

CANADA / JUDGMENT

R. v. Morris

2026 ONCA 140

COURT

Court of Appeal for Ontario

DECIDED

26 February 2026

Source: norma.lexum.com · Research copy typeset by Esheria. Not court-issued or certified.

R. v. Morris

Collection

Decisions of the Court of Appeal

Date

2026-02-26

Neutral citation

2026 ONCA 140

Docket numbers

COA-23-CR-1308

Judges

Zarnett, Benjamin; George, Jonathon C.; Gomery, Sally A.

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Morris, 2026 ONCA 140[1]

DATE: 20260226

DOCKET: COA-23-CR-1308

Zarnett, George and Gomery JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Michael Morris

Appellant

Michael Lacy and Marcela Ahumada, for the appellant

Deborah Krick and Adrianna Mills, for the respondent

Heard: August 22, 2025

On appeal from the conviction entered by Justice Edward E. Gareau of the Superior Court of Justice, sitting with a jury, on April 25, 2023, and from the sentence imposed on September 27, 2023, with reasons reported at 2023 ONSC 5161.

Zarnett J.A.:

- [1] The appellant was charged with sexual assault, sexual interference, and invitation to sexual touching. The complainant, N.B., was between 12 and 13 years old when the offences were alleged to have occurred. The appellant was a friend of N.B.'s stepfather; he visited N.B.'s home frequently and was often left alone with him.
- [2] The principal issue at trial was the credibility and reliability of N.B.'s evidence. The appellant did not testify.
- [3] The jury returned verdicts of guilty on all charges. The appellant was sentenced to five years' incarceration on the sexual assault conviction, less nine days' credit for pre-trial custody. Certain ancillary orders were also made.[2] The other two convictions were conditionally stayed according to the principle in *R. v. Kienapple*, [1975] 1 S.C.R. 729.
- [4] The appellant appeals his conviction and sentence.
- [5] The conviction appeal focuses on a portion of the instructions the trial judge gave the jury. Under the heading "Motive", the trial judge addressed two topics – motive to commit the offences and motive to fabricate evidence. The appellant argues that both aspects were flawed. He submits that the jury was improperly instructed that they could not consider if N.B. had a motive to fabricate his evidence and they were not told that the absence of a motive to fabricate did not mean N.B. was telling the truth. At the same time, the jury was invited to consider, as a factor in whether the appellant was guilty, whether he had a motive to commit the offences when, according to the appellant, there was no evidence of a motive, only an improper suggestion Crown counsel had made in his closing address which went uncorrected by the trial judge. The appellant contends that the result was a legally erroneous, unbalanced, charge.

- [6] I would dismiss the conviction appeal. Reading the jury instructions as a whole, in the context of the entire trial, I conclude that the jury was adequately and sufficiently instructed to decide the case according to the law and the evidence. There was no basis in the evidence for the jury to consider whether N.B. had a motive to fabricate, nor was it the defence's position at trial that there was one, nor were any arguments made to the jury that would have led them to improperly consider the significance of an absence of a motive to fabricate. The motive to fabricate aspect of the impugned instruction largely mirrored the specific request made by experienced defence counsel. The concerns raised on appeal about the motive to commit the offences aspect of the impugned instruction are answered by other parts of the jury charge. Reinforcing these conclusions is the fact that there was no objection at trial to the "Motive" section of the jury charge.
- [7] The appellant's sentence appeal is premised on a contention that the trial judge considered, as an aggravating factor, a comment in the pre-sentence report about the appellant's lack of insight as to the incidents which brought him before the court. Reading the reasons for sentence as a whole, I conclude that the trial judge did not make that error. Accordingly, although I would grant leave to appeal sentence, I would dismiss the sentence appeal.

