R. v. Haidary

Collection: Decisions of the Court of Appeal
Date: 2023-11-24
Neutral citation: 2023 ONCA 786
Docket numbers: C68705
Judges: Miller, Bradley; Paciocco, David M.; Nordheimer, Ian V.B.
Subject: Criminal

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. Haidary, 2023 ONCA 786
DATE: 20231124
DOCKET: C68705

Miller, Paciocco and Nordheimer JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Harris Haidary

Appellant

Anthony Moustacalis and Aidan Seymour-Butler, for the appellant

Dana Achtemichuk, for the respondent

Heard: November 14, 2023

On appeal from the conviction entered on November 26, 2019 by Justice Michael G. Quigley of the Superior Court of Justice, sitting without a jury.

REASONS FOR DECISION

OVERVIEW

[1] Harris Haidary, a security guard at a bar, was charged with sexually assaulting a significantly impaired female patron in an alley behind the bar,

contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46. Mr. Haidary testified at this trial, denying the allegations, and providing an innocent account of his activities.

[2] In rejecting Mr. Haidary's exculpatory testimony in its entirety, the trial judge relied materially on his finding that Mr. Haidary had tailored his testimony by changing his account after learning of the evidence available against him. It is "legally wrong" for a trial judge to "discount the credibility of the accused on the basis that they have tailored their evidence to the testimony heard in the courtroom": *R. v. Hudson*, 2021 ONCA 772, 158 O.R. (3d) 589, at para. 161, citing *R. v. G.V.,* 2020 ONCA 291, 392 C.C.C. (3d) 14; *R. v. Thain*, 2009 ONCA 223, 243 C.C.C. (3d) 230. This is a dangerous form of reasoning that must be avoided by trial judges absent exceptional circumstances, such as alibi defences, even where there may be a logical basis for the finding. This rule operates because "no such inference can be invited or drawn without turning fundamental constitutional rights into a trap and exacting an evidentiary price for their exercise": *Hudson*, at para. 161.

[3] Moreover, Mr. Haidary was not given notice that an inference of tailoring could be drawn, leaving him no reason to believe that he should address the issue. This undermined the fairness of the trial.

[4] Since we would allow Mr. Haidary's appeal on these bases and order a new trial, it is unnecessary for us to comment in the reasons that follow on Mr. Haidary's related submission that the finding of tailoring was unreasonable, or to consider his sentence appeal.

[5] Nor is it necessary to set out the material facts in detail. Those facts needed to understand our decision can be set out adequately during the analysis.

THE ISSUES

[6] There are three issues that warrant attention:

A. Did the trial judge err in drawing an inference that Mr. Haidary tailored his evidence to the Crown evidence?

B. Was the trial rendered unfair by the failure to alert Mr. Haidary of a possible inference of tailoring?

C. Should the curative proviso be applied?

ANALYSIS

A. DID THE TRIAL JUDGE ERR IN DRAWING AN INFERENCE THAT MR. HAIDARY TAILORED HIS EVIDENCE TO THE CROWN EVIDENCE?

[7] The trial judge identified a range of problems that he perceived with Mr. Haidary's testimony. In explaining his rejection of Mr. Haidary's testimony, the trial judge gave emphasis to what he referred to as "the big evidentiary contradictions" that arose from discrepancies and omissions between a prior statement Mr. Haidary gave to his employer in a text message and the testimony that Mr. Haidary gave after subsequently learning of the evidence available to the Crown. Based on these "big evidentiary contradictions", the trial judge found that Mr. Haidary's prior statement was "plainly designed to exculpate him from the alleged assault, but at a time when he could not know what others present … would later testify that would present a different story."

He then found that the "revised story" Mr. Haidary gave in his testimony acknowledging that he had been present with the complainant in the back alley, "was necessary because of [a witness'] evidence" which put him in the back alley with the complainant. In listing his reasons for the complete rejection of Mr. Haidary's testimony, the trial judge also said, "[m]ost importantly" there was no mention in the text account that Mr. Haidary left the complainant alone in the alley to respond to a fight, a detail provided in his testimony (emphasis added). The trial judge found it to be "obvious" that Mr. Haidary added this detail in his testimony because "[i]t never occurred to him at the time he wrote the [prior statement] that there would be evidence from [a witness] that would definitively place him in the alley with an inebriated [complainant], the key fact that underlies the sexual assault allegations."

[8] We do not accept the Crown's submission that, in making these comments, the trial judge was not drawing an adverse inference that Mr. Haidary tailored his trial testimony but was simply expressing a hypothesis after already rejecting the evidence. These comments are clear findings that Mr. Haidary modified his account by tailoring his evidence to conform to the Crown evidence, and there can be no question that the trial judge offered these adverse inferences in explaining why he rejected Mr. Haidary's evidence in its entirety.

