

CANADA / JUDGMENT

R. v. Y.Y.

2025 ONCA 766

COURT

Court of Appeal for Ontario

DECIDED

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Judges

Trotter, Gary T.; Zarnett, Benjamin; Rahman, Moiz

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Y.Y., 2025 ONCA 766[1]

DATE: 20251110

DOCKET: COA-24-CR-0186

Trotter, Zarnett and Rahman JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Y.Y.

Appellant

Jessica Zita and Simon Kim, for the appellant

Samuel Greene, for the respondent

Heard: November 3, 2025

On appeal from the convictions entered by Justice Fletcher Dawson of the Superior Court of Justice, sitting with a jury, on April 27, 2023.

REASONS FOR DECISION

- [1] At the conclusion of oral argument the appeal was dismissed with reasons to follow. These are our reasons.

Background

- [2] The appellant was charged with one count of assault, one count of sexual assault, and one count of sexual exploitation, committed against M.Y., one of his daughters.
- [3] M.Y. was the only witness for the Crown at trial. She described an assault that occurred in the family home in 2014 when she was 16 years old. According to M.Y., after accusing her of lying about the circumstances in which she spoke to boys on her cellphone, the appellant hit her repeatedly, choked her, and kicked her. She also described an incident of sexual assault and sexual exploitation that occurred in 2016 when she was 17 years old. According to her testimony, the appellant came into her bedroom while she was in bed, put his hands on both sides of her left thigh, lifted the leg of her sleep shorts to just below her underwear, touched her labia, pulled the waistband of her shorts and underwear away from her body, and tried to look inside her underwear.
- [4] The defence theory was that neither incident occurred. The appellant was self-represented at trial, but counsel was appointed under s. 486.3 of the Criminal Code, R.S.C., 1985, c. C-46, to cross-examine M.Y., and did so, challenging the credibility and reliability of her evidence, and suggesting that she had reasons to falsely accuse the appellant. The appellant did not testify; however, he led the evidence of his wife (the complainant's mother), three of the complainant's sisters, and one of their spouses, to cast doubt on whether the incidents occurred as the complainant suggested.

- [5] The jury convicted the appellant of each count. The sexual assault conviction was stayed under *R. v. Kienapple*, [1975] 1 S.C.R. 729. The appellant was sentenced to two years imprisonment on the sexual exploitation count, and six months imprisonment on the assault count, to be served consecutively.

The Grounds of Appeal

- [6] The appellant raises three grounds of appeal from his conviction, each of which we reject.
- (i) The trial judge did not err in permitting cross-examination of the complainant's mother and sisters that referred to abusive conduct of the appellant with which he was not charged [7] The appellant argues that the trial judge should not have permitted the Crown to cross-examine the complainant's mother or her sisters by referring to acts of abuse by the appellant directed at members of his family, as such acts did not form the subject matter of the charges. He further submits that in any event the trial judge should not have permitted such cross-examination to go on to the extent that it did. We disagree.
- [8] The complainant's mother, in examination in chief, gave evidence of a home environment that was inconsistent with the type of incidents that M.Y. said occurred. She said that the environment in the family home was a "very good" one in which the family operated according to Christian values. According to the mother, it was M.Y. who became disobedient and aggressive. The mother also gave evidence of reasons why M.Y. might fabricate her allegations. She testified that before making her allegations against the appellant, M.Y. had threatened her mother that if she did not divorce the appellant M.Y. would go to the police with her sexual assault allegation. The mother described this as "blackmail". The mother also testified that, when she left the family home to briefly stay with M.Y. in 2020, she did so because she missed her and wanted her to come home.
- [9] The mother had made prior statements to the police that were inconsistent with this evidence, referring to routine hitting and abuse in the family home, and that she left the family home to stay with M.Y. because she was concerned for her own safety.
- [10] We see no error in the trial judge's decision to allow the Crown to contradict the mother's evidence with her prior inconsistent statements, and thus prevent a distorted picture from being presented to the jury, even though the prior statements included assertions of abusive conduct by the appellant with which he was not charged. As Doherty J.A. stated in *R. v. Batte* (2000), 49 O.R. (3d) 321 (C.A.), at para. 89:

