

CANADA / JUDGMENT

## R. v. Davis

2026 ONCA 198

### COURT

Court of Appeal for Ontario

### DECIDED

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R. v. Davis

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Judges

Simmons, Janet M.; Favreau, Lise G.; Rahman, Moiz

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Criminal

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Davis, 2026 ONCA 198[1]

DATE: 20260319

DOCKET: COA-25-CR-0126

Simmons, Favreau and Rahman JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Adam Davis

Appellant

Paul Socka, for the appellant

Avene Derwa, for the respondent

Heard: January 15, 2026

On appeal from the convictions entered by Justice Thomas J. Carey of the Superior Court of Justice on March 15, 2024.

Favreau J.A.:

A. Introduction [1] The appellant was convicted of sexual assault, sexual exploitation, intimidation and uttering threats. The appellant represented himself at trial.

[2] The appellant appeals on the basis that his trial was unfair because the trial judge failed to provide him with sufficient assistance given that he was self-represented. The appellant submits the trial judge erred in failing to appoint amicus to assist him throughout the trial.

[3] I would allow the appeal on the basis that the trial was unfair and that this amounted to a miscarriage of justice. There were several occasions throughout the trial when the judge failed to provide sufficient assistance to the appellant given that he was self-represented. Cumulatively, this had an impact on trial fairness. Had the trial judge appointed amicus, trial unfairness may have been avoided, but I do not conclude that it was an error per se for the trial judge not to appoint amicus.

B. Background [4] The appellant was charged with sexual assault and other offences involving C.M., the daughter of his former romantic partner, L.M. The offences were alleged to have occurred over two time periods. The first period occurred while the appellant lived with L.M. and C.M., when C.M. was between the ages of 15 or 16 and 18 years old. C.M. then moved to Alberta with her boyfriend. The second period occurred approximately three years later, when C.M. returned to Ontario and the appellant no longer lived with L.M. The Crown alleged that the sexual activity during the second period was coerced.

[5] The appellant was arrested in September 2019. He was originally represented by a lawyer. He changed lawyers at least three times before trial. The trial was delayed and adjourned several times, due, in part, to these changes in representation. Ultimately, the trial began on January 8, 2024, by which point the appellant was self-represented.

- [6] It is helpful to review the chronology leading up to the trial date as it shows why the trial was delayed and how the appellant came to be self-represented:
- (a) After his arrest in September 2019, the appellant retained his first lawyer. In December 2019, through his first lawyer, the appellant elected to have a judge-alone trial in the Superior Court. By the end of February 2020, a three-day trial was scheduled to start in January 2021.
  - (b) In January 2021, the trial was adjourned at the first lawyer's request due to his own health issues. The trial was rescheduled to October 4, 2021.
  - (c) On October 3, 2021, the day before the trial was set to start, the Crown disclosed a new witness statement. The appellant's first lawyer filed an application under s. 276 of the Criminal Code arising from this new witness statement. The trial was adjourned again to January 2022 to allow the application to be heard.
  - (d) In early January 2022, the trial was adjourned once more at the first lawyer's request due to health reasons. Later in January, the first lawyer was removed as counsel of record because of a potential conflict with one of the Crown's witnesses.
  - (e) In March 2022, the appellant briefly retained a second lawyer. In April 2022, the appellant retained a third lawyer. The trial was rescheduled to start in June 2023. However, on the first day of trial, the third lawyer was removed due to a breakdown in the solicitor-client relationship.
  - (f) After several court appearances, a trial date was ultimately set for January 8, 2024.
  - (g) In October 2023, a fourth lawyer attended court and advised that he intended to bring a Rowbotham application, but that he would require an adjournment of the trial if he was appointed. The Crown expressed concern over any further delay, and Hurley J., who was presiding that day, asked the Crown whether they were going to bring an application to appoint counsel pursuant to s. 486.3 of the Criminal Code to cross-examine the complainant.
- [7] In November 2023, the Crown brought an application to appoint s. 486.3 counsel and to appoint amicus curiae. The Crown submitted that amicus was required in order to avoid further adjournments, stating that amicus should be available to ensure the appellant had a fair trial and to "explain to the accused the rules and procedures of the trial process and explain to the accused any legal issue that arises".
- [8] In his ruling on the application, Hurley J. appointed s. 486.3 counsel but declined to appoint amicus. However, he stated that, if the Crown and s. 486.3 counsel thought the role of appointed counsel should expand, then the trial judge could make an order combining s. 486.3 counsel's role with the role of amicus.
- [9] The trial commenced as scheduled on January 8, 2024. At that time, the appellant still did not have counsel. On the first day of trial, the appellant stated that he was ill. Paramedics were called, but the appellant did not want to go to the hospital, stating that he was experiencing the familiar symptoms of an anxiety attack. The Crown urged the trial judge to

