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R. v. S.P., 2025 ONCA 60

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. S.P., 2025 ONCA 60[1]
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2025 ONCA 60 (CanLII)

Hourigan, Favreau and Dawe JJ.A.

BETWEEN

His Majesty the King

Respondent

and

S.P.

Appellant

Ingrid Grant, for the appellant

Meghan Tait, for the respondent

Heard: January 21, 2025

On appeal from the conviction entered on March 8, 2023, and the sentence imposed on July 27, 2023, by Justice Andrew J. Goodman of the Superior Court of Justice, sitting with a jury.

REASONS FOR DECISION

[1] This appeal is subject to a publication ban pursuant to s. 486.4 of the *Criminal Code,* R.S.C. 1985, c. C-46.

[1] The appellant was convicted by a jury of assault and sexual assault, and sentenced to three years' imprisonment.[2] He appeals against both his convictions and his sentence.

[2] At the conclusion of the hearing, we advised that the conviction and sentence appeals were dismissed, with reasons to follow. These are those reasons.

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A. THE CONVICTION APPEAL

(1) Factual background

[3] This was a single-witness trial, with the complainant testifying as the only Crown witness. The appellant did not call any evidence.

[4] The complainant and the appellant were in a romantic relationship for several years, and lived together for part of this time. In May 2018, the complainant went to the police and made a statement that led to three charges being laid against the appellant. Two counts were ultimately left with the jury: (i) a sexual assault charge, based on the complainant's allegation that on one occasion in 2016 the appellant had sexual intercourse with her without her consent, and (ii) an

[2] The trial judge directed a verdict of acquittal on a second assault charge. The appellant's sentence was apportioned as three years' imprisonment on the sexual assault count, and six months' imprisonment concurrent on the assault count.

assault charge, based on her allegation that on April 14, 2018, the appellant pushed her onto a bed and choked her.

[5] The complainant testified that after the April 14, 2018 assault she took a selfie photograph showing a burst blood vessel in one of her eyes, and a second photo showing marks on her neck. Her evidence was that she texted this second photograph to the appellant, and that he responded “I’m so sorry. I’m super sad now I hate myself for that”, to which she replied “It just can’t happen again please”.

[6] The complainant testified that she took a screenshot of this text message exchange and gave it to the police a few weeks later when she made her complaint. The screenshot was entered as an exhibit at trial. It is undated, and identifies the other participant in the text message exchange by the appellant’s first name and his initials, but does not show his phone number. The complainant testified that this reflected how she had stored the appellant’s name in her phone contacts list. She agreed with defence counsel’s suggestion that it would have been easy to make this text message exchange appear to have been with the appellant, simply by changing the name of some other person in her contacts list to that of the appellant, but she denied having done this.

(2) The grounds of appeal

[7] In his factum, the appellant advanced two grounds of appeal against his conviction, both relating to the trial judge’s treatment of the screenshot of the text

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message exchange. When the trial began, the trial judge ruled that the screenshot was admissible on the expectation that the complainant would testify that she had made it, and that it showed text messages she had exchanged with the appellant. The appellant's first argument was that the trial judge erred by admitting the screenshot without independent authenticating evidence that it showed what the complainant said it showed.

[8] The appellant's second argument, in the alternative, was that the trial judge failed to give the jury adequate limiting instructions about the screenshot's authenticity and reliability.

[9] The appellant's counsel did not pursue the first of these grounds in oral argument, in view of this court's very recent decision in *R. v. S.M.,* 2025 ONCA 18.

[10] We agree that the first ground must fail. To authenticate an electronic document for the purposes of admission, s. 31.1 of the *Canada Evidence Act,* R.S.C. 1985, c. C-5, requires only that there be "evidence capable of supporting a finding that the electronic document is that which it is purported to be." It does not require this evidence to be provided by an independent witness. In *S.M.*, this court held that the complainant's testimony was sufficient to authenticate screenshots she took of Snapchat photos: at paras. 10, 27-30. Similarly, in the appellant's case the trial judge was entitled to find that the complainant's evidence that the screenshot accurately showed her text message exchange with the appellant was

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sufficient to meet the “low” authentication threshold: *R. v. C.B.,* 2019 ONCA 380, 146 O.R. (3d) 1, at paras. 67-68; *S.M.*, at para. 30. What use should be made of the screenshot was a matter for the jury to decide.

[11] The appellant’s second argument is that once the screenshot was admitted into evidence, the trial judge should have given the jury a stronger limiting instruction about its potential frailties. In particular, he argues that the trial judge should have specifically instructed the jury that because the probative value of the screenshot depended on the complainant’s own testimony about what it showed, it was not capable of confirming her own evidence about the alleged assault.

[12] As Rowe J. explained in *R. v. Abdullahi,* 2023 SCC 19, 483 D.L.R. (4th) 1, at paras. 60-70, the need for a particular jury instruction must be assessed in light of both the evidence at trial and the positions taken by counsel. In this case, the appellant’s trial counsel did not argue that the screenshot was a complete fabrication. Rather, she relied on the possibility that the complainant could have altered a text message exchange with some other person to make it look like it had been with the appellant. She urged the jury to conclude that:

> [T]hese messages, frankly, in light of that are of very little, if any, use to you in your overall assessment of credibility and reliability of this witness. They cannot safely be used to corroborate anything because they're so easily fabricated. I would invite you to find that the texts just don't really assist you.