If the defence chose to rely on evidence of the trip to the Bahamas and the "New Brunswick" evidence to support its position that the relationship between the complainants and the appellant was entirely inconsistent with any abuse during the relevant time frame, the complainants had to be allowed to describe the events which occurred in those places and shed light on the nature of their relationship with the appellant. The defence could not choose to put a fact in issue and then argue that evidence which was probative on that issue should be excluded because it involves allegations of misconduct by the accused. The rules of evidence do not permit the accused (or the

Crown) to present a one-sided version of events to the trier of fact. This jury could not hope to arrive at the truth regarding the nature of the relationship between the complainants and the appellant if the complainants' description of that relationship was censored so as to completely distort their version of the nature of that relationship. [Citations omitted.]

[11] Moreover, the trial judge instructed the jury mid-trial, and in his charge, about the use that could and could not be made of the evidence of other bad acts. He told the jury that they were not to engage in propensity reasoning – that the appellant was more likely to have committed the offences with which he was charged because he was of bad character – but were only to consider the evidence to help understand the narrative and to assess credibility. The final charge to the jury also explained that the “evidence [was] admitted for [this] limited or specific purpose” and that the jury “must not use the evidence to conclude that the accused is a person of bad character or disposition who, for that reason, is more likely to be guilty of the crimes charged because he is the type of person who would commit them.”

[12] For similar reasons, we see no error in the trial judge’s decision to permit the Crown to cross-examine the three sisters on their descriptions of a home environment that was inconsistent with the abuse of M.Y. having occurred, since they had also made prior statements describing a household in which the appellant was physically abusive.

[13] As to the extent of the cross-examination, that was clearly a matter within the trial judge’s discretion, and we see no basis to interfere. The extent of the cross-examination was largely a function of the refusal of the witnesses, especially the mother, to concede points, necessitating repeated questioning by Crown counsel.

[14] We therefore reject this ground of appeal.

(ii) The trial judge did not make a s. 276 error [15] At trial s. 486.3 counsel sought advice on “how far” he could question M.Y. regarding her relationship with a friend without triggering s. 276. That provision makes inadmissible evidence that “the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge” unless the judge determines that the evidence meets certain criteria. Section 486.3 counsel initially indicated that he wanted to question M.Y. on whether her relationship with her friend was “more than platonic” because this may “give weight” to the defence allegation of M.Y.’s animus against the appellant based on the appellant having restricted the friend’s access to the family home.

[16] The trial judge noted that the mandatory procedural steps for an application to admit evidence that is otherwise inadmissible under s. 276 had not been followed, and that making an application at that late stage was highly problematic given the delays that it would cause. Section 486.3 counsel indicated that he did not want to bring an application.

[17] The trial judge shared his preliminary views, questioning the relevance of any sexual or romantic aspect of the relationship. The trial judge stated, “I don’t see what the sexual aspect of any alleged relationship with [the friend] would be. The point is, if they were friends and the suggestion is that, you know, the complainant blamed the accused for [her friend’s]

removal from the house, there's your motive". Section 486.3 counsel agreed that "whether or not [the friend] and [M.Y.] were in some sort of sexual relationship isn't really relevant so I can tiptoe around that." The discussion then focused on how s. 486.3 counsel could question M.Y. about the friend without inviting innuendos regarding a sexual relationship between them.

[18] The appellant submits that the trial judge erred in finding that the proposed line of questioning engaged s. 276, or that he erred in not permitting the line of questioning initially proposed. But the trial judge was neither asked to, nor did he make, such a ruling. Rather, counsel worked with the trial judge to avoid a disputed, untimely, application. We see no error nor any prejudice to the appellant. As s. 486.3 counsel stipulated, exploring whether the relationship was romantic added nothing to the proposition that the appellant wanted to advance, namely, that the appellant's refusal to allow M.Y.'s friend to stay in the family home created a motive on the part of M.Y. to falsely accuse the appellant.

