

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. M.D., 2020 ONCA 290

DATE: 20200514

DOCKET: C65149

Feldman, Harvison Young and Jamal JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

M.D.

Appellant

Howard L. Krongold, for the appellant

Catherine Weiler, for the respondent

Heard: November 27, 2019

On appeal from the conviction entered by Regional Senior Judge Calum U. C. MacLeod of the Superior Court of Justice on November 16, 2017, with reasons reported at 2017 ONSC 6776.

Feldman J.A.:

A. OVERVIEW

[1] The appellant, M.D., was convicted following a judge-alone trial of one count of sexual assault, contrary to s. 271 of the *Criminal Code*. The central issues at trial were consent and honest but mistaken belief in consent.

[2] On this appeal, the appellant raised a number of grounds of appeal relating to the trial judge’s reasons for disbelieving the appellant. It is not necessary to address all of the grounds because I would allow the appeal on the first ground and order a new trial.

[3] As one reason for rejecting the appellant’s evidence, the trial judge stated that he “formed the impression” that “many of [the appellant’s] answers were tailored precisely to the evidence he knew would be forthcoming or to the forensic disclosure”: at para. 47. It was an error of law for the trial judge to criticize the appellant and impugn his credibility on the basis that his evidence responded to Crown evidence at trial (or at the preliminary hearing), when the appellant was constitutionally entitled to receive Crown disclosure and be present at his trial.

B. FACTUAL BACKGROUND

[4] The complainant was a 19-year-old university student who had recently been hired by the appellant, a bar manager, to work as a hostess at the bar. From the outset of the employment relationship, the appellant made sexually suggestive references toward the complainant in person and over private messages on various social media platforms, as part of a pattern of behaviour that the trial judge characterized as “predatory”: at para. 27. In text messages, the appellant requested that the complainant wear revealing clothing at work, including no underwear. Following her second shift, he asked her to send him revealing photographs of herself.

[5] The complainant acknowledged flirting with the appellant, but she testified that in order to succeed in the bar industry, it was important for the bar manager to like her and staff her on more shifts.

[6] The allegations forming the basis of the appellant’s criminal charges occurred on the night of February 15, 2015, during the complainant’s fifth shift at the bar. That night, the appellant gave the complainant the opportunity to train as a bartender, a much more lucrative position, during a private event. Before the shift began, the appellant texted the complainant about wearing “something hot” during her shift. Video footage of the bar shows the appellant and complainant flirting and touching throughout the night, but the footage ends before the assault allegedly occurred.

[7] Because the trial turned on the credibility of the two accounts of what occurred, it is important to set out both versions.

[8] The complainant testified that she consumed about ten one-ounce shots of alcohol between 10:30 p.m. and 12:30 a.m. that evening, five with the appellant. At one point he asked for her phone and she gave it to him. Shortly before 1:30 a.m., she asked the appellant for permission to go upstairs to get some candy from her coat pocket and tripped on the way up. At the top of the stairs she saw the appellant talking to another man, she went over to say hi and to get her phone back. After the other man walked away, the appellant took out the phone and went through her videos and photos, which included one of the complainant having sex with her boyfriend. She tried to grab the phone but he held it out of her reach. She then began vomiting in her mouth, and went into the washroom where she vomited into the toilet. The appellant came in behind her and shut the door. He began rubbing her back and kissing her neck. She felt drunk and sick and was not able to speak or move. Once she stopped vomiting, she closed the toilet seat. The appellant performed oral sex on her as she lay on her back on the floor, without saying anything. He then turned her over and penetrated her from behind. She was in and out of consciousness. He then stopped and told her to clean herself up; they would get back to work and finish this later. She locked the door behind him and looked for her underwear which was gone. She did not consent to the sexual activity.

[9] She remained in the bathroom to gather herself, then went to the coat check to get her coat and down to the bar for her boots and purse. She saw the appellant outside, got her phone back, and took a taxi over to a nearby bar where her boyfriend was working. She arrived around 2 a.m. upset and crying. She threw up there as well. When she told her boyfriend that the appellant had forced himself on her in the bathroom, her boyfriend used her phone to text the appellant accusing him of the attack. At 5 a.m., the complainant’s boyfriend drove her to the hospital to have a sexual assault kit performed. She reported the assault to the police some weeks later.

