

CANADA / JUDGMENT

R. v. Kennedy

2026 ONCA 295

COURT

Court of Appeal for Ontario

DECIDED

27 April 2026

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R. v. Kennedy Collection Decisions of the Court of Appeal Date 2026-04-27 Neutral citation 2026 ONCA 295 Docket numbers COA-22-CR-0466 Judges Roberts, Lois B.; Miller, Bradley; Rahman, Moiz Subject Criminal Decision Content COURT OF APPEAL FOR ONTARIO CITATION: R. v. Kennedy, 2026 ONCA 295[1] DATE: 20260427 DOCKET: COA-22-CR-0466 Roberts, Miller and Rahman JJ.A. BETWEEN His Majesty the King Respondent and Charles Kennedy Appellant Charles Kennedy, acting in person Naomi Lutes, appearing as duty counsel Étienne Lacombe, for the respondent Heard: April 13, 2026 On appeal from the convictions entered by Justice Gary W. Tranmer of the Superior Court of Justice, on December 7, 2022. REASONS FOR DECISION

- [1] The complainant and the appellant saw each other occasionally and when they did, they occasionally had sex. Both had serious problems with substance abuse.
- [2] They met up at the appellant's house on September 28, 2015, after not having seen each other for a month. The complainant's evidence, which was accepted by the trial judge, was that the next day the appellant received a text or phone call informing him that his brother-in-law had been murdered. This put the appellant into a state of panic, as he was concerned that he would be a suspect. The complainant testified that the appellant "freaked out", grabbed her by the hair, threw her across the kitchen, and began a lengthy, violent assault, kicking her in the stomach and ribs and punching her in the face. He tied her hands behind her back, placed her in a chair, duct-taped her mouth and told her he was going to kill her.
- [3] At that point, a co-worker of the appellant unexpectedly drove up the driveway. The appellant quickly removed the rope and duct tape. His co-worker came into the house and the appellant and complainant both acted as though nothing had happened.
- [4] The next morning, the police arrived to talk to the appellant about his brother-in-law's murder. At some point, the complainant also talked to the police. She did not tell them about the assault. They did not observe any injuries. She stated at trial that she did not know why she didn't say anything to the police, but noted that she was in shock and the appellant was there and she was afraid of him.

- [5] Later that day the two drove into Kingston to get the complainant's methadone. They stopped at the house of some friends of the appellant's. The appellant went out for a few hours and left the complainant alone with his friends. She did not tell them about the assault. The appellant later returned with two other friends – a man and a woman – and they followed the appellant and complainant back to the appellant's house. The complainant later told the woman about the assault from the night before and asked her not to leave the complainant alone with the appellant. The complainant said that she and the other woman developed a plan to escape.
- [6] Late the next morning, October 1, after the appellant's friends went outside, the appellant told the complainant he wanted intercourse. She said she did not want to. He told her to "suck it up". She testified that she was afraid he would become angry if she did not comply. She removed her pants and they had penetrative intercourse for about five minutes. She complained that it was painful, and he became angry and pushed her away.
- [7] The complainant dressed, left the house, and never saw the appellant again. She walked to the road. A motorist stopped and offered her a ride to Kingston. Once in Kingston she went to the ReStart Employment Services office, where she told her Ontario Works case worker about the assault. The caseworker testified that the complainant was "beside herself", scared, hyper. The complainant did not appear to her to be under the influence of drugs. She testified that the complainant's neck was red, like a rug burn, and she had scrapes on her forearms.
- [8] The complainant did not go to the police until many months later, after she was encouraged to do so by a volunteer who used to drive her to the methadone clinic.
- [9] In his reasons for judgment, the trial judge noted inconsistencies in the complainant's evidence, but found these were with respect to peripheral matters, were understandable given the nature of events, and did not detract from her credibility as to the core allegation that she had been assaulted by the appellant. This included the apparent mismatch between the severity of the assault described, and the minor injuries observed by the caseworker, and the non-observation of injury by the police. The trial judge accepted the complainant's evidence that her only visible injury was a bloody nose and some swelling at the bridge of her nose, and he would not speculate that greater injury should have been visible. The trial judge found the appellant guilty of assault and of unlawful confinement.
- [10] With respect to the sexual assault allegation, the trial judge found that the complainant did not consent, and even if she had consented, that consent was vitiated by her fear of further assault by the appellant. The trial judge rejected the defence argument that the Crown had not proven beyond a reasonable doubt that the defence of honest but mistaken belief in communicated consent did not apply. The trial judge found that in light of the complainant's refusal, the appellant had to take reasonable steps to ascertain whether the complainant was now consenting. The complainant's conduct in removing her pants and sitting on the appellant's lap after being told to "suck it up" did not satisfy this requirement. The issues on

appeal

[11] Ms. Lutes, as duty counsel, raised the following issues on appeal on behalf of the appellant:

1. The trial judge erred in his analysis of the defence of honest but mistaken belief in consent to sexual intercourse;
2. The trial judge erred in applying case law specific to the delayed reporting of sexual assault to the delayed reporting of physical assault.

Analysis

[12] Ms. Lutes argued that the trial judge confused vitiation of consent with the analysis of mens rea for the offence of sexual assault. As a result, he failed to properly assess the defence of honest but mistaken belief in consent.

[13] We do not agree that the trial judge made this error. The trial judge stated two conclusions in the alternative: (1) that no consent was given; and (2) if consent was given, it was vitiated by fear. Honest but mistaken belief in consent is relevant to the first conclusion. The trial judge found that in light of the complainant's express refusal to engage in intercourse, the appellant was required to take reasonable steps to determine that the complainant had changed her mind and was now consenting. On the evidence the trial judge accepted, the appellant did not do so. The appellant simply gave an imperative and she complied. Particularly in the context of the appellant having recently assaulted the complainant and exercised control over her, the trial judge found that the complainant's response to the appellant was equivocal at best and not sufficient to support a finding of honest but mistaken belief in consent. The trial judge made no error.

[14] With respect to delayed reporting of the assault, the appellant argues that the trial judge erred in applying case law specific to the delayed reporting of sexual assault. This line of case law is concerned with avoiding fallacious stereotypical reasoning about how victims of sexual assault ought to respond and has no application to credibility assessment in the case of common assault.

[15] We do not agree that the trial judge erred. The trial judge found that the complainant disclosed both the assault and the sexual assault to the caseworker. This was the first time she perceived herself to be outside of the appellant's control. Although she could have told the police a day earlier when they attended at the house as part of the murder investigation, and in her testimony she expressed regret that she had not done so, the trial judge did not find that this lessened her credibility. The trial judge accepted that she was still subject to the control of the appellant at that time and had been subjected to a traumatic experience. The trial judge made no error in his approach to assessing the complainant's credibility, and his assessment is entitled to deference.

- [16] The appellant also raised, for the first time on appeal, arguments based on s. 11 of the Charter. As these constitutional issues were not raised at trial, and there is no adjudication of them, it is not appropriate to consider them on appeal.

DISPOSITION

- [17] The appeal is dismissed. “L.B. Roberts J.A.” “B.W. Miller J.A.” “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.

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