proceed with the trial given the previous adjournments and delay. The trial judge agreed, and the trial started late but did commence on the scheduled date. There were indications throughout the day that the appellant was feeling ill and that he was not paying attention to the proceedings. I provide more detail about what occurred on the first day of trial in the analysis below.

- [10] In total, the trial lasted four days.
- [11] On the first day, the Crown opened its case with a voluntariness application to admit the appellant's statement to the police. The police statement was largely exculpatory. The trial judge granted the application and admitted the statement. The appellant did not cross-examine the police officer who took the statement, nor did he make any submissions on the application.
- [12] The Crown called four witnesses at trial, including C.M., who was cross-examined by s. 486.3 counsel. The Crown also called L.M., T.M. (C.M.'s sister) and Wanda Whiteman (the appellant's ex-partner, with whom he had a relationship after his relationship with L.M.). The appellant did not cross-examine any of these witnesses. In the analysis below, I address in more detail the circumstances that led the appellant not to cross-examine these witnesses.
- [13] The appellant did not testify nor did he call any witnesses. Again, I address the circumstances leading to the appellant calling no evidence in more detail in the analysis section.
- [14] After the evidence was completed, the trial judge found the appellant guilty of all charges.[2] He found the complainant credible and that the appellant's police statement did not leave him with a reasonable doubt.

C. Issues and analysis [15] The primary issue on appeal is whether the appellant, as a self-represented accused, received a fair trial. The appellant alleges the trial judge failed to provide him with adequate assistance. The appellant also alleges that the trial judge erred by not appointing amicus to assist him throughout the trial.[3]

- [16] Given that the appellant was self-represented, the trial judge had an obligation to provide him with reasonable assistance. Looking at the conduct of the trial as a whole, I find that the trial judge failed to do so and that the trial was accordingly unfair. I start with a general discussion of a trial judge's obligation to assist a self-represented accused in a criminal proceeding. I then review what occurred in this case, leading to my conclusion that the trial was unfair. I conclude by briefly addressing the issue of amicus.
1. General principles regarding the conduct of a trial with a self-represented accused [17] When an accused is self-represented, the trial judge has an obligation to ensure that the trial is fair and respects the accused's fundamental rights: *R. v. Richards*, 2017 ONCA 424, 349 C.C.C. (3d) 284, at para. 110; *R. v. Kahsai*, 2023 SCC 20, 483 D.L.R. (4th) 199, at para. 54. This requires the trial judge to provide reasonable assistance to the accused and to guide the

accused throughout the trial so that the “defence is brought out with its full force and effect”: *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 (Ont. C.A.), at p. 347.

- [18] The duty to provide assistance is subject to a standard of reasonableness. The extent of the obligation to provide assistance depends on the circumstances of the case and what is reasonable in the particular case: *R. v. Forrester*, 2019 ONCA 255, 375 C.C.C. (3d) 279, at para. 15; *R. v. Bancroft*, 2024 ONCA 121, at para. 7. The trial judge is not required to, and in fact must not, provide the same kind of assistance as defence counsel would provide: *Richards*, at para. 111. In effect, a trial judge’s obligation to remain neutral necessarily limits the scope of the duty to assist a self-represented accused: *Kahsai*, at para. 54.
- [19] While the level of assistance depends on the circumstances of each case, in *R. v. Tran* (2001), 55 O.R. (3d) 161, at para. 33, a case where the accused was self-represented and showed signs that he did not understand the trial process, this court stated that, at the beginning of the trial, the trial judge should have explained the trial process to the accused in order to meet the “minimum requirement”:

At this stage of the trial, to satisfy the minimum requirement of providing assistance for the appellant, the trial judge should have explained to the appellant the course which the trial was to take, beginning with his arraignment, followed by the Crown Attorney calling her witnesses, his right to cross-examine the witnesses and to object to irrelevant evidence, his right to call witnesses and to testify, the risks inherent in testifying and not testifying, and finally, the right to make closing argument.