I. The Conviction Appeal 1. The Trial Evidence [8] N.B. was 16 when he testified at trial. In addition to his trial testimony, his video-taped police interview, recorded on July 8, 2020, was adduced on consent pursuant to s. 715.1 of the Code, and he adopted it as part of his evidence when he testified. He described five incidents:

- (a) The first took place in the spring or summer of 2019, in his stepfather's trailer. The appellant touched N.B.'s penis and performed oral sex, stopping when the appellant heard N.B.'s stepfather approaching the trailer on his ATV.
- (b) A second incident took place about two weeks after the first, in the garage of the appellant's home. The appellant rubbed his penis against N.B.'s. While N.B.'s pants were down, the appellant performed oral sex on him and also attempted anal penetration.
- (c) The third incident occurred in the winter of 2019, when the appellant had taken N.B. snowmobiling. After they got off the snowmobiles, the appellant pulled N.B.'s penis out, touched it, and performed oral sex on him.
- (d) A fourth incident occurred later in the winter when, during another snowmobile ride, the appellant and N.B. stopped for a snowball fight. The appellant said, "you really want it" and attempted to touch N.B. sexually, but N.B. said no.
- (e) A fifth incident occurred in June 2020. The appellant was walking the bush line with N.B. and his younger stepsister. They entered the bush and got lost, at which point the appellant sent N.B.'s stepsister to walk ahead. The appellant then pulled N.B.'s pants down below his waist and said, "I want to make you feel good", but on this occasion N.B. did not let anything further occur.

- [9] N.B. disclosed the abuse to his great-aunt in early July 2020. A report to the police was made shortly afterwards.
- [10] The Crown also called, as witnesses: (i) the officer in charge of the investigation who also conducted N.B.'s police interview; (ii) N.B.'s stepsister, who confirmed that the appellant and N.B. were alone for a period of time when they were lost in the bush; (iii) N.B.'s stepfather, who testified about his relationship with the appellant, certain occasions when the appellant was alone with N.B., and about finding N.B. and his stepsister in the bush after they went for a walk with the appellant and got lost; and (iv) N.B.'s great-aunt who described him disclosing the incidents to her.
- [11] The defence called no evidence. Defence counsel challenged, through cross-examination, the credibility and reliability of N.B.'s account of the incidents. He attempted to highlight alleged gaps and inconsistencies in N.B.'s recollection, as well as inconsistencies between his recollection and those of other witnesses.
- [12] Two areas of the cross-examination bear on the issue raised on appeal concerning the motive to fabricate aspect of the jury charge.
- [13] The first was a rhetorical question posed by N.B. At one point during a challenge to his recollection in cross-examination, N.B. retorted "[y]ou think I'm just going to make this shit up?" and then, "[b]ut why would I make this up?"
- [14] The second was a line of questioning by defence counsel. Defence counsel asked N.B. about whether his stepfather was angry that the appellant was taking over his role, and whether they had ever discussed a way of getting the appellant "out of the picture". N.B. denied any such discussions. Although the stepfather testified that he was upset that the appellant was spending time with N.B. and his stepsister when the stepfather was at work, and about the occasion when they got lost in the bush, he did not give any evidence that he shared with N.B. any concern that the appellant was taking over his "role" or should be "out of the picture".
2. The Closing Arguments a. Crown Counsel
- [15] Crown counsel, who addressed the jury first, outlined what he expected defence counsel would tell the jury. He said that one of the arguments he expected defence counsel to make was that N.B., "in some sort of effort to get the [appellant] out of the lives of [his] family to make his stepdad happy or for some other reason, thought up a lie ... to make sure [the appellant] was out [of] their lives." Crown counsel went on to anticipate that defence counsel would point out that portions of N.B.'s evidence were implausible, rely on various inconsistencies in his evidence and with the evidence of other witnesses, and N.B.'s demeanour while testifying, to suggest that N.B.'s account of the incidents was "unreliable and incredible." Crown counsel then outlined for the jury why N.B.'s evidence should be accepted.

[16] The Crown's closing address included statements about the number of incidents; a suggestion that the issue was whether the appellant was attracted to prepubescent boys, in particular N.B.; and an "explanation" of N.B.'s demeanour:

With the number of incidents that you guys are looking at, and, and I've got to be careful because, you know, you – a person could tell a lie a hundred times and it's still a lie. Incidents piled up don't necessarily prove guilt. But when you look at the number of incidents here and the description that the kid gives for them, there's very little room for misunderstanding. Either this guy's attracted to prepubescent boys, in particular, [N.B.], or not. Right? That's what we've got here. I don't mean to dumb it down, but there are, there are some inconsistencies in what [N.B.] says, but this isn't a situation where he can simply be mistaken five times and make these allegations.

...

