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 or 486.6 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 162.1, 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) as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;
> >
> > (b) on application made by the victim, the prosecutor or any such witness, make the order; and
> >
> > (c) if an order is made, as soon as feasible, inform the witnesses and the victim who are the subject of that order of its existence and of their right to apply to revoke or vary it.

(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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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;

(b) on application of the victim or the prosecutor, make the order; and

(c) if an order is made, as soon as feasible, inform the victim of the existence of the order and of their right to apply to revoke or vary it.

(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.

(3.1) If the prosecutor makes an application for an order under paragraph (2)(b) or (2.2)(b), the presiding judge or justice shall

(a) if the victim or witness is present, inquire of the victim or witness if they wish to be the subject of the order;

(b) if the victim or witness is not present, inquire of the prosecutor if, before the application was made, they determined if the victim or witness wishes to be the subject of the order; and

(c) in any event, advise the prosecutor of their duty under subsection (3.2).

(3.2) If the prosecutor makes the application, they shall, as soon as feasible after the presiding judge or justice makes the order, inform the judge or justice that they have

(a) informed the witnesses and the victim who are the subject of the order of its existence;

(b) determined whether they wish to be the subject of the order; and

(4) An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or

(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

(5) An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

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.

(1.1) A prosecutor shall not commence or continue a prosecution against a person who is the subject of the order unless, in the opinion of the prosecutor,

(a) the person knowingly failed to comply with the order;

(b) the privacy interests of another person who is the subject of any order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that person have been compromised; and

(c) a warning to the individual is not appropriate.

(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. Varghese, 2024 ONCA 555
DATE: 20240715
DOCKET: COA-23-CR-1243

Trotter, Favreau and Gomery JJ.A.

BETWEEN

His Majesty the King

Appellant

and

John Varghese

Respondent

Akshay Aurora, for the appellant

Bryan Badali and Marcela Ahumada, for the respondent

Heard: June 12, 2024

On appeal from the acquittal entered on October 3, 2023 by Justice Renu J. Mandhane of the Superior Court of Justice.

Gomery J.A.:

[1] On October 13, 2019, the respondent John Varghese responded by telephone to an online advertisement for escort services. He reached the complainant, N.D., and they arranged to meet in her hotel room. According to the complainant, after the respondent arrived in the hotel room, he forced her to disrobe and perform fellatio by threatening her with a knife; took a photo of her wearing only a bra and threatened to post it online if she went to the police; and

robbed her of all the money in her purse. According to the respondent, he and the complainant engaged in consensual sex, after which she attempted to extort him for more money than he had agreed to pay her. He admitted that he took a picture of her wearing only a bra.

[2] Following an eight-day trial, the trial judge acquitted the respondent of forcible confinement, robbery, uttering threats, sexual assault, and aggravated sexual assault. She found the respondent would say "anything necessary to evade criminal responsibility" and rejected as implausible the respondent's claim that he was intimidated by the complainant, given that he was much younger, bigger, and more physically fit than her. On the other hand, she did not find the complainant's account wholly reliable, in part because it "defied common sense" that the complainant chose to run to the bathroom after the respondent allegedly forced her to perform fellatio rather than seeking to escape the hotel room. The trial judge declined to consider other Crown evidence that confirmed the complainant's account. She concluded that she did not know whether to believe the respondent or the complainant and so had reasonable doubt.

[3] The Crown appeals, contending that the trial judge made errors in law material to assessing the complainant's credibility, which was central to the case. The respondent argues that the trial judge committed no reversible errors and that this court should defer to the trial judge's credibility assessment.

[4] I would allow the appeal for the reasons that follow.

The evidence at trial

[5] In the early evening of October 13, 2019, the complainant received a call from a man, later identified as the respondent, responding to an online advertisement for her services. After they talked, she texted him confirming her rates ($90 for half an hour or $180 for a full hour) and indicating the services she would and would not provide. As shown in the text message produced at trial, excluded services included ejaculating in her mouth or on her face. The respondent agreed to meet the complainant at a hotel room booked by her friend, J.B.

[6] The complainant and the respondent gave dramatically different accounts of what happened in the hotel room. I will focus for now on their evidence.

