

CANADA / JUDGMENT

R. v. Z.M.L.

2025 ONCA 872

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Z.M.L.

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COA-24-CR-0065

Judges

Sossin, Lorne; Copeland, Jill M.; Gomery, Sally A.

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Z.M.L., 2025 ONCA 872[1]

DATE: 20251216

DOCKET: COA-24-CR-0065

Sossin, Copeland and Gomery JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Z.M.L.

Appellant

Brian H. Greenspan and Michelle M. Biddulph, for the appellant

Andrew Hotke, for the respondent

Heard: November 18, 2025

On appeal from the finding of guilt entered by Justice F. Bruce Fitzpatrick of the Superior Court of Justice on January 26, 2023, and the sentence imposed on June 14, 2024, with reasons reported at 2024 ONSC 3445.

Sossin J.A.:

A. Overview [1] The appellant, a young person at the time of the offence, was found guilty of manslaughter, and sentenced under the Youth Criminal Justice Act, S.C. 2002, c. 1 (the “YCJA”) to 18 months custody, followed by 18 months under community supervision. He appeals against both his finding of guilt and sentence.

[2] For the reasons that follow, I would allow the appeal against the finding of guilt, and accordingly, it is unnecessary to consider the appeal against sentence. The trial judge found that the appellant fabricated several exculpatory in-court statements, based on his mere disbelief of the appellant’s evidence, and without any independent evidence of fabrication. He then relied on his finding of fabrication as circumstantial evidence of the appellant’s guilt. This line of reasoning with respect to the in-court statements was in error because it is inconsistent with this court’s decision in *R. v. Iqbal*, 2021 ONCA 416, 406 C.C.C. (3d) 208. In *Iqbal*, this court held a trial judge must be satisfied that there is independent evidence of fabrication before they can transform their disbelief of an accused into circumstantial evidence that the accused’s account displays a consciousness of guilt.

[3] In light of this error, it is unnecessary to consider whether the trial judge also erred in his treatment of the appellant’s out-of-court statements, or the other grounds of appeal against the finding of guilt.

[4] The proviso does not apply. A new trial is required.

B. Background 1. The uncontested evidence [5] In the early morning of September 3, 2014, William Wapoose, a 32-year-old Indigenous man, was beaten and stabbed to death. His body was found in a ditch next to the shoulder of a ring road in Chapples Park in Thunder Bay. His autopsy revealed multiple blunt and sharp force injuries to his head and neck, and it is likely he died of a deep stab wound to his throat. In May 2019, the Thunder Bay police charged the appellant with the second degree murder of Mr. Wapoose.

- [6] On the evening of September 2, 2014, L.Z., the appellant, C.B., and J.M. were drinking at J.M.'s home. Both the appellant and L.Z. were under the age of 18, while J.M. was 18. By nightfall, all were intoxicated. J.M.'s mother told them to leave. The group walked C.B., the most intoxicated of the group, home. L.Z., the appellant, and J.M. then began walking toward where they all lived, through Chapples Park. During the walk, J.M. came into possession of a metal pole-type object.
- [7] J.M. specifically spoke to L.Z. and the appellant about wanting to rob somebody as the group left J.M.'s home. He was carrying a large hunting knife on his person when the group entered Chapples Park.
- [8] In the early morning hours of September 3, 2014, the group came across Mr. Wapoose, who was heavily intoxicated and leaning against a lamppost at the side of the road in Chapples Park. They had an initial encounter with Mr. Wapoose before walking on. After some time, some members of the group turned back to assault Mr. Wapoose.
- [9] During this assault, J.M. administered a beating to Mr. Wapoose. At some point during the assault, J.M. stabbed Mr. Wapoose and dragged him to the ditch where his body was eventually found, though the order of these events was disputed at trial. L.Z. also stole Mr. Wapoose's bicycle.
- [10] J.M. was tried separately as an adult. Z.M.L. was tried alone. L.Z. testified for the Crown at Z.M.L.'s trial. At trial, the appellant and L.Z. gave different accounts of the assault. Both testified that they were not involved in the beating and that it was the other who had participated. Both testified that it was the other who helped J.M. drag Mr. Wapoose into the ditch where he was ultimately found dead. J.M. was convicted of second degree murder in his separate trial.
2. The appellant's evidence [11] The appellant testified that J.M. and L.Z. had been talking about wanting to rob someone that night and that he attempted to dissuade them. His evidence was that L.Z. and J.M. robbed Mr. Wapoose of his backpack and bicycle upon their initial encounter. L.Z. then suggested to J.M. that the two go back to where Mr. Wapoose was laying because they needed to urinate. The appellant also testified that L.Z. wondered aloud if Mr. Wapoose had "seen their faces".
- [12] While J.M. and L.Z. were away, the appellant heard screams coming from the area where the group had first encountered Mr. Wapoose. The appellant, fearing for J.M. and L.Z.'s safety, went to investigate. From a distance of 30 to 40 feet, the appellant observed L.Z. and J.M.