- [20] In *Kahsai*, at para. 54, the Supreme Court stated that the trial judge can typically fulfill the duty owed to a self-represented accused by explaining the trial process to them, although some circumstances will require the judge to intervene more actively. For example, the trial judge may be required to identify relevant issues, frame questions to elicit relevant evidence for the defence or raise potential Charter breaches.
- [21] The failure to assist or sufficiently assist a self-represented accused is not an independent ground of appeal. Rather, it raises the possibility that the trial was unfair, and that there has been a miscarriage of justice requiring appellate intervention pursuant to s. 686(1)(a)(iii) of the Criminal Code. Not every breach of a trial judge’s obligation to assist a self-represented accused makes a trial unfair or results in a miscarriage of justice. Rather, the court should consider the cumulative effect of the trial judge’s errors in failing to assist the self-represented accused: *Forrester*, at para. 17; *Bancroft*, at para. 8.
2. The trial was unfair resulting in a miscarriage of justice [22] Having regard to the general principles reviewed above, I am satisfied that the trial was unfair in this case. I reach this conclusion based on the cumulative effect of several pivotal points during the trial where the trial judge failed to provide any or sufficient assistance to the appellant. These lapses occurred at the beginning of the trial, during the voluntariness voir dire; after each Crown witness, other than C.M., when the appellant had an opportunity to cross-examine but chose not to do so; when the appellant had an opportunity to testify but decided not to do so; and

when it was the appellant's turn to call his own witnesses but he called none. I address each of these areas below.

a. Opening of trial

- [23] On the first day of trial, the appellant advised that he was feeling sick. Paramedics were called to examine him. The appellant chose not to go to the hospital, and the trial started later that day.
- [24] At the beginning of the hearing, the trial judge made minimal inquiries regarding whether the appellant was ready to proceed with the trial. The Crown urged the trial judge to proceed given earlier adjournments. Section 486.3 counsel did not take a position on this issue when asked by the trial judge. The trial judge did not ask for further information regarding the reason for the adjournments. Had he done so, he would have been informed that there was no evidence that the appellant was intentionally trying to delay his trial. Rather the previous adjournments were caused by the first lawyer's illness, late disclosure by the Crown and a breakdown in solicitor client relations between the appellant and his third lawyer. Instead of making any inquiries, the trial judge simply agreed to the Crown's request that the trial proceed without giving the appellant the chance to ask for an adjournment due to his medical issues.
- [25] Besides failing to make meaningful inquiries about the appellant's ability to proceed and the reasons for previous adjournments, at the beginning of the trial, the trial judge gave the appellant no directions or instructions about how the trial would proceed. As such, he failed to meet the "minimum requirement" highlighted by this court in *Tran*, at para. 33. As reviewed below, he gave some instructions as the trial progressed about the right to cross-examine, the pros and cons of testifying in his own defence, the right to call evidence and other matters, but these instructions were sporadic and, at times, incomplete or incorrect. In addition, this does not make up for the failure to meet the minimum requirement to explain the trial process at the beginning of trial. As highlighted below, the trial judge instead assumed that the appellant understood the trial process because he had been represented by counsel when previous trial dates were adjourned. Notably, in making this assumption, he did not ask the appellant whether this was a correct assumption.

b. Voluntariness voir dire

- [26] After the opening of the trial, the Crown brought an application to have the appellant's statement to the police admitted on the basis that it was made voluntarily. From the transcript, it is evident the trial judge failed to make sufficient efforts to explain the voir dire process to the appellant and to make sure the appellant understood what was going on, especially given that the appellant was showing signs that he was sleeping and feeling ill throughout.

[27] As the Crown was calling the first and only witness on the voir dire, a police officer, the appellant interrupted and stated, “I’m not sure how to properly defend myself in this”. The trial judge briefly explained the purpose of the voir dire to the appellant and told him that he would have the right to cross-examine the officer. The trial judge explained cross-examination as follows:

Okay. So cross-examination is not an opportunity to testify, but rather an opportunity for you to ask questions, not in a cross way, that’s not why it’s called cross-examination, but it’s an examination that allows you to bring out any details that you think would be helpful to your view of, of this case. And if you have any difficulties in forming a question or knowing what the parameters of your ability to cross-examine are, I will attempt to assist you.

[28] The trial judge then asked the appellant if he understood, at which point the appellant responded that he was going to be sick:

[The appellant]: Sorry. Yeah, sorry, Your Honour. I’m going to get sick again.

THE COURT: All right.

