

CANADA / JUDGMENT

R. v. M.H.

2026 ONCA 196

COURT

Court of Appeal for Ontario

DECIDED

17 March 2026

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R. v. M.H. Collection Decisions of the Court of Appeal Date 2026-03-17 Neutral citation 2026 ONCA 196 Docket numbers COA-24-CR-1289, M56703 Judges Roberts, Lois B.; Thorburn, Julie; Favreau, Lise G. Subject Criminal Decision Content COURT OF APPEAL FOR ONTARIO CITATION: R. v. M.H., 2026 ONCA 196[1] DATE: 20260317 DOCKET: M56703 (COA-24-CR-1289) Roberts, Thorburn and Favreau JJ.A. BETWEEN His Majesty the King Respondent/Responding Party and M.H. Appellant/Moving Party Brandon Chung, for the appellant/moving party Jacob Millns, for the respondent/responding party Heard: March 9, 2026 REASONS FOR DECISION

- [1] The appellant appeals his convictions of two counts of assault and one count of sexual assault against the complainant, B.F. He intends to bring a motion before the appeal panel to admit fresh evidence of his mother's affidavit attaching transcripts and recordings of phone calls that took place post-conviction between B.F., the appellant and his mother, in which he says B.F. recanted the allegations forming the basis of the appellant's convictions. On the motion for fresh evidence, the Crown will seek to file B.F.'s subsequent police statement in which she resiles from the recantation in the recordings.
- [2] The appellant moves under s. 683 of the Criminal Code, R.S.C. 1985,
- c. C-46, to cross-examine B.F. on the fresh evidence of the transcripts and her police statement, as well as on any inconsistencies between them and her trial evidence. He argues that the cross-examination is necessary to ensure the appeal panel has the complete context of B.F.'s recantation and subsequent change of position.
- [3] The Crown opposes the motion, arguing that it is an abuse of process because the appellant and his mother obtained the recordings in breach of the order that there be no communication with B.F., which was imposed following his conviction and sentence. Further, the Crown says that the cross-examination is unnecessary because the record is sufficient to permit the appellant to advance his arguments on the motion for fresh evidence and, if the evidence is admitted, on appeal. In the alternative, if cross-examination is permitted, its scope should be limited to the post-trial events, and it should be conducted by the Crown.

- [4] At the conclusion of the submissions, we granted the motion with reasons to follow, including concerning the scope of the cross-examination and other directions. These are those reasons.
- [5] We recognize this court's caution in *R. v. Sihota*, 2009 ONCA 770, 249 C.C.C. (3d) 22, at para. 14, that: "It will only be in exceptional cases that an appellant who has been convicted of sexual assault should be afforded the opportunity to cross-examine the complainant in aid of a fresh evidence application on appeal" because a complainant "should not be forced to repeat the stress and trauma of the legal process unless clearly required by the interests of justice."
- [6] The overarching consideration on this motion under s. 683 is whether it would be in the interests of justice to order the requested cross-examination of B.F. Informing this court's discretion is the two-part test set out in *R. v. Trotta* (2004), 23 C.R. (6th) 261 (Ont. C.A.), at para. 25, which was adopted by this court in *Sihota*, at paras. 13-14, as part of the test for cross-examination in aid of a motion for fresh evidence:
1. There is a reasonable possibility that the order for cross-examination could assist on the motion to produce fresh evidence; and
 2. There is a reasonable possibility that the testimony from the cross-examination may be received as fresh evidence on appeal. See also: *R. v. Swaine*, 2025 ONCA 614, at para. 18.
- [7] This is a very unusual and exceptional situation. The appellant's convictions depended on B.F.'s evidence. Her recantation in the calls with the appellant and his mother appears to be important fresh evidence that was not available at trial. In the transcript of the calls, B.F. provided concrete reasons why she gave what she described as false evidence against the appellant at trial. However, in the August 6, 2025 police statement in which she resiled from her recantation, she offered equally concrete reasons for saying that her trial testimony was false when she was speaking to the appellant and his mother. As the case management judge, George J.A. remarked at para. 10 of his reasons, reported at 2026 ONCA 19, in which he dismissed the Crown's motion for directions to preclude B.F.'s cross-examination[2]: While cross-examination of the complainant on the proposed fresh evidence may appear to create a fairness issue given the circumstances in which the evidence was collected, the fact remains that the panel hearing the fresh evidence motion may struggle to properly assess that evidence without the benefit of cross-examination. That is because, even if the appellant is only seeking to admit the fresh evidence for its impeachment value, and not for the truth of its contents, the credibility of the recantation may still be relevant. As this court held in *R. v. Snyder*, 2011 ONCA 445, 273 C.C.C. (3d) 211, at paras. 54-56, "[i]n determining whether [a] recantation has sufficient impeachment potential to merit its admission on appeal, the appeal court must determine what a trier of fact could reasonably make of the recantation in its assessment of the credibility of that witness's trial testimony. The credibility of the recantation is relevant to that assessment."