The complainant's version of events

[7] The complainant testified that, on entering the hotel room, the respondent looked around the main room and then in the washroom and in the closets. The complainant followed him, asking if he was okay. Once the respondent had confirmed that they were alone in the room, he turned to face the complainant and pointed a knife at her, cutting the front of her neck. He threatened to kill her if she screamed. The respondent then ordered the complainant to take off her clothes, turned the volume on the TV up, and told her to perform oral sex on him. According

to the complainant, the respondent was aggressive and kept pushing her head down, making her feel like she was choking.

[8] When the oral sex ended, the complainant said that she tasted ejaculate or pre-ejaculate in her mouth. She went to the washroom to rinse it out. The respondent followed, holding the knife. He instructed the complainant to walk back into the main room and demanded money. She retrieved her purse from the bedside table and put it on the bed. The respondent took her wallet out and removed all the money, about $1700. He took a picture of the complainant wearing only a bra and told her that he would post it on the internet if she reported him to the police.

[9] According to the complainant, the respondent then told her to get in the bathtub, still pointing the knife at her. The complainant pushed the respondent, grabbed a flat iron, and hit his shoulder. They struggled. During the struggle, the complainant's thumb was cut with the respondent's knife, and she was scratched beneath the eye. The respondent then left the room.

[10] After the respondent left, the complainant contacted J.B. J.B. told her to call another escort who was working at the hotel, M.S., to get immediate help. M.S. took the complainant to the hospital because she was bleeding profusely from a deep cut at the base of her thumb.

The respondent's version of events

[11] The respondent testified that he was disappointed to find that the complainant was much older than advertised when he got to the hotel room. He told her that he was not interested in her services and wanted to leave. Raising her voice, the complainant told him that he must pay for the time he had booked with her, whether or not he stayed, and she threatened to call the police. The respondent said he felt vulnerable because he feared the complainant would fabricate allegations against him. He was also a virgin and wanted to have sex. So rather than leave, he paid her $90 for oral sex.

[12] The complainant then performed oral sex on the respondent, which he testified was consensual. He pulled his penis out of her mouth before he orgasmed, ejaculating on his stomach. He testified that the complainant gave him a "weird look" and seemed upset. She went to the washroom. When she returned, she told the respondent that he needed to give her more money because he had ejaculated in her mouth. She raised her voice again and told him that "her guy at the hotel" would "deal with [him]" if he did not pay.

[13] According to the respondent, the complainant began searching his pockets and he then gave her all his cash, about $200. He admitted that he responded by taking a photo of the complainant wearing only a bra and threatened to post it online and expose her as a scammer. He said he did this because he was

frustrated at being extorted. In response, the complainant tried to snatch his phone away.

[14] During the ensuing struggle, the respondent testified that the complainant pushed him, and he ended up in the washroom. There, she took a hair straightener and hit him, then grabbed a knife and pointed it at him near his chest. The respondent testified that he was scared for his life. He grabbed the complainant's hand and disarmed her, then ran out of the room. He disposed of the knife on the way home.

Other evidence called by the Crown

[15] The Crown called evidence from the lead investigating officer and a member of Digital Forensic Services at the Peel Regional Police, and from three of the complainant's friends: J.B., M.S., and D.M. The Crown also filed telephone, cellphone, and hospital records into evidence.

[16] J.B. testified that she received a call from the complainant on October 13, 2019. The complainant was crying. J.B. ordered an Uber so that she could join the complainant at the hotel. M.S. testified that she had heard screaming coming from the hotel room occupied by the complainant before getting a call from her that evening. When M.S. arrived in the complainant's hotel room, the television was playing loudly. She saw blood on the doorknob inside the room and the

complainant's thumb was "falling apart" and bleeding. M.S. helped the complainant tie up the wound and get dressed, then brought her to a hospital in an Uber.

[17] The hospital record indicates that the complainant was treated for a deep laceration that severed a nerve at the base of her thumb. Her wound was stitched up and splinted. The complainant also had a superficial scratch on her cheek and some swelling, and a small abrasion on her neck. When questioned by a doctor about how she got hurt, the complainant first said that she had cut her thumb while cooking, but later said that she had been robbed. The doctor suspected that the complainant was a victim of domestic violence and referred her to the hospital's crisis intervention team. According to the social worker's report, the complainant described how she had been robbed at knifepoint after withdrawing money at an ATM.