beating Mr. Wapoose on the side of the road. This lasted some five minutes. J.M. then stabbed Mr. Wapoose in the neck, and J.M. and L.Z. dragged Mr. Wapoose into the ditch where his body was recovered. The appellant also testified that he saw J.M. throw the pole with which he had beaten Mr. Wapoose into the ditch.

[13] The appellant testified that after they killed Mr. Wapoose, L.Z. and J.M. told him that they would kill him if he said anything about the events of that night.

[14] The appellant was questioned by police about the killing on February 9, 2015. He lied to the police, saying that he had heard about the homicide from people on the street. He also lied to police about the route the group took home that night. The appellant testified that he did so because when he ran into J.M. prior to February 9, J.M. asked the appellant if the police were talking to him and implied that if the appellant told police about L.Z. and J.M.'s involvement in the killing, J.M. would kill the appellant and his family.

3. L.Z.'s evidence [15] L.Z. testified that after the group's initial encounter with Mr. Wapoose, it was the appellant who wanted to go back and rob him. L.Z. testified that the appellant and J.M. kicked and punched Mr. Wapoose on the road before dragging him to the ditch. He testified that he saw J.M. hit Mr. Wapoose with a metal pole, but did not see J.M. stab Mr. Wapoose. He also readily admitted to stealing Mr. Wapoose's bike.

C. Decision below 1. Reasons for judgment [16] At the close of the Crown's case, the defence brought a motion for a directed verdict, seeking that the trial proceed on the lesser offence of manslaughter. The Crown joined in this motion, agreeing that there was insufficient evidence to support the appellant's liability for murder. The motion was granted.

[17] Applying the framework from *R. v. W.(D.)*, [1991] 1 S.C.R. 742, the trial judge concluded that the explanation for the appellant and L.Z.'s contradictory evidence was that the appellant had participated in the assault. That said, the trial judge believed that both L.Z. and the appellant were attempting to avoid culpability and that neither of them were telling the whole truth.

[18] The trial judge rejected the appellant's evidence on several key points. He did not believe that the appellant last saw Mr. Wapoose on the road or that he was standing far away from J.M. during the beating, nor that the assault lasted as long as five minutes. In part, this was because the appellant's account did not accord with scene photographs. They showed Mr. Wapoose in the ditch and showed no blood on the road. This belied the appellant's testimony that he last saw Mr. Wapoose on the side of the road. Moreover, no metal pole was recovered by police. This contradicted the appellant's testimony that he saw J.M. throw it in the ditch. Based on the trial judge's conclusion that the appellant's evidence on these issues was not credible, he rejected the appellant's testimony about his degree of involvement in the physical acts of beating and stabbing Mr. Wapoose.

