NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. P.N.*, 2021 NSCA 68

Date: 20211007
Docket: CA 484503
Registry: Halifax

Between:

P.N.

Appellant

and

Her Majesty The Queen

Respondent

and

Jonathan Hughes

Intervenor

Restriction on Publication: s. 486.4(1)

Judge: The Honourable Justice David P. S. Farrar

Appeal Heard: June 16, 2021, in Halifax, Nova Scotia

Subject: Criminal Law; admissibility of misconduct evidence; credibility assessment

Summary: Mr. N was convicted of two counts of sexual assault, two counts of unlawful confinement and seven counts of common assault against Ms. Q, all occurring between September 1, 2015, and October 21, 2015.

Mr. N appeals alleging that the trial judge committed a number of errors including, improperly admitting bad conduct evidence of Mr. N improperly using Ms. Q's credit cards; using the absence of evidence of a basis for finding Ms. Q as credible and requiring Mr. N to call evidence to refute the evidence of Ms. Q.

Issues: (1) Did the trial judge err by admitting extrinsic misconduct evidence at trial;

(2) Did the trial judge err in improperly shifting the burden of proof to the defence?

(3) Did the trial judge err by making positive determination of Ms. Q's credibility on the basis of the absence of contradictory evidence?

Result: The trial judge erred by admitting evidence that Mr. N misused Ms. Q's credit cards and in relying on that evidence in finding that Mr. N was not credible.

He also erred in finding that Ms. Q's credibility was enhanced by her identification of the presence of a third party at one of the alleged incidents of sexual assault. The third party was not called to testify by either the crown or the defence. The trial judge found that Ms. Q's reference to the third-party enhanced her credibility because it would have been easy for the defence to have the individual testify if they were seeking to put his credibility in doubt.

As a result of the trial judge's errors a new trial is ordered.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 16 pages.

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Judges:	Beveridge, Farrar, Beaton JJ.A.
Appeal Heard:	June 16, 2021, in Halifax, Nova Scotia
Held:	Appeal allowed and a new trial ordered, per reasons for judgment of Farrar; Beveridge and Beaton JJ.A. concurring
Counsel:	Nicole Rovers, for the Appellant Glenn A. Hubbard, for the Respondent William L. Mahody, Q.C., for the Intervenor

Order restricting publication — sexual offences

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Reasons for judgment:

Introduction

[1] In an oral decision (unreported) on March 5, 2018, after a trial before Justice Glen G. MacDougall, the Appellant, P.N., was convicted of two counts of sexual assault, two counts of unlawful confinement and seven counts of common assault all occurring between September 1, 2015, and October 21, 2015. The Indictment describes the offences as follows:

1. AT, or near Bedford, in the county of Halifax in the Province of Nova Scotia, did unlawfully commit a sexual assault on M.Q.[1], contrary to Section 271(1)(a) of the Criminal Code.
2. AND further that he, at or near Bedford, in the county of Halifax in the Province of Nova Scotia, did unlawfully commit a sexual assault on M.Q., contrary to Section 271(1)(a) of the Criminal Code.
3. AND further that he at the same time and place aforesaid, did unlawfully assault M.Q., contrary to Section 266 of the Criminal Code.
4. AND further that he at the same time and place aforesaid, did without lawful authority confine M.Q., contrary to Section 279(2) of the Criminal Code.
5. AND further that he, at the same place aforesaid, did unlawfully assault M.Q., contrary to Section 266 of the Criminal Code.
6. AND further that he, at the same place aforesaid, did unlawfully assault M.Q., contrary to Section 266 of the Criminal Code.
7. AND further that he, at the same place aforesaid, did unlawfully assault M.Q., contrary to Section 266 of the Criminal Code.
8. AND further that he, at the same place aforesaid, did unlawfully assault M.Q., contrary to Section 266 of the Criminal Code.
9. AND further that he, at the same place aforesaid, did unlawfully assault M.Q., contrary to Section 266 of the Criminal Code.

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[1] The complainant is referred to as Ms. Q. in the Indictment, at the time of trial she had changed her name to M.L.. I will refer to her throughout as M.Q. or Ms. Q..

10. AND further that he, at the same place aforesaid, did unlawfully assault M.Q., contrary to Section 266 of the Criminal Code.

11. AND further that he, at the same place aforesaid, did unlawfully confine M.Q., contrary to Section 279(2) of the Criminal Code.

