COURT OF APPEAL FOR ONTARIO

CITATION: R. v. George, 2016 ONCA 464

DATE: 20160614

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Weiler, Simmons and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Dwayne George

Appellant

Michael W. Lacy, for the appellant

Dayna Arron, for the respondent

Heard: April 28, 2016

On appeal from the conviction entered on May 3, 2011 and the sentence imposed on February 17, 2012 by Justice J. Bryan Shaughnessy of the Superior Court of Justice, sitting without a jury.

Weiler J.A.:

A. OVERVIEW

[1] The appellant was convicted of a number of offences relating to events that took place between August 3 and August 5, 2007, and in June 2008, all in respect of his former girlfriend: break and enter, assault causing bodily harm, unlawful confinement, uttering threats, breach of recognizance, and obstruct justice. The trial judge found that the appellant was a dangerous offender and imposed an indeterminate sentence.

[2] In convicting the appellant, the trial judge relied on the testimony of the complainant as well as circumstantial evidence including police photographs of damage to the door of the complainant's apartment, injuries to her face and chin, blood on the mattress in the complainant's bedroom, and her fearful demeanor. The trial judge also ruled that evidence of the appellant's prior convictions in 2002 for break and enter with intent to commit an indictable offence, unlawful confinement, assault causing bodily harm, assault with a weapon, and kidnapping - all in relation to the same complainant - was admissible as similar fact evidence.

[3] Further circumstantial evidence consisted of post-offence conduct: in 2008, while the appellant was incarcerated in relation to the 2007 charges, a prison guard found a note in the appellant's handwriting urging another inmate to force the complainant to recant her evidence. These facts also formed the basis of the appellant's convictions for one count of uttering a threat and for obstruct justice.

[4] The appellant appeals his convictions and sentence.

[5] In relation to his convictions, the appellant raises two grounds of appeal. First, he argues that the trial judge mischaracterized defence evidence as alibi evidence, and consequently erred in law in drawing an adverse inference from the failure to disclose the "alibi" until trial and the fact that the appellant did not testify. Second, he argues that the trial judge's approach to and assessment of credibility issues was flawed, in that he (a) subjected defence evidence to a higher and more exacting level of scrutiny than the evidence of the Crown, and (b) overly relied on the similar fact evidence and the after the fact circumstantial evidence to satisfy himself of the appellant's guilt. The appellant seeks a new trial.

[6] In relation to his sentence, the appellant argues that the trial judge erred in failing to accord minimal weight to psychiatric evidence that was challenged and significantly weakened during cross-examination, and in imposing an indeterminate period of detention rather than a long-term supervision order.

[7] I would dismiss the appeal.

[8] With respect to the conviction appeal, although the term alibi was used by defence counsel at trial, on the facts as found by the trial judge, the defence evidence at issue was not an alibi and I agree with the appellant that the trial judge erred in treating it as such. I am, however, of the view that the trial judge's reasons reveal that he fairly scrutinized the evidence of both the appellant and the Crown, including both the similar fact and after the fact evidence, and that he was entitled to give the weight to it he did.

[9] While the trial judge's error in relation to the alibi issue was serious, I would reject the appellant's submissions as to the effect of the error, and am satisfied that the evidence of the accused's guilt was so overwhelming that a trier of fact would inevitably convict. Accordingly, the Crown has met its burden of demonstrating the result would necessarily be the same and I would apply the curative proviso in s. 686(1)(b)(iii).

[10] With respect to the sentence appeal, there is no issue that the appellant met the criteria for a dangerous offender designation. The trial judge applied the correct legal framework. On the evidence, it was open to the trial judge to conclude that he was not satisfied of a reasonable possibility that the appellant's risk in the community could be controlled by the end of any possible long-term supervision order.

B. FACTS

[11] A brief overview of the facts will suffice to give the necessary context to the appellant's grounds of appeal.

(1) Charges arising out of events occurring on August 3-5, 2007

[12] The complainant testified that on Thursday, August 2, she came home to her basement apartment and discovered that the door was unlocked and there was damage to the frame of the doorway. Someone had attempted to enter the apartment. She got some wood from the hardware store and tried to repair the door. She slept on the couch in the living room that night.

[13] In the early morning hours of Friday, August 3, the complainant woke up sensing that someone was in the room. She saw the appellant standing over her. He grabbed her and assaulted her on the way to her bedroom. He hit her repeatedly on the back of her head, her chin and her face. He made her lay down on her bed and stood with his foot on her back. He forced her to undress and tied a piece of her clothing around her face. He threatened her and told her he was going to kill her – that he had already done seven years in prison and was not afraid to do another 15 years for killing her.

[14] The complainant testified that after the assault, the appellant remained in the apartment with her. She tried to go on with life as usual for the sake of her children: she did not think she could leave. When Mr. Gray, a friend who lived nearby, came by her apartment on Saturday morning to see if she wanted to take her children, aged two and four, to the park, she told him to go away. He asked what happened to her face. She told him not to worry about it. The complainant

testified that she let Gray take the children for a few hours while she remained inside with the appellant.

[15] On Sunday, Gray drove the complainant and her two children to a tanning salon. He called the police on his own initiative. When he returned to the apartment with the complainant and her children, the police were there. The appellant had locked himself in the bathroom. He was arrested and charged with break and enter, assault causing bodily harm, unlawful confinement, uttering threats, and breach of recognizance.

[16] After the appellant's arrest, police searched the apartment and found a knapsack of the appellant on the floor in the complainant's bedroom together with some clothing in a small grocery store bag.

(2) Charges arising out of events occurring in June 2008—the "post-offence conduct"

[17] In June 2008 the appellant was incarcerated awaiting trial on the August 2007 charges at issue on this appeal. A corrections officer found a note among another inmate's possessions and immediately recognized the appellant's "unique" handwriting. The officer had become familiar with the appellant's handwriting as he regularly received request forms from the appellant and also reviewed the appellant's correspondence.

[18] The note began by describing the physical appearance of the complainant and directed that she should be lured, held