, trial counsel never solicited the prosecutor's position on release, in particular, whether release would be opposed (the onus was on the prosecutor) or release on the appellant's own recognizance with reporting conditions would be sufficient.

[79] The appellant denied having any discussions with trial counsel about waiver of his judicial interim release hearing and consent to a detention order. The appellant provided the names of some potential sureties to trial counsel, but trial counsel considered them as unsuitable in the circumstances after minimal inquiries.

Trial preparation

[80] Before he attended a judicial pre-trial, where resolution was discussed and elected trial by provincial court judge on the appellant's behalf, trial counsel had not received, let alone reviewed, the prosecutor's disclosure. As it happened, the disclosure consisted of videotaped interviews of the complainant and other witnesses, as well as a videotaped interview of the appellant by the investigating officer. None of the interviews was transcribed.

[81] Trial counsel considered this prosecution to be a "she said/he said" case that the appellant had instructed him to "move along". The notes of trial counsel contained no reference to any instructions about an expedited hearing.

[82] Before February 21, 2008, the appellant made it clear to trial counsel that he had committed no crime and was not guilty of any offence with which he was charged. The case was to proceed to trial on February 21 and March 4, 2008. Trial counsel had not transcribed or even reviewed the videotaped interviews prior to February 21, 2008. He could not recall whether he had prepared any outline of proposed cross-examinations. He had not prepared the appellant to give evidence, because he considered it unlikely that the appellant

would testify on the first day of trial.

The audio system malfunction

[83] The appellant is hearing impaired, although the precise nature and scope of his impairment has not been disclosed. During some of his preliminary appearances, the appellant indicated that he was unable to hear some of the things said by various participants. It is unclear whether his ability to hear was because of what was said or the volume with which the words were spoken. [page497]

[84] Trial counsel indicated that the appellant required an enhanced audio system so that he could hear the proceedings. On both February 21 and March 4, 2008, the appellant sat at counsel table beside his lawyer. The record of proceedings is barren of any voiced concern by the appellant about his ability to hear anything anybody said. He asked no one to speak up and responded to the judge's question when asked whether he had anything to say prior to sentence.

[85] In his affidavit filed on appeal, the appellant asserts that he did not hear "most of what was said" on February 21, 2008.

The trial date

[86] What happened on February 21, 2008 is critical to the appellant's claim of ineffective assistance of counsel.

[87] The appellant acknowledged that he was reluctant to have the complainant testify at trial, but he denied instructing trial counsel to resolve the charges because of this reluctance or otherwise. In any discussions he had with trial counsel, the appellant reiterated his intention to proceed to trial. He did not authorize trial counsel to resolve the case at the pre-trial or otherwise.

[88] Trial counsel maintained few notes of his discussions with the appellant. He had no note that indicated anything other than that the appellant wanted to have the case tried. He

never explained to the appellant any of the procedural mechanisms available to the prosecutor to assist in the presentation of the complainant's testimony, in part because they were complex and not easily understood by those charged with sexual offences.

[89] The appellant and his trial counsel agree that they had a brief discussion before court proceedings began on February 21, 2008. During those discussions, the appellant signed a piece of paper, handwritten by trial counsel. There the agreement ends.

[90] The appellant says that he signed a single-page "good efforts" memo prepared by trial counsel. He did not read it before signing it. He never signed a two-page document at any time. At different times, the appellant described the signature on this two-page document as a forgery, a signature that does not look like his, or one that could be his.

[91] Trial counsel's version is different. He says the appellant signed the two-page document because he (the appellant) did not want the complainant to have to testify in court. Trial counsel had no recollection of explaining to the appellant the procedure that would follow the plea of not guilty or the contents of the allegations to be read by the prosecutor of which trial counsel was completely unaware.
[page498]

The positions of the parties

[92] For the appellant, Mr. Rumble says that the ineffective assistance provided by trial counsel caused a miscarriage of justice. In essence, trial counsel took advantage of a hearing-impaired client who had consistently denied the complainant's allegations and wanted [a] trial at which he could testify and demonstrate his innocence. Instead, trial counsel countermanded the appellant's instructions by entry of a plea of not guilty, followed by an uncontested recital of allegations with which he knew the appellant disagreed, in the knowledge that a conviction would inevitably follow.

[93] Mr. Rumble contends that the ineffective assistance of trial counsel was obvious throughout his relationship with the appellant. Trial counsel made no application for the appellant's release although the appellant was 62 years old, without prior convictions and lived in northern Ontario, far removed from the complainant and her family. Trial counsel did not even find out the prosecutor's position on release, rather simply concluded that the appellant had no viable release plan and consented to a detention order.

[94] Mr. Rumble assails trial counsel's failure to adequately prepare for the appellant's trial. Counsel did not review the disclosure provided by the prosecutor, prepare for cross-examination of the complainant, watch or transcribe the videotaped interviews or prepare the appellant to testify on his own behalf.

[95] Mr. Rumble submits that trial counsel's assistance to the appellant fell below the applicable standard of reasonable competence, because counsel failed to inform the appellant about the procedural mechanisms available for a youthful complainant to testify, thus assuaging the appellant's expressed concern about requiring the complainant to testify. But, more importantly, trial counsel never explained to the appellant that, despite his insistence on a trial, the procedure that was to be followed was not a trial, but rather would lead to the appellant's immediate conviction and a probable jail sentence.

[96] In the end, Mr. Rumble says, the ineffective assistance of trial counsel caused a miscarriage of justice. The proceedings on February 21, 2008 were unfair and yielded a verdict that is unreliable in the absence of any testing of the prosecutor's case.

[97] For the respondent, Mr. Hrybinsky says that the complaint about ineffective assistance of trial counsel should focus on what occurred on February 21, 2008. To be more specific, we should examine whether a miscarriage of justice resulted from [page499] the manner in which trial counsel conducted the proceedings on the first date scheduled for

trial.

[98] Mr. Hrybinsky contends that the failure of trial counsel to seek the appellant's release from pre-trial custody, or to adequately prepare for a trial that never occurred, did not cause the appellant any prejudice or result in a miscarriage of justice.

[99] Mr. Hrybinsky acknowledges that the accounts of the principals about what happened on February 21, 2008 to convert the proceedings from a trial to the functional equivalent of a plea of not guilty or nolo contendere are remarkably divergent. He submits that, in the end, the appellant's account lacks credulity. His explanation of the origin and nature of the document he signed is beyond belief. His conduct during and after the proceedings of February 21, 2008, including but not only his apology to the complainant's mother and his original notice of appeal contesting only the fitness of his sentence, demonstrate his understanding of the nature of those proceedings. The failure of trial counsel to more fully explain the procedure that was followed caused no miscarriage of justice.

The governing principles

[100] Where a claim of ineffective assistance of counsel is advanced on appeal, we follow a three-stage approach to scrutinize the claim. The appellant must establish

- (i) the facts that underpin the claims;
- (ii) the incompetence of the representation provided by trial counsel (the performance component); and
- (iii) a miscarriage of justice as a result of the incompetent representation (the prejudice component).

R. v. B. (M.), [2009] O.J. No. 2653, 68 C.R. (6th) 55 (C.A.), at para. 8; R. v. Joannis, [1995] O.J. No. 2883, 102 C.C.C. (3d) 35 (C.A.), at p. 59 C.C.C., leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 347, at p. 57.

[101] The burden of establishing ineffective representation at trial that warrants appellate intervention rests upon the appellant who urges it. The burden is not easily discharged.

Our approach to these claims requires caution: B. (M.), at para. 7.

[102] Once the facts that underpin the claim have been established, we begin with an examination of the prejudice component to determine whether a miscarriage of justice has occurred. In the absence of prejudice, it is superfluous to consider the performance or competence component: B. (M.), at para. 7; [page500] R. v. B. (G.D.), [2000] 1 S.C.R. 520, [2000] S.C.J. No. 22, at paras. 29 and 34.

[103] The prejudice component acknowledges that, in the context of ineffective assistance of counsel, miscarriages of justice may take several forms. Counsel's inadequacies may cause procedural unfairness in the proceedings or compromise the reliability of the result reached at first instance: B. (G.D.), at para. 28.

[104] In large measure, the nature of any demonstrated incompetence will dictate the kind of inquiry required to determine the effect of that incompetence on the fairness of the trial. Pervasive incompetence demands that the focus of the inquiry be on the effect of that incompetence on the fairness of the adjudicative process: Joanisse, at pp. 62-63 C.C.C.

[105] Claims of incompetence may fasten upon discrete decisions made or actions taken by trial counsel in the course of the defence. These claims reduce to an assertion that, because of trial counsel's incompetence, the defence position was not properly advanced or the prosecution's case not properly challenged. We measure the effect of counsel's incompetence on the fairness of the trial by reference to the impact of any error on the reliability of the result: Joanisse, at p. 64 C.C.C.

[106] Some discrete decisions that have been advanced as demonstrative of trial counsel's incompetence that have compromised the reliability of the result have included failure to prepare an accused for cross-examination, a failure to cross-examine a critical prosecution witness, a failure to obtain or review videotaped statements of witnesses and a

failure to have a transcript of prior inconsistent statements on which to cross-examine a witness: *Joanisse*, at pp. 63-64 C.C.C.; and *R. v. T. (P.)* (2002), 59 O.R. (3d) 577, [2002] O.J. No. 2142, 165 C.C.C. (3d) 281 (C.A.), at paras. 18 and 27-28.

[107] The performance component has to do with incompetence on the part of trial counsel. We determine incompetence according to a standard of reasonableness that begins from a strong presumption that trial counsel's conduct falls within the vast expanse of reasonable professional assistance. We place the onus on the appellant to establish the conduct of counsel, whether acts or omissions, that are alleged not to have been the result of reasonable professional skill. We eschew the role of the Monday morning quarterback. The omniscience of hindsight occupies no place in our analysis: *B. (G.D.)*, at para. 27.

[108] It is critical to keep in mind that, during the course of criminal proceedings, defence counsel make many decisions in good faith and in the best interests of his or her client. We ought [page501] not look behind every decision counsel makes, except where it is essential to prevent a miscarriage of justice. Defence counsel need not always obtain approval for each and every decision they make in the conduct of an accused's defence: *B. (G.D.)*, at para. 34.

[109] On the other hand, some decisions, like whether to enter a plea of guilty or whether to testify, require instructions from the client. It is for the client, not for counsel, to make these decisions. The failure to discuss these issues with the client and to obtain the necessary instructions may raise questions of procedural fairness and the reliability of the trial result and lead to a miscarriage of justice: *B. (G.D.)*, at para. 34.

The principles applied

[110] The appellant has undertaken a painstaking analysis of almost every act or omission of trial counsel from initial retainer to final account. I do not propose to do so. At least, as it seems to me, our focus ought to be on whether a

miscarriage of justice occurred on February 21, 2008 because of the manner in which trial counsel conducted the case on the appellant's behalf.

[111] The failure of trial counsel to apply for judicial interim release and the reasonableness of his assessment of the viability of the appellant's plan for release had no say in what occurred on February 21, 2008. The custodial status of the appellant, indeed whether a failure to seek the appellant's judicial interim release reflected ineffective assistance, had disappeared into the background months before the trial date occurred.

[112] In one sense, as the respondent argues, the complaints about inadequate preparation for trial seem destined for the same refuse heap. After all, inadequate trial preparation is linked to counsel's conduct at trial, an event that never occurred here.

[113] Despite the first-impression attraction of this argument, persuasively packaged by Mr. Hrybinsky, I am unable to say that the inadequacies of trial counsel's preparation for trial were without influence on the proceedings that unfolded on February 21, 2008.

[114] The prosecutor and trial counsel were unable to resolve the case before trial. They estimated that trial proceedings would require two days of court time. The dates selected for trial were February 21 and March 4, 2008. The appellant denied the allegations. When the parties arrived at the courthouse on February 21, 2008, the appellant was to enter a plea of not guilty. The prosecution's case would follow and then an opportunity for the appellant to answer. [page502]

[115] On February 21, 2008, the first day of what was to be a two-day trial, trial counsel for the appellant had not reviewed or had transcribed the video statements of the complainant and other witnesses that were the core of the prosecution's case against the appellant. Nor had he taken similar steps in connection with the appellant's videotaped interview by the investigating officer that he had earlier acknowledged was

voluntary, at least for the purposes of cross-examination of the appellant.

[116] Trial counsel had not prepared the appellant to testify as a witness in his own defence despite the appellant's repeated assertions that he wished to do so. Nor had counsel developed any meaningful strategy to defend the case or an outline of potential cross-examination of the prosecution witnesses.

[117] As it turned out, no trial took place. We have no trial transcript to review in order to assess whether trial counsel's lack of preparation made the trial unfair or contributed to an unreliable verdict. On the other hand, only the stunningly naive among us would not connect the dots between the lack of preparation and the fortuitous turn of events that terminated the trial proceedings by a de facto guilty plea, a procedure of which the appellant was not fully informed.

[118] A miscarriage of justice occurred in this case. The proceedings were encumbered by procedural unfairness. The practical effect of what occurred was that the appellant, who pleaded not guilty, essentially admitted the full sweep of the prosecutor's allegations that he had consistently denied since arrest. Yet none of the safeguards that we associate with either formal admissions or pleas of guilty were evident in the rush to judgment that occurred here. A hasty, ill-informed volte face from an outright denial to a veiled acceptance of everything alleged in the blink of an eye as trial proceedings were about to begin.

[119] What occurred here also raises questions about the reliability of the conclusion of guilt that rests upon allegations untested in the crucible of cross-examination because of inadequate trial preparation by the appellant's former counsel.

Conclusion

[120] For these reasons, I would allow the appeal, set aside the conviction of sexual interference and order a new trial.

Notes

Note 1: The term "general plea" is not used in the Criminal Code.

Note 2: The "evidence" may include admissions under s. 655 of the Criminal Code and any facts of which judicial notice may be taken.

Note 3: The rejected plea would be admissible as an informal admission.

Note 4: Sometimes the allegations may be reduced to writing, signed by the prosecutor, counsel for the accused and accused, and tendered under s. 655 of the Criminal Code.