[2] He was acquitted of one of the counts of sexual assault.

[3] Mr. N. appeals. He also seeks to introduce fresh evidence in support of one of his grounds of appeal that of ineffective assistance of counsel. For the reasons that follow, I would dismiss the application to introduce fresh evidence, allow the appeal, set aside the convictions and order a new trial.

Background

[4] Mr. N. and Ms. Q. met on a dating site in the spring of 2015, and moved in together at […] in Bedford, Nova Scotia, in early September 2015, shortly before or at the beginning of the school year. They lived together until approximately October 21, 2015. During their period of co-habitation, Ms. Q. also maintained her own residence at […] in Bedford, Nova Scotia. Both parties had two children from previous relationships.

[5] Ms. Q. testified about a series of violent, and in some cases, sexually violent behaviours on the part of Mr. N. while they were cohabitating.

[6] The trial judge did not specifically assign factual determinations directly to the counts on the information. I will attempt, as Mr. N. has done in his factum, to connect the testimony at trial to the counts on the Indictment.

Incident 1: Counts 3 & 5

[7] Ms. Q. described an incident that occurred around September 17, 2015. She said that she had locked herself in the bathroom and was on the telephone when Mr. N. kicked in the door, causing her to move backwards toward the windows. She described an hour or so of interaction with Mr. N. before she left to meet with her girlfriend. In this hour-long period, Mr. N. threw a PlayStation controller at her that hit her in the back of the leg. She said that she made a disparaging remark to Mr. N. and he approached her with his hand raised as if to hit her, and then he spit in her face. She slapped his face in response.

[8] The trial judge concluded that Mr. N. was guilty of assault – presumably Count 3 (the first assault count in the Indictment) – by throwing the PlayStation controller that struck Ms. Q. in the back of the leg. He also convicted Mr. N. of assault – presumably Count 5 (the next assault count in the Indictment) – by "the aborted striking of Ms. Q.'s face with his hand and then, instead, spitting in her face" (Trial Decision, p. 17).

Incident 2: Counts 2, 6, 4 or 11

[9] Ms. Q. described a second incident that occurred before the September 17, 2015, incident outlined above. She was of the view that it took place on the night before the first day of school, or probably a week prior to the PlayStation controller incident.

[10] She said that she and Mr. N. were in their bedroom throughout the night. She said Mr. N. was drunk and wanted sex. He was persistent. She said that she was concerned with keeping him quiet so as not to disturb her children who were sleeping in another room. At one point, around 4:00a.m. or 5:00a.m., Mr. N. picked her up and threw her across the bed. She landed on the hardwood floor and hit her head. Ms. Q. testified that shortly thereafter she had sexual intercourse with him because she felt scared and was desperate to keep him quiet.

[11] The trial judge found Mr. N. guilty of sexual assault – presumably Count 2 – on the basis that her consent was not voluntarily given (Trial Decision, pp. 16-17).

[12] The trial judge also convicted Mr. N. of unlawful confinement – either Count 4 or 11 – on the basis that Ms. Q. had been prevented from removing herself from the bedroom (Trial Decision, p. 16).

[13] The trial judge convicted Mr. N. of assault – presumably Count 6 (the next assault count in the Indictment) – for throwing Ms. Q. over the bed, resulting in her head striking the floor (Trial Decision, p. 17).

Incident 3: Count 7

[14] Ms. Q. testified that she was punched in the arm twice by Mr. N. on or about Thanksgiving 2015. She testified that this caused bruising.

[15] Justice MacDougall convicted Mr. N. of assault – presumably Count 7 (Trial Decision, p. 17).

Incident 4: Count 8

[16] Ms. Q. testified that on the Friday following Thanksgiving 2015, she was sitting on the toilet in the bathroom located next to the bedroom when Mr. N., without warning, poked her in the eye causing a black eye and a small cut.

[17] Justice MacDougall convicted Mr. N. of assault – presumably Count 8 (Trial Decision, p. 17).

Incident 5: Count 9

[18] Ms. Q. testified that on the following Saturday morning she was in bed with Mr. N. when she looked at him and said: "you would never really hurt me". She said she was then struck so hard in the head that she saw stars. In cross-examination she added that this comment arose after Mr. N. had slapped her twice.

[19] Justice MacDougall convicted Mr. N. of assault by "striking Ms. Q. in the head so hard that she was left dazed" – presumably Count 9 (Trial Decision, p. 17).

