WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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;
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> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 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 at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
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> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
>
> (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).
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> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
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> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
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> (b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Massey-Patel, 2021 ONCA 860
DATE: 20211130
DOCKET: C67596

Strathy C.J.O., Hourigan and Paciocco JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Timothy Massey-Patel

Appellant

Gregory Furmaniuk, for the respondent

Thomas M. Hicks and Angela Ruffo, for the appellant

Heard: November 23, 2021

On appeal from the conviction entered on May 17, 2019 by Justice Feroza Bhabha of the Ontario Court of Justice.

REASONS FOR DECISION

OVERVIEW

[1] The appellant, Timothy Massey-Patel, was working as a dancer at a male strip club. The complainant, who was attending a bachelorette party, hired the appellant for a private dance in a small room in the V.I.P. area of the club. Shortly after leaving the V.I.P. area, the complainant made allegations that led to a sexual assault charge against the appellant. The appellant was tried and convicted on that charge before the Ontario Court of Justice.

[2] At the trial the complainant testified that the appellant touched her sexually and inserted his finger into her vagina without her consent. She also testified that

the appellant briefly inserted his penis into her vagina, again without her consent. She said that she did not call out for help or vocalize her lack of consent to any of this touching because she was frozen in shock and felt powerless.

[3] The appellant did not testify. In a police statement that was admitted into evidence the appellant initially denied that the alleged sexual contact took place. He ultimately admitted to the police that he had in fact digitally penetrated the complainant but described her as an enthusiastic participant and he gave details of her active participation. He denied penetrating the complainant's vagina with his penis but acknowledged that his penis may have been in the general area of the complainant's vagina.

[4] The trial judge did not believe the appellant's testimony about the complainant's consent and was not left in reasonable doubt by that testimony. She believed beyond a reasonable doubt the complainant's testimony that she had not consented to the sexual activity with the appellant. Although she had a reasonable doubt about whether the appellant penetrated the complainant with his penis, the trial judge found beyond a reasonable doubt that the sexual touching and digital penetration occurred. Although it was not argued before her, the trial judge noted that a belief in consent defence was not available to the appellant because he had not taken reasonable steps to confirm that the complainant was communicating consent. Accordingly, she found the appellant guilty of one count of sexual assault.

[5] The appellant appeals that conviction. At the end of the oral argument, we dismissed the appeal for reasons to follow. These are our reasons.

ANALYSIS

The verdict was not unreasonable

[6] The appellant argued that, given her reasonable doubt about whether the appellant penetrated the complainant with his penis, it was unreasonable for the trial judge to have found the appellant guilty of sexually assaulting the complainant by touching and digitally penetrating her without consent. The appellant submits that these outcomes are irreconcilable. We disagree.

[7] When the trial judge's decision is read as a whole, it is clear that her reasonable doubt about whether the appellant penetrated the complainant with his penis did not arise from credibility concerns about the complainant, whose evidence she believed. Instead, the trial judge's reasonable doubt relating to whether the appellant penetrated the complainant with his penis arose from reliability concerns that in no way impugned the credibility of the complainant's testimony.

[8] As the trial judge explained, her reasonable doubt about the alleged penile penetration arose from "the totality of the evidence". That evidence included testimony by the complainant that she was in shock, an admission made by the appellant to the police that his erect penis was near her vaginal area, and the

complainant's uncertainty about whether the appellant ejaculated. In these circumstances it was reasonable for the trial judge to have been left in reasonable doubt by the appellant's denial that he had penetrated the complainant with his penis, while at the same time accepting both the appellant's admission that he had digitally penetrated the complainant and the complainant's testimony that she did not consent.

[9] Nor was it unreasonable for the trial judge to have rejected the appellant's police statement that the complainant was an active participant in the sexual contact that occurred. The appellant's account was discredited by the fact that, during the course of that statement, his version of events moved from "indignant denial" of sexual contact to admitting digital penetration. Quite simply, he lied about the core allegation. Moreover, the appellant told the police that when he touches his clients, he stops if they say no. The trial judge was entitled to rely on this admission as discrediting his account of the conversations he claimed to have had with the complainant about her consent. The trial judge was also entitled to find that the appellant offered a self-serving and exaggerated account of how visible the inside of the booth was to those in the area. Moreover, the trial judge was entitled to rely on the complainant's abrupt departure from the V.I.P. booth, and testimony from her and her friends about her distraught condition, as supportive of her account.

[10] Simply put, we see no merit in the unreasonable verdict appeal.