[The appellant]: I apologize. My eyes are forcing themselves closed.

THE COURT: All right, well – sorry?

[The appellant]: When I was sick outside for awhile, it drained, it made me tired.

[29] After the appellant made this statement, the trial judge did not respond to him or consider what to do given the appellant’s stated illness. Instead, he told the parties they were going to proceed, either with watching the video or calling the police officer.

[30] The Crown next examined the police officer who had taken the appellant’s statement. After the Crown completed the police officer’s examination in chief, the trial judge turned to the appellant to tell him that he could ask questions. Based on the transcript of the trial judge’s statements at this point, it appears that the appellant may have been sleeping:

THE COURT: Mr. Davis, you have the right, but no obligation, to ask any questions. Mr. Davis. So perhaps the Court Services Officer can check on Mr. Davis, he’s not responsive to my question. He appears to be sleeping. [Emphasis added.]

[31] It is unclear from the transcript what occurred next. However, the transcript indicates that the trial judge explained to the appellant that it was incumbent on the Crown to prove that the statement was voluntary and that he was entitled to ask the police officer questions on that issue. The trial judge again noted that the appellant was unresponsive:

So if, if you wish to ask any questions, you may. Otherwise I'll presume that you have no submissions as to the voluntariness or no reason why I should find this statement to be not made voluntarily. All right? All right, there's no response. You have not indicated at any point in time, sir, that you're unable to stay awake or not following any of this, so we'll adjourn now till two o'clock. I will not close the door on your ability to make any submissions on voluntariness when we come back at two o'clock. [Emphasis added.]

[32] The appellant did not say anything in response.

[33] After the lunch recess, the Crown made submissions on the voluntariness of the appellant's statement. The trial judge next asked the appellant whether he had any submissions about whether the statement should be admitted, to which the appellant responded, "What statement was it?" The trial judge explained that it was the video they had watched before lunch. He then stated, "I'll take your silence that you have no submissions as to why the statement should be ruled inadmissible." The appellant asked twice more what statement was at issue. The trial judge did not respond and then gave his ruling on the voir dire.

c. Cross-examination of Crown witnesses

[34] After the Crown examined the complainant in chief and s. 486.3 counsel cross-examined her[4], the Crown called L.M., T.M. and Ms. Whiteman. The appellant did not cross-examine any of these witnesses. The trial judge provided no instructions on the appellant's right to cross-examine after L.M. testified. The trial judge only gave the appellant a perfunctory explanation regarding cross-examination when T.M. and Ms. Whiteman testified, and this was only in response to concerns the appellant raised about their evidence. A review of what occurred after each of these examinations highlights the inadequacy of the trial judge's instructions.

[35] After the Crown completed L.M.'s examination in chief, the trial judge asked the appellant if he wanted to cross-examine her. He did not explain the purpose of cross-examination, but instead stated that he assumed the appellant knew his rights because he had previously been represented by counsel and because of discussions with s. 486.3 counsel. Notably, there was no evidence on the record that s. 486.3 counsel explained the role of cross-examination to the appellant and the appellant's responses to the trial judge show that he did not understand what he could do at this stage:

THE COURT: ... I'll just ask you, are you intending to cross-examine?

[The appellant]: No.

THE COURT: No. Okay. So you have no, no questions on cross-examination?

[The appellant]: No.

THE COURT: All right, thank you. I didn't go through the whole what I would normally say. I, I take it at this point you know your rights and while you've not recently had a lawyer, you, you had a lawyer at some point and I presume you have had some discussions with counsel about the whole procedure. So and of course, [s. 486.3 counsel] was not your lawyer, but you did have – you, you and he had discussions in order to assist him in cross-examining [the complainant] and I, I note that. So...

[The appellant]: I wouldn't know...

THE COURT: ...you....

[The appellant]: ...what to do.

THE COURT: Sorry?

[The appellant]: I, I wouldn't even know what to do.

THE COURT: All right. But – and that's fine. If that's the reason you're not cross-examining, as a judge I am required to, to assist you. But you've said you, you don't want to cross-examine, is that right?

[The appellant]: Yes.

THE COURT: Okay. I'm, I'm satisfied that [the accused] is sufficiently informed of, of the procedures and his rights in this, this case and has made an informed decision not to cross-examine...