Incident 6: Counts 4 or 11

[20] Ms. Q. testified that later that same night, while he was out, Mr. N. sent an onslaught of accusatory texts to her regarding alleged infidelity. He later showed up at the apartment and continued his accusations to the point where he would not let her sleep or exit the bedroom. He physically pinned her to the bed several times.

[21] Justice MacDougall convicted Mr. N. of unlawful confinement – either Count 4 or 11 (Trial Decision, p. 16).

Incident 7: Count 10

[22] Ms. Q. testified that, about two days before their separation, she and Mr. N. were lying in bed listening to music on headphones. She said that she was, without warning, elbowed in the ribs by him which resulted in a cracked rib. She testified

that she went to her doctor after she separated from Mr. N. and had her ribs examined and a rape kit completed.

[23] Justice MacDougall convicted Mr. N. of assault – presumably Count 10 (Trial Decision, p. 17).

Incident 8: Count 1

[24] Ms. Q. described a serious allegation of sexual assault(s) that occurred at her condominium. She situated the incident as sometime before Thanksgiving weekend, 2015. She testified that both she and Mr. N. had been drinking. She said that he sexually assaulted her in the bathroom off the master bedroom when he forced her face into the tiles on the bathroom floor, and shoved his fingers inside of her vagina causing two or three inch-long cuts.

[25] Ms. Q. said that she went to the hospital about a week later due to the nature of her injuries. She was cross-examined as to the contents and meaning of a text conversation between her and Mr. N. at or around the time of this incident. The text messages suggested the vaginal cuts were an accident during the course of consensual sex caused by Mr. N.'s fingernails.

[26] The trial judge, after considering, among other things, evidence brought out in cross-examination regarding these text messages and a medical report describing the extent of the injuries, concluded he had a reasonable doubt about the bathroom incident and did not convict Mr. N. of any offence arising from it:

> After considering all the evidence surrounding this series of related events, I am left with a reasonable doubt that it happened the way the Complainant says it did. While it may have happened and likely did, I am not convinced beyond a reasonable doubt that it was non-consensual (Trial Decision, p. 13).

[27] Ms. Q. testified that after the digital penetration incident, they went to sleep. Then, she gave the following evidence:

> I remember the next morning he called his friend Joey to come pick him up to go to work, and when Joey got there he decided that he wanted to have sex with me. And I remember I was bleeding, like, bad, and he got it all over his white t-shirt. He wore that t-shirt around with the blood on it from me, took a picture of it and sent it to me. So fucked up.

[28] She said that Mr. N. attempted intercourse with her the following morning in the bedroom but was either unsuccessful or only temporarily successful. In cross-examination, she acknowledged that she had not complained initially to the police about this, nor had she mentioned it at the preliminary inquiry. In re-direct examination, she said she did not tell the police or testify at the preliminary inquiry about this incident because she did not think about it. The trial judge came to no conclusion on the issue of whether the Crown had proved a sexual assault as a result of this allegation of attempted intercourse the following morning.

[29] Ms. Q. then testified about Mr. N. attempting to force her to perform oral sex on him in her kitchen in the presence of Joey:

> A. I remember that same morning, when Joey was there, [Mr. N] tried to get me to give him a blow job in front of this man in my kitchen. I remember that.
> Q. What if anything, did Mr. [N.] say?
> A. He just pushed me down on my knees in the kitchen, in front of my fridge. Joey was standing there. He thought it was funny.
>
> …
> A. He tried to get me to give him a blow job, and I wouldn't. And he was telling me that, like, just do it, and Joey was standing there, and I wouldn't, and he tried to force my head towards it, and I wouldn't. It didn't happen.
> Q. Force your head towards what?
> A. His penis.
> Q. Was it inside his pants or was it exposed?
> A. Outside.

[30] In cross-examination, Ms. Q. agreed that she had not disclosed this incident involving oral sex in the kitchen at the time of her initial complaint, while under oath at the preliminary inquiry or at any time prior to the trial. In re-direct examination, she said she did not provide this information earlier, at the preliminary inquiry, because she did not remember a lot of it.

[31] In cross-examination about Mr. N.'s exposure of his penis in front of Joey, Ms. Q. added that he "pulled it out and peed in the sink, and then he wanted me to give him a blow job. And Joey was right there".

