

CANADA / JUDGMENT

R. v. I.M.B.

2025 ONCA 678

COURT

Court of Appeal for Ontario

DECIDED

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R. v. I.M.B. Collection Decisions of the Court of Appeal Date 2025-10-01 Neutral citation 2025 ONCA 678 Docket numbers COA-23-CR-1024 Judges Hourigan, C. William; Monahan, Patrick J.; Dawe, Jonathan Subject Criminal Decision Content COURT OF APPEAL FOR ONTARIO CITATION: R. v. I.M.B., 2025 ONCA 678[1] DATE: 20251001 DOCKET: COA-23-CR-1024 Hourigan, Monahan and Dawe JJ.A. BETWEEN His Majesty the King Respondent and I.M.B. Appellant Mark C. Halfyard, for the appellant Hannah Freeman, for the respondent Heard: September 24, 2025 On appeal from the findings of guilt entered by Justice G. Paul Renwick of the Ontario Court of Justice on June 30, 2023. REASONS FOR DECISION A. Introduction [1] The appellant, a Young Person, was found guilty of sexual assault, sexual touching, and invitation to sexual touching of his stepsister O.C. He was sentenced to eight months' incarceration followed by probation.

[2] The appellant raises multiple grounds of appeal. However, it is only necessary to consider two of his submissions. The first submission is that the trial judge erred in granting the Crown's application to discontinue the cross-examination of a witness, R.C., and later relying on R.C.'s evidence, which rendered his trial unfair. The second submission is that the trial judge erred in rejecting the appellant's evidence because of his demeanour. At the conclusion of oral arguments, we allowed the appeal with reasons to follow. These are our reasons. B. FACTS [3] The appellant was charged with seven counts involving his three stepsisters, O.C., R.C., and I.C. He eventually pled guilty to the sexual assault of I.C., and the charges involving R.C. were later withdrawn. Only counts 4, 5, and 6 concerning O.C. remained to be decided at the end of the trial. Those charges arose from allegations that when O.C. was in grades one through three, the appellant would put his penis in her anus and engage in other sexual touching after they would wrestle in the evenings.

[4] The trial began in January 2023. R.C. was the second complainant to testify. She completed testifying in chief and had completed one hour of cross-examination when court ended for the day. The next day, she told the Crown and the officer in charge that she had contemplated suicide the previous evening and that she had been physically ill and was concerned for the health of her unborn child. The officer in charge swore an affidavit on January 13, 2023, detailing these discussions. In the interim, the trial continued with the testimony of the third complainant.

- [5] On March 9, 2023, the Crown brought an application to discontinue the cross-examination of R.C. The appellant opposed the application on the basis that there was an insufficient evidentiary basis to make the order and that he would be deprived of the opportunity to cross-examine R.C. about collusion among the complainants. The trial judge granted the Crown's application. He found that R.C.'s claims (inability to keep food down, sleeplessness, concern for her pregnancy and mental wellbeing) were serious. He also accepted that she was pregnant and found there was a risk to her pregnancy if she continued to testify.
- [6] On appeal, the appellant argues the trial judge erred in discontinuing this cross-examination. The appellant submits that the basis on which the trial judge found R.C. was unable to continue testifying was unsupported by any contemporaneous or medical evidence, and that the termination inhibited him from cross-examining R.C. about the inadvertent tainting of O.C.'s memories.
- [7] Regarding the demeanour ground of appeal, the appellant submits that the trial judge found that he was generally credible but then overemphasized his demeanour as a basis to reject his evidence given at trial as untruthful. C. Analysis i. Cross-examination
- [8] The right of an accused to cross-examine prosecution witnesses without significant and unwarranted constraint is an essential component of the constitutional right to make full answer and defence. It is fundamental to providing a fair trial to the accused: *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at paras. 41-44; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 608; *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 663.
- [9] Notwithstanding the importance of this right, it is not limitless. Trial judges have discretion to decide whether the case against an accused may proceed following an incomplete cross-examination: *R. v. Cameron* (2006), 208 C.C.C. (3d) 481 (Ont. C.A.), at para. 22. The discretion should be exercised with a view to ensuring fairness to the accused, the Crown, and the pursuit of truth: *Cameron*, at para. 22, citing *R. v. Hart*, 1999 NSCA 45, 174 N.S.R. (2d) 165, leave to appeal refused, [2000] S.C.C.A. No. 109. These determinations will require courts to consider many elements, but the three broad factors that guide courts are: (1) the reasons for the witness's unresponsiveness, (2) the impact of the witness's unresponsiveness, and (3) possible ameliorative action: *Hart*, at paras. 95-112.
- [10] In the circumstances of this case, the trial judge made two errors related to the truncated cross-examination that resulted in the appellant not receiving a fair trial.
- [11] First, the trial judge erred in finding that R.C. was unable to continue testifying. His finding rested on a medical judgment he made without a sufficient evidentiary basis. Despite acknowledging that there was no medical evidence supporting R.C.'s claims, the trial judge found that there was a risk to her pregnancy. The evidence of these concerns came from dated hearsay, as it was only tendered through the affidavit of the officer in charge. The trial judge assumed the concerns continued from January 2023 into March 2023, when the application was decided, and merely directed the Crown to confirm that this was correct after he had made his ruling. This was not a sufficient evidentiary basis on which to make a

finding that a complainant was medically unable to continue being cross-examined.

