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R. v. M.S.A., 2024 ONCA 477

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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 or 486.6 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 162.1, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 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 from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (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) as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;
>
> (b) on application made by the victim, the prosecutor or any such witness, make the order; and

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(c) if an order is made, as soon as feasible, inform the witnesses and the victim who are the subject of that order of its existence and of their right to apply to revoke or vary it.

(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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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;

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

(c) if an order is made, as soon as feasible, inform the victim of the existence of the order and of their right to apply to revoke or vary it.

(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.

(3.1) If the prosecutor makes an application for an order under paragraph (2)(b) or (2.2)(b), the presiding judge or justice shall

(a) if the victim or witness is present, inquire of the victim or witness if they wish to be the subject of the order;

(b) if the victim or witness is not present, inquire of the prosecutor if, before the application was made, they determined if the victim or witness wishes to be the subject of the order; and

(c) in any event, advise the prosecutor of their duty under subsection (3.2).

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(3.2) If the prosecutor makes the application, they shall, as soon as feasible after the presiding judge or justice makes the order, inform the judge or justice that they have

> (a) informed the witnesses and the victim who are the subject of the order of its existence;
>
> (b) determined whether they wish to be the subject of the order; and

(4) An order made under this section does not apply in either of the following circumstances:

> (a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or
>
> (b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

(5) An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

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

(1.1) A prosecutor shall not commence or continue a prosecution against a person who is the subject of the order unless, in the opinion of the prosecutor,

> (a) the person knowingly failed to comply with the order;
>
> (b) the privacy interests of another person who is the subject of any order prohibiting the publication in any document or the

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broadcasting or transmission in any way of information that could identify that person have been compromised; and

(c) a warning to the individual is not appropriate.

(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.

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. M.S.A., 2024 ONCA 477
DATE: 20240617
DOCKET: COA-22-CR-0216

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Benotto, Favreau and Madsen JJ.A.

BETWEEN

His Majesty the King

Respondent

and

M.S.A.

Appellant

Mark Halfyard and James Bray, for the appellant

Jennifer Epstein, for the respondent

Heard: June 6, 2024

On appeal from the conviction entered on June 7, 2022 by Justice Patrick J. Monahan of the Superior Court of Justice, sitting without a jury, with reasons reported at 2022 ONSC 2921.

REASONS FOR DECISION

[1] The appellant was convicted of seven counts of sexual assault, one count of assault with a weapon and one count of assault. The offences took place during his marriage to the complainant.

[2] The complainant testified that, throughout their marriage, the appellant sexually and physically assaulted her. She would at times document these

instances through notes and audio recordings. On July 19, 2018, she moved out. She did not immediately report her allegations of abuse. However, in late October 2018, she received a video from the appellant's father showing a woman being pushed into a grave and buried alive. Fearing for her safety, the complainant attended at a police station on November 19, 2018, and made a detailed statement.

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[3] The appellant did not testify. The trial judge found that the complainant's evidence was "detailed, clear, and consistent", noting that "she never wavered in her description of these incidents" and that "the few inconsistencies" in her evidence were "minor or peripheral."

[4] The appellant raises three issues on appeal. He submits that the trial judge erred: (i) in his treatment of the complainant's motive to fabricate; (ii) by using "oath helping" to bolster the complainant's credibility; and (iii) by admitting the electronic evidence of text messages and recordings.

Motive to fabricate

[5] The trial judge was urged to find that, because the complainant and the appellant were involved in family law litigation, she had a motive to lie. A conviction, the appellant argued, would assist her in the custody case.

[6] The trial judge declined to find that the complainant had a motive to lie due to the parties' family law litigation as "both the parenting and financial issues" had

been resolved, at least on an interim basis, and the complainant was not "actively pursuing family law claims." The trial judge deemed the motive to lie allegations to be "hypothetical and without foundation in the evidence." The appellant says this was an error because there was a foundation in the evidence: the family law proceedings that had only been resolved on an interim basis. The appellant also submits that the trial judge should have considered the motive to fabricate when the matter was reported to the police, not just at the time of trial when the parenting issues had resolved.

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[7] We accept neither proposition. The mere existence of an outstanding family law claim does not, on its own, provide evidence of motive to lie. While it may be a feature in the ultimate determination, standing alone as it was here, it is not. As the trial judge commented:

> It may well be that the outcome of this criminal case could have implications for the interim family law arrangements. But the same would be true in any sexual assault case where the parties had been married and had children. If that alone were sufficient grounds to support a finding that a complainant in a sexual assault case had a motive to lie, it would constitute a significant barrier to the reporting of sexual assaults by complainants who had been married to the alleged abuser.

[8] Nor do we accept the submission that the only relevant time to consider motive to fabricate was when she reported to the police. Her testimony at trial was evidence, not the police statement. The relevant time was when she testified.

Oath helping

[9] Count 5 related to forced sexual intercourse. The morning after the assault, the parties discussed what had happened, and the complainant recorded part of their conversation. The complainant did not use the words "sexual assault." The complainant was cross-examined on a 2011 paper she had written on the topic of rape to show that she was familiar with the terms "rape" and "sexual assault" but never used them in conversations with the appellant. The complainant explained that it was one thing to write about sexual assault and another to confront your spouse with allegations. She then highlighted her paper's thesis – that women in conservative or religious cultures are less likely to identify a sexual assault when it occurs or report it – and related it to her own situation.

[10] The trial judge said:

> With defence counsel having opened the door to a discussion of this 2011 paper, the complainant proceeded to make the point that the main thesis of the paper was that women in conservative or religious cultures are less likely to identify a sexual assault when it has occurred, and are less likely to report it to police. She said that her marriage to MSA was a real-life illustration of this very thesis, since one of the reasons for her reluctance in reporting MSA's assault to the police was because of her religious upbringing, combined with fears for her safety if she did so. Once again, the net effect was to make her claims appear more rather than less credible.

[11] The appellant submits that the trial judge used the paper for impermissible oath helping to bolster the complainant's overall credibility.

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[12] We do not agree. The trial judge did not use the paper's thesis to conclude that the complainant was more credible. The cross-examination of the complainant gave her the ability to further explain why she had not reported the abuse to the police as it was happening. The trial judge accepted her reasons for her delay in reporting.

Electronic evidence

[13] The Crown sought to adduce electronic evidence taken by the complainant: audio recordings and a set of text messages. The appellant argued the recordings had been altered as the time stamps in the metadata did not coincide with the dates the recordings were said to be made. The trial judge accepted that this discrepancy was explained by the complainant having transferred the recordings from her phone to her computer.

[14] The appellant submits that the trial judge erred in his treatment of the electronic evidence. Raised for the first time on appeal is the argument that the trial judge did not comply with the best evidence rule set out in s. 31.2 of the *Canada Evidence Act,* R.S.C. 1985, c. C-5.

[15] Sections 31.1-31.2 provide that electronic documents must be authenticated by adducing evidence that they are what they purport to be. They must then satisfy the best evidence rule to ensure that the electronic document accurately reflects

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the original information that was input. There is a presumption of integrity of the document and these rules have a low bar.

[16] We do not accept the appellant's submissions for two reasons. First, the low bar for admission would easily have been met by the complainant's evidence that the texts and recordings accurately reflected what she saw and heard. Second, the trial judge's credibility analysis did not depend on the admission of the electronic evidence.

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

"M.L. Benotto J.A."
"L. Favreau J.A."
"L. Madsen J.A."

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