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Crown counsel, who had addressed the jury first, had argued that this scenario was implausible, and that the jurors should accept the complainant's evidence about what the screenshot showed.

[13] In these circumstances, it would have been clear to the jurors where the parties joined issue. They would have understood that the probative value of the screenshot depended on their accepting the complainant's evidence that it captured a text message exchange with the appellant.

[14] When the trial judge made his ruling that the screenshot was admissible at the start of the trial, he suggested that "a strong limiting instruction will cure any overemphasis of the document as the jurors have it in the jury room." However, it was open to him to decide by the end of the case that no specific limiting instruction was necessary, and that it was sufficient to address the screenshot in his general instructions about the appellant's alleged out-of-court statements. He directed the jury that they could only rely on these statements, including the text message in the screenshot, if they first found that the appellant actually said the things that the complainant attributed to him, explaining:

> An accused can be held responsible only for what he actually says, not for what anyone else says. An out-of-court statement can only be used for and against the accused who actually makes the statement. … Unless you decide that [the appellant] actually made a particular comment, utterance or statement, you must not consider it in your decision.

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The jury would have understood from this that they could only use the text message in the screenshot as evidence against the appellant if they were satisfied that he was the person who sent it.

[15] The trial judge also instructed the jury, in determining whether the appellant made the alleged statements, to "[c]onsider the circumstances in which the alleged statement took place" and to "[b]ear in mind anything else that may make the witness' story more or less reliable." The jury would have understood that they had to consider anything that might call into question whether the screenshot actually did capture a text message exchange the complainant had with the appellant.

[16] Significantly, defence counsel at trial did not ask for a more detailed limiting instruction about the screenshot, or make any objection to the instructions that the jury received. While not conclusive, this is a relevant consideration. As Rowe J. noted in *Abdullahi,* at paras. 68 and 69, "[c]ounsel's silence may be particularly relevant as to whether a contingent instruction was required", and "may be particularly significant where there are indications that it was a tactical decision." Here, trial counsel may well have decided that a more extensive limiting instruction would have undermined her position before the jury that they should treat the screenshot as being of "very little, if any, use" in their deliberations.

[17] In the circumstances of this case, we are satisfied that the jurors were adequately instructed about how they should approach the screenshot evidence.

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B. THE SENTENCE APPEAL

[18] On his sentence appeal, the appellant argues that the trial judge failed to give sufficient weight to both the *Gladue* and *Morris* factors: see *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Morris*, 2021 ONCA 680, 159 O.R. (3d) 641.

[19] The appellant has both Black and Indigenous ancestry, and the trial judge noted that the *Gladue* report filed on sentencing addressed both aspects of his background, and "may be also considered a *Morris* type of report". The trial judge was impressed by this report, which he described as "one of the most thorough reports that I have read." However, after considering all of the evidence and the applicable case law, he decided that the *Gladue* and *Morris* factors in this case did not reduce the appellant's moral culpability to such a degree to justify a sentence below the three-to-five-year range identified by this court in *R. v. A.J.K.*, 2022 ONCA 487, 162 O.R. (3d) 721, at para. 77. The three-year global sentence that he imposed fell at the bottom end of this range.

[20] The appellant argues that the trial judge erred by treating his lack of connection with his Indigenous cultural roots as making "the link towards Indigenous issues and background … somewhat tenuous." Ms. Grant points out that this lack of connection can be attributed to the appellant's mother's decision to move from Nova Scotia to Ontario, away from the family's Mi'kmaw community,

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in order to escape her own dysfunctional and abusive family, and that this can be viewed as one aspect of the legacy of colonialism.

[21] We are not persuaded that the trial judge improperly ignored this factor. After his comments about the appellant's lack of personal connection with his Indigenous background, the trial judge continued by stating:

> I cannot say the same thing though when I talk about inter-generational trauma and the accused growing up in a highly dysfunctional black Indigenous family, with sexual abuse. And I emphasize black only because a lot of information is placed in the report here, which I am not going to go into, but it does talk about poverty, education, family, and then … talks about racism.

In short, the trial judge expressly recognized that the appellant was a victim of intergenerational trauma attributable to both his Indigenous and Black ancestry.

[22] The trial judge ultimately concluded that the appellant's *Gladue* and *Morris* factors, while mitigating, could only reduce the sentence so far:

> [W]hen I have to consider the offender's degree of personal responsibility and moral culpability, the offender's experience with *Gladue* Indigenous issues and more particularly in this case, black racism, is of course important, but does not impact on the seriousness or gravity of the offence. In other words, *Morris* principles or *Gladue* principles for that matter, cannot invoke or make a fit sentence into an unfit sentence in that regard.

[23] The extent to which *Gladue* and *Morris* factors justify a reduced sentence in a particular case is a discretionary judgment call entitled to appellate deference. An appellate court may not intervene simply because it would have weighed the

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relevant factors differently: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 49. We see no error in principle in the trial judge's treatment of these factors that would justify our intervention.

C. DISPOSITION

[24] Accordingly, the conviction appeal is dismissed. Leave to appeal sentence is granted, but the sentence appeal is dismissed.

"C.W. Hourigan J.A."

"L. Favreau J.A."

"J. Dawe J.A."

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