[36] At the conclusion of T.M.'s examination in chief, the trial judge asked the appellant if he had any questions. The appellant said he wanted to "respond back" to something T.M. referred to in her evidence. The trial judge told the appellant he would have an opportunity to respond. The Crown then expressed concern that the area the appellant wanted to respond to was hearsay evidence and might raise s. 276 concerns. The trial judge explained to the appellant that "when a witness tells us something another witness said to her, her or him, it's not confirmatory of the truth of that statement". The trial judge told the appellant that cross-examination was not an opportunity to tell his story. The trial judge then asked the appellant once more whether he had any questions for T.M., to which the appellant responded "no". In the context of this exchange, the trial judge again did not explain the purpose of cross-examination.

[37] Soon after the Crown started Ms. Whiteman's examination in chief, the trial judge raised questions about the purpose of her evidence. The Crown explained that the intention was, at least in part, to demonstrate falsehoods in the appellant's police statement through inculpatory text messages exchanged with Ms. Whiteman. The appellant then stated that he was concerned that Ms. Whiteman was good with technology, suggesting that she could manipulate some of the text messages the Crown intended to rely on. The appellant also stated that Ms. Whiteman had anger issues toward him and that she was in a conflict of interest because she had attended some of his meetings with his first lawyer. The Crown and

the trial judge had a discussion during which the Crown assured the trial judge that he did not intend to ask Ms. Whiteman any questions about the appellant's conversations with the appellant's first lawyer. The trial judge next turned to the appellant to say that he would have an opportunity to cross-examine Ms. Whiteman. The trial judge then told the appellant:

So as I said to you earlier, since you're representing yourself, you have a right to cross-examine every witness. Sometimes it won't be necessary and you haven't cross-examined to date... Cross-examination is not an opportunity to state your case by evidence, but you can put to a witness that, that often lawyers will say, "I suggest to you," or a more everyday kind of language would be, "well, isn't it true that you, you told me this," or, "you said that." And without you testifying, you could say – well – you could ask her, "isn't it true your very experience[d] with texting," and if it's your position that in the past she has changed things or has the ability to, you can put that to her and, she will have the opportunity to agree or disagree. So you can do all that in cross-examination, but you can't – but you, you have to examine and as I might have said earlier, because it's called cross-examination doesn't mean that you can be cross or angry.

[38] The appellant stated that he had not known that Ms. Whiteman was going to testify and that he would have brought some documents to put to her if he had known. The trial judge initially stated that he would allow the appellant to wait until the next day to conduct the cross-examination. The Crown objected on the basis that the appellant had been notified that Ms. Whiteman was going to be called as a witness. The trial judge agreed with the Crown's objection, but suggested that the court could break for the appellant to go home and get what he needed. The appellant then stated that he wanted to continue and "just get it done". The Crown proceeded with Ms. Whiteman's examination in chief.

[39] After the Crown completed Ms. Whiteman's examination in chief, the trial judge asked her some questions about text messages between her and the appellant. The trial judge asked her what she thought a sexually explicit message from Mr. Davis about the complainant meant and what her reaction to that message was. The trial judge also asked Ms. Whiteman whether the text messages were authentic, including whether she had the technical expertise to manufacture them, to which she responded "no".

[40] Following the trial judge's questions to Ms. Whiteman, he told the appellant that he asked Ms. Whiteman "some questions to assist in dealing" with what he perceived as "live issues". The trial judge then told the appellant that he had a right to cross-examine Ms. Whiteman, explaining the risks of doing so as follows:

You, you do have the right to cross-examine. Cross-examination is – can be a double-edged sword, that is you may not get the answer that you or any, anyone cross-examining never is sure what answer – and even skilled cross-examiners who've been doing it for many years, as the Crown Attorney, sometimes can find themselves with an unexpected answer. And so professionals, they say that cross-examination is an art that should be approached carefully. You should remember that it's not a time to give evidence.