(iii) The trial judge did not make a *Browne v. Dunn* error [19] The Crown raised an objection during the defence case that evidence was being led on issues that had not been put to M.Y. when she was cross-examined. The appellant continued to lead evidence that elicited further objections of this nature. By the time the case was going to the jury the Crown had raised numerous areas where, in the Crown's view, the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.) had been breached. The Crown's position was that the remedy for this should be an instruction to the jury as it was not practical to recall M.Y.

[20] The trial judge agreed that it was impractical and unfair to recall M.Y. He decided to address the *Browne v. Dunn* issue in his charge to the jury. He instructed the jury on the rule, describing it as one of fairness. He then listed some "topics or areas of the evidence" where M.Y. was not given an opportunity to present her position. The trial judge told the jury that "there may or may not be other instances like this that you will think of" or that they may disagree with the instances the trial judge described. He went on to tell the jury that if they were of the view that evidence was led on issues that should have been, but were not, put to M.Y., then:

[I]n such circumstances, when assessing the credibility and reliability of the witnesses and the extent to which you are prepared to rely on their testimony, you should keep this rule of fairness [the rule in *Browne v. Dunn*] in mind. It is for you to decide whether and to what extent the failure to put to [M.Y.] the contradictory evidence called later impacts the extent to which you are prepared to accept and rely upon the evidence of the witnesses.

[21] The appellant submits that the trial judge erred in suggesting to the jury that there had been breaches of *Browne v. Dunn*. He submits that the areas identified were peripheral, and that in substance M.Y.'s position on them was made known in her evidence. He underscores the context of the appellant having been a self-represented litigant at trial.

[22] We disagree.

[23] On the issue of fairness to a self-represented litigant, we note that the appellant was provided, before trial, with a “Trial Information for Self-Represented Accused” booklet which explained trial procedure including the substance of the rule in *Browne v. Dunn* and the potential consequence of a violation. It stated:

[I]f you are going to challenge a witness’ recollection of events or statements, you should cross-examine that witness on your version of events. If you fail to do so, it may make your suggested version of the events less compelling because the witness was not given a chance to provide his or her explanation of the events.

[24] As well, cross-examination of M.Y. was conducted by s. 486.3 counsel, and it would be expected that he was briefed by the appellant on what evidence he planned to lead so that the cross-examination of M.Y. could be appropriately tailored to avoid *Browne v. Dunn* concerns.

[25] On the issue of whether there were violations of the *Browne v. Dunn* rule, as well as the remedy chosen, the trial judge’s determinations are entitled to deference on appeal: *R. v. Quansah*, 2015 ONCA 237, 125 O.R. (3d) 81, at paras. 118, 121, leave to appeal refused, [2016] S.C.C.A. No. 203.

[26] We see no reversible error in the trial judge’s determinations that the rule appeared to have been violated in the instances that the trial judge identified.

[27] As for remedy, a trial judge is entitled to refuse to require a witness to be recalled to cure the other party’s violation of the rule, especially where, as here, the witness has already testified at length about sexual matters: *R. v. M.F.1 & P.F.*, 2010 ONSC 4018, at para. 29, *aff’d* 2012 ONCA 807. An instruction, such as the one the trial judge gave, that advises the jury that they may take the violation into account in assessing credibility, while leaving it to the jury to decide whether to do so and the weight to assign to that factor, is a proper remedy in such circumstances: *R. v. Paris* (2000), 138 O.A.C. 287 (C.A.), at para. 27, leave to appeal refused, [2001] S.C.C.A. No. 124.

[28] We therefore reject this ground of appeal.

Conclusion

[29] For these reasons the appeal was dismissed.

“Gary Trotter J.A.”

“B. Zarnett J.A.”

“M. Rahman J.A.”

[1] This appeal is subject to a publication ban pursuant to s. 276 and s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.

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