So, again, [the appellant] doesn't have to prove that this didn't happen. The Crown has to prove that it did happen. But what you have to assess is what is the evidence that I called? And that the heart and soul of the case is what [N.B.] says. And in assessing what he says, you're going to assess there's a little 13-year-old [N.B.] in the video that you can really hear. And you're going to assess the 16-year-old testosterone-infused kid dropping F bombs and talking back to [defence counsel]. And you're going to look at his demeano[u]r, both as a 13-year-old and as a 16-year-old. He's frustrated as a 16-year-old. I suggest to you that he's acting like any other 16-year-old, a victim of domestic violence. And, you know, I don't mean to be gender-biased, but he's a guy too. There's an issue with that. By issue, I mean, I don't know. Call me crazy, but it, it just seems it can seem different for men.

[17] Once the jury was excused, defence counsel raised a concern about one aspect of these statements: that it was improper for the Crown to suggest that N.B.'s demeanour was consistent with that of someone who had been the victim of sexual touching as that invited the jury to engage in stereotypical reasoning. The trial judge indicated that he would address this concern in the jury charge.

b. Defence Counsel

[18] Defence counsel began his own address to the jury with a "general comment". He said:

When the Crown is able to tell you the faults that the defence will point out, you know that there [are] some faults that are there. They are, they are obvious and [Crown counsel] gave to you a number of them. Now I'll give you some more detail with respect to that. But you know that the Crown case has some issues when the Crown [comes] to you and say[s] here's what [the] defence is likely to say.

[19] Defence counsel then focused on issues with N.B.'s credibility and reliability. He highlighted that: N.B.'s stepfather did not corroborate N.B.'s account that following the incident in the trailer (the first incident referred to above) his stepfather had appeared at the trailer on his ATV; N.B.'s evidence, and that of his stepfather, differed as to who picked N.B. up from the

appellant's home after the second incident; with respect to the two snowmobiling incidents, N.B. provided very little detail and the allegations were vague; and N.B. himself testified that nothing happened during the fifth incident, that occurred in the bush, and it was improbable that anything had occurred given N.B.'s stepsister's evidence that she was always close to N.B. and the appellant and did not witness or hear anything. He urged the jury to apply any doubts to the "whole of the evidence".

- [20] Contrary to what the Crown had anticipated, defence counsel did not argue that N.B. had lied to please his stepfather or to get the appellant "out of the picture". He did address N.B.'s own rhetorical question, "[b]ut why would I make this up?" He told the jury that "[t]his is not a question you need to answer", and that the trial judge would make that clear to them. He also indicated his belief that the trial judge would instruct them that "[a] lack of apparent motive [to lie] does not enhance the truth or reliability of a piece of evidence.... Instead, ask yourself the proper question which is this. Given the inconsistencies and the other features of the evidence, is it reliable enough for me to be sure that [the appellant] committed these offences?"
3. The Jury Charge [21] After counsel's closing submissions, the trial judge provided a draft of the jury charge for counsel's review and comment. Both Crown and defence counsel made substantive suggestions and attended a pre-charge conference. Both parties also filed additional submissions in writing following the pre-charge conference.
- [22] The charge, as delivered, instructed the jury that they were to decide the case on the evidence that they "saw and heard in the courtroom" and "nothing else". It warned them not to speculate, or "make up theories without evidence to support them." The jury was told that counsel's comments were not evidence; moreover, counsel's questions to witnesses were not evidence unless the witness agreed with what was suggested to them. The jury was instructed not to rely on any assumptions about the type of person who may commit sexual assault. The charge told them that the burden of proof was on the Crown, and that the appellant was not required to prove anything. It gave the jury a list of factors they might use to assess the credibility and reliability of a witness including whether there was "any reason why the witness would not be telling the truth", whether their recollection was internally consistent, consistent with what was said on prior occasions, and consistent with what other witnesses said. The charge outlined the theories of the Crown and the defence, the elements of each offence, and the trial judge's summary of the evidence as it related to the issues in dispute.
- [23] The trial judge included the following in the charge to address the objection defence counsel had made after the Crown's closing:

At this point, I want to deal with a comment made by Crown counsel in his closing remarks to you. During the evidence of [N.B.] there were times when he was argumentative or unresponsive to the questions put to him. The Crown suggested that "he was acting like a 16-year-old who is a victim of sexual assault". It cannot be predicted how a victim of sexual abuse will act or react.