- [41] The trial judge went on to discuss matters not relevant to cross-examination. He concluded by telling the appellant that he had covered some areas with Ms. Whiteman. He then asked the appellant, “[A]re there any questions that you want to ask this witness?” The appellant responded “no”.
- [42] The Crown next advised that it had completed its evidence.
- [43] Ultimately, the appellant chose not to cross-examine any of the Crown witnesses, other than C.M. who was cross-examined by s. 486.3 counsel. When asking the appellant whether he wanted to cross-examine L.M. and T.M., the trial judge provided the appellant with no information regarding the purpose of cross-examination or how cross-examination works. At the time the appellant decided not to cross-examine Ms. Whiteman, the trial judge only informed him about the form his questions might take and the fact that cross-examination was so difficult and risky that even lawyers found it challenging. These instructions, even if they had been provided earlier in the trial, fell well short of explaining the purpose and strategy of cross-examination to the appellant. The trial judge’s minimal instructions to the appellant regarding the purpose of and strategies for cross-examination are in sharp contrast with circumstances where instructions have been found to be adequate: *R. v. P.D.C.*, 2021 ONCA 134, 401 C.C.C. (3d) 406, at para. 58; *R. v. Assoun*, 2006 NSCA 47, 244 N.S.R. (2d) 96, at paras. 273-274, leave to appeal refused, [2006] S.C.C.A. No. 233. Also, I note that the Canadian Judicial Council, *Criminal Law Handbook For Self-Represented Accused* (Canadian Judicial Council, 2021) sets out the gold standard for information to be provided to self-represented accused. The section on cross-examination provides a comprehensive explanation of the purpose of cross-examination and tips on conducting a cross-examination. Ideally, this is the type of comprehensive explanation the trial judge would have provided to the appellant. The failure to provide such a comprehensive explanation on its own may not be an error. Every case depends on its circumstances. But, here, the trial judge did not meet the minimum requirements for ensuring that the appellant understood the purpose and process of cross-examination.

d. Appellant’s opportunity to call witnesses and testify

- [44] On the day the Crown completed its case, before adjourning for the day, the appellant expressed confusion and stated he did not know what was going on. The trial judge advised the appellant that he could testify in his own defence if he wanted to, but warned the appellant that this would expose him to cross-examination on his whole police statement:

So you can’t just give evidence on one part and not be open to cross-examination on the whole part. The Crown has, has indicated that they’re going to suggest to you that your statement was – had all sorts of falseness in it. You should know that there is, the law would say that even if – because the Crown has put in your statement, a court can use all or some of the statement and that the principle of that, you cannot be found guilty of an offence unless there’s evidence beyond a reasonable doubt applies to evidence that the Crown puts in from what is largely an exculpatory statement. So that a court can have a reasonable doubt based on some or all or part of the, or part

of the statement and if you do not testify, you can't be cross-examined on any part of the statement that is incorrect or the Crown is suggesting is a lie.

...

But if you do give evidence you can be cross-examined on parts of the statement, including that you barely knew – and, and you've, you've said in court, and it's not testimony, something to the affect that you thought – or, or there's been evidence that you – from [Ms. Whiteman], that you thought the law was such that [the complainant] was underage and that's why you made all these denials and so that is a contradiction of some of what you said about a limited relationship, non-sexual relationship with [the complainant]. And so if you give, if you give evidence, the Crown Attorney will be able to cross-examine you on all, all of your statement and would probably be saying, if they got the answers that they expect, that no weight should be given to the exculpatory parts of your statement. I say all that, it may help you in, in making a decision as to whether you call evidence. You can call evidence other than testifying yourself.

[45] The appellant then raised the possibility of calling his father and uncle as witnesses, because they had allegedly been present during one of the sexual assaults on the complainant. The trial judge told the appellant that he could call them as witnesses but warned that he would not grant an adjournment for that purpose because the appellant would have known before the trial started, from the Crown's disclosure, that his father and uncle were allegedly present. The trial judge then told the appellant that he could decide whether to testify or call witnesses the next day.

[46] The next day, the trial judge asked the appellant if he intended to call any evidence. The appellant responded "no" and stated, "Cause I was too late for my dad and that to get the notice to get off work." The trial judge then told the appellant that he had been aware of the trial date for some time and that there had been previous adjournments, and that he would therefore not consider granting an adjournment:

[W]hen you say, "it was too late," this trial was set some time ago and it's, it's had four trial dates. So presumably you've been aware of, of all of those dates and you have in the course of this trial that started on Monday been aware of your ability to call evidence and had disclosure of the evidence that was presented by the Crown Attorney and so the arrival of this point in the trial should not have come as any surprise to you or any potential witnesses. So I'm not inviting you, I'm not inviting you to ask for an adjournment to get witnesses, because there's been a number of adjournments and delays right up to Monday of this date when we had a delay so that you could be examined by a paramedic crew. And so having said that, you're not calling evidence and the defence case is closed.

[47] The trial judge moved on to ask the Crown to give a closing statement. The Crown asked the trial judge to confirm that the appellant did not intend to testify on his own behalf, to which the appellant responded, "Well, I don't have anything."