[10] The appellant testified and told a different story. He said that while they were working downstairs, he asked the complainant when he was going to see the naked photos of her on her phone. She first showed him some photos downstairs at the bar, then they went upstairs and she showed him more photos and two videos, including a video of her having sex. At that point he held the phone so he could see the video more clearly. Then she led him by the hand into the washroom. She spat a few times into the toilet, he asked if she was ok, and she said she was.

[11] The appellant testified that he sat down on the toilet and the complainant pulled down her shirt to expose her breasts. She told him he was going to see what he saw in the photos, then allowed him to remove her underwear. She put her leg up onto the toilet. He inserted his finger into her vagina and engaged in cunnilingus. When she stopped responding to him, he determined that she was too drunk, like she had “hit a wall”, so he stopped. He picked up her underwear, he said, so she would not be embarrassed if someone came in and saw the underwear. He went down and brought back a bottle of water. He recalled smoking a cigarette outside and that the complainant came and asked for her phone back. He texted her later asking if she had left. He also responded to her boyfriend’s text denying that he had forced himself on the complainant.

[12] As part of the complainant’s sexual assault kit, blood samples were taken at the hospital at 8 a.m. on the morning following the alleged assault. At that time, she had a blood alcohol level of 74 milligrams of alcohol in 100 milliliters of blood. The toxicologist’s evidence was that at 1:30 a.m., the level would have been between 120 and 206 milligrams of alcohol per 100 milliliters of blood. The vaginal swab showed male DNA in trace amounts belonging to someone other than the complainant’s boyfriend. The DNA found on her underwear – a new pair that she put on at her boyfriend’s house before heading to the hospital – was a match for the appellant and amylase traces were consistent with saliva.

C. REASONS OF THE TRIAL JUDGE

[13] The trial judge found that the Crown had proven beyond a reasonable doubt that the complainant was sufficiently impaired by alcohol that she was incapable of providing consent. Moreover, despite noting some problems with the complainant’s testimony, the trial judge accepted her evidence that she did not seek out the sexual encounter or consent to it. As a consequence, even if consent were possible, it was not given or was vitiated by the appellant’s position of authority.

[14] The trial judge rejected the appellant’s defence of honest but mistaken belief in consent. In order to successfully invoke this defence, s. 273.2(b) of the *Criminal Code* requires the appellant to have taken reasonable steps in the circumstances known to him at the time to ascertain that the complainant was consenting. The trial judge found that the appellant’s circumstances included knowledge of the complainant’s level of intoxication and the power dynamic inherent in their employment relationship. He found that the appellant had made no effort, in light of these circumstances, to assess whether the complainant was sufficiently sober to consent.

[15] Although he noted that the appellant described “in elaborate detail how matters unfolded and why he believed the complainant was inviting him to touch her”, the trial judge largely rejected the appellant’s evidence that the complainant initiated the sexual activity and that it was entirely consensual: at paras. 36, 45. He gave several reasons for rejecting the appellant’s evidence, at paras. 45-47:

In the first place he denied seeing the complainant vomit but he did describe her as spitting into the toilet. It is hard to imagine spitting into the toilet as a prelude to a sexual encounter and his clear need to downplay the event by describing it as “spitting” did not have a ring of truth.

Similarly he had no convincing explanation of why he took the complainant’s underwear. He was evasive on that point and the suggestion made by the Crown that he took the underwear as a trophy seems the most likely explanation. He had no good answer for why he could not have taken the complainant into his office which was right next to the washroom if this was consensual sexual activity. Finally his evidence that she was initially not too intoxicated to consent but then suddenly “hit a wall” and became too intoxicated is not credible and is too dependent on split second assessment as she succumbed to the effects of alcohol to have any air of reality.

While credibility of evidence cannot be assessed purely [by] demeanour, observation of the accused and the manner in which he testified is a useful tool. I found the evidence of the accused to be delivered in a manner that was bordering on glib. He was clearly an intelligent and sophisticated witness who admitted that many of his activities were immoral, wrong and perhaps even illegal but he did so with no real conviction. I formed the impression that many of his answers were tailored precisely to the evidence he knew would be forthcoming or to the forensic disclosure. His vagueness about the number of drinks he knew the complainant had drunk, the precise timing of her blackout and his inability to describe what happened to the complainant after he left her alone in the bathroom left me entirely unconvinced.

