

CANADA / JUDGMENT

R. v. A.B.

2026 ONCA 116

COURT

Court of Appeal for Ontario

DECIDED

19 February 2026

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COA-24-CR-0020

Judges

Tulloch, Michael H.; Roberts, Lois B.; Rahman, Moiz

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. A.B., 2026 ONCA 116[1]

DATE: 20260219

DOCKET: COA-24-CR-0020

Tulloch C.J.O., Roberts and Rahman JJ.A.

BETWEEN

His Majesty the King

Respondent

and

A.B.

Appellant

Laura Remigio and Caroline Ward, for the appellant

Dana Achtemichuk, for the respondent

Heard: February 3, 2025

On appeal from the conviction entered by Justice Susanne Boucher of the Superior Court of Justice, on October 20, 2022, and from the sentence imposed on December 15, 2022.

REASONS FOR DECISION

A. Overview [1] The appellant was convicted of sexual assault, sexual interference, invitation to sexual touching, and assault with a weapon, namely a knife. The trial judge found that all the offences were committed against his stepdaughter when she was 14 years old, and that they occurred in the complainant's bedroom at home on multiple Saturdays while her mother was away at work. The trial judge imposed an 8-year global custodial sentence.

[2] The appellant appeals his convictions and sentence. He raises the following grounds of appeal:

(i) The trial judge erred by finding that the appellant's silence in his police statement equated to or was a "tacit admission" of guilt on the various charges on which he was convicted.

(ii) The trial judge misapprehended substantial pieces of evidence, specifically in relation to the Facebook messages that she found the appellant sent to the complainant.

(iii) The trial judge erred in failing to consider rehabilitation and restraint in sentencing a first-time offender, leading to an unfit sentence.

[3] The appeal turns on the first ground of appeal. It is therefore unnecessary to consider the other ground of appeal on the conviction appeal, or the sentence appeal.

[4] We conclude that the trial judge erred by treating the appellant's silence in his police statement as a "tacit admission" of guilt to the offences that he did not explicitly deny. The trial judge's error was foundational because it materially affected her assessment of the appellant's testimony, leading her to reject it, and of the complainant's testimony, by bolstering it. Moreover, her finding of the appellant's "tacit admission" of guilt served as one of the principal bases for her finding of the appellant's guilt on the charges. We set aside the convictions and order a new trial. It is unnecessary to consider the sentence appeal.

B. Background i. The Charged Offences [5] The charges against the appellant were extremely serious. He was charged with five sexual-assault-related offences against his 14-year-old stepdaughter who lived with him and her mother, along with her two very young half-sisters. Two of the offences involved assault with a weapon, one with a knife and the other with a rope. The trial judge acquitted the appellant of the charge of assault using a rope.

ii. The Police Interview and Statement [6] The appellant was arrested on December 30, 2019. The police interviewed the appellant about the complainant's allegations following his arrest. He spoke with counsel before giving his statement to the police. He told the investigating officer that his counsel advised him to say nothing. At the beginning of the interview, the investigating officer questioned the appellant about various uncontroversial matters: confirming his name, his treatment by the police, his opportunity to speak with counsel, and the domestic relationships with the complainant and her mother and half-sisters.

[7] The conversation then moved on to discussing the charges against the appellant. After asking the appellant if he understood why he was in custody, and how he felt, the officer asked the appellant if there was any way the complainant could be mistaken about being sexually assaulted, the appellant answered, "You should ask her. I'm just gonna keep quiet now." When the officer told the appellant that he had already spoken to the complainant, and he was just giving the appellant a chance, the appellant responded, "There you go. I'm gonna shut up now." The appellant did respond to a few questions about whether he was ever alone at home with the complainant, but then said, "I shouldn't even be talking right now." The investigating officer then turned to the complainant's allegations that formed the basis for the charges. He read out a litany of multiple allegations, including that the appellant had sent a sexually explicit text about oral sex to the complainant ("the text"). The appellant provided no verbal response to these allegations: he swiveled in his chair and stared at the ceiling of the interview room.

[8] The investigating officer then put forward an allegation of oral sex. The appellant responded: "That one never happened" and "I ain't do that shit". Thereafter, he resumed swiveling in his chair and staring at the ceiling. The investigating officer continued questioning the appellant, who largely stayed silent or deflected in his answers. The investigating officer then repeated the oral sex allegation. The appellant silently swiveled in his chair. The investigating officer concluded the interview.

iii. The Trial Judge's Reasons [9] The trial judge reviewed the entire statement and video of the appellant's interview. She accepted the Crown's argument that the appellant admitted the conduct that was the subject of the charges, concluding that "the wording of the denial to the oral sex allegation effectively constituted a "tacit admission" to the other sexual conduct." As the allegation that the appellant sent the text to the complainant was among those read by the investigating officer, the trial judge found that the denial to only one of the allegations also amounted to a "tacit admission" that he sent the text.