- [19] The trial judge also disbelieved that the appellant counseled J.M. and L.Z. not to rob someone on the night of the killing, as this was inconsistent with his testimony that he returned to the scene of the assault when he heard screams and did not leave during the beating. This too buttressed the trial judge's rejection of the appellant's account of his involvement in the assault.
- [20] Finally, the trial judge did not believe the appellant's evidence that he lied to police about his involvement in the offence when questioned in February 2015 because he had received death threats from J.M. and L.Z. shortly after the offence. The trial judge did not mention the appellant's testimony regarding the death threats he received in 2015.
- [21] The trial judge repeats at several points in his reasons that the appellant had concocted his in-court evidence to minimize his involvement in Mr. Wapoose's death and to "deflect blame from himself" and onto L.Z.: see paras. 68-70, 72, 75, 77-78, 80, 82. With respect to his lie to police, the trial judge reasoned that once the appellant was confronted by police, his motive for keeping quiet disappeared, given that his potential involvement in the killing was now revealed. In the trial judge's view, the appellant chose not to tell the truth, not because he was afraid of retribution, but because he was involved in the acts leading to Mr. Wapoose's death and did not want to admit it.
- [22] Overall, the trial judge believed L.Z.'s evidence that he witnessed J.M. and the appellant beat the victim. In part, this was because L.Z. was truthful about stealing Mr. Wapoose's bicycle. The trial judge accepted that J.M. also participated in the assault and did not discount the possibility that L.Z. participated in the assault.
- [23] The Crown submitted that the appellant was a party to the manslaughter by virtue of a common unlawful purpose with J.M., pursuant to s. 21(2) of the Criminal Code, R.S.C. 1985, c. C-46. The trial judge held he was not bound by that aspect of the Crown's submissions. Based on the evidence he did accept, the trial judge found he was required to consider whether the Crown had proved beyond a reasonable doubt that the appellant was a joint principal to the manslaughter pursuant to s. 21(1)(a) of the Criminal Code. The trial judge found that the appellant was liable as a joint principal because he participated in a violent group assault that caused Mr. Wapoose's death, and his acts of repeatedly punching and kicking Mr. Wapoose constituted an unlawful act that was a contributing cause of death beyond the de minimis range.

D. Issues on Appeal [24] The appellant raises the following grounds of appeal with respect to his finding of guilt:

- (1) Whether the trial judge erred in treating the appellant's lies to police and disbelieved evidence at trial as circumstantial evidence of guilt;
- (2) Whether the trial judge erred in failing to appropriately scrutinize the evidence of L.Z. and in rejecting the appellant's evidence based on illogical reasoning; and

- (3) Whether the trial judge erred in finding the appellant guilty as a principal under s. 21(1)(a) of the Criminal Code when the parties conducted the trial based on the appellant's potential liability under ss. 21(1)(b) (aider) and 21(2) (common unlawful purpose).
- [25] If unsuccessful in appealing his finding of guilt, the appellant raises the following grounds of appeal with respect to his sentence:
- (1) Whether the trial judge erred in his application of the principles of youth sentencing, erred in failing to give effect to any mitigating factors, erred in treating a subsequent adult conviction as an aggravating factor, and ultimately imposed a sentence that was demonstrably unfit.

E. Analysis [26] In my view, this appeal can be resolved on the basis of the first ground of appeal.

- [27] As I explain below, I agree with the appellant that the trial judge erred in treating his disbelief of the appellant as circumstantial evidence of his guilt. Accordingly, a new trial is required.
1. Legal Framework [28] There is an important distinction between a trial judge's mere disbelief of an accused person's exculpatory evidence and a finding of deliberate concoction: *R. v. Wright*, 2017 ONCA 560, 354 C.C.C. (3d) 377, at para. 38. As this court affirmed in *R. v. Al-Enzi*, 2021 ONCA 81, 401 C.C.C. (3d) 277, leave to appeal refused, [2023] S.C.C.A. No. 35., while a statement that is disbelieved cannot be evidence that strengthens the Crown's case, a statement that has been deliberately concocted is capable of supporting an inference of guilt: at para. 38. This is because it supports the inference that the accused fabricated their account because they were conscious of their guilt and thus sought to minimize it: *R. v. O'Connor* (2002), 170 C.C.C. (3d) 365 (Ont. C.A.), at para. 26.
- [29] However, in keeping with the fact that the Crown always bears the burden of proof, the Crown must adduce evidence of fabrication that is independent of the evidence that contradicts or discredits the accused's exculpatory statement: *Al-Enzi*, at para. 39. Otherwise, it would be far too easy to "equate disbelief of an accused's version of events with guilt": *R. v. Coutts* (1998), 126 C.C.C. (3d) 545 (Ont. C.A.), at pp. 551-52, leave to appeal refused, [1998] S.C.C.A. No. 450.
- [30] Accordingly, in *Iqbal*, at para. 58, this court set out the following criteria for appellate review of a trial judge's treatment of disbelieved evidence arising from in-court testimony:
- (a) Did the trial judge disbelieve the appellant's testimony?
 - (b) If so, did the trial judge also find that the appellant fabricated their testimony?
 - (c) If the trial judge found the appellant's testimony was fabricated, was there independent evidence of fabrication capable of supporting that finding?
 - (d) If not, did the trial judge, despite the absence of independent evidence of fabrication, erroneously rely on the finding of fabrication as circumstantial evidence of guilt?