The law does not permit us to engage in stereotypical behaviour when it comes to how victims of sexual abuse will or should behave. It may be fair to suggest that [N.B.] is acting like a 16-year-old but the jury is instructed to disregard the suggestion that [N.B.] is acting like a 16-year-old who is the victim of sexual abuse. It is proper for the jury to consider [N.B.'s] demeanour while he was giving evidence in the overall assessment of his credibility as a witness.

[24] As noted above, defence counsel had indicated in his closing argument that the trial judge would instruct the jury regarding N.B.'s question: "why would I make this up?" The trial judge included the following instruction to the jury, under the heading "Motive":

Motive is a reason why somebody does something. It is not one of the essential elements that Crown counsel must prove. In other words, you do not need to find a motive for what [the appellant] did in order to find him guilty of an offence. It is just part of the evidence – one of the many things for you to consider as you determine whether [the appellant] is guilty.

Similarly, in deciding this case, a motive to fabricate by the complainant [N.B.] is not one of the essential elements in this case which needs to be established in deciding the guilt or innocence of the [appellant]. You do not need to answer the question "why would [N.B.] lie" or find that he had no motive to fabricate in deciding this case.

[25] There was no objection to the Motive instruction.

[26] The charge also included, over objections of defence counsel, an instruction that had been requested by the Crown about myths and stereotypes:

Myths and stereotypes regarding what sexual assault is, how it happens, and who it happens to, still exist in society. Such myths and stereotypes have no place in a court of law and must not be considered by you when deciding this case. In particular, there is a myth that complainants in sexual assault cases have a higher tendency than other complainants to fabricate allegations based on "ulterior motives" and are therefore less worthy of belie[f]. This belief is not supported by social science, the law or judicial experience. It is a myth. There is no basis for the belief that sexual assault complainants are more likely to fabricate allegations than complainants of any other type of crime. When you decide this case, you must do so free of any such incorrect presumptions about sexual assault complainants and make your decision based only on the evidence you hear in this case.

4. Analysis a. The Issues

[27] The principal submission on appeal is that the jury did not receive the required assistance from the trial judge concerning motive, resulting in a charge that was fatally unbalanced.[3] The submission has several interrelated parts.

[28] First, the appellant submits that the second paragraph of the Motive instruction was flawed, and that this flaw was accentuated by the myths and stereotypes instruction. In cross-examination, a motive to fabricate was suggested to N.B. – to get the appellant out of the lives of his family, and thus, please his stepfather. Crown counsel referred to this in his

closing address as something he expected defence counsel to argue. According to the appellant, the jury should have been told they could consider whether N.B. had a motive to fabricate and should have been given guidance on that task in accordance with *R. v. L.L.*, 2009 ONCA 413, 96 O.R. (3d) 412, at para. 53. An essential part of that guidance is that the defence has no onus to show a motive to fabricate, and the lack of an apparent motive to fabricate does not enhance credibility. Instead, the effect of the trial judge's instruction was that the jury was told not to consider whether N.B. had a motive to fabricate and was not told that the lack of an apparent motive to lie did not enhance N.B.'s credibility.

- [29] Second, the appellant argues that the first paragraph of the Motive instruction invited the jury to consider the appellant's motive to commit the offences as "one of the many things for you to consider as you determine whether [the appellant] is guilty." This was an error, according to the appellant, as there was no evidence of a motive on the part of the appellant. The Crown's suggestion, in closing argument, that either the appellant had a desire to engage in sexual acts with pre-teen boys or not,[4] was an improper invitation to engage in a prohibited line of reasoning. But the trial judge did not tell the jury not to consider the Crown's statement, rather, according to the appellant, the instruction invited the jury to do so, as the Crown's improper statement was the only suggestion of a motive of the appellant for the jury to refer to.

b. Discussion

- [30] An appellate court is to adopt a functional approach when reviewing jury instructions for legal error. It must direct its review to the ultimate function of instructions, which is to properly equip the jury in the circumstances of the trial to decide the case according to the law and the evidence. A properly equipped jury is one that is "both (a) accurately and (b) sufficiently instructed": *R. v. Abdullahi*, 2023 SCC 19, 483 D.L.R. (4th) 1, at para. 37. The overriding question in the appellate assessment of jury instructions is whether they fulfilled that function: *Abdullahi*, at paras. 34-37.
- [31] In addressing that question, it must be borne in mind that the accused is entitled to a properly instructed jury, not a perfectly instructed one. The charge must be read as a whole; it must be considered in the context of the trial as a whole; and its substance (rather than adherence to any prescribed formula) is what matters: *Abdullahi*, at para. 35.
- [32] The question of whether the jury was accurately instructed is an "inquiry [into] the overall understanding of a given issue in the mind of the jury", considering the charge as a whole: *Abdullahi*, at paras. 39, 41. Where the instructions contain both correct and problematic statements about the same issue "[t]he organization of the charge and the placement of alleged inaccuracies within it will inform the overall accuracy of the charge": *Abdullahi*, at para. 42.
- [33] The sufficiency of an instruction involves two related questions: first, was the instruction required because it is mandatory in every case, or due to the circumstances of the particular case (a contingent instruction) and, second, if an instruction was required, was it given in