- [8] We agree with George J.'s assessment. Cross-examination could assist the panel in clarifying the record in this regard. Moreover, given the importance of B.F.'s recantation and subsequent change of position, subject to what we note below about the breach of the non-communication order, there is a reasonable possibility that the parties' proposed fresh evidence, as well as the cross-examination, may be received as fresh evidence by the appeal panel.
- [9] The appellant and his mother have been charged with breaching the non-communication order by speaking with B.F. While the record before us did not indicate that they have been convicted of this breach, there is no dispute that the order was in place when the mother facilitated the communications between the appellant and the complainant. Such a breach would generally mitigate against allowing the cross-examination, especially of a complainant in a sexual assault proceeding. On the other hand, the evidence from the recordings and the subsequent police statement go to the heart of the convictions and raise a genuine issue that the complainant lied under oath at trial, similar to the case in *Sihota*.
- [10] It may very well be that the appeal panel will decline to accept the fresh evidence because it was obtained in a manner that breached a court order and therefore may be construed as an abuse of process. That is not a decision, however, that we are prepared to make on this motion. Rather, given the potential importance of the evidence, it is the appeal panel that should determine this issue based on a complete record, including B.F.'s cross-examination. The appeal panel will be in the best position to determine whether it is in the interests of justice to admit the fresh evidence, including B.F.'s cross-examination, weighing, among other factors, the apparent breach.
- [11] However, we are of the view that B.F.'s cross-examination should be subject to certain limits to ensure that her rights and interests are respected and that the cross-examination does not exceed the bounds of the appellant's fresh evidence application: *Sihota*, at para. 16.
- [12] As noted above, the Crown argues that it should conduct the cross-examination, while the appellant should be limited to re-examination. The appellant does not object to the Crown cross-examining the complainant but submits that he ought to be able to cross-examine the complainant who is adverse in interest. In the unique circumstances of this case, where both sides seek to refer to evidence of the complainant's post-trial statements, we conclude that it is fair that both parties are permitted to cross-examine the complainant.

Disposition

- [13] Accordingly, B.F.'s cross-examination shall be ordered subject to the following terms:
1. B.F.'s cross-examination shall be carried out remotely by Zoom video.
 2. The appellant shall not attend the cross-examination.
 3. The appellant's counsel and Crown counsel may cross-examine B.F.

4. The scope of B.F.'s cross-examination shall be limited to the post-conviction recordings and transcripts obtained in May 2024 and her subsequent police statement given on August 6, 2025.
 5. B.F.'s cross-examination shall take place before George J.A., who shall have the discretion to expand the scope of cross-examination, as he sees fit. The appellant's counsel argues that there may be legitimate questions arising out of the cross-examination that require reference to B.F.'s earlier statements and trial testimony. It shall be up to George J.A. to determine if those questions are permitted.
 6. The parties shall obtain all other directions from George J.A. as to the date and length of the cross-examination, as well as the issue of counsel for B.F. "L.B. Roberts J.A." "Thorburn J.A." "L. Favreau 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] George J.A. directed the scheduling of this motion before a panel because, as a single judge, he did not have the authority to decide the issue of cross-examination.

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