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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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;
>
> (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
>
> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

> (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
>
> (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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. Crespo, 2016 ONCA 454

DATE: 20160610

DOCKET: C59193

Laskin, Cronk and Miller JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Fernando Crespo

Appellant

Najma Jamaldin, for the appellant

Mary-Ellen Hurman, for the respondent

Heard: March 8 and 9, 2016

On appeal from the conviction entered by Justice Michael J. Epstein of the Ontario Court of Justice, on December 12, 2013 and from the sentence imposed on July 23, 2014.

B.W. Miller J.A.:

(1) Overview

[1] After a two-day trial before a judge alone, the appellant Fernando Crespo was convicted of the sexual assault of P.I., a friend of a woman he had begun dating one month earlier. He was sentenced to 15 months' imprisonment, plus 18 months' probation. Because the appellant is a permanent resident of Canada and not a citizen, a consequence of the sentence is that he will be subject to removal from Canada at the conclusion of his custodial sentence. The appellant appeals from both conviction and sentence.

[2] For the reasons that follow, I would dismiss both the conviction and sentence appeals.

(2) Background

[3] The appellant and L.I. had just begun dating. L.I. arranged an evening out so that she could introduce the appellant to her friend P.I. and P.I.'s partner, O.B. After a night of heavy drinking and dancing, the four went to the appellant's apartment. The appellant, P.I., and O.B. were all heavily intoxicated. L.I. was less so. At some point in the evening, P.I. was feeling unwell and went to lie down on the bed in the appellant's bedroom. O.B. went with her. P.I. fell asleep on the bed, with O.B. beside her. O.B. later ended up asleep on the floor beside the bed.

[4] L.I. and the appellant engaged in some foreplay in the living room before L.I. decided to go home. She went to check on P.I. in the bedroom, and found her asleep on her stomach with her dress hiked up. L.I. pulled P.I.'s dress back down over her underwear, and then went to catch a taxi. The appellant walked L.I. to the taxi, and then returned to the apartment.

[5] Shortly thereafter, P.I. was awakened by the feeling of the appellant on top of her, engaging in sexual intercourse. P.I. was still drunk and disoriented, and it took her a minute to realize that it was the appellant who was having sex with her, and not O.B. When she realized it was the appellant, she exclaimed and pushed him off. He left the room calmly and went to sleep on the couch in the living room. She tried to waken O.B., without initial success. She then sent the first of a series of text messages to L.I., telling her that she had just been raped by the appellant. She was eventually able to awaken O.B. The appellant and O.B. exchanged words and O.B. and P.I. left the apartment.

[6] The appellant was convicted of sexual assault.

(3) Issues

[7] The appellant advances three main grounds on his conviction appeal. First, that the trial judge erred in finding that P.I. did not consent to sex with him. Second, that the trial judge erred in not considering the defence of honest but mistaken belief in consent. Third, that the trial judge erred by admitting into evidence text messages from P.I., L.I., and the appellant. With respect to sentence, the appellant submits that the trial judge erred in not considering the immigration consequences to the appellant in sentencing and failing to consider a conditional sentence.

(4) Discussion

(1) The defence of consent

[8] The appellant argues that the trial judge erred in rejecting the appellant's defence that P.I. consented to having sex with him. The appellant argues that it was a palpable and overriding error for the trial judge not to have considered L.I.'s evidence of P.I.'s attempted seduction of the appellant earlier in the evening and other material evidence said to undermine P.I.'s claim not to have consented.

[9] The insurmountable obstacle to this submission is the trial judge's finding that P.I. was asleep when the appellant commenced intercourse, and thus lacked the capacity to consent at that time. Her prior conduct is therefore irrelevant to the question of whether she consented. On the facts as found by the trial judge, she could not have consented. The trial judge committed no error in rejecting the appellant's defence of consent.

(2) The defence of honest but mistaken belief in consent

[10] Although the appellant did not, at trial, advance the defence of honest but mistaken belief in consent, he now argues that there was an air of reality to the defence and that the trial judge erred by not considering it. I do not agree that there was a sufficient factual foundation for this defence, as required by *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 41-49, and would not give effect to this ground of appeal for the reasons set out below.