- [31] The analysis remains the same for out-of-court statements: *R. v. Ahmadi*, 2025 ONCA 219, 446 C.C.C. (3d) 497, at para. 50.
- [32] Where an exculpatory statement is made in court, the circumstances surrounding the statement cannot constitute independent evidence of fabrication: *Iqbal*, at para. 55. This is because such evidence necessarily goes to the falsity of the accused's in-court testimony, and it is well-established that in order for evidence to be truly independent, it cannot be used to both disbelieve the accused and make a finding of fabrication or concoction against him: *Iqbal*, at paras. 56, 75-76.
2. The trial judge improperly relied on his disbelief of the appellant as circumstantial evidence of guilt a. Parties' positions
- [33] The appellant submits that the trial judge used his disbelief of the appellant's in- and out-of-court statements as circumstantial evidence of guilt without independent evidence thereof. According to the appellant, the trial judge made six separate findings that the appellant testified in an exculpatory manner at trial because he was guilty of the offence and was attempting to avoid responsibility.
- [34] The appellant also asserts that there was no independent evidence of fabrication adduced at trial. The appellant adds that the fact that the appellant's evidence conflicted with some evidence at trial – including the photographs of the location in which the deceased's body was found – is not independent evidence of fabrication.
- [35] The Crown submits that the content of the accused's account can be used to ground a finding that his evidence is a deliberate fabrication. Accordingly, significant inconsistencies, improbabilities, and contradictions in the accused's in-court testimony can constitute independent evidence of fabrication, depending on the specifics of the case. According to the Crown, *Iqbal* should not be understood to displace the proposition that the content of an in-court statement can be used as independent evidence of concoction.
- [36] The Crown agrees with the appellant that the trial judge found that the appellant's evidence contained lies and deliberate fabrications. These findings contributed to the trial judge's rejection of the appellant's evidence. However, the trial judge did not go so far as to use these findings as positive evidence of the appellant's guilt under the third step of *W.(D.)*. For example, the Crown contends that the trial judge does not say that the fabrications were evidence of the appellant having a guilty conscience because he committed the offence. Rather, the finding of guilt was based on the evidence that at least two persons committed the assault and the trial judge's acceptance of L.Z.'s evidence.
- [37] Alternatively, the Crown argues that the curative proviso under s. 686 of the Criminal Code should be applied. Even if the trial judge implicitly used the fact that the appellant lied to avoid culpability as circumstantial evidence of guilt, it can reasonably be concluded that his ultimate finding of guilt would have been the same but for this error.

b. The trial judge's erroneous treatment of the appellant's in-court testimony

[38] I begin with the trial judge's treatment of the appellant's in-court evidence. It is clear that the trial judge disbelieved the bulk of the appellant's testimony and concluded he had fabricated his exculpatory account. However, he then went a step further. In evaluating the appellant's in-court testimony, the trial judge made findings to the effect that the appellant was "lying about the details because he [was] making up the parts of the story in a way to try and deflect blame from himself": at para. 77. Elsewhere, he stated, at para. 72:

In addition, I do not believe Z.M.L.'s testimony about his involvement in the beating and stabbing actions that were visited upon Mr. Wapoose because of his evidence about what he had been saying to the others before they came upon Mr. Wapoose. Z.M.L. testified that L.Z. had been "egging J.M. on" to try and find someone to rob. Z.M.L. testified he was telling them to stop and that he wanted no part of this. In my view, this is just a convenient lie to place blame on L.Z. and deflect blame from himself. [Emphasis added.]