sufficient detail: Abdullahi, at para. 46. When a particular instruction is required, it is an error of law to omit it: Abdullahi, at para. 49. Whether a required instruction has been given in sufficient detail must be assessed in the context of the charge as a whole: Abdullahi, at para. 53. The question is whether enough, not whether all, has been said to sufficiently equip the jury with what it needs to consider: Abdullahi, at para. 56.

- [34] Counsel's closing arguments may be relevant to the assessment of the instructions. On the one hand they may fill gaps in the judge's review of the evidence, although they cannot replace an accurate and sufficient instruction on the law by the trial judge, from whom the jury has been told to take the law. On the other hand, sometimes an argument of counsel, or a problematic statement, will support the need for the trial judge to give a specific instruction to the jury or to tell them to disregard counsel's statement: Abdullahi, at paras. 63-65.
- [35] The failure of counsel to request a specific inclusion in the instruction, or to object to what has been included, can be a relevant consideration, but it is not determinative, as the responsibility for the charge lies with the trial judge: Abdullahi, at para. 67. Counsel's silence may reinforce the conclusion that a contingent instruction was not required, or that, when read as a whole, the charge was accurate. Counsel's silence may be particularly significant where the decision not to object was tactical: Abdullahi, at paras. 68-69.

i. The Motive to Fabricate Instruction

- [36] The motive to fabricate instruction in this case was as follows:

[s]imilarly, in deciding this case, a motive to fabricate by the complainant [N.B.] is not one of the essential elements in this case which needs to be established in deciding the guilt or innocence of the [appellant]. You do not need to answer the question "why would [N.B.] lie" or find that he had no motive to fabricate in deciding this case.

- [37] The appellant argues that this instruction was flawed because it essentially told the jury not to consider whether N.B. had a motive to fabricate, and they were not told that the absence of an apparent motive to fabricate did not enhance N.B.'s credibility.

- [38] I do not accept that there was any basis on which the jury should have been instructed to consider whether N.B. had a motive to fabricate. Neither L.L. nor R. v. Reves, 2025 ABCA 5, 81 Alta. L.R. (7th) 238, relied on by the appellant, support that submission.

- [39] In L.L., this court was concerned with a case in which "[s]everal witnesses gave evidence about the complainant's relationship with the [accused] and about the possibility that she had a motive to fabricate": at para. 22. Both counsel addressed the jury about whether the complainant had a motive to fabricate: L.L., at paras. 27-30. In particular, in his closing submission in L.L., Crown counsel had commented on the absence of motive to fabricate, stating that lack of motive "is a critical factor in [the jury's] deliberations", and asserting that "this woman had no motive to lie": L.L., at para. 30. As this court observed, the Crown's comments in closing created two problems – they suggested the lack of motive to fabricate

had been proven (an assertion the evidence did not support) and they created a risk that the jury would conclude that the complainant must be telling the truth if there was no demonstrated motive to lie.

