

CANADA / JUDGMENT

R. v. Zaki

2026 ONCA 130

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Zaki Collection Decisions of the Court of Appeal Date 2026-02-24 Neutral citation 2026 ONCA 130 Docket numbers COA-23-CR-0049 Judges Tulloch, Michael H.; Roberts, Lois B.; Rahman, Moiz Subject Criminal Decision Content COURT OF APPEAL FOR ONTARIO CITATION: R. v. Zaki, 2026 ONCA 130[1] DATE: 20260224 DOCKET: COA-23-CR-0049 Tulloch C.J.O., Roberts and Rahman JJ.A. BETWEEN His Majesty the King Respondent and Syed Zaki Appellant Nader R. Hasan and Alexandra Heine, for the appellant Katherine Beaudoin, for the respondent Heard: February 3, 2026 On appeal from the conviction entered by Justice Riun Shandler of the Ontario Court of Justice, on October 20, 2022, and from the sentence imposed on January 24, 2023. REASONS FOR DECISION Overview

- [1] The appellant was convicted of three counts of sexual assault. The charges arose out of three separate incidents against three separate complainants. The complainants were patients at the hospitals where the appellant worked as an EEG technician, and were sexually touched during their EEG tests. When each of the assaults occurred, the appellant was alone with the complainants, each of whom was incapacitated by seizures or heavily drugged. He received a global custodial sentence of eighteen months, followed by 18 months' probation.
- [2] The appellant appeals his convictions and sentence. For the reasons that follow, we dismiss his appeals.

Analysis

1. Conviction Appeal [3] We reject the appellant's submissions that the trial judge misapplied the W.D. analytical framework or reversed the burden of proof. The trial judge clearly stated that the Crown bore the burden of proving the offences beyond a reasonable doubt and that the appellant, who was presumed innocent, did not have to prove anything.
- [4] The appellant argues that the trial judge erred in assessing both the appellant's evidence and the complainants' evidence in light of: 1) the fact that the complainants were incapacitated, 2) the possibility that the touching could have been incidental and misperceived as sexual, and 3) contradictory evidence given by one of the complainant's nurses.

- [5] In fact, the trial judge's reasons respond to the parties' arguments, which framed the live issues at trial. The appellant categorically denied the alleged sexual touching. At trial, defence counsel argued that there were reliability concerns with the evidence of the complainants because of their medical conditions. As such, the trial judge's reasons devoted some time to assessing the credibility and reliability of the complainants' evidence. The trial judge did not simply prefer the complainants' accounts of what happened over the appellant's version of events. He carefully examined the whole of the evidence of all the witnesses: the complainants, their family members present in hospital, the appellant and the attending nurses.
- [6] In particular, he assessed the inconsistencies between the complainants' evidence and other witnesses' and explained why he accepted the complainants' evidence. He was alive to the potential frailties with the complainants' evidence because of their respective levels of incapacity at the time of the assaults and detailed why they did not detract from the credibility and reliability of their evidence. That he did not assign the same significance to the deficiencies in the complainants' evidence as urged by the appellant at trial and on appeal does not mean that his treatment of them was flawed: *R. v. O.M.*, 2014 ONCA 503, 313 C.C.C. (3d) 5, at para. 28.
- [7] The trial judge found that many aspects of the complainants' evidence, outside of the sexual assaults themselves, were corroborated by other witnesses, including the appellant. The corroboration satisfied him as to the complainants' consciousness of what was happening around them at the relevant times. He did not accept the appellant's denials, nor did they leave him with a reasonable doubt about his guilt.
- [8] At its core, we see the appellant's arguments as amounting to an allegation of insufficiency of reasons rather than a misapplication of the reasonable doubt standard to the trial judge's credibility and reliability determinations. The appellant argues that although he sets out the appellant's evidence in his reasons, the trial judge should have explained why he rejected it and why it did not leave him with a reasonable doubt.
- [9] This is not a case where the trial judge failed to give any meaningful reasons. His reasons allow for meaningful appellate review. As already noted, he carefully considered all the evidence and applied the correct governing principles. The trial judge considered the Crown's case with the appellant's denials in mind: *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, at para. 28. It was apparent from his reasons that, as in *R. v. J.J.R.D.*, 218 O.A.C. 37 (C.A.), at para 53, leave to appeal refused, [2007] S.C.C.A. No. 69, the trial judge rejected totally the appellant's denials because "stacked beside" the complainants' evidence, they did not leave the trial judge with a reasonable doubt. As this court further explained in *J.J.R.D.*, at para. 53: An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.