[18] J.B. and M.S. returned to the hotel to retrieve the complainant's belongings from her hotel room. J.B. testified that she saw blood on the inside doorknob of the door to the room and in the bathroom sink.

[19] The next morning, the complainant told her friend D.M. about the alleged assault and gave him the telephone number that the respondent had used to contact her. On October 14 and 15, 2019, D.M. texted the respondent telling him that he had "hurt the wrong woman". He told the respondent that if he did not return

the money and return or destroy the photos he had taken of the complainant, the police would become involved.

[20] The complainant reported the alleged assault and robbery to the Peel Regional Police on October 16, 2019. The lead investigator, Officer Sheldon Langlois, familiarized himself with the complainant's statement, which had been taken by another officer, and obtained video surveillance from the hotel. The footage showed that a man, later identified as the respondent, got into the hotel elevator in the lobby at 6:15 p.m. on October 13 and left the hotel at 6:40 p.m.

[21] On October 18, 2019, the Peel Regional Police's Special Victims Unit issued a press release asking for the public's assistance in identifying the man who had sexually assaulted and robbed the complainant. The press release included a physical description of the suspect and invited recipients to visit a webpage with screenshots from the hotel surveillance footage.

[22] D.M. testified that, on October 20, 2019, the respondent called him from a different number than the one given to the complainant. According to D.M., the respondent told him that he had deleted the photos of the complainant and would return her money if the police were called off.

[23] The respondent turned himself in to police on October 23, 2019. A photo of the complainant wearing only a bra was found on his phone along with the still images in the October 18 police press release.

The trial judge's reasons

[24] After summarizing the testimony of the complainant and the respondent about what occurred in the hotel room, the trial judge stated that the case turned largely on their respective credibility. She noted that triers of fact are not to treat the standard of proof as a credibility contest between Crown and defence witnesses. She correctly instructed herself that she had a duty to assess the accused's evidence in light of all the evidence, including that of the complainant. She set out the test in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

[25] The trial judge then assessed the respondent's evidence. She found he lacked credibility as a witness. She noted that, during his police interview, he specifically denied receiving sexual services from the complainant and did not mention that she had brandished a knife or that he took her photo. In court, he denied lying to the police but admitted he had not told the whole truth. The trial judge was "left with the strong impression that the [respondent] would say anything necessary to evade criminal responsibility whether to the police or to this Court".

[26] The trial judge also found the respondent's account of what occurred in the hotel room implausible and inconsistent. Among other things, she noted that, based on their relative physical attributes and ages, the respondent "could have easily overwhelmed the complainant and 'escaped the room at multiple points'", including before the struggle with the knife. She found it unrealistic that the

complainant would have threatened to call the police “when her livelihood that day depended on providing sexual services to clients exactly like the accused”.

[27] Turning to the complainant’s evidence, the trial judge found she also had credibility issues. She gave four specific examples: the complainant’s “evolving explanation” at the hospital for how she sustained injuries to her thumb, neck, and face; her action in fleeing to the bathroom after the forced fellatio rather than running out of the hotel room altogether; inconsistency in her evidence about whether the respondent ejaculated in her mouth or not; and her denial that she had a long term friendship with J.B. and M.S. when they testified that they had known her for over twenty years.

[28] The trial judge acknowledged that there was evidence confirming the complainant’s version of events but did not describe it or place any weight on it. She explained that “very little of it related to the assault itself and therefore I find it was of little assistance in determining what happened in the hotel room”. She did not review the evidence of M.S., J.B., or D.M., because “there was ample time for the witnesses to discuss their evidence in advance of trial”.

[29] The trial judge concluded that:

> Given the inconsistencies in the complainant’s and accused’s evidence, I simply do not know who to believe. In such circumstances, the accused is entitled to the benefit of the doubt. Accordingly, I find him not guilty.