D. ISSUES

[16] The appellant raises the following issues on the appeal:

- 1) The trial judge erred in law by rejecting the appellant’s evidence on the basis that he seemed to have tailored his testimony to the evidence he knew would be forthcoming and to the disclosure;
- 2) The trial judge erred by misapprehending the evidence of the appellant and the toxicologist on a number of issues;
- 3) The trial judge erred by applying an objective test to the appellant’s defense of honest but mistaken belief in consent; and
- 4) The trial judge applied uneven scrutiny to the evidence of the appellant and that of the complainant.

[17] I would allow the appeal on the basis of the first ground of appeal and find it unnecessary to address the other three grounds.

E. ANALYSIS

(1) The trial judge’s impugned finding

[18] Among his reasons for rejecting the appellant’s evidence, the trial judge referred to his impression that the appellant’s testimony was “tailored precisely to the evidence he knew would be forthcoming or to the forensic disclosure”: at para. 47.

[19] The trial judge did not elaborate on this comment with specific examples. However, the appellant had attended a preliminary inquiry, he had received Crown disclosure, and he heard the evidence of all the Crown witnesses including the toxicologist and the DNA expert. Due to a procedural anomaly, the accused first testified on a pre-trial *voir dire* having already heard the testimony of the toxicologist and the DNA expert. The DNA evidence confirmed that the appellant had performed oral sex on the complainant and deposited his DNA in her vagina, but not that they had had intercourse. On the *voir dire*, the appellant admitted in his evidence that he performed cunnilingus on the complainant and that he digitally penetrated her, but denied that he had had intercourse with her, as she claimed. The Crown suggests that the trial judge was merely referring to this procedural anomaly, which allowed the appellant to “tailor” his *voir dire* testimony having benefitted from knowing the DNA evidence, and to then keep his evidence consistent when he subsequently testified in the trial proper.

[20] Regardless of the reason the trial judge drew this conclusion, he fell into legal error by using the appellant’s presence at his trial and his receipt of Crown disclosure against him.

(2) Case law on “tailoring”

[21] This court has discussed and explained this issue in a number of cases and contexts, including in *R. v. G.V.*, 2020 ONCA 291, released concurrently with these reasons.

[22] The issue first arose in relation to Crown cross-examination of the accused regarding the disclosure, during jury trials. In *R. v. White* (1999), 132 C.C.C. (3d) 373 (Ont. C.A.), and in *R. v. Schell* (2000), 148 C.C.C. (3d) 219 (Ont. C.A.), the Crown had tried to suggest to the accused in cross-examination that his answers were formed based on his knowledge of Crown disclosure.

[23] In *White*, Doherty J.A. acknowledged the basic logic underlying an allegation that the accused tailored his evidence to the disclosure, but explained that cross-examination of the accused suggesting such reasoning is improper and potentially prejudicial, stating, at para. 20: “That inference, no matter how logical, cannot be drawn without turning fundamental constitutional rights into a trap for accused persons.” He directed trial judges to ensure that such any such inference in cross-examination be eradicated: at para. 20. As the trial judge in that case had given immediate instructions to the jury to undercut the improper suggestion put forth by the Crown, the appeal was dismissed.

[24] In *Schell*, the following year, Rosenberg J.A. repeated the same admonition against the Crown’s insinuation, in cross-examination and in a closing address, that the accused was tailoring his evidence to the disclosure he had received and the testimony he had heard. Rosenberg J.A. stated, at para. 57: “It was wrong and unfair for Crown counsel to attempt to exploit the appellant’s exercise of his rights.”

[25] This court has applied similar reasoning in the context of judge-alone trials. In *R. v. Thain*, 2009 ONCA 223, 243 C.C.C. (3d) 230, the trial judge’s analysis of the credibility of the accused included the observation that the appellant’s testimony came “long after disclosure was available to him and having regard to the totality of the evidence”: at para. 15. On appeal, this court approached the case as one of first instance, given that the issue was not improper Crown use of disclosure against the accused, but improper use of it by a trial judge in his reasons.