- [12] Second, and more importantly, the trial judge relied on R.C.'s testimony to bolster the Crown's case in his analysis, despite the discontinued cross-examination. Specifically, he cited R.C.'s evidence respecting her instruction to O.C. not to tell a social worker about sexual abuse she had suffered. He found this corroborated O.C.'s testimony that this instruction from R.C. motivated her to be untruthful to the social worker.
- [13] In all the circumstances, we find the appellant was deprived of his right to a fair trial because the trial judge relied on the evidence of a witness whose cross-examination was improperly terminated. ii. Demeanour
- [14] The trial judge found that the appellant was a "credible witness for most of his testimony. He is instantly likeable, apparently candid, and at times he appeared willing to admit things that did not paint him in a positive light." Despite these findings, the trial judge found that there were two areas that undermined the appellant's credibility as a witness.
- [15] The trial judge's first concern was that the appellant had previously admitted to a social worker that he had touched I.C.'s thigh but did not mention that he pulled her hand toward his groin. However, at trial, the appellant admitted pulling I.C.'s hand toward his groin. In other words, the trial judge was concerned that the appellant was more candid at trial than he had been during an investigation of the incident by a social worker. It is doubtful that an accused should be found to be less credible based on his increased candour at trial. Regardless, the trial judge did not place much emphasis on this evidence.
- [16] The trial judge's other concern with the appellant's testimony, which he described as "[t]he more significant area" of concern, arose during the appellant's cross-examination regarding whether he told his parents in 2020 that he would wrestle naked with O.C.: Q: And at this point, you're searching for something that could be mistaken for what is being alleged, right? A: Off the top of my head, yes. Q: And that's where you, you know, suggest to your parents that, well, we have — we would wrestle often? A: A lot. Q: A lot? A: Yeah. Q: And searching for things that might confuse — isn't it true that you also went further and acknowledged that you and [O.C.] would wrestle naked sometimes? A: Not naked. Q: So just to be clear, you deny saying in that phone call that you would wrestle naked with [O.C.]? A: Yes. Q: And just to get — so I get it on point here, saying that what [the appellant's mother M.S.] said yesterday was wrong, that she overheard you say that you would sometimes wrestle naked with [O.C.]? A: I believe that's true. Q: You believe that's wrong? A: Sorry? Q: Sorry, you believe that [M.S.] was wrong when she says... A: Sorry, yes, I believe... Q: Okay. A: ...she's wrong.
- [17] The trial judge quoted this passage and then stated: What the transcript does not capture is the Young Person's physical presentation during this part of his evidence. He was clearly agitated, his posture became rigid and he suddenly became sweaty. I have contrasted this demeanor evidence with his demeanor generally while testifying. I had not seen the Young Person agitated at any other part of the trial. Even when admitting things that were harmful

to his character (for instance, testifying that he had withheld telling the social worker about trying to pull I.C.'s hand toward his penis to avoid more trouble), the Young Person maintained a calm, relaxed appearance that was consonant with his evidence.

- [18] The trial judge cautioned himself about the dangers of relying too heavily on demeanour evidence. He then made the following findings: When I consider the Young Person's demeanor at this part along with his unusual phraseology ("Not naked." and "I believe that's true" — referring to his belief that M.S.' evidence is wrong), and the need to have the question repeated for no apparent reason ("Sorry?"), I am convinced that the Young Person was completely untruthful during this testimony. This is not insignificant in terms of assessing the reliability of the Young Person's evidence. It completely undermines the veracity of the Young Person's denials of wrong-doing in respect of O.C. [*Italics in original; underlining added.*] As a result, as it concerns the material aspects of the allegations made by O.C., I completely reject the Young Person's testimony as untruthful. I find that the Young Person attempted to mislead the court by his untruthful testimony in order to avoid liability for the alleged offences.
- [19] Consideration of a witness's demeanour by a trial judge is permissible but will become problematic when it is overemphasized or if undue weight is placed on it: *R. v. J.M.*, 2023 ONCA 472, at para. 3. As the trial judge recognized, reliance on demeanour is an area fraught with problems because demeanour can be affected by many factors unrelated to the honesty of the witness: *R. v. Rhayel*, 2015 ONCA 377, 324 C.C.C. (3d) 362, at para. 85. Crown counsel at trial candidly acknowledged in his closing submissions that the appellant "did testify well", and did not suggest that there had been anything about his demeanour that would justify rejecting his evidence.
- [20] The trial judge attempted to bolster his observations of demeanour with reference to "unusual phraseology" and the fact that the appellant asked for a question to be repeated. But there was nothing unusual in the phrases "[n]ot naked" and "I believe that's true." The trial judge's reliance on the appellant's request to have a question repeated was similarly unwarranted. On any objective review of the relevant exchange, the Crown's question was confusing. Indeed, the Crown implicitly acknowledged this by apologizing on the record about the question. The appellant did what witnesses are supposed to do when asked an unclear question: he sought clarification. We note as well that there was no attempt by the trial judge to link the request to have the question repeated to any change in the witness's demeanour. For example, there was no finding that the request for the question to be repeated was coupled with demeanour evidence that suggested the appellant was avoiding answering the question.
- [21] The trial judge made clear in his reasons that his observations of demeanour were the most significant basis for finding the appellant's evidence was not true and that the appellant attempted to mislead the court. In our view, the trial judge erred in placing undue weight on the appellant's demeanour to reject his evidence as untruthful. D. Disposition [22] For these reasons, we allow the appeal, quash the convictions on counts 5 and 6, lift the conditional

stay of proceedings entered on count 4, and order a new trial on those counts. “C.W. Hourigan J.A.” “P.J. Monahan J.A.” “J. Dawe 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. This appeal is also subject to a publication ban pursuant to ss. 110-111 of the Youth Criminal Justice Act, S.C. 2002, c. 1.

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