- [40] The trial judge's instructions in L.L. did not address the problems created by the trial Crown's closing, but simply pointed out that it was for the jury to determine whether a motive to fabricate had been established. The instructions also did not address how the jury should treat a failure to demonstrate a motive to fabricate.
- [41] Against that backdrop this court held that the trial judge should have cautioned the jury against attributing undue weight to the absence of evidence of a motive to fabricate. In particular, the corrective instruction should have addressed:
- the difference between absence of apparent motive and proven absence of motive;
 - that it was open to the jury to find an absence of any apparent motive to fabricate on the part of the complainant;
 - that absence of apparent motive to fabricate is one of many factors to consider in assessing the credibility of the complainant; and
 - that the accused has no obligation to prove a motive to fabricate and the onus remains on the Crown throughout to prove guilt beyond a reasonable doubt.
- [42] *Reves* was also a case in which counsel for the accused had argued to the jury that the complainant had fabricated the allegations and Crown counsel had responded that the complainant had no motive to lie. The Alberta Court of Appeal set aside the conviction and ordered a new trial, holding that the trial judge's instructions were deficient in two respects. First, they did not include a warning that absence of evidence that the complainant had a motive to fabricate did not equate to evidence that she was telling the truth, and second, they did not include an instruction that raising the possibility of fabrication does not shift the burden of proof to the appellant. The absence of an objection at trial from the accused's counsel to this aspect of the jury instruction was not determinative.
- [43] This case is substantially different. A motive to fabricate was not argued to the jury, nor was there a basis in the evidence to suggest the possibility of one.
- [44] Crown counsel did not argue that N.B. had no motive to lie; he did not argue that the jury should take an absence of a motive to lie (proven or apparent) into account as an indicator of N.B.'s credibility. This was reflected in the trial judge's summary of the Crown's theory to the jury, which did not posit that N.B. lacked a motive to lie. Although Crown counsel did anticipate, in his closing address to the jury, that the defence might suggest that N.B. had a motive to fabricate to please his stepfather, defence counsel did not do so when he addressed the jury. To the contrary, he expressly told the jury that they need not answer N.B.'s rhetorical question "why would I make this up?" and he asked the trial judge to instruct the jury that they should not answer that question.

- [45] There was also no evidentiary basis for the jury to consider a possible motive to fabricate. Although defence counsel asked N.B. whether he had ever discussed with his stepfather a desire to get the appellant out of their lives, or a concern that the appellant was usurping his stepfather's role, N.B. denied that there were any such discussions.
- [46] Given the absence of any argument by the defence at trial that there was a possible motive to fabricate, and the absence of any reliance by the Crown on the lack of a motive to fabricate, the trial judge did not err by instructing the jury, in accordance with the defence request, that they should not consider a motive to fabricate – they should not answer N.B.'s rhetorical question, "why would I make this up?"
- [47] In the circumstances this raises two further questions. First, was it incumbent on the trial judge to go further and instruct the jury that the absence of apparent motive to fabricate is one of many factors to consider in assessing the credibility of the complainant (as in L.L.), or second, was it incumbent on the trial judge to warn the jury that lack of motive to fabricate did not equate to evidence that N.B. was telling the truth (as in *Reves*)? As noted, in those cases, absence of a motive to fabricate was relevant, because it was argued to the jury in each case that such absence was significant.
- [48] The rationale for the explanations given in L.L. and *Reves* was simply not present here. In this case, no one suggested to the jury that there was any significance to the absence of a motive to fabricate – the jury was warned away from the issue entirely. Accepting the appellant's argument would mean that a detailed motive to fabricate instruction should be given to the jury in every case. That is not the law.
- [49] Moreover, it is the substance of the instruction, read as a whole, rather than adherence to any formulaic wording, that matters. In defence counsel's closing address to the jury, after telling the jury they need not answer N.B.'s "why would I make this up" question, he went on to say that he expected the trial judge would instruct them that lack of an apparent motive to lie did not enhance "truth or reliability". But importantly, he added that the jury should instead "ask [themselves] the proper question which is this. Given the inconsistencies and the other features of the evidence, is it reliable enough for me to be sure that [the appellant] committed these offences?"
- [50] The trial judge's charge directed the jury to exactly that "proper question". It reviewed both the defence theory of inconsistencies and gaps in the evidence and the Crown's theory of why N.B.'s evidence held together. It reminded the jury that the burden was on the Crown and the appellant did not have to prove anything. It also gave guidance on the assessment of credibility and reliability – guidance that did not suggest that the lack of an apparent motive to lie enhanced N.B.'s credibility or reliability.
- [51] In these circumstances, the absence of an objection to the wording of the motive to fabricate instruction is telling – it is an indicator that, when read as a whole, the charge was accurate on the issue of motive to fabricate.