[32] While the trial judge had a reasonable doubt about the alleged digital penetration in the bathroom, he was satisfied beyond a reasonable doubt that Ms. Q. had been sexually assaulted in the kitchen the following morning:

> What occurred the next morning, however, has a different result. Ms. [L.] describes being in the kitchen preparing breakfast for the children. The children were

> elsewhere in the house. Mr. [N.]'s friend, Joey, had dropped by at Mr. [N.]'s request to take him to work. Joey was present in the kitchen when, according to Ms. [L.], the accused tried to force her to perform oral sex on him. Her evidence was that Mr. [N.]'s penis was outside his pants and he tried to physically force her head downwards towards his exposed penis. She managed to resist him.
>
> During cross-examination, she admitted that this incident had not been previously mentioned to the police or during her testimony at the preliminary inquiry. In speaking about it at trial, Ms. [L.] said she recalled what happened and added that Mr. [N.] also peed in the kitchen sink. The fact that Ms. [L.] added this and put Mr. [N.]'s friend Joey into the equation, in my mind, enhances her credibility. If it had not occurred, it would have been so easy to have Joey testify that he did not witness these events.
>
> I am not suggesting that the accused has the labouring oar to prove his innocence. I only mention it to explain why I believe the Complainant. In doing so I find that all of the elements of sexual assault have been proved beyond a reasonable doubt and, accordingly, I find Mr. [N.] guilty of the offence of sexual assault contrary to s.271(1) (a) of the ***Criminal Code*** (Trial Decision, pp. 13-14).

[33] This was the first conviction of sexual assault outlined by the trial judge in his decision. Therefore, this is accounted for by Count 1.

Other Incidents

[34] At the conclusion of direct-examination, Ms. Q. was asked if there were any further incidents she could recall. She indicated that she remembered being hit in the head the day after she was poked in the eye. The Crown was permitted to present Ms. Q.'s initial statement of complaint from October 22, 2015, to her in an effort to refresh her memory. After reviewing the statement, she testified that Mr. N. slapped her across the face in front of her son in the kitchen of their apartment on the very day that she moved out.

[35] The trial judge made no determination about this allegation of assault from the October 22, 2015, statement. He indicated that there were other instances of physical assault but that there "is no need to elaborate on these allegations as there was ample evidence to establish beyond a reasonable doubt that P. N., on at least seven occasions, assaulted Ms. [L.]" (Trial Decision, p. 18).

[36] Mr. N.'s defence was a denial. He testified that he did not throw her across the bed or unduly pressure her into intercourse the night before the first day of school in September 2015.

[37] Mr. N. said on the same night she says she barricaded herself in the bathroom, it was actually she who struck him in the face in front of his daughter. Mr. N. denied kicking in the bathroom door or spitting in Ms. Q.'s face. He also denied striking Ms. Q. in the leg with a PlayStation controller.

[38] As to the digital penetration in the bathroom allegation, Mr. N. testified the sex was consensually undertaken with Ms. Q.. Mr. N. referred to the contents of texts between himself and Ms. Q.. Mr. N. agreed that Joey came over to the apartment the next morning after this incident. However, he denied attempting to have intercourse with Ms. Q. in the morning, urinating in the sink, or attempting to force her to engage in oral sex in the kitchen.

[39] Mr. N. testified he was with Ms. Q. on Thanksgiving 2015. He denied any assaultive behaviour on his part. He testified that around this time it was he who had been assaulted on occasion by her: once in front of the bathroom door and once in bed when they were listening to music.

[40] Mr. N. denied poking Ms. Q. in the eye or elbowing her in the ribs.

[41] Mr. N. confirmed that he and Ms. Q. often had senseless arguments about infidelity. He said that, in his mind, they were not taken seriously by either of them.

[42] Mr. N. testified that he never confined Ms. Q. in an effort to prevent her from leaving the residence or a room in the residence. He denied ever threatening her. He testified that the couple became involved in a final argument that led to Ms. Q. striking him and he swatted her hand away. They parted company the following day.

[43] As is often the case in sexual assaults, the trial judge was left to decide the guilt of Mr. N. based on his assessment of the credibility of the parties.

Issues

[44] Mr. N. raises the following issues in his Notice of Appeal:

1. The trial judge erred by improperly shifting the burden of proof to the defence;
2. The trial judge erred by making positive determinations of the complainant's credibility on the basis of the absence of contradictory evidence;

3. A miscarriage of justice resulted from a conviction based on allegations never particularized as the case to be met by the defence, either before or at the time of trial; and
4. A miscarriage of justice resulted from the ineffective assistance of trial counsel.