Standard of review

[30] A trial judge's credibility assessment is entitled to substantial deference from this court. The Crown's ability to appeal an acquittal is circumscribed by s. 676(1)(a) of the *Criminal Code*, R.S.C. 1985, c. 46, which provides that an acquittal can be appealed only in the face of an error involving "a question of law alone". As stated in *R. v. Lacombe*, 2019 ONCA 938, 383 C.C.C. (3d) 114, at para. 29, the onus on the Crown on such an appeal is heavy:

> Crown appeals of acquittals must be based on errors of law, which are reviewed on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. It is only where a reasonable doubt is tainted by a legal error that appellate intervention in an acquittal is permitted: *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 39. Not only must the Crown identify an error of law, but the Crown must also establish a nexus between the error of law and the acquittal.

[31] Limiting the scope of Crown appeals of acquittals is fundamental to the core tenets of our legal system: *R. v. Hodgson*, 2024 SCC 25, at paras. 22, 26 to 31. An appealable error "must be traced to a question of law, rather than a question about how to weigh evidence and assess whether it meets the standard of proof": *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405, at para. 10. Exceptionally, however, a trial judge's alleged shortcomings in assessing the evidence may constitute an error of law: *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 24, affirmed in *Hodgson*, at para. 34. This may occur, for example, when a trial judge assesses the evidence based on a wrong legal principle, makes

a finding of fact for which there is no evidence, or fails to consider all of the evidence in relation to the ultimate issue of guilt or innocence": *Hodgson*, at para. 35, citing *J.M.H.*.

[32] The Crown is not required to establish that the verdict necessarily would have been different but for a legal error by the trier of fact. It must, however, persuade the appellate court that the error had a material bearing on the acquittal: *Lacombe*, at para. 56; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14; *Hodgson*, at para. 36.

The trial judge erred in law in assessing the complainant's credibility

[33] In explaining why she had trouble accepting the complainant's account, the trial judge stated that it "defies common sense that the complainant would have run to the washroom to rinse her mouth after forced fellatio at knife point, rather than running out of the hotel room altogether". In doing so, the trial judge relied on stereotypical reasoning about how a victim of sexual assault should behave, without regard to the complainant's testimony explaining her actions. This error affected a central issue in the trial judge's decision, the complainant's credibility, and was therefore material to it.

[34] The Supreme Court of Canada and other Canadian appellate courts have repeatedly affirmed that "myths and stereotypes have no place in a rational and just system of law, as they jeopardize the courts' truth-finding function": *R. v. A.G.*,

2000 SCC 17, [2000] 1 S.C.R. 439, at para. 2; *R. v. Kruk*, 2024 SCC 7, at para. 43. As stated in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 95:

> Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. … It is part of the role of this Court to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.

[35] A persistent myth is that a victim of sexual assault will necessarily resist, fight, or attempt to get away from their assailant. We now recognize that these are false assumptions. As the trial judge acknowledged elsewhere in her reasons, there is no right way for a victim of sexual violence to behave after the fact: *Lacombe*, at para. 45; *R. v. Kiss*, 2018 ONCA 184, at para. 101, citing *R. v. D.(D.)*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 65. Despite this, discredited myths and stereotypes endure about how a sexual assault victim should behave, often masked in "common sense" language: *R. v. A.R.D.,* 2017 ABCA 237, 422 D.L.R. (4th) 471, at para. 9, cited by this court in *Lacombe*, at para. 33, and *R. v. Donnelly*, 2023 ONCA 243, at para. 40.

[36] Reliance on discredited stereotypes and prejudicial reasoning in assessing a complainant's credibility is an error of law: *Kruk*, at paras. 29, 44 and 50; *Lacombe*, at para. 33, citing *A.R.D.*, at para. 9; *R. v. Steele*, 2021 ONCA 186, 154 O.R. (3d) 721, at para. 17, citing *R. v. A.R.J.D.*, 2018 SCC 6, [2018] 1 S.C.R. 218,

at para. 2. In concurring reasons in *Hodgson*, at para. 86, Rowe J. affirmed that such an error would constitute a reviewable error under s. 676(1)(a) of the *Criminal Code.*

[37] A credibility assessment tainted by a legal error may displace the deference usually given to a trial judge's credibility assessment and merit appellate intervention: *Lacombe*, at para. 32, citing *R. v. Luceno*, 2015 ONCA 759, 331 C.C.C. (3d) 51, at para. 34. In *Lacombe*, at para. 45, this court found that the trial judge committed a reversible error in comparing a complainant's conduct "to conduct [expected] of a sexual assault complainant without giving any consideration to her evidence of fear".