[26] In his analysis, Sharpe J.A. noted two circumstances where, contrary to the general principle, the Crown may cross-examine an accused regarding disclosure: *Thain*, at para. 24. One such situation arose in *White*, where the accused used telephone records produced prior to trial to assist with times and dates of meetings with the complainant, and the Crown was entitled to bring out that he had had access to the records before testifying: see *White*, at para. 22; *R. v. Cavan* (1999), 139 C.C.C. (3d) 449 (Ont. C.A.), at para. 45, leave to appeal refused, [1999] S.C.C.A. No. 600; *R. v. Kokotailo*, 2008 BCCA 168, 232 C.C.C. 279, at paras. 53-58. Similarly, the Crown may cross-examine the accused on disclosure to substantiate a claim of recent fabrication or concoction of an alibi by the accused: see *R. v. Khan* (1998), 126 C.C.C. (3d) 523 (B.C.C.A.), at paras. 51-52, leave to appeal refused, [2001] S.C.C.A. No. 126; *R. v. Marshall* (2005), 77 O.R. (3d) 81, at paras. 69-75, leave to appeal refused, [2006] S.C.C.A. No. 105.

[27] Sharpe J.A. also referred to *R. v. Peavoy* (1997), 34 O.R. (3d) 620 (C.A.), in which the Crown argued in its closing address to the jury that the accused had concocted his evidence after receiving disclosure, but never put that proposition to the accused. The court found the Crown’s conduct unfair and prejudicial both because of the misuse of disclosure against the accused and the failure to give the accused the opportunity to respond to the charge of recent fabrication: *Peavoy*, at p. 625.

[28] Taking this jurisprudence into account, Sharpe J.A. found that the trial judge in *Thain* had no legal basis to use the fact of receiving disclosure against the accused. None of the exceptions applied, nor had the Crown ever suggested to the accused that he recently fabricated his evidence. Any comment on the accused’s use of the disclosure thus first emerged in the trial judge’s reasons. In these circumstances, Sharpe J.A. concluded, at para. 29, that in a judge-alone trial, fairness is undermined if the accused has no opportunity to respond to allegations of fabrication on the basis of Crown disclosure:

In my view, the fact that the accused enjoyed his constitutional right to disclosure had no bearing on his credibility in this case and the trial judge erred in law by stating that it did. Even if the disclosure might possibly have had a bearing on credibility, trial fairness demanded that the accused be confronted with the suggestion and afforded the opportunity to refute it or make submissions before being disbelieved on that account.

[29] The issue arose again in *R. v. Jorgge*, 2013 ONCA 485, 4 C.R. (7th) 170, another sexual assault trial by judge alone. In her reasons for judgment dealing with her credibility assessment of the accused, the trial judge discounted his evidence because he had had the benefit of listening to the legal arguments presented by his counsel and by the Crown and therefore understood the issues at stake: 2010 ONSC 8038. At paras. 10-14 of her reasons, she made several comments that were the subject of the accused’s appeal to this court:

Mr. Jorgge had the benefit of listening to the various arguments raised by his counsel at the *voir dire*. He also understands now that consent to sexual relations means more than a woman not protesting as sexual activity progresses.

...

I conclude that this evidence given by Mr. Jorgge at the trial when he said “that unless I gave him something, I was never going to get out of there” was evidence carefully tailored to fit the arguments raised by the Crown and his counsel during the *voir dire*.

...

I conclude that the evidence given by Mr. Jorgge in his statement about the sexual activity that took place on July 18, 2008, and in particular whether Ms. R. was moving or was inert as she was sleeping or passed out, is truthful. I conclude that his commentary given at the trial is simply an attempt by Mr. Jorgge to distance himself from any concessions made in the statement relevant to the issue of consent now that Mr. Jorgge has a better understanding of the issues.

I conclude that his evidence given at the trial, when it conflicts with his prior statement, is an attempt to challenge the ruling as to the voluntariness of his statement after hearing the capable arguments of his counsel. In drawing this conclusion I have considered all of the statement and all of Mr. Jorgge’s evidence at this trial.

[30] While this court again acknowledged that there may be a “natural temptation” to reason in the way the trial judge did, that temptation must be resisted: at para. 12. It subverts an accused’s statutory right and obligation to be present at his or her trial under s. 650(1) of the *Criminal Code*, which is grounded in the guaranteed *Charter* rights to a fair trial and to make full answer and defence: ss. 7 and 11(d). In *Jorgge*, this court explained that a trial judge is entitled to consider inconsistencies between an accused’s statement to police and his testimony at trial, but may not attribute any such inconsistencies to the accused’s presence at the *voir dire*.