[45] In addition to the four issues raised by Mr. N., during the course of the appeal hearing, the Panel raised the issue of whether the trial judge erred by admitting extrinsic misconduct evidence at the trial. Supplementary submissions were requested and received from the parties on that issue. As a result, I would restate the issues as follows:

1. Did the trial judge err by admitting extrinsic misconduct evidence at trial?
2. Did the trial judge err in improperly shifting the burden of proof to the defence?
3. Did the trial judge err by making positive determinations of Ms. Q.'s credibility on the basis of the absence of contradictory evidence?
4. Did a miscarriage of justice result from a conviction based on allegations never particularized as the case to be met by the defence, either before or at the time of trial?
5. Did a miscarriage of justice result from the ineffective assistance of counsel?

[46] As I am satisfied that the appeal can be disposed of on the first three grounds of appeal, it is not necessary for me to deal with the last two grounds of appeal.

[47] The fresh evidence application seeks to introduce evidence on the ineffective assistance of counsel. As it is not necessary to address that ground of appeal, the application is dismissed.

Standard of Review

Issue 1

[48] Whether the trial judge misapplied the rules governing the admissibility and use of character evidence, is a question of law and reviewable on a correctness standard. (*R. v. C.J.,* 2011 NSCA 77, at para. 19).

Issues 2

[49] Whether the trial judge effectively shifted the burden of proof is a question of law reviewable on a correctness standard. (*R. v. J.A.H.*, 2012 NSCA 121, at para. 7).

Issues 3

[50] Absent error of legal principle, deference is owed to a trial judge's credibility assessments. (*R. v. N.M.*, 2019 NSCA 4, at para. 17).

Analysis

Issue 1: Did the trial judge err by admitting extrinsic misconduct evidence at trial?

[51] The Crown concedes that the trial judge erred in admitting extrinsic misconduct evidence, but it says its introduction had no impact on his decision because he placed no reliance on it. With respect, I disagree.

[52] The Crown, in direct examination, elicited evidence of bad character from Ms. Q. when she testified about being financially exploited by Mr. N.:

> Q: How did Mr. [N.] spend every cent that you had? What do you mean by that?
>
> A: I found out after the fact that he had used my credit cards for thousands of dollars in child care, building material, liquor store, cash withdraws. He's a taker, he's a parasite, he finds a host and he sucks them dry.
>
> Q: What steps, if any, did you take to uncover, I guess, this spending?
>
> A: Credit card statements.

> Q: Okay. Who had access to your credit card?
>
> A: He did.
>
> Q: Anyone else?
>
> A: I did.
>
> …
>
> Q: Anyone else?
>
> A: No, nobody else.

[53] The verdict in this case turned on credibility. In assessing the credibility of Mr. N., the trial judge specifically references the alleged financial exploitation of Ms. Q. by Mr. N. as a negative factor affecting the truthfulness of his testimony:

> What few shreds of credibility Mr. [N.] had at this point in time were completely torn away by this pitiful attempt to portray himself as the victim. Not only did Mr. [N.] physically and sexually abuse Ms. [L.], he also exploited her financially by using her credit card without her authorization to charge childcare expenses for his own children along with building supplies and food and beverage purchases for some of his employees and friends. When it comes down to deciding who might be telling the truth as between Mr. [N.] and Ms. [L.], it really isn't much of a contest. (Trial Decision p. 12).
>
> *[emphasis added]*

[54] In my view, in using the misconduct evidence in this manner, he erred.

[55] The principles with respect to the admissibility of bad character evidence were discussed by the Supreme Court in *R. v. Handy,* 2002 SCC 56:

> [31] The respondent is clearly correct in saying that evidence of misconduct beyond what is alleged in the indictment which does no more than blacken his character is inadmissible.

[56] The Supreme Court goes on in *Handy* to discuss the exclusionary rule laid down by Lord Herschell L.C. in *Makin v. Attorney-General for New South Wales,* [1894] A.C. 57:

> [65] It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

[57] The exceptions to the exclusionary rule are outlined in *R. v. G (S.G.)*, [1997] 2 S.C.R. 716:

1. The evidence is related to an issue in the case;
2. Where the accused puts their character in issue;
3. Where the evidence is adduced incidentally to proper cross-examination of the accused on their credibility.

