

CANADA / JUDGMENT

R. v. M.H.

2026 ONCA 19

COURT

Court of Appeal for Ontario

DECIDED

14 January 2026

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R. v. M.H. Collection Decisions of the Court of Appeal Date 2026-01-14 Neutral citation 2026 ONCA 19 Docket numbers COA-24-CR-1289 Judges George, Jonathon C. Subject Criminal Decision Content COURT OF APPEAL FOR ONTARIO CITATION: R. v. M.H., 2026 ONCA 19 [1] DATE: 20260114 DOCKET: COA-24-CR-1289 George J.A. (Case Management Judge) BETWEEN His Majesty the King Respondent/Moving Party and M.H. Appellant/Responding Party Brandon Chung, for the appellant/responding party Jacob Millns, for His Majesty the King Heard: in writing REASONS FOR DECISION

- [1] This is a Crown motion for directions.
- [2] By way of brief background, on February 22, 2021, the appellant was convicted of sexual assault, assault, and breaching a court order. The sexual assault and assaults were committed against the appellant's former domestic partner, who is cognitively impaired and who was described by the trial judge as being "particularly vulnerable".
- [3] On June 3, 2024, the day the appellant's inmate appeal against conviction was scheduled to be argued, he advised for the first time that he would be seeking to admit fresh evidence. An adjournment was granted to allow the appellant to bring that motion. A solicitor's notice of appeal was filed on December 19, 2024. A supplementary notice of appeal and a notice of motion to admit fresh evidence were filed on May 5, 2025.
- [4] The proposed fresh evidence is an affidavit from the appellant's mother. The affidavit was sworn on May 2, 2025, and attaches transcripts and recordings of conversations she facilitated and recorded between the appellant and complainant after the trial and before the appellant's scheduled inmate appeal. The appellant was in custody and prohibited from communicating with the complainant during this time. The recordings capture the complainant recanting her allegations against the appellant.
- [5] The police interviewed the complainant after learning of these conversations. The complainant admitted it was her speaking to the appellant in the recordings, but said she felt pressured by the appellant to recant. While speaking with police, she reaffirmed her allegations and said she regretted talking to the appellant. The police charged both the appellant and his mother with failing to comply with court orders.

- [6] As mentioned, the appellant seeks to have the complainant's out of court recantation admitted as fresh evidence through the appellant's mother, a third party[2]. The Crown initially sought to cross-examine the complainant. The appellant took the position that this was neither practical nor necessary. The Crown then advised the appellant that it would seek to have the complainant's police statement admitted through a third party, the police officer who interviewed her. The appellant then asked that the complainant be made available for cross-examination on her police statement. The Crown declined, maintaining that it should be the Crown who conducted any cross-examination of the complainant. Alternatively, the Crown proposed that the parties put both the police statement and recordings containing the recantation before the court in an agreed statement of fact, or through third party affidavits, which the Crown says is what the appellant initially intended. The appellant, who wanted to preserve his ability to cross-examine the complainant, did not agree.
- [7] The Crown brought this motion for directions on December 29, 2025. Each party has filed written submissions setting out their respective positions.
- [8] The Crown asks that "the proposed fresh evidence be provided to the court without further examination of the very vulnerable complainant". It relies on r. 27(8) of the Criminal Appeal Rules, which allows an appeal management judge to make directions concerning the dates, manner and order of cross-examinations to ensure that the fresh evidence record is completed expeditiously. The Crown offers several good reasons why the appellant should not be allowed to cross-examine the complainant to advance his fresh evidence application, including that the proposed fresh evidence was apparently obtained in violation of a court order prohibiting communication with the complainant. Further, the Crown relies on this court's prior direction that "[i]t 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": *R. v. Sihota*, 2009 ONCA 770, 249 C.C.C. (3d) 22, at para. 14. The Crown submits that this direction is particularly important when, as here, the complainant is vulnerable.
- [9] The appellant's primary position is that the Crown should be directed to file an affidavit from the complainant pursuant to r. 27(8)(b) of the Criminal Appeal Rules which permits an appeal management judge to give directions on the "contents of the record on [a] motion". This order would in effect require the complainant to be made available for cross-examination. In the alternative, the appellant says he is prepared to bring an application under s. 683 of the Criminal Code, R.S.C., 1985, c. C-46, for an order that the complainant attend for cross-examination. Section 683(1) of the Criminal Code provides that: For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice, ...
- (b) order any witness who would have been a compellable witness at trial, whether or not he was called at the trial,

- (i) to attend and be examined before the court of appeal, or (ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose
- [10] 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, “in 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.”
- [11] While there are legitimate arguments for and against permitting the complainant’s cross-examination, as I will explain, it would not only be premature for me to decide this issue now but likely beyond my authority as a single judge.
- [12] Granting the Crown motion and directing that the complainant not be cross-examined would effectively short circuit the normal s. 683(1)(b) process which involves bringing a motion for cross-examination for consideration by a panel comprised of at least three judges of this court. In other words, granting the Crown’s motion at this stage would bar the appellant from bringing a motion that he is otherwise entitled to advance, and which only a panel of this court has the authority to decide. The court must hear submissions and consider whether “there is some reasonable possibility that the cross-examination could assist on the motion to adduce fresh evidence by yielding material that will be admissible as fresh evidence”: *R. v. Sihota*, at para. 14. This includes material having to do with credibility and what use can be made of the complainant’s recantation.
- [13] Further, the Criminal Appeal Rules stem from s. 482.1(1) of the Criminal Code which allows a court of appeal to make rules for case management so long as they are not inconsistent with the Criminal Code and other federal statutes. As this court held in *R. v. J.M.*, 2021 ONCA 735, 158 O.R. (3d) 81, at paras. 27-28, while procedural rules may be made under s. 482(3)(d) to carry out the Criminal Code’s provisions relating to appeals, they cannot expand the court’s jurisdiction. In *R. v. J.M.*, this court held that the Criminal Appeal Rules cannot ground a right of appeal which the Criminal Code does not provide. In this case, the rules cannot neutralize the appellant’s existing statutory right under s. 683.

- [14] Although an appeal management judge has broad authority under r. 27(8) of the Criminal Appeal Rules, the Criminal Code empowers a panel to make an order for examination of a witness. Accordingly, it would not be appropriate for me, as a single judge, to make an order which effectively directs that a particular witness cannot be examined. Nor am I inclined to make an order, as the appellant urges, that directs the Crown to file an affidavit from the complainant pursuant to r. 27(8)(b) of the Criminal Appeal Rules.
- [15] The best course is to dismiss the Crown's motion and instead set a timetable for the appellant's s. 683(1)(b) motion for an order compelling the complainant to be examined, if he still wishes to proceed in that way. I will discuss this with counsel at our next appeal management meeting, which they are to schedule with court staff once the appellant confirms that he is indeed bringing such a motion.
- [16] For these reasons the Crown's motion for directions is dismissed. "J. George 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 appellant's mother is scheduled to be cross-examined on her affidavit on January 16, 2026.

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Prepared on 26 October 2026 · Esheria