[9] To be clear, no issue can be taken if, in rejecting testimony offered by an accused, a trial judge relies on material discrepancies between that testimony and a prior inconsistent statement made by the accused: *R. v. Jorgge*, 2013 ONCA 485, 4 C.R. (7th) 170 at para. 13. This, of course, occurs regularly since

prior inconsistencies can raise logical concerns about the reliability or credibility of in-court testimony. But when a trial judge goes on to make an affirmative finding based on these inconsistencies that the accused changed their version of events by tailoring their testimony to account for evidence that they subsequently learned about, the trial judge has gone beyond the mere consideration of the impact of prior inconsistencies and has added another important makeweight in favour of rejecting entirely the testimony of the accused. To appreciate the point, consider that testimony often survives prior inconsistencies, whereas a finding that the accused tailored their testimony to the evidence requires the rejection of the "tailored" testimony in its entirety. Moreover, a finding that the accused tailored their evidence is a determination that the accused engaged in post-offence conduct in an effort to avoid conviction. Such a finding creates a risk that, advertently or inadvertently, a finding of tailoring will operate as an indicium of guilt. Adding an inference of tailoring is not a benign addendum to the analysis of prior inconsistencies. It is a finding of importance with potentially devastating consequences for the accused.

[10] We also reject the Crown submissions that the trial judge was merely making findings of implausibility or concluding that the prior text message statement was false. In our view, there can be no other conclusion when the decision is read as a whole but that the trial judge found that Mr. Haidary tailored his evidence, and then relied heavily on this finding in rejecting Mr. Haidary's testimony in its entirety.

[11] The Crown argued in the alternative that even if the trial judge drew adverse inferences of tailoring, this case falls within an exception to the rule against doing so. We do not agree.

[12] First, the Crown argued that adverse inferences of this kind are permitted in alibi cases where a previously undisclosed alibi is presented at trial that conforms to the disclosure or the Crown's case in chief: *R. v. M.D.* 2020 ONCA 290, 392 C.C.C. (3d) 29, at para. 26, citing *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 (C.A.), at paras. 69-75, leave to appeal refused, [2006] S.C.C.A. No. 105. This exception exists but it does not apply because Mr. Haidary did not present an alibi defence. Mr. Haidary acknowledged in his testimony that he was present at the scene of the alleged crime. Mr. Haidary simply explained his actions and movements while at the scene of the alleged crime in a manner that differed from the account provided by the complainant.

[13] Second, the Crown sought to rely on the decision in *R. v. Fraser*, 2021 BCCA 432, 407 C.C.C. (3d) 307 at paras. 2, 56-63, leave to appeal refused, 2022 CanLII 30686 (S.C.C.) to submit that there is a "possible exception" to the rule against inferences of tailoring that can be applied on a "case-by-case basis" for prior inconsistent statements, and that this case-by-case exception should be applied in this case.

[14] There is reason to question whether our jurisprudence allows for a case-by-case exception in cases where the inference of tailoring is based on prior inconsistent statements. The rule against using prior inconsistencies as a basis

for drawing adverse inferences of tailoring has been stated in absolute terms in this Court: *Jorgge* at para. 13; *M.D.*, at para. 30. Moreover, there may be reason to question whether such an exception is consistent with the purpose underlying the rule against adverse inferences of tailoring or with recognition that the rule applies even where the inference may be logical. In the circumstances of this case, it is unnecessary to resolve the underlying issue of whether a case-by-case exception operates in Ontario, because even if it does, we would not apply it. The Crown advanced no basis for treating this case as exceptional, nor do we see any basis for doing so.

[15] Unlike *Fraser,* this case contains no features that promote the application of a case-by-case exception. *Fraser* was the appeal of a second-degree murder conviction. The issue was whether the conviction should be overturned because the Crown made suggestions of tailoring during cross-examination in a case where the trial judge focused in his jury charge on the inconsistencies in Mr. Fraser's evidence, without featuring the Crown's tailoring theory. Put simply, the impugned conduct in *Fraser* created the risk of unfair reasoning which the trial judge's charge reduced. In contrast in this case the trial judge unequivocally went beyond considering the dampening impact that prior inconsistent statements can have on an assessment of the reliability or credibility of testimony and used the prior inconsistent statements to support tailoring findings, and then employed those findings as an additional and powerful makeweight in his reasoning.

