R. v. Clement

Collection: Decisions of the Court of Appeal
Date: 2023-04-18
Neutral citation: 2023 ONCA 271
Docket numbers: C68906
Judges: Tulloch, Michael H.; Benotto, Mary Lou; Trotter, Gary T.

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. Clement, 20
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Tulloch, Benotto and Trotter JJ.A.

BETWEEN

His Majesty the King

and

John Clement

Solomon Friedman and Vanessa Garcia, for the appellant

Natalya Odorico, for the respondent

Heard: November 30, 2022

On appeal from the conviction entered by Justice Richard T. Knott of the On
Justice on March 9, 2020.

REASONS FOR DECISION

A. OVERVIEW

[1] The appellant was convicted of sexual assault, sexual interference, a probation. The offences arose out of a relationship the appellant had with the thi complainant, whom he had met on Tinder, in the summer of 2018. The case larg whether the appellant took all reasonable steps to ascertain the complainant's ag

[2] At the hearing, we dismissed the appeal with reasons to follow. The

B. BACKGROUND FACTS

[3] In June 2018, the thirteen-year-old complainant created several fake accounts including an account on Tinder, an online dating application for ind eighteen or older. She used the false name “Anne” and stated that she was ni profile. Initially, she posted a photo of her face on her profile, but later took it dov she matched with the appellant, the only picture on her profile was of a green Fe

[4] The appellant and the complainant began messaging on Tinder. The twenty-two years old at the time. They soon moved their conversation to Snap private messaging application, because the appellant was suspicious of the Tinder profile. On Snapchat, the complainant told the appellant her real name was eighteen years old. She also told the appellant that she was in grade twelve high school. The complainant and the appellant also exchanged nude phot Snapchat.

[5] Over the next few months, the complainant and the appellant met i engaged in sexual relations on five separate occasions. On one occasion, picked the complainant up at her mother’s house in the late evening, they appellant’s residence where the complainant performed oral sex and they the vaginal intercourse. The next two sexual encounters involved the complainant p sex on the appellant. The fourth encounter involved intercourse.

[6] The final sexual encounter occurred on September 19, 2018. The complair the appellant’s residence after school in her high school uniform. She met t roommate, Mr. Mitton, and his roommate’s girlfriend, Ms. Strader, and told them eighteen years old.

[7] The next day, the complainant messaged the appellant, revealed her

[8] In the complainant's first statement to the police, she made allegations of s against the appellant and another man. She said she "tricked" the appellant int was eighteen and felt guilty because "they" were innocent people. About a m complainant gave a second statement to the police. The appellant was ar afterwards.

[9] At the time of the alleged assaults, the appellant was subject to a probatio required him to keep the peace and be of good behaviour. The probation order at trial on consent.

[10] The appellant did not testify at trial, but his statement to the police was a statement, the appellant denied knowing the complainant and having had any se with her. The appellant raised the alternative defence that he was lawfully mista complainant's age, under s. 150.1(4) of the *Criminal Code*, R.S.C., 1985, c. C-46

C. TRIAL DECISION

[11] The trial judge was satisfied beyond a reasonable doubt that the sexu occurred. He further found that these encounters were consensual in the s complainant wanted to have sex with the appellant, but she could not cons relations with a twenty-two-year-old at the age of thirteen.

[12] The trial judge then turned to assess the mistaken belief in age complainant's first statement to the police – that she lied to the appellant abou felt he was innocent – created an air of reality to this defence. The trial judg principles set out in *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021,[1] at para

> [T]o convict an accused person who demonstrates an "air of reality to the mistake of age defence, the Crown must prove, beyond reasonable doubt, either that the accused person (1) did not honestl believe the complainant was at least 16 (the subjective element); o

[13] The trial judge found that the appellant did not take all reasonable steps to complainant's age. The trial judge considered the following evidence in conclusion:

- The appellant and the complainant had a nine-year age difference;
- The complainant was only thirteen and not close to sixteen, the age sexual relations with the appellant;
- It was "clear" from the complainant's physical appearance that she was teens";
- The complainant wore a school uniform when she was with the appella one occasion in September, indicating that she was still in high school at of the school year;
- The appellant knew that the complainant was still living at home with her p
- The complainant wore braces;
- The complainant did not consume alcohol with the appellant;
- The appellant's roommate and the roommate's girlfriend "commented on t of the complainant";
- The complainant's mother described her as "socially immature" and n suffers from ADHD, PTSD, anxiety, and depression; and
- The appellant was suspicious of the complainant's Tinder profile. The lack her profile and her admission that she initially lied about her age should warning bells to make further inquiries.

[14] Aside from the complainant's evidence that she told the appellant she was opposed to nineteen, there was no evidence that the appellant took any o determine the complainant's age when these circumstances would have requir just asking the complainant about her age.

