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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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;
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> (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
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> (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
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> (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).
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> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
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> (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
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> (b) on application made by the victim, the prosecutor or any such witness, make the order.
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> (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an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. Spicer, 2023 ONCA 232
DATE: 20230405
DOCKET: COA-22-CR-0219

Nordheimer, Sossin and Copeland JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Cody Spicer

Appellant

Mark Ertel and Brendan Coffey, for the appellant

Jennifer Epstein, for the respondent

Heard: March 29, 2023

On appeal from the decision of Justice Michelle O'Bonsawin of the Superior Court of Justice, dated January 25, 2021, with reasons reported at 2021 ONSC 398, allowing an appeal from the acquittal entered on June 12, 2019, by Justice Robert Graydon of the Ontario Court of Justice.

REASONS FOR DECISION

[1] Cody Spicer appeals, with leave, from the decision of the summary conviction appeal judge ("SCAJ") that allowed the Crown's appeal from the acquittal entered by the trial judge. For the following reasons, we would allow the appeal and restore the acquittal.

Background

[2] The background facts can be summarized briefly. The complainant and the appellant worked at the same restaurant. On the evening in question, they were both at a staff party. Both had been drinking. At one point, the complainant needed to use the washroom. The complainant testified that she went into the men's washroom because she could not see the entrance to the women's washroom. The complainant was washing her hands, prior to leaving the washroom, when the appellant came into the washroom. The complainant joked about being in the men's washroom, and the appellant laughed. It is at this point that the versions of events diverge.

[3] The complainant said that the appellant made comments about her looks, then approached her and grabbed her nipples. The complainant said that the appellant then told her to go into one of the bathroom stalls where he followed. In the stall, with the door locked, the appellant attempted to force the complainant to perform oral sex on him. This effort ended when two co-workers, one after the other, came into the washroom. The first co-worker who entered the washroom saw what was going on between the two. The complainant and appellant left the washroom. The complainant was upset and found her sister.

[4] The appellant said that, after he entered the washroom, he did make comments about the complainant's looks but did not touch her breasts before

entering the stall. He suggested that the two go into one of the stalls and then put out his hand to guide the complainant toward the stall. The complainant took his hand, and they went into the stall where he locked the door. The appellant then removed his penis from his pants. The complainant put her hand into his hand, and he guided it towards his penis but there was no touching of it because they heard people come into the washroom. The appellant reached down and grabbed the appellant's breasts. At that point, a co-worker entered the washroom. The co-worker looked over the wall of the stall and saw what was happening. The co-worker left, and the complainant left the stall directly thereafter as a second co-worker walked into the washroom. The appellant then left the washroom.

The Trial Decision

[5] The trial judge began by outlining the parties' positions and the law applicable to the offence. He also recited the general principles relating to the assessment of credibility and the underlying principles of *W.(D.)*.[1]

[6] The trial judge continued by reviewing the evidence. He referred to the evidence of some of the witnesses, apart from the complainant and the appellant, as more peripheral. The trial judge then reviewed the evidence of the complainant and the appellant in detail. He noted the obvious differences between the two versions of the events. In the end, the trial judge said he was left with a reasonable

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[1] *R. v. W. (D.),* [1991] 1 S.C.R. 742.

doubt that the appellant had grabbed the complainant's nipples prior to them going into the stall. Also, on the evidence, the trial judge said he was also left with a reasonable doubt that the complainant did not give her consent for what happened in the stall and how they both wound up in the stall. In coming to this conclusion, the trial judge noted an inconsistency in the complainant's evidence (the complainant's evidence "materially changed") about how she and the appellant ended up in the stall together. Consequently, the trial judge entered an acquittal.

[7] The Crown appealed. The SCAJ allowed the appeal and ordered a new trial. In so concluding, the SCAJ found that the trial judge's conclusion "rested on myth-based reasoning predicated around the myth that sexual assaults happen only in private" which amounted to an error of law. The SCAJ further found that there was "no evidence that [the complainant] specifically consented to each and every sexual act" and that the trial judge erred in finding that she had. Consequently, the SCAJ allowed the appeal and ordered a new trial.

Analysis

[8] While the SCAJ correctly cited the principles applicable to a Crown appeal from an acquittal, in our view, she failed to properly apply those principles. In fact, what the SCAJ did was to revisit the conclusions that the trial judge drew from his factual findings and substitute her own view of them. It was an error for the SCAJ to do so.

[9] Central to this error was the SCAJ's finding that the trial judge engaged in myth-based reasoning. With respect, that is not what the trial judge did. What the trial judge did was draw reasonable inferences from the particular facts that were before him. More specifically, the trial judge did not say that sexual assaults happen only in private. That statement does not appear in any place in the trial judge's reasons. What the trial judge did say was that he had a reasonable doubt that the appellant grabbed the complainant's nipples in part because the assault would have been in "open plain view for anyone to see entering the bathroom", especially so at a staff party with others right outside the washroom door. The trial judge also referred to the fact that any report of the appellant grabbing the complainant's breasts would be grounds for the immediate termination of the appellant's employment under his employer's zero-tolerance policy.

[10] A trial judge is entitled to draw reasonable inferences from the facts that are presented. It was open to the trial judge to draw the inference that he did from the facts that were before him. A different factual scenario might not allow for such an inference. But it was the trial judge's job to decide on the available inferences, and to do so without being labelled as having engaged in myth-based reasoning. While we accept that the trial judge's reasons were not as clear as they might have been on this point, ambiguity is not sufficient to establish error. As was observed in *R. v. G.F.,* 2021 SCC 20, 404 C.C.C. (3d) 1, at para. 79:

> Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error. [Citations omitted.][2]

[11] It was also an error for the SCAJ to conclude that the trial judge erred in finding that the complainant had consented to each and every sexual act. The trial judge did not make any such finding. What the trial judge did find was that he was left in a reasonable doubt over the issue of consent. Specifically, the trial judge said:

> It leaves this court with a reasonable doubt that [the complainant] did not give her consent for what happened in the stall and how both of them end up entering the stall together.

[12] There is a difference between a finding of a lack of consent and a finding that there is a reasonable doubt about consent. The difference is fundamental to the *W.(D.)* principle and the burden of proof that rests on the Crown. The SCAJ erred in failing to recognize, and give effect to, that difference.

[13] Finally, even accepting that any error occurred in the trial judge's reasoning, the SCAJ was required to determine whether any such error materially affected the trial judge's ultimate conclusion. As this court observed in *R. v. B.(S.C.)* (1997), 36 O.R. (3d) 516 (C.A.), at para. 44:

> On a Crown appeal from acquittal, an appellate court may only order a new trial if it is reasonably certain that

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[2] We note that the decision in *G.F.* was released after the SCAJ's decision in this case.

> the trial judge would not necessarily have acquitted the accused had no error been made: [citation omitted]. In *R. v. Evans* [1993] 2 S.C.R. 629, 82 C.C.C. (3d) 338 at p. 350, Cory J. emphasized that "the Crown must satisfy the court with a reasonable degree of certainty that the verdict would not necessarily have been the same." He stressed that this "is a very heavy onus and it is fitting that it should be."

The SCAJ failed to engage in that analysis or to make that finding.

Conclusion

[14] The appeal is allowed, the order of the SCAJ is set aside, and the acquittal is restored.

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

"L. Sossin J.A."

"J. Copeland J.A."