- [10] The trial judge found that the appellant's denial of the oral sex allegation was consistent with the complainant's evidence that he only attempted oral sex, reasoning: "[The appellant's] denial is believable in that sense, and further confirms that he was not denying the other sexual conduct, and in effect tacitly admitting it".
- [11] The trial judge relied on her finding of the appellant's "tacit admissions" in her analysis of both the complainant's and the appellant's evidence.
- [12] She rejected the complainant's evidence about the assault with the rope and noted that that the lack of clarity in the complainant's testimony about the assault with a rope was "a problem for credibility." The trial judge went on to use the appellant's "tacit admissions" about the remaining charges to bolster the complainant's credibility in light of the issues with the testimony about the rope:

The issues with respect to the rope indicate that the court should not accept that evidence. However, the overall force of the rest of evidence, combined with [the appellant's] tacit admission about the sexual touching and the fact that he sent the sexual message to the complainant, make the rest of the complainant's evidence compelling and credible.

- [13] The trial judge also relied on the appellant's "tacit admissions" as the first reason why she did not believe his denial of the abuse allegations: "[The appellant] tacitly admitted the sexual touching and the text, when confronted with the allegations. His denial of the oral sex is consistent with the complainant's explanation at trial that [the appellant] did not succeed in having the complainant perform oral sex; rather, he only attempted it and she successfully resisted."

C. Analysis [14] An accused's right to silence in the face of police questioning is fundamental under the common law and has received "Charter benediction" under s. 7 of the Canadian Charter of Rights and Freedoms: *R. v. Turcotte*, 2005 SCC 50, [2005] 2 S.C.R. 519, at paras. 41-42. The choice to remain completely silent, or to impart some but not all information, can never be used as evidence of guilt: *Turcotte*, at paras. 44-46, 52.

- [15] Such evidence can sparingly be used in cases where, for example, the defence raises an issue to which the accused's silence is relevant, such as where the accused testifies that he had denied the charges against him at the time he was arrested, or where silence may be relevant to the defence theory of mistaken identity and a flawed police investigation: see *Turcotte*, at para. 49.
- [16] Other exceptional use of pre-trial silence may arise, "if it is inextricably bound up with the narrative or other evidence and cannot easily be extricated": *Turcotte*, at para. 50.

- [17] Evidence of silence can, in limited situations, be used to assess credibility: see, in respect of co-accused persons, *R. v. Crawford*, [1995] 1 S.C.R. 858. In general, however, it is an error to draw an adverse inference about an accused's credibility from his silence: *R. v. G.L.*, 2009 ONCA 501, 250 O.A.C. 266, at para. 38; *R. v. Palmer*, 2008 ONCA 797, 181 C.R.R. (2d) 134, at para. 9.
- [18] Crown counsel argues that this is not a right to silence case because the trial judge did not use the appellant's silence during his police statement to infer guilt. Rather, the trial judge merely interpreted the appellant's police statement as a whole and determined what the appellant's denial meant in the context of the police questioning. Alternatively, Crown counsel argues that, if the court finds that the appellant's right to silence is engaged, the trial judge's use of the appellant's silence is permissible because the evidence of the appellant's silence is "bound up with the narrative or other evidence and cannot easily be extricated" and is thus admissible, per *Turcotte*, at para. 50.
- [19] We disagree.
- [20] It is clear from her reasons reproduced above that the trial judge accepted the trial Crown's submission that, in denying one allegation, the appellant's silence regarding the other allegations and the text amounted to admissions. The inference suggested by the Crown amounted to an impermissible inference of guilt from silence. That is especially so because the appellant asserted his right to silence more than once during the interview. The trial judge relied on these "tacit admissions" as foundational support for her findings of guilt against the appellant with respect to the charges for which he was convicted.
- [21] The Crown's reliance on *G.L.* is thus misplaced. *G.L.* directed triers of fact to consider what the accused did say holistically – "to make findings respecting statements made by an accused and their meaning ... in context and on the basis of the statement read as a whole": at para. 29. This direction is not an invitation to infer guilt from silence on some allegations merely because others were denied. As *G.L.* clarified, at para. 39: "The appellant had a constitutional right to remain silent during any part of the police interview. That right was not extinguished simply because he chose to speak to the officer with respect to some matters and did not exercise his right to silence completely."
- [22] As such, the trial judge erred by using the appellant's silence to infer guilt. A new trial is required.

D. Disposition [23] For these reasons, we allow the appeal, quash the convictions, and order a new trial. Given our disposition of the conviction appeal, we do not reach the sentence appeal.

"M. Tulloch C.J.O."

"L.B. Roberts J.A."

"M. Rahman J.A."

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- [1] This appeal is subject to a publication ban pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.
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