- [48] Based on a review of the trial judge's discussions with the appellant after the Crown closed its case, it is evident that the trial judge provided insufficient assistance to the appellant in deciding whether or not to testify or call witnesses.
- [49] With respect to whether the appellant would testify, the trial judge only focused on the Crown's ability to cross-examine him on his statement to the police. While this was an important warning about the risks of testifying, it only gave the appellant a partial understanding of the pros and cons of testifying in his own defence. Notably, the trial judge did not warn the appellant that if he did not testify, he would not be able to rely on his version of events other than as set out in his police statement as part of his defence. Based on some of the appellant's interjections up to that point, it should have been evident to the trial judge that the appellant wanted to put forward a different version of some of the events.
- [50] With respect to the appellant's ability to call witnesses, the trial judge made no effort to assist the appellant in calling his father and uncle as witnesses. For example, he did not raise the possibility of issuing subpoenas. Moreover, the trial judge's assumption that the appellant would have known before the trial that he could call witnesses was not based on any discussions he had with the appellant, nor anything else that he would have learned from the record. Again, had the trial judge discussed the trial process with the appellant at the outset of the trial, the appellant may have been better prepared to call witnesses, or at least been able to alert the trial judge about their availability.
- [51] The trial judge also did not give the appellant the opportunity to request an adjournment to call his witnesses. Instead, he appeared to be concerned about further delay without making any inquiries about the cause of the earlier delays. This concern about delay is difficult to understand since there was still one more day set aside for trial.

e. Closing statements

- [52] After the trial judge invited the Crown to give a closing statement, the Crown stated that he needed time to prepare because he had not anticipated the appellant would call no evidence. The trial judge said that the "case ha[d] gone at a pace" and that the Crown should take "all the time [he] need[s]".
- [53] The trial judge then turned to the appellant and gave him a very cursory explanation of how to prepare for closing submissions and suggested he would attempt to assist the appellant:
- [Y]ou may want to prepare some notes for yourself about what you want to say. You would go second and so that gives you an opportunity to hear what the Crown Attorney has to say and then respond based on evidence, not based on evidence that wasn't call[ed] or that I didn't hear, but based on, on evidence, based on cross-examination that was completed and, again, I have a, a legislated responsibility to assist self-represented people to a degree without putting my finger on the scale anywhere, but in order to keep the scale of justice balanced so to speak. And I, I will, as I have done in this trial, attempt to assist you in areas of complexity or lack of understanding.

- [54] The Crown gave detailed and lengthy closing submissions.
- [55] The trial judge then told the appellant that he could respond to what the Crown had said. The appellant started saying that he could not have committed the sexual assaults during the time period described by the complainant because he was away for extended periods of time and working full-time. The trial judge interrupted the appellant and said that he had not heard evidence on this point and that the appellant had chosen not to call witnesses or to testify. The appellant tried again to tell what he described as his “side of the stuff.” Through a prolonged exchange, the trial judge emphasized that he gave the appellant an opportunity to testify and that he chose not to do so or to call any witnesses.
- [56] After a few additional exchanges, the appellant stated that he did what he could representing himself and thanked the trial judge for his assistance.
- [57] The trial judge’s exchange with the appellant during closing submissions should have alerted the trial judge to the fact that the appellant potentially had evidence to offer in his defence. Again, there was still one more day allotted for trial. The trial judge could have taken this opportunity to again canvass whether the appellant may have wanted to testify in his own defence and called evidence. That is especially significant given the trial judge’s earlier insufficient explanation about the advisability of testifying.

f. Conclusion

- [58] During the argument of the appeal, the Crown addressed many of the alleged deficiencies in the trial proceeding and submitted that they did not impact trial fairness. For example, while the trial judge did not explain the trial process to the appellant at the beginning of trial, the appellant would have been aware of the trial process because he had been ready to start the trial on three previous occasions while represented by counsel. The Crown relied on the fact that the appellant’s former counsel were prepared to concede the voluntariness of his police statement. In addition, the Crown submitted that any deficiencies in the explanation the trial judge gave the appellant about his right to cross-examine L.M., T.M. and Ms. Whiteman were offset by the fact that the main witness at trial was C.M., and that she was cross-examined by s. 486.3 counsel.
- [59] The problem with the Crown’s position is that it fails to account for the cumulative impact of the deficiencies in the trial judge’s assistance to the appellant. Individually, these deficiencies may not have led to an unfair trial, but cumulatively the appellant was essentially left without a proper understanding of the trial proceeding and without an opportunity to mount any defence to the charges, other than through s. 486.3 counsel’s cross-examination of the complainant.
- [60] The assistance the trial judge provided to the appellant fell well below the minimum requirements. The appellant was unsophisticated. He showed many signs that he did not understand the trial process or how to defend himself. At the beginning of the trial, the trial judge took no steps to explain the trial process to the appellant or to ensure that the