- [52] At trial, defence counsel objected to the inclusion of the myths and stereotypes instruction, stating that it was contradictory to the instruction that the jury was not to consider whether the complainant had a motive to fabricate and on other grounds unrelated to the motive to fabricate instruction. In this court, the appellant argues that although an instruction that it is a myth that sexual assault complainants have a higher tendency to lie than complainants in other types of cases is proper, here it “re-centred the question of motive” and increased the likelihood that the jury would equate the absence of evidence of motive to fabricate with the absence of a motive to do so, and “give the former the import of the latter.”
- [53] I disagree. The myths and stereotypes instruction properly warned the jury away from reasoning on the basis of a variety of myths. As the Supreme Court noted in *R. v. Kruk*, 2024 SCC 7, 433 C.C.C. (3d) 301, at para. 65, there can be a difference between myth-based reasoning and reasoning based on the circumstances of the case:

just because the evidence happens to align with a myth or stereotype does not necessarily mean that any inferences that can be drawn from that evidence will be prejudicial. While it is a myth that women regularly fabricate allegations of sexual assault, it is not an error to consider whether the circumstances of a particular case support the existence of a motive to fabricate (see, e.g., *R. v. Esquivel-Benitez*, 2020 ONCA 160, 61 C.R. (7th) 326, at paras. 9-15) — indeed, where the defence adduces evidence on this point, a trial judge is obliged to consider it to give full effect to the presumption of innocence, and a failure to do so constitutes reversible error. [Emphasis in original.]

- [54] In this case, the circumstances did not support the jury reasoning on the basis of a motive to fabricate. The jury was appropriately instructed not to do so. It would also have been wrong for the jury to reason on the basis of a myth or stereotype about fabricated allegations. The myths and stereotypes instruction warned the jury not to engage in this type of reasoning either.

ii. The Motive to Commit the Offences Instruction

- [55] The trial judge’s instruction informed the jury that the appellant’s motive was not an essential element of the offences with which he was charged, but that motive was one of the things that the jury could consider in determining whether the appellant was guilty. The charge did not go on to say that the Crown alleged a particular motive or point to any evidence of what might constitute a motive for the jury to assess.
- [56] As the Supreme Court explained in *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at paras. 130-132, in most cases the Crown need not prove the accused had a motive, as it is not an essential element of the offence. In such cases:

the necessity of charging a jury on motive falls along a continuum. At one end of the continuum are “cases where the evidence as to identity of the [offender] is purely circumstantial and proof of motive on the part of the Crown so essential that reference must be made to motive in charging the jury”. At the other end of the continuum are cases where there is a proven absence of motive. In such cases, the trial judge must charge on motive, as the proven absence of motive is ordinarily an important factor favouring the accused.

But between these two poles, “the necessity to charge on motive depends upon the course of the trial and the nature and probative value of the evidence adduced”, and “[i]n these cases, a substantial discretion must be left to the trial judge”. Moreover, “motive is always a matter of fact and evidence and, therefore, primarily for the judge and jury rather than the appellate tribunal” and trial judges “must be given reasonable latitude” in charging the jury. Accordingly, the trial judge’s decision as to whether to charge on motive “should not be lightly reversed”. In addition, trial judges have discretion as to how to deal with issues relating to motive, and “there is no formula that must be followed”. [Emphasis in original; citations omitted.]

- [57] In this case, except perhaps to tell the jury that motive was not an essential element of the offences, there was no reason to instruct on motive to commit the offences, and there was certainly no reason to instruct them to consider motive as one of the many things for the jury to consider on the question of whether the appellant was guilty. Motive is a matter of fact and evidence. Here, there was no evidence of a reason why the appellant would commit the offences separate from the evidence that he actually did so. This was not, for example, a case where a sexual assault occurred but the issue was about the identity of the person who committed it.
- [58] The appellant contends that the motive to commit the offences aspect of the instruction was not harmless because it may have directed the jury back to Crown counsel’s statement in closing argument (conceded on appeal to have been improper): “[e]ither this guy’s attracted to prepubescent boys, in particular, [N.B.], or not. Right?” In other words, according to the appellant, the Crown improperly suggested, without evidence, a motive – an attraction to prepubescent boys – and the trial judge, rather than warning the jury away from that statement, may in effect have told the jury they could take it into account.
- [59] I do not accept that argument. The inclusion of an inaccurate or unnecessary sentence in the charge may make it imperfect but does not necessarily mean that the jury was improperly charged. The jury was specifically instructed to decide the case only on the evidence heard in court, and not to take counsel’s arguments as evidence. Even if the instruction on motive led the jury to consider whether there was evidence of a motive, the jury charge expressly told them what they could, and could not, consider to be evidence.
- [60] Moreover, Crown counsel’s improper suggestion about an attraction to prepubescent boys was not included in the trial judge’s review of the Crown’s position, lessening still the risk that the jury would consider it.