The trial judge did not err in her assessment of the evidence of the cashier and the club manager

[11] The trial judge accepted evidence that when she left the V.I.P. area the complainant remarked something to the effect of, "what was supposed to happen in there", and that she was distraught as she approached her friends. The appellant argues that the trial judge erred in accepting this evidence in the face of the testimony of the cashier to the contrary. We disagree. There was evidence before the trial judge that the cashier was distracted by other patrons, and that the club was noisy. In these circumstances, the trial judge was entitled to conclude that the cashier failed to hear the statement and was not in a position to observe the complainant's distraught condition described by the complainant and her friends. The trial judge was also entitled to find that the cashier did not have a complete memory of events, given that his testimony that the complainant did not pay any money before leaving the V.I.P. area was contradicted by other witnesses.

[12] The trial judge was also entitled to reject the testimony of the club manager that the complainant did not become upset until she failed to pay the required fee, at which point, he said, she decided to begin the "waterworks". The trial judge found the club manager to be partial against the complainant, dismissive of her demeanour and her complaint, and disinterested in inquiring into what happened.

As explained immediately below, the trial judge also found that he gave misleading evidence about the limits of appropriate conduct within the club.

[13] We are not persuaded that the trial judge erred in assessing the evidence of the cashier and the club manager.

The trial judge did not rely on impermissible stereotypes

[14] We reject the submission that the trial judge engaged in impermissible stereotypical reasoning. None of the inferences drawn by the trial judge were inappropriate.

[15] Specifically, the trial judge relied on her observations about the sexualized culture of the club in discounting the manager's testimony that the kind of sexual activity complained of would not be tolerated. She commented on the "parade" of men in various states of dress and undress to explain the complainant's apparent confusion about how the appellant was dressed. And she referred to the complainant's accurate observation of the "copious amounts of condoms within the V.I.P. area" as an illustration of the complainant's capacity to observe matters of detail despite her alcohol consumption. Simply put, there is no basis for concluding that the trial judge relied on the sexualized atmosphere of the club as proof that the sexual assault occurred, or to support the improper inference that those who would work in such a place are less worthy of belief.

[16] Similarly, there is no basis for concluding that the trial judge relied on the appellant's general routine during private dances to draw impermissible propensity inferences or to find that he is not of credible character. She referred to the appellant's general routine during private dances because the appellant relied upon that routine in recounting his version of events, and because his description of his routine included his admission that he would determine whether a client was consenting by touching her and gauging her reaction. There is simply no basis for concluding that the trial judge inferred that as a sex worker, the appellant is less worthy of belief, or more likely to commit sexual offences.

[17] Nor is there any basis for concluding that the trial judge relied on the stereotype of the sexually naïve woman to bolster the complainant's credibility or to undermine the appellant's credibility. Instead, the trial judge accepted the complainant's direct testimony that she was shocked at what was taking place, and that based on her one prior visit to a strip club where she had gone for a private dance, she was not expecting the kind of sexual contact that she alleged. These were findings the trial judge was entitled to make.

[18] We also reject the appellant's contention that the trial judge disregarded evidence about the complainant's conduct leading up to the alleged assault. The trial judge was acutely aware that while attending a bachelorette party at a strip club, and after seeing fully naked men, the complainant purchased a lap dance and voluntarily entered a private booth with the appellant. The trial judge recounted

all of this in her reasons for judgment. Although a trial judge must consider the factual context within which allegations are made, as the appellant conceded in oral argument, none of these circumstances required the trial judge to have a reasonable doubt relating to the complainant's denial of consent. The complainant described her state of mind and the trial judge believed her. No issues of stereotype or double standards arise.

[19] Finally, there is no merit in the appellant's claim that the trial judge evoked the stereotype that sexual activity with a sex worker is "naughty" and something to be ashamed of. It was the appellant who advanced this theory by suggesting that the complainant concocted the sexual assault allegation because she regretted having let things go so far and had "bride's remorse". The trial judge's conclusion that if the complainant had indeed been remorseful, she could easily have kept her conduct secret by saying nothing as the events took place in a private area, was a reasoned and appropriate basis for rejecting the defence theory as implausible.

[20] We reject the suggestion that the trial judge employed impermissible stereotypes.

The trial judge did not apply uneven scrutiny

[21] We are thoroughly unpersuaded that the trial judge applied uneven scrutiny to the evidence. As we have explained, she gave cogent and compelling reasons for rejecting the credibility of the exculpatory claims the appellant made in his police statement. We can find no basis for concluding that the trial judge applied a different standard in finding that the comparatively minor imperfections in the complainant's evidence did not undermine her credibility.

[22] We reject this ground of appeal.

CONCLUSION

[23] The appeal is therefore dismissed.

"G.R. Strathy C.J.O."
"C.W. Hourigan J.A."
"David M. Paciocco J.A."