- [10] That is the case here. We see no basis for appellate intervention.
2. Sentence Appeal [11] We do not accept the appellant's submissions that the trial judge erred: 1) in declining to impose a conditional sentence order; or 2) in imposing a 20-year SOIRA order under s. 490.013(2) of the Criminal Code.
- i. Conditional Sentence
- [12] With respect to the custodial sentence imposed, the trial judge properly applied the relevant sentencing principles and balanced the mitigating and aggravating factors in this case. He considered but rejected a conditional sentence because he found that such a sentence would not be consistent with the fundamental purpose and principles of sentencing, as the objectives of denunciation and deterrence were predominant in this case. He found, correctly in our view, that the sentencing objectives of denunciation and deterrence predominated because of the appellant's repeated abuse of his position of trust against vulnerable female patients who remain hugely traumatized by the appellant's actions.
- [13] In considering specific deterrence and assessing the appellant's rehabilitation prospects, the trial judge did not err by finding that "there was little to do to promote his rehabilitation without his acceptance of responsibility for his actions". As the trial judge concluded: "No treatment program will be effective as [the appellant] does not admit to having any problems that led to his offending behaviour". The trial judge did not use the appellant's lack of expressed remorse as an independent aggravating factor but as a relevant consideration regarding the appellant's rehabilitation and likelihood of reoffending, which he was permitted to do. His consideration of the absence of remorse tracks this court's instructed approach in *R. v. Shah*, 2017 ONCA 872, at para. 8: Lack of remorse is not ordinarily a relevant aggravating factor on sentencing. It cannot be used to punish the accused for failing to plead guilty or for having mounted a defence. Absence of remorse is a relevant factor in sentencing, however, with respect to the issues of rehabilitation and specific deterrence, in that an accused's absence of remorse may indicate a lack of insight into and a failure to accept responsibility for the crimes committed, and demonstrate a substantial likelihood of future dangerousness. [Citations omitted.]
- [14] The custodial sentence imposed was fit. We see no basis to interfere with it.
- [15] In support of his request for a conditional sentence, the appellant seeks to file fresh evidence concerning his wife's deteriorating medical condition and his increased role as her caregiver as evidence of the impact that his incarceration would have on his family. We are not persuaded that it would have affected the custodial sentence imposed. The impact of the appellant's incarceration has not materially changed since sentencing: while the fresh evidence suggests that, sadly, the appellant's wife's medical condition has deteriorated, her dependence on caregivers has not materially altered; nor is there evidence that the appellant's caregiving role has substantially increased.
- [16] Accordingly, we do not admit the fresh evidence. ii. SOIRA Order

- [17] With respect to the SOIRA order, the appellant seeks to vacate it, arguing that the trial judge erred by treating the 20-year SOIRA registration stipulated under s. 490.013(2)(b) of the Criminal Code as a mandatory order. He relies on the Supreme Court's October 28, 2022 decision, *R. v. Ndhlovu*, 2022 SCC 38, [2022] 3 S.C.R. 52, in which the Court declared s. 490.012 of the Criminal Code to be unconstitutional and of no force or effect.
- [18] We disagree that the trial judge erred. Section 490.012 provides that SOIRA orders are mandatory for offenders convicted of sexual assault. As the trial judge noted, in *R. v. Ndhlovu*, the Court held that the declaration of invalidity in respect of s. 490.012 was suspended for one year and applies prospectively. Accordingly, we agree with the trial judge that at the time of the appellant's sentencing on January 24, 2023, s. 490.012 was valid and mandatory. Accordingly, the trial judge made no error in imposing a 20-year SOIRA order as required under s. 490.013(2)(b) of the Criminal Code.
- [19] We also note that the appellant may still apply to a lower court for an exemption under s. 490.04(1)(a) of the Criminal Code.
3. Notice of Constitutional Question [20] While not pursued at trial, the appellant brings a notice of constitutional question to seek relief from the SOIRA registration. Although this court may consider the appellant's Charter request for relief under s. 24(1), the record is not sufficiently developed to make the factual findings required to determine the appellant's claim for a personal remedy; we are therefore of the view that it is more appropriately brought before a court of first instance: *R. v. N.D.*, 2024 ONCA 777, at paras. 49 and 51.

Disposition

- [21] The appeals are therefore dismissed. The motion to admit fresh evidence is also dismissed. "M. Tulloch C.J.O." "L.B. Roberts J.A." "M. Rahman 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.

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