[38] The trial judge in this case made the same error. Her "common sense" reasoning presupposes that a person who has been the victim of a violent sexual assault would attempt, possibly at the risk of injury, to flee at the first opportunity from her assailant. This is the very sort of stereotypical reasoning that courts have been instructed not to rely on. If the trial judge had instructed jurors that, based on common sense, they could infer that the complainant lacked credibility because she did not behave in the way that they might imagine a victim of sexual violence would behave immediately after the alleged assault, this would have been an error of law. It is no less an error of law when the trial judge herself engaged in such reasoning.

[39] The respondent argues that the trial judge was not implying that the complainant should have been expected to try to flee at the first opportunity, but rather that her evidence about her actions belied her overall narrative that the respondent coerced her. The complainant admitted in cross-examination that she paused to clean up the respondent's ejaculate with a tissue before getting up to go to the washroom. She did not say that she asked the respondent for permission to take these actions. The respondent argues that this autonomy of movement contradicts the complainant's claim that she gave the respondent oral sex because he had a knife and she was afraid, and that her behaviour was more consistent with giving the respondent oral sex because he had paid her to do so. The respondent contends that it is not an error for a trial judge to make a finding of fact that coincidentally aligns with a conclusion that might have been reached using stereotypical reasoning, given that there was an evidentiary basis for it.

[40] It would have been open to the trial judge to find that the complainant's account of her actions after the oral sex was implausible based on her evidence as a whole or inconsistencies in her account. But that is not what the trial judge did.

[41] The trial judge did not refer to the arguable contradictions in the complainant's evidence that the respondent relies on to interpret her reasoning. She did not refer to the admissions made by the complainant about what she did right after the respondent ejaculated. She instead invoked "common sense".

[42] As in *Lacombe*, the trial judge furthermore failed to explain why she rejected the complainant's evidence about why she did not try to leave the room. The complainant testified that she "was naked and "very scared and shaking"; that the respondent had threatened her, saying "[d]on't scream or else I will kill you"; and that, following the alleged assault, the respondent's knife was still within his reach. The trial judge did not mention any of this evidence.

[43] The respondent argues that the complainant's explanation of why she remained in the room at trial was different than her explanation at the preliminary inquiry. Again, it was open to the trial judge to find that the complainant's evidence about why she did not try to leave was not credible because of this inconsistency. The trial judge did not, however, refer to any of the evidence about the complainant's state of mind after the oral sex in her reasons.

[44] Not every finding based on an error of law is fatal to a verdict. This error, however, had a material impact on the trial judge's conclusion on the assessment of the complainant's evidence and hence whether the Crown had met its burden under *W.(D.)*. Consent was the critical issue. In *Lacombe*, this court concluded that the trial judge's reliance on "common sense" in assessing how the complainant ought to have behaved tainted the acquittal. Pepall J.A. explained that "[b]ecause the trial judge was required to consider the respondent's evidence in light of all the evidence, including the complainant's, it is not possible to divorce the trial judge's acquittal of the respondent from his flawed reasoning": *Lacombe*, at para. 59.

[45] I reach the same conclusion here. I would therefore allow the appeal on this basis alone.

The trial judge erred by giving no consideration to confirmatory evidence

[46] It is appropriate to consider further arguments advanced by the appellant, whether or not they would independently amount to separate reversible errors, as accumulated errors may have further affected the outcome of the trial.

[47] The trial judge found that she did not need to consider the confirmatory evidence because "very little of it related to the assault itself" and it was therefore "of little assistance in determining what happened inside the hotel room". Both the factual and legal premises underlying this rejection of the Crown's evidence were inaccurate.

[48] As a matter of law, confirmatory evidence need not relate to the central issue in a prosecution to be relevant. As stated in *R. v. Primmer*, 2021 ONCA 564, at para. 39:

> The fact that the evidence did not directly confirm the most contentious point of the complainant's evidence is of no moment. The consideration of evidence which is capable of confirming or supporting certain aspects of a witness's testimony is typically part of the assessment of credibility in making findings of fact.