[16] Moreover, although the BCCA found that the Crown could not rely on a fixed exception to the rule against adverse inferences to support its attempt to

invite an inference that Mr. Fraser tailored his evidence, the circumstances of the case were not far-removed from satisfying the exception that the Crown had relied upon. This exception applies where the accused raises prior disclosure for a purpose calculated to aid the defence: *R. v. Kokotailo*, 2008 BCCA 168, 232 C.C.C. (3d) 279 at para. 56, citing *R. v. Cavan*, (1999) 139 C.C.C. (3d) 449 (Ont. C.A.), leave to appeal refused, [1999] S.C.C.A. No. 600. The BCCA decided that this exception was not met in *Fraser*, because Mr. Fraser's reference to prior evidence was only "oblique" and not explicit. Nonetheless, Mr. Fraser's testimony provided a specific foundation for the prospect that he may have modified his evidence after learning of Crown evidence. To be clear, the BCCA did not identify this as a factor in its decision to admit the evidence on a case-by-case basis, but this feature nonetheless marks a point of material distinction between *Fraser* and this case. Whereas Mr. Fraser's testimony provided a specific foundation for a tailoring inquiry, Mr. Haidary did nothing to open the door and indeed, as we will explain below, he was not even alerted to the possibility that his discovery of the evidence against him prior to his testimony would even be raised.

[17] In our view, there are no circumstances comparable to *Fraser* in this case, or no other compelling bases for applying a case-by-case exception for prior inconsistent statements.

[18] We are therefore persuaded that in the circumstances of this case no exceptions to the rule against inferences of tailoring were operating in this case, and the trial judge erred in drawing the adverse inferences of tailoring that he did.

B. WAS THE TRIAL RENDERED UNFAIR BY THE FAILURE TO ALERT MR. HAIDARY OF A POSSIBLE INFERENCE OF TAILORING?

[19] We also agree with Mr. Haidary's alternative but related submission that, apart altogether from the breach of the rule against drawing an inference of tailoring that we have found, the trial was rendered unfair when the trial judge drew an adverse inference of tailoring against him without alerting Mr. Haidary in advance that he may do so. In *Thain,* at para. 29, Sharpe J.A. said:

> 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.

[20] Similarly, in *Fraser* at para. 63, Frankel J.A. commented that "it would have been improper for counsel to have argued to the jury that Mr. Fraser had concocted his testimony if she had not raised that subject with him." In this case, the tailoring issue was not raised with Mr. Haidary.

[21] In coming to his conclusion, we accept the Crown submission that it would have been plain to Mr. Haidary that the Crown position was that his trial testimony was a fabrication. However, at no time was Mr. Haidary made aware that changes that he made to his version of events after learning of the evidence against him were going to be relied upon as proof of that fabrication. Had he been so advised he could have attempted to persuade the trial judge

that this inference was inappropriate, either legally or factually. The mere allegation of fabrication was not sufficient notice.

[22] It is understandable why the trial Crown did not raise this issue at trial. Absent an exception, it would have been an error for the trial Crown to have confronted Mr. Haidary with the suggestion in cross-examination that he had tailored his evidence, or to invite the trial judge in submissions to draw this inference: *R. v. Schell*, (2000) 148 C.C.C. (3d) 219 (Ont. C.A.). Appropriately, the Crown did not do so. However, the trial judge should have done so before drawing an adverse inference. His failure to do so rendered the trial unfair, giving rise to a miscarriage of justice.

C. SHOULD THE PROVISO BE APPLIED?

[23] The Crown did not ask for the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code* to be invoked relating to the trial judge's treatment of the tailoring issue, and the Crown did not respond to submissions made by Mr. Haidary in his factum and oral arguments as to why the curative proviso should not be applied. It would not be appropriate for us to invoke the curative proviso in these circumstances.

[24] In any event we would not have applied the curative proviso even if requested to do so since "the impermissible tailoring inference 'appears to have played a large role in the trial judge's rejection of the appellant's version of what occurred'" and decisions of this court have discouraged the use of the proviso in such circumstances: *R. v. C.T.*, 2022 ONCA 163, 78 C.R. (7th) 359, at para. 11, citing *R. v. B.L.*, 2021 ONCA 373, at para. 50. Moreover, the trial unfairness we have identified give rise to a miscarriage of justice, and not

simply an error of law, and is therefore not amendable to the operation of the curative proviso.

CONCLUSION

[25] The appeal is allowed. Mr. Haidary's sexual assault conviction is set aside, and a new trial is ordered.

"B.W. Miller J.A."

"David M. Paciocco J.A."

"I.V.B. Nordheimer J.A."