appellant was sufficiently alert to meaningfully participate in his trial. Throughout the hearing, the trial judge only provided minimal, and at times incorrect or incomplete, explanations to the appellant about the trial process and how he could protect his interests.

- [61] Based on the cumulative circumstances, I conclude that the trial was unfair. I also conclude that the trial unfairness amounted to a miscarriage of justice. A miscarriage of justice occurs where an accused was convicted following a trial that was unfair in fact or in appearance: s. 686(1)(a)(iii) of the Criminal Code; *R. v. Tayo Tompouba*, 2024 SCC 16, 491 D.L.R. (4th) 195, at paras. 55, 72. In assessing whether a miscarriage of justice occurred, the question is whether the irregularity was severe enough to render the trial unfair or to create the appearance of unfairness: *Tayo Tompouba*, at para. 72. This is a high bar: *Tayo Tompouba*, at para. 72. Courts have found unfairness giving rise to a miscarriage of justice in different circumstances: *Tayo Tompouba*, at para. 73; *R. v. Walker*, 2019 ONCA 765, 381 C.C.C. (3d) 259; and *R. v. Nahmabin*, 2024 ONCA 534. This includes where a self-represented accused received insufficient assistance from a trial judge: *R. v. Wilde*, 2022 SKCA 74.
- [62] The trial judge's failure to provide the appellant with reasonable assistance throughout the trial left the appellant without any ability to defend himself at trial. To succeed on this ground of appeal, it is not necessary for the appellant to show that he had a viable defence or that he could have succeeded at trial. Nevertheless, in this case, given the conduct of the trial, it is not possible to know whether he had a viable defence or whether he could have succeeded at trial.
3. It is not necessary to decide the issue of whether the trial judge should have appointed amicus [63] The appellant submits that Hurley J. and the trial judge erred in failing to appoint amicus. In particular, the appellant argues that, once the trial began and it became evident that the appellant was not able to represent himself, the trial judge erred by failing to expand the role of s. 486.3 counsel or by failing to appoint amicus.
- [64] It is not necessary to decide this issue. In *Kahsai*, at para. 72, where the accused was self-represented, the Supreme Court found that the trial judge was under no obligation to appoint amicus at a particular time or with a particular mandate. There may be circumstances where such an appointment is appropriate but this decision remains discretionary: *Kahsai*, at para. 72. In this case, appointing amicus may have avoided trial unfairness. However, given my conclusion that the trial was unfair, it is not necessary to consider separately whether the trial judge erred in this case by failing to appoint amicus.
4. A new trial is required [65] Where an appeal from conviction is allowed on the basis of a miscarriage of justice, the court must quash the conviction and either enter an acquittal, order a new trial, or enter a stay of proceedings: s. 686(2) of the Criminal Code; *R. v. Bouvette*, 2025 SCC 18, 448 C.C.C. (3d) 319, at para. 57.

[66] In this case, I am satisfied that a new trial is required. It is not clearly more probable that the appellant would be acquitted if there were a new trial. A properly instructed jury, acting reasonably, could convict the appellant.

D. Disposition [67] I would allow the appeal and order a new trial.

Released: March 19, 2026 “J.S.”

*“L. Favreau J.A.”*

*“I agree. Janet Simmons J.A.”*

*“I agree. M. Rahman J.A.”*

- [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.
- [2] The uttering threats charge was stayed pursuant to *Kienapple v. R.*, [1975] 1 S.C.R. 729.
- [3] The appellant also brought a motion to introduce fresh evidence. He sought to admit a psychological report that was obtained for sentencing. The appellant brought the motion because this evidence was not available at the time of trial. The Crown does not oppose the motion. As I have reached the conclusion that the trial was unfair without the fresh evidence, it is unnecessary that I rule on its admissibility.
- [4] Section 486.3 counsel did not play any role at trial other than cross-examining the complainant. He was only present for the opening of trial, and for the complainant's examination and cross-examination.

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