D. ISSUES ON APPEAL

[15] The appellant raises the following grounds of appeal: (1) did the trial admitting cross-count evidence, without a Crown application, *voir dire*, or t evidence analysis; and (2) did the trial judge fail to properly apply the law with reasonable steps" and in so doing, reverse the burden of proof and ap considerations?

E. ANALYSIS

(1) The trial judge did not improperly admit or rely on the probation order

[16] The appellant submits that his probation order was improperly admitted a evidence that would not have survived a bad character evidence inquiry. We appellant was charged with breach of probation and his probation order was p the court with respect to this count: see e.g., *R. v. R.C.* (2001), 161 C.C.C. O.A.C. 373 (C.A.), at para. 40. The probation order was admitted at trial on c purpose of showing that the appellant was bound by the probation order at th alleged sexual offences. The Crown did not rely on the probation order for any ot

[17] The appellant submits that the trial judge nonetheless improperly relied on order in his analysis of the sexual interference offence where he stated that: "Or a person on probation to keep the peace and be of good behaviour would n when he is engaging in sexual relations with a teenager."

[18] In the reasons preceding this statement, the trial judge explicitly caut against the impermissible use of the probation order: "[w]hether the accused h record or not is irrelevant to this case, apart from the breach of probation impugned comment that followed was made in passing and was not central to th assessment of the key issues in this case. The trial judge did not refer to the

improper inference from the existence of the probation order in his analysis on belief in age defence.

[19] In any event, any error in relation to the evidence from the probation bearing on the outcome. The trial judge considered a number of other more sign to conclude that a reasonable person in the circumstances known to the appella made further inquiries into the complainant's age.

(2) The trial judge reasonably concluded that the appellant faile reasonable steps to ascertain the complainant's age

[20] The offence of sexual interference under s. 151 of the *Criminal Code* requi to prove beyond a reasonable doubt that (i) the complainant was under sixteen (ii) that the accused touched the complainant, and (iii) that the touching was purpose: *R. v. W.G.*, 2021 ONCA 578, 405 C.C.C. (3d) 162, at para. 51, lea refused, [2021] S.C.C.A. No. 381.

[21] Section 150.1(4) precludes the defence of honest but mistaken b complainant was at least sixteen years old unless the accused took "all reason ascertain the complainant's age: *W.G.*, at para. 54. Once the accused raises a to this defence, the burden is on the Crown to establish that the accused di reasonable steps. The determination of whether an accused took "all reasona ascertain the complainant's age is based on what steps a reasonable person light of the circumstances known to the accused at the time: *W.G.*, at para. 60; *R* 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 210. There is no automatic considerations or an exhaustive list of steps that an accused must take t requirement: *R. v. Duran*, 2013 ONCA 343, 3 C.R. (7th) 274, at para. 52. The in contextual and fact-specific: *W.G.*, at para. 46; *Morrison*, at para. 113. Tria

[22] The trial judge did not fail to properly apply the law with respect to "all reas under s. 150.1(4) of the *Criminal Code*. The appellant presents alternative explar evidence that the trial judge relied on to conclude that the appellant did reasonable steps", summarized at para. 13 above, to suggest that each indiv evidence did not necessarily support the inference that the appellant appeared However, a trial judge must take a holistic, not a piecemeal, approach to the e trial judge's weighing of the evidence is owed considerable deference on appeal.

[23] The appellant takes issue with the trial judge's reference to the compla health issues as part of this analysis because these mental health concerns we to the appellant. The trial judge did not rely on the complainant's mental health indicator of her age. The trial judge acknowledged that the appellant was ur complainant's struggles with mental health and simply noted that her "health sit to the additional vulnerabilities of young teenagers". This remark demonstrates judge was alive to the legislative objective of s. 150.1(4). It is otherwise consequence.

[24] The trial judge's finding that the appellant did not exercise "the same deg ascertaining a complainant's age that a reasonable person would exercise circumstances" is reasonable and supported by the evidence: *W.G.*, at para. 4 basis to interfere with this finding.

[25] Based on the trial judge's assessment of the complainant's physical appe when she was fourteen, it was clear to him that she was somewhere in her m appellant's roommate and his roommate's girlfriend also commented on their p the complainant's young age. The complainant wore her high school uniform to t apartment at the start of the school year in September 2018 indicating that sh

so for others. He also had reasonable suspicions about the complainant's Ti
However, there is no evidence that the appellant took any steps to confirm the
real age after she told him she was eighteen, as opposed to nineteen. All of
taken as a whole, should have raised alarms for the appellant.

[26] On the totality of the evidence, a reasonable person in the circumstances
appellant would have made further inquiries into the complainant's age. As s
judge did not err in rejecting the appellant's mistaken belief in age defence und
of the *Criminal Code*.

F. DISPOSITION

[27] Accordingly, we dismiss the appeal from conviction.

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[1] The trial judgment was rendered prior to this court's decision in *R. v. Carbone*, 2020 ONCA 394, 150 O.R. (3d) 758.