[58] If the Crown wants to lead evidence of an accused's disposition, it must identify the issue at trial, on which the evidence of disposition is said to relate (*Handy*, pp 73 – 74).

[59] As Justice Binnie explained in *Handy*, the forbidden chain of reasoning is inferring guilt from a persons' character. The verdict may be based on prejudice rather than proof, thereby undermining the presumption of innocence:

> [139] It is frequently mentioned that "prejudice" in this context is not the risk of conviction. It is, more properly, the risk of an unfocused trial and a wrongful conviction. The forbidden chain of reasoning is to infer guilt from general disposition or propensity. The evidence, if believed, shows that an accused has discreditable tendencies. In the end, the verdict may be based on prejudice rather than proof, thereby undermining the presumption of innocence in ss 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.

[60] Even if the Crown identifies a live issue to which the evidence may relate, the trial judge is required to weigh the probative value against the prejudicial effect of such evidence. On the issue of the weighing of the probative value versus prejudicial effect, Justice Binnie said:

> [148] One of the difficulties, as McHugh J. pointed out in *Pfennig*, *supra*, at p. 147, is the absence of a common basis of measurement: "The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial." The two variables do not operate on the same plane.
>
> [149] As probative value advances, prejudice does not necessarily recede. On the contrary, the two weighing pans on the scales of justice may rise and fall together. Nevertheless, probative value and prejudice pull in opposite directions on the admissibility issue and their conflicting demands must be resolved.
>
> [150] …Justice is achieved when relevant evidence whose prejudice outweighs any probative value is excluded (*R. v. Marquand*, 1993 Can LII 37 (SCC), [1993] 4 S.C.R. 223.

[61] In Mr. N.'s trial, bad character evidence was adduced by the Crown, absent any comment from the Court or objection from defence counsel. There was no weighing of probative value versus prejudicial effect, or any comment about what use the Court could make of this evidence. The Crown identified no live issue to which a fact may have been inferred from the evidence with respect to the improper use of Ms. Q.'s credit cards. This is similar to *R. v. C.J.,* 2011 NSCA 77, where Fichaud J.A. reasoned:

> [42] No such process occurred here. At the trial the Crown identified no live issue to which a fact that may be inferred from the evidence would be relevant. So the defence had no opportunity to admit that fact at the heart of the live issue. The judge did not perform the functions that the balancing test called on him to perform. At the trial there was no acknowledgement by the Crown, defence or judge that there was even a process to be followed before this evidence could be admitted. Neither did the judge's decision acknowledge the process or attempt to perform those functions that he was called upon to perform. Yet the judge's decision used the problematic evidence in his reasoning that led to the convictions.

[62] The trial judge specifically referenced and relied on the improper evidence of bad character in making his credibility assessment and in questioning Mr. N.'s truthfulness. This is not an error so harmless or minor that it could not have impacted the verdict.

[63] In *R. v. Larion*, 2020 ONSC 5611, after reviewing the difficulty trial judges may have in precisely articulating their credibility assessments, the court said:

> [61] It is not apparent from the trial judge's reasons that she recognized that the inadmissible bad character evidence could play no part in her assessment of the appellant's credibility. Firstly, the reasons contain no self-direction to that effect. And, critically, they also reveal that the trial judge failed to appreciate that the Crown had elicited any "bad character" evidence concerning the appellant. In these circumstances, to presume that the trial judge guarded against allowing the bad character evidence, the very nature of which escaped her recognition, from affecting her assessment of the appellant's credibility, would involve little more than wishful thinking.

[64] Likewise, in the case of Mr. N., the trial judge's reasons reflect no self instruction on the law relating to bad character, and no realization that the Crown had elicited the bad character evidence concerning Mr. N.. For me to conclude that the trial judge did not allow this bad character evidence to influence his decision to convict Mr. N. (as suggested by the Crown), would be contrary to the record. The trial judge's reasons reveal he relied on that very evidence in his credibility assessment.

[65] The trial judge should not have used the improper evidence in his reasoning that led to the conviction.

[66] On this ground alone, I would allow the appeal and order a new trial.

Issue 2 – Did the trial judge err in improperly shifting the burden of proof to the defence?

Issue 3 – Did the trial judge err by making a positive determination of Ms. Q.'s credibility on the basis of the absence of contradictory evidence?

[67] These two issues are related and, as Mr. N. has done in his factum, I will address them together.

