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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 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) 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shall not be published in any document or broadcast or transmitted in any way.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.

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.

(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.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Diehl, 2023 ONCA 191
DATE: 20230317
DOCKET: M54102 (COA-22-CR-0158)

Lauwers J.A. (Motion Judge)

BETWEEN

His Majesty the King

Respondent

and

Brent William Diehl

Applicant (Appellant)

Mr. Adam Godlewski, for the applicant

Mr. Jacob Millns, for the respondent

Heard: March 16, 2023

ENDORSEMENT

A. OVERVIEW

[1] The applicant was convicted of sexual assault with a weapon on January 27, 2022. The Area Committee denied legal aid funding for his conviction for lack of merit. His appeal to the Provincial Office was denied. The applicant moves for funding for counsel under s. 684 of the *Criminal Code*, R.S.C., 1985, c. C-46.

B. CONTEXT OF THE CONVICTION

[2] It is common ground that the complainant went to the applicant's home at his invitation to have sexual intercourse. Then the narratives diverge. On the

version of events related by the complainant and accepted by the trial judge, when the applicant failed to get an erection, he digitally penetrated the complainant's rectum. She told him to stop. Instead of stopping, the applicant wrapped a belt around the complainant's neck and digitally penetrated her rectum again. He then tied her to the bedpost and forced his penis into her mouth. He repeatedly attempted vaginal intercourse without success. The complainant went to the hospital the next day. She had injuries and bruises on her body consistent with the assault.

[3] The applicant put forward another narrative. He denied any form of sexual assault. He testified that when he failed to get an erection, the complainant became angry, insulted him, and then left. The defence theory was that the complainant was upset with the applicant for wasting her time, concocted the allegations against him the next day, and inflicted the injuries on herself.

C. ARGUMENTS ON APPEAL

[4] Counsel seeks s. 684 funding and would focus the appeal on three paragraphs in the trial judge's reasons:

> I am mindful that defence cautions me to consider the notion that consenting women will calmly accept sexual disappointments as a potential myth or stereotype. Nevertheless, I reject the defendant's evidence that the complainant became angry at his inability to perform and stormed out of his apartment. I further reject the notion, when considered in the context of all of the evidence before me, that the complainant went on to next concoct

> a very detailed and compelling account of his sexual abuse and mistreatment of her that evening and then somehow self-inflict a series of bruises on her body.
>
> Even if I were to accept—which I do not—that the defendant's inability to maintain an erection made the complainant angry, the defendant's story lacks believability and defies common sense: how did she get all of the bruising? Why did she immediately photograph her bruises? Why did she abruptly leave after two or three minutes?
>
> Simply put, his story is illogical and unreasonable. I do not believe or accept his version of events.

[5] The applicant would argue that the trial judge made two interconnected errors: "First, the trial judge erred in their reliance on myths and stereotypes in their credibility assessment; and [s]econd, the trial judge's Reasons turned the trial into a credibility contest. These two grounds of appeal both deal with the fast-evolving and very important issue of credibility in sexual assault offences." Counsel adds that "the disposition of this appeal will be of some jurisprudential significance", so that it would be "in the interests of justice to have well reasoned and legally rigorous submissions from experienced counsel."

D. DISCUSSION

[6] To succeed on an application under s. 684 of the *Criminal Code*, an applicant must establish on a balance of probabilities that he does not have "sufficient means" to obtain legal assistance, and that "it appears desirable in the interests of justice" that counsel be appointed. The first element of the test is met

in this case. Legal Aid Ontario was satisfied that the applicant did not have the means to retain private counsel and the respondent does not seek to challenge that determination for the purposes of the s. 684 application.

[7] Respecting the “interests of justice”, the applicant must show that: (a) the appeal is “arguable”; and (b) it is “necessary” that counsel be appointed. In assessing necessity, the court considers whether the applicant is capable of advancing the grounds of appeal without a lawyer, and whether the court will be able to adjudicate the appeal without the assistance of defence counsel: *R. v. Bernardo* (1997), 105 O.A.C. 244, 121 C.C.C. (3d) 123 (C.A.), at paras. 22-24; *R. v. Brown*, 2018 ONCA 9, at para. 8.

[8] It will be for a panel of this court to determine the appeal on its merits. I do not find the “myths and stereotypes” argument to have much merit. The trial judge did not rely on myths and stereotypes in his reasoning, and inferentially cautioned himself against using them. His decision turned on the physical evidence, not on myths and stereotypes, as the quoted text from his decision reveals.

[9] Counsel also argues that the trial judge did not properly apply the principles in *R. v. W.(D.),* [1991] 1 S.C.R. 742. The trial judge rejected the applicant’s evidence and found it did not leave him with a reasonable doubt. He accepted the complainant’s version of events, finding her both credible and reliable. The trial judge referred to *W.(D.)* in the penultimate paragraph of the decision:

> I disbelieve the evidence of the defendant that he did not commit the offence. His evidence does not raise a reasonable doubt. The totality of the evidence that I do believe and accept proves his guilt beyond a reasonable doubt.

[10] This statement must be put in the context of all the evidence. I see no reason to accept the submission that by mentioning *W.(D.)* only at the end of his reasons, it is reasonable to infer that its principles were not in the trial judge's mind throughout.

[11] Turning to the issue of necessity, there is some force in counsel's submission that the applicant lacks the education and the literacy skills to put forward these arguments. However, this was a short trial involving few witnesses. The reasons are also short. The applicant will be assisted by the material filed on this motion in putting forward the arguments. I add that these are the types of issues on which the duty counsel program may be willing to render assistance to the appellant in the inmate stream.

[12] I dismiss the s. 684 application.

"P. Lauwers J.A."