[49] To be given confirmatory weight, evidence need only be more consistent with the complainant's version of events than with another version: *R. v T.W.S.*, 2018 BCCA 119 at para. 40; *R. v. Demedeiros*, 2018 ABCA 241,

364 C.C.C. (3d) 271, at para. 10, aff'd 2019 SCC 11, [2019] 1 S.C.R. 568. Deciding whether evidence confirms or corroborates a complainant's allegations "is part of the broader assessment of the complainant's credibility and reliability that trial judges must make based on the entirety of the evidence": *R. v. G.H.*, 2023 ONCA 89, at para. 20, citing *Primmer* at paras. 31-33, 39; *R. v. S.R.*, 2023 ONCA 671, at para. 7.

[50] Drawing on another passage from the Alberta Court of Appeal's reasons in *Demedeiros*, the respondent contends that a trial judge has the discretion not to consider confirmatory evidence or give it any weight. At para. 8, the majority stated that confirmatory evidence, like any other circumstantial evidence "can be given weight even if it does not directly confirm the key allegations of sexual assault or directly implicate the accused" (emphasis added).

[51] This court's recent statements in *G.H.* and *S.R.* are arguably inconsistent with the respondent's interpretation of paragraph 8 of *Demedeiros*. But even if the trial judge may choose to disregard confirmatory evidence, this discretion must be exercised on correct legal principles. The trial judge said that she disregarded the evidence because, in her view, it did not assist in determining the central issue in the case. This amounted to an error of law.

[52] Some of the confirmatory evidence furthermore did relate directly to the alleged assault. The hospital record corroborated the complainant's testimony that

it was the respondent who wielded a knife. There is no explanation for how she would have sustained a deep cut to the base of her thumb if she, rather than the respondent, had been holding it. The abrasion on the complainant's neck corroborated her account of how the respondent held the knife to her throat. There is again no other explanation advanced for this injury.

[53] The trial judge's misapprehension of the legal principles regarding the use of confirmatory evidence and her misstatement of the nature of the evidence was material to her assessment of credibility. This error, in combination with the myth and stereotype-driven legal error found earlier, supports my conclusion that the appeal ought to be granted.

The trial judge erred in rejecting the evidence of the complainant's friends for speculative reasons ungrounded in any evidence

[54] The trial judge rejected the evidence of J.B., M.S., and D.M. because "there was ample time for the witnesses to discuss their evidence in advance of trial". She did not summarize or even refer to their evidence, except to note that J.B. and M.S. each said they had known the complainant for many years.

[55] A trier of fact again has wide latitude in weighing witness testimony or rejecting it outright. It was open to the trial judge to place no weight on the evidence of the Crown's witnesses if she found their testimony implausible, inconsistent, or

unreliable for any other reason, or if she did not think it relevant. It was not open to her, however, to reject it wholesale for reasons ungrounded in any evidence.

[56] The mere possibility that a witness could fabricate or embellish because of their relationship with one of the parties is not a valid reason to reject their evidence out of hand. Many witnesses know one or more parties involved in a given case. Nor can testimony be disregarded solely based on speculation that witnesses could have colluded. This possibility again exists in virtually any proceeding.

[57] Here, there was no evidentiary basis for the sweeping rejection of the testimony of J.B., M.S., and D.M. The trial judge did not find that their accounts were suspiciously similar or that they had any motive to lie. There was no evidence that these witnesses had, in fact, discussed their evidence prior to the trial. This possibility was not even put to them in cross-examination.

[58] The trial judge's disregard of the evidence of other Crown witnesses affected her assessment of the complainant's credibility. Their evidence corroborated central aspects of the complainant's account of the alleged assault and robbery. J.B. and M.S. both confirmed the complainant's emotional state after her encounter with the respondent. They also confirmed that the complainant's thumb was cut very deeply. D.M.'s evidence that the respondent offered to return the complainant's money confirms the complainant's account of how he took all the cash from her purse.

[59] While the trial judge's failure to consider this evidence might not, standing alone, warrant a new trial, it adds weight to the conclusion that the accumulated errors may have affected the outcome of the trial.

Disposition

[60] I would allow the appeal, set aside the acquittal, and direct a new trial on all charges on the indictment.

Released: July 15, 2024 "G.T.T."

"S. Gomery J.A."
"I agree. Gary Trotter J.A."
"I agree. L. Favreau J.A."