[61] Defence counsel did not object to Crown counsel's suggestion to the jury after the closing address was made, even though he objected to other comments of Crown counsel which the trial judge addressed in his jury instructions (see paras. 17 and 23 above). Nor did trial counsel object to the jury instruction on motive to commit the offences. Although not determinative, the failure to object, in combination with the trial judge's instructions, provides further confirmation that the risk that the jury would engage in the prohibited path of reasoning this ground of appeal assumes was unlikely.

[62] I would therefore reject this ground of appeal.

II. The Sentence Appeal [63] The gravamen of the sentence appeal is that the trial judge treated the appellant's lack of remorse as an aggravating factor. The appellant bases this submission on the reference, in the reasons for sentence, to a passage from the pre-sentence report that indicated the appellant "has little insight as to the incidents which bring him before the court", as well as the trial judge's more general statement that he considered the comments in the pre-sentence report. The appellant notes that defence counsel had argued that no weight should be placed on the "little insight" passage because the author was not qualified to make such an assessment, and it was unclear what that opinion was based on.

[64] Appellate interference with a sentence is justified only where the trial judge made an error in principle that has impacted the sentence or where the sentence is demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 41, 44. In particular, erroneous consideration of an aggravating factor will justify appellate interference only where it appears from the trial judge's decision that the error had an impact on sentence. In my view, the appellant has not shown, from the trial judge's brief reference to a passage in the pre-sentence report, that the trial judge used lack of remorse as an aggravating factor, nor that it impacted the sentence he imposed.

[65] The trial judge found one mitigating factor – the lack of a related criminal record. He took into account the principle of restraint, as this would be the appellant's first custodial sentence. He expressly set out the aggravating factors he took into account; these did not include "lack of remorse". Instead, he listed the following as the aggravating factors he considered:

- N.B.'s age;
- The nature and number of the incidents, which included two occasions of oral sex and an attempt to engage in anal penetration;
- The appellant's relationship with the family of N.B.;
- The appellant's breach of trust; and
- The significant negative impact the actions of the appellant had on N.B., his mother and stepfather.

[66] In *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, the Supreme Court sent a clear message – that “sexual offences against children are violent crimes that wrongfully exploit children’s vulnerability and cause profound harm to children, families, and communities” and that “[m]id-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances”: at paras. 5, 114. The trial judge referred to and followed the message in *Friesen* by imposing a sentence within the range it suggested: see also *R. v. G.S.*, 2023 ONCA 712, 431 C.C.C. (3d) 227, at paras. 65, 69.

III. Conclusion [67] I would dismiss the conviction appeal. I would grant leave to appeal sentence but would also dismiss the sentence appeal.

Released: February 26, 2026 “B.Z.”

“B. Zarnett J.A.”

“I agree. J. George J.A.”

“I agree. S. Gomery J.A.”

[1] This appeal is subject to a publication ban pursuant to 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.

[2] The Crown also sought and obtained: (a) a DNA order; (b) a Sex Offender Information Registration Act order for 20 years; (c) a mandatory firearms prohibition pursuant to s. 109 of the Code for a period of 10 years; (d) an order pursuant to s. 743.2(1) of the Code that the appellant not have any contact with N.B. or N.B.’s family members while he is serving his custodial sentence; and (e) a 10-year prohibition order under s. 161 of the Code barring the appellant from engaging as a volunteer or being in a position of trust to a person under the age of 16 years, and from having any contact with a person under the age of 16 years unless under the supervision of an adult over the age of 21 who is aware of the appellant’s conviction for sexual assault.

[3] In his factum, the appellant’s second ground focused on the Crown’s closing statement rather than the jury instruction regarding motive to commit the offences. He argued that Crown counsel’s suggestion to the jury was inappropriate such that the convictions should not stand, and a new trial should be ordered. This ground was reframed in oral argument and is addressed on that basis.

[4] As reflected in Crown counsel’s encapsulation of the issue for the jury as being: “[e]ither this guy’s attracted to prepubescent boys, in particular, [N.B.], or not. Right?”

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://norma.lexum.com/coa/coa/en/item/23966/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-morris-2026>

Prepared on 28 October 2026 · Esheria