[68] Not only are there difficulties with the manner in which the trial judge assessed the credibility of Mr. N., there are also difficulties with his determination that Ms. Q. was credible.

[69] Mr. N. says that the trial judge, when assessing culpability for the incident of oral sex in the kitchen of the condominium, erred by determining that the credibility of Ms. Q. was enhanced by her identification of the presence of a third party. The third party, identified as "Joey", was not called to testify by either the Crown or the defence. The trial judge was of the view that Ms. Q.'s reference to Joey enhanced her credibility because it would have been easy for the defence to have Joey testify if seeking to put her credibility in doubt:

> In speaking about it at trial, Ms. [L.] said she recalled what happened and added that Mr. [N.] also peed in the kitchen sink. The fact that Ms. [L.] added this and put Mr. [N.]'s friend Joey into the equation, in my mind, enhances her credibility. If it had not occurred, it would have been so easy to have Joey testify that he did not witness these events.
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> I am not suggesting that the accused has the labouring oar to prove his innocence. I only mention it to explain why I believe the Complainant. In so doing I find that all of the elements of sexual assault have been proved beyond a reasonable doubt and, accordingly, I find Mr. [N]. guilty of the offence of sexual assault contrary to s.271(1)(a) of the ***Criminal Code***. (Trial decision p. 14).
>
> *[emphasis added]*

[70] To say this line of reasoning is troublesome is an understatement. The trial judge committed two errors:

1. He used the absence of potentially troublesome credibility detractors (Joey's evidence) in enhancing the credibility of Ms. Q.;
2. His remarks can be interpreted as placing the evidentiary burden upon the defence to call a witness to the stand to contradict Ms. Q., and the failure to do so enhanced the credibility of Ms. Q..

[71] In *R. v. Laing,* 2017 NSCA 69, Beveridge, JA, concluded, and the Crown in that case conceded, the absence of evidence cannot be a basis of making a positive finding of credibility:

> [68] The Crown reasonably concedes that the first two factors, no evidence of a motive to lie and lack of impairment, are, in fact, neutral. The absence of possible troublesome credibility detractors cannot be the basis to make a positive finding of credibility and reliability.

[72] In my view, the trial judge committed a reversible error when he determined that a witness's credibility was actually enhanced by reference to non-existent evidence which may have detracted from it.

[73] There is nothing wrong with a trial judge commenting on the absence of evidence that might diminish Ms. Q.'s credibility. However, an absence of evidence cannot be used "as a makeweight in favour of credibility".

[74] The Ontario Court of Appeal made this point in *R. v. Kiss,* 2018 ONCA 184;

> [53] On the other hand, in my view, there is nothing wrong with a trial judge noting that things that might have diminished credibility are absent. As long as it is not being used as a makeweight in favour of credibility, it is no more inappropriate to note that a witness has not embellished their evidence than it is to observe that there have been no material inconsistencies in a witness' evidence, or that the evidence stood up to cross-examination. These are not factors that show credibility. They are, however, explanations for why a witness has not been found to be incredible.

[75] The trial judge's error with respect to the role of the non-existent evidence was further accentuated when he suggested that it would have been "easy" for Joey to have been called as a witness. This could only have been a remark directed at the defence. It was predicated on the notion that if Joey's evidence could have contradicted Ms. Q., then it would have been easy for the defence to have him testify to this effect. The trial judge implied that the defence's failure to call the witness had the effect of enhancing the credibility of Ms. Q..

[76] While the trial judge tempered his remarks by saying that he is "not suggesting that the accused has the labouring oar to prove his innocence", his remarks reveal he was placing some obligation on the defence to call Joey to contradict Ms. Q.'s evidence, and that a failure to do so enhanced the Crown's case. This is clearly an error.

[77] I also have concerns about the trial judge's finding that Ms. Q.'s recall, in cross-examination, that Mr. N. "peed in the kitchen sink", could in any way enhance her credibility. Up until cross-examination, Ms. Q. had not informed the police about this event, disclosed it at the preliminary inquiry, or mentioned it in her direct evidence at the trial. I am at a loss to discern how this fact could have strengthened Ms. Q.'s credibility given the timing and manner of its disclosure. If anything, it should have raised concerns about the reliability of her evidence.

I would also allow this ground of appeal.

Conclusion

[78] I would allow the appeal, dismiss the application to admit fresh evidence, and order a new trial on all the counts.

Farrar J.A.

Concurred in:

Beveridge J.A.

Beaton J.A.