[11] Unlike the defence of consent, it is possible for the defence of honest but mistaken belief in consent to be made out in circumstances where the complainant was asleep (or otherwise incapable of consenting) but appeared to be awake and consenting: *R. v. Esau*, [1997] 2 S.C.R. 777, at paras. 17-25. However, establishing this defence requires more than a bare assertion from the accused that the complainant was an active and willing participant: *R. v. Park*, [1995] 2 S.C.R. 836, at para. 20. A bare assertion, however, is all that the appellant provided.

[12] The appellant argues that the circumstances of the case support his belief that P.I. was not asleep, but awake and in a blacked-out state when he sat down on the bed beside her. She initiated sexual activity with him, he says, and they engaged in sexual intercourse while she remained in a blacked-out state. Her amnesiac state accounts for her lack of memory of the commencement of sexual activity.

[13] The appellant argues that P.I.'s lack of memory of the initiation of sexual activity is as consistent with P.I. participating in sexual activity in a blacked-out state as it is with P.I. having been asleep. As an evidential matter, he objects that P.I. simply has no memory of the incident and therefore no evidence to give as to whether she was an active and willing participant. The only evidence on that point, the appellant says, is his own and it should be accepted because no one else observed what was happening and his evidence was thus uncontradicted.

[14] This evidential submission is deeply troubling. Were we to give effect to it, it would make the defence of honest but mistaken belief in consent *prima facie* available whenever a victim was asleep at the time of an assault, and the accused provided self-serving and unanswerable testimony as to the appearance of consent. This would be a dangerous expansion of the doctrine and I would reject it.

[15] The appellant's main submission is that the trial judge erred by failing to consider that P.I. could have been awake but in a blacked-out state, actively engaging in sexual activity with the appellant, and thus leading him to reasonably believe that she was consenting.

[16] For this argument, the appellant relies heavily on *R. v. Garciacruz*, 2015 ONCA 27, 320 C.C.C. (3d) 414, an appeal concerning the sufficiency of a trial judge's reasons. In *Garciacruz*, this court held that the trial judge's factual findings were equally consistent with the complainant having remained asleep throughout intercourse, as with the alternative inference that the complainant consented to intercourse in a state of amnesia (at para. 67).

[17] *Garciacruz*, however, is readily distinguished from the present case. Significantly, the complainant's evidence in *Garciacruz* supported the conclusion that she was in a blacked-out state well in advance of sexual activity with the accused, and remained in that state until she awoke the next morning. On the complainant's evidence, everything went black after she had a few sips of gin and tonic at a bar, and she had only a few scattered and vague recollections thereafter (at para. 48). She was not intoxicated. She had virtually no memory of events between leaving the bar and waking up the next morning, including walking out of the bar, getting into a taxi, and going to the accused's apartment, in the company of the accused and her cousin (at para. 56).

[18] This court held in *Garciacruz* that the evidence supported two possible inferences: either the complainant was asleep at the time of sexual intercourse and did not consent, or she was in an amnesiac state from earlier in the evening, fell asleep, continued in the amnesiac state when she awoke, and then actively engaged in sexual intercourse with the accused while retaining no memory of it. The trial judge's error in *Garciacruz* was a failure to give reasons that would have allowed this Court to determine whether the trial judge had considered the latter possibility, and his reasons for not accepting that it raised a reasonable doubt.

[19] Unlike *Garciacruz*, the trial judge's factual findings in this case foreclose the argument that the appellant advances. The factual findings in this case do not support the conclusion that P.I. was in an amnesiac or blacked-out state at any point in the evening prior to lying down and going to sleep on the appellant's bed. There was a finding that she had some lapses in her memory due to alcohol consumption, and some disagreement with other witnesses about what occurred that evening. However, neither of these findings supports a conclusion that P.I. was in an amnesiac state. Unlike the complainant in *Garciacruz*, P.I. was aware of events and circumstances until the point that she fell asleep. And unlike the complainant in *Garciacruz*, she specifically remembered lying down to fall asleep and being awakened by the appellant having sex with her. She remembered

doing many things immediately thereafter: trying to awaken O.B., texting L.I., calling her mother.