[39] In my view, in focusing on the appellant fabricating facts in order to deflect blame from himself, the trial judge implicitly relied on fabrication as circumstantial evidence of guilt. It only makes sense for the appellant to have fabricated his account to "deflect blame" if he himself participated in the assault. The trial judge did not refer to the legal principles governing fabricated statements as circumstantial evidence of guilt, nor did he explicitly identify any independent evidence of fabrication.

[40] This is similar to the error identified in *Iqbal*. In that case, the trial judge erroneously found that, by fabricating part of his testimony, the appellant was "hiding something" and had attempted to "mislead the court": at para. 78. This court found that the trial judge had relied on her disbelief of the appellant's testimony to infer that he must have deliberately fabricated his evidence to avoid culpability: *Iqbal*, at para. 79. Here, while the trial judge did not use the same language of "hiding something" or attempting to "mislead the court," the trial judge explicitly relied on his disbelief of the appellant's evidence to infer that he fabricated his in-court evidence to avoid culpability. It is clear that the trial judge inferred that the appellant made these statements because he was conscious of his guilt.

[41] However, as noted above, the trial judge failed to identify any independent evidence of fabrication. According to *Iqbal*, at para. 69:

Where a trial judge fails to advert to independent evidence of fabrication, the jurisprudence indicates that an appellate court may assess whether the record reveals sufficient such evidence to show that the trial judge's omission did not prejudice the appellant.

[42] The record does not contain any independent evidence of fabrication. Indeed, the trial judge erred by using L.Z.'s evidence and the scene photographs as the basis to both disbelieve the appellant's evidence and make a finding of fabrication or concoction against him. With respect to L.Z.'s testimony, this evidence directly contradicts the appellant's evidence and thus cannot be considered independent: *Iqbal*, at para. 56. With respect to the scene

photographs, as Iqbal notes, the same piece of circumstantial evidence cannot be used to both disbelieve an accused and support a claim of fabrication: at paras. 75-76.

[43] Similarly, contrary to the Crown's submission, Iqbal makes clear that the circumstances surrounding an accused's in-court statement cannot be used to ground a finding of fabrication: at para. 55. Any implausibility or inconsistency in the appellant's testimony cannot be placed on the scales of proof to find him guilty.

[44] Thus, the trial judge impermissibly used his rejection of the appellant's in-court evidence as circumstantial evidence of guilt, notwithstanding the absence of independent evidence of fabrication.

[45] As this error in my view warrants a new trial, I do not need to consider whether the trial judge's treatment of the appellant's out-of-court evidence also reveals a reversible error.

c. The curative proviso does not apply

[46] The Crown argues that the curative proviso in s. 686(1)(b)(iii) of the Criminal Code applies. I disagree. With respect to the "harmless error" branch, the trial judge's finding of fabrication both operated as independent evidence of guilt and allowed him to prefer L.Z.'s testimony. L.Z.'s evidence, in turn, was the only evidence implicating the accused in the physical acts of beating and stabbing. There is thus a very real possibility that this error impacted the ultimate verdict: see e.g., *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 26. With respect to the "overwhelming Crown case" branch, this was a credibility case where the trial judge recognized material weaknesses in L.Z.'s evidence. It is not the case that L.Z.'s evidence was so overwhelming that a finding of guilt was inevitable: *Khan*, at para. 26.

F. Disposition [47] Having concluded that the appellant's finding of guilt must be set aside based on the first ground of appeal, it is not necessary for me to consider the additional grounds against the finding of guilt or the sentence appeal.

[48] For these reasons, I would allow the appeal and order a new trial.

Released: December 16, 2025 "L.S."

"L. Sossin J.A."

"I agree, J. Copeland J.A."

"I agree, S. Gomery J.A."

[1] This appeal is subject to a publication ban pursuant to s. 110 of the Youth Criminal Justice Act, S.C. 2002, c. 1.

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