(3) Application of the case law

[31] This case law applies with full force to the reasons given by the trial judge in this case. The trial judge fell into the same error as in the cases discussed by discounting the appellant’s credibility on the basis that he “tailored” many of his answers to the case against him, which he knew from being present during the proceedings and from the disclosure. This reasoning, as in the previous cases, turned the appellants’ constitutional rights into an evidentiary trap.

[32] The Crown referred the court to two cases that it submits may contradict the other authorities: *R. v. Brown*, 2018 ONCA 9, and *R. v. Roble*, 2004 CanLII 23106 (Ont. C.A.). I do not regard either of these cases as undermining the statements of the law as articulated by the court in full reasons in *White, Schell, Thain, and Jorgge*.

[33] *Brown* was a chambers decision denying a motion to appoint counsel under s. 684 of the *Criminal Code*. One of the issues the motion judge considered was the potential merit of the appeal, including the submission that the trial judge improperly found the appellant’s evidence was tailored to the disclosure he had received. More specifically, the trial judge said that “his answers had the air of being scripted, practiced and tailored”: *Brown*, at para. 14. On the s. 684 application, the motion judge commented that if the trial judge’s statement was made in response to the Crown’s closing submissions which referenced disclosure, then the trial judge’s statement could be problematic, but not “if the trial judge was referring to testimony being scripted to the Crown’s case at trial”: at para. 14. The Crown relies on the latter comment.

[34] In *Brown*, the motion judge was acknowledging that the applicant had an arguable ground of appeal, but one that required closer examination of the record in the context of the parties’ positions and submissions at trial. I do not read his comment as intended to depart from the jurisprudence I have referred to. He was responding to the parties’ submissions, not articulating a general statement of law.

[35] *Roble* was a brief, six-paragraph endorsement by this court. One issue was whether the trial judge applied a different standard of scrutiny to the evidence of the appellant. In rejecting that submission, the court commented that the trial judge was entitled to find that the accused was “tailoring his evidence to fit the events described” and that his specific explanations of various counts were tailored, well thought out and convoluted: at paras. 4-5.

[36] In his reasons, the trial judge in *Roble* characterized the accused’s evidence as “well thought out; scripted”: 2002 CarswellOnt 5994 (S.C.), at para. 41. For example, on one count, the complainant alleged that the accused butted her face and eye with a cigarette. The trial judge found the accused’s testimony that a woman with a cigarette slapped the complainant to be “incredulous and another attempt to tailor his evidence”: at para. 47. Rather than use the accused’s presence in court and access to disclosure as the starting point for impeaching his credibility, the trial judge focused on the internal implausibility of the accused’s account of the events. It cannot be said that he turned the accused’s enjoyment of his constitutional rights into a trap within the credibility analysis. Moreover, the issue on appeal was uneven scrutiny of the evidence, and this court did not consider whether the trial judge’s analysis undermined the appellant’s right to be present at the trial and to make full answer and defence.

(4) Conclusion

[37] For these reasons, I find that the trial judge fell into legal error when he reasoned that the appellant “tailored” his testimony “to the evidence he knew would be forthcoming or to the forensic disclosure.” That inference tainted the trial judge’s legal analysis and conclusion.

[38] The Crown submits that if the court finds an error, it should apply the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*. The Crown argues that the tailoring point was only one of many reasons the trial judge gave for rejecting the appellant’s evidence, and that it was near the bottom of the list and therefore less significant to the trial judge’s analysis.

[39] A similar request was made and rejected in *Thain*: at para. 38. As in *Thain*, I would not apply the proviso in this case, which turned on the trial judge’s credibility findings. While the tailoring issue was only one of the concerns the trial judge had with the appellant’s testimony, there is no basis to believe it was an unimportant one, particularly because the trial judge stated that many of the appellant’s answers appeared to be tailored to the disclosure and the evidence he knew was coming. This error is far from harmless. It goes to the heart of trial fairness and the right to make full answer and defence.

F. DISPOSITION

[40] I would allow the appeal, set aside the conviction, and order a new trial.

[41] Because of the COVID-19 emergency, the panel relieved the appellant from the term of his bail that requires him to surrender into custody prior to this decision being released.

Released: “K.F.” May 14, 2020

“K. Feldman J.A.”

“I agree. Harvison Young J.A.”

“I agree. M. Jamal J.A.”