[20] The appellant's difficulties with the defence of honest but mistaken belief in consent do not stop there. The defence is only available where an accused has taken reasonable steps to ascertain consent: s. 273.2(b) of the *Criminal Code* (R.S.C. 1985, c. C-46); *Esau*, at para. 49. On the appellant's evidence, the complainant looked him in the eyes, wrapped her legs around him, and helped him to remove his pants. The accused argues that this interaction amounts to having taken reasonable steps to ascertain consent. The trial judge, however, rejected the appellant's evidence that this interaction occurred. There is no basis for appellate interference with this finding.

[21] The appellant's evidence was rejected by the trial judge on its own terms, and not simply because it conflicted with the complainant's evidence. There were ample grounds to do so. The trial judge held:

> The accused was an extremely poor witness. He was almost comically evasive when confronted with obvious inconsistencies […] I cannot accept his trial evidence that he remembered the complainant giving her consent in light of the contrary position he took with his friends and with police […] He swore to police on the lives of those he loved that he had no recollection. He says that was a lie. His evidence about the pills and the drink was so convoluted and evasive as to be unbelievable […]
>
> I simply do not believe the accused nor does his evidence raise a reasonable doubt in my mind. Moreover, on all the evidence I am satisfied that he came upon the complainant in the bedroom, observed that she was passed out and took advantage of her.

[22] In light of these factual findings, the trial judge was not obliged to consider whether the appellant had an honest but mistaken belief in consent as that defence simply had no air of reality.

(3) Admissibility of text messages

[23] Text messages between L.I. and P.I., the appellant and L.I., and P.I. and the appellant were admitted into evidence with the appellant's consent. The appellant brought a fresh evidence motion on appeal to introduce an affidavit from his defence counsel at trial stating that the appellant only consented to the

admission of the text messages for the purposes of refreshing memory and for impeachment on cross-examination. He did not consent to the admission of P.I.'s texts for the truth of their contents.

[24] The appellant argues that the conviction rests on the texts, which are hearsay evidence and ought not to have been admitted, notwithstanding that trial counsel did not object to their use, and indeed made extensive use of them in cross-examination.

[25] I would accept the fresh evidence, but it does not alter my conclusion on the admissibility and alleged misuse of the text messages. The difficulty with the appellant's submission is that all the witnesses testified and adopted the statements made in the texts, with the exception of one text from P.I. that she could not recall having sent. The hearsay objection therefore falls away.

[26] The appellant further objects that the trial judge erred by improperly relying on some of the text messages as prior consistent statements to bolster the credibility of P.I. A review of the trial judge's reasons, however, does not support this argument. In any event, as noted above, the trial judge rejected the appellant's evidence on its own terms.

(4) Sentence

[27] The appellant received a sentence of 15 months in custody. He appeals on the basis that the sentence is overly lengthy and disproportionate when considered in conjunction with the immigration consequences of the sentence. He also argues that the sentencing judge erred by failing to consider a conditional sentence. The appellant is an Ecuadorian national, and he introduced fresh evidence that he faces deportation at the conclusion of the custodial portion of his sentence.

[28] Although the sentencing judge imposed the sentence requested by the defence, defence counsel did not appear to be alive to the immigration issue, and did not bring it to the attention of the sentencing judge. The appellant relies on the judgment of this court in *R. v. Nassri*, 2015 ONCA 316, 125 O.R. (3d) 578, for the proposition that sentencing judges can take into account immigration consequences when sentencing.

[29] The difficulty with the appellant's submission is that, by operation of s. 36(1)(a) of the *Immigration and Refugee Protect Act*, S.C. 2001, c. 27, the appellant will face deportation if he receives any custodial sentence of six months or longer. However, a custodial sentence of less than six months, or a conditional sentence, would be manifestly unfit for the circumstances of this offender and

this offence on the facts as found by the trial judge. As the Crown argues, consideration of immigration consequences cannot justify an otherwise inadequate sentence: *R. v. Freckleton*, 2016 ONCA 130.

[30] I see no basis upon which to interfere with the sentence imposed, and I would decline to do so.

(5) Disposition

[31] For the reasons given, I would grant leave to admit the fresh evidence concerning the admission of text messages, and the fresh evidence related to the sentence appeal. I would dismiss both the appeal as to conviction and as to sentence.

Released: "BWM" JUN 10 2016

"B.W. Miller J.A."

"I agree. John Laskin J.A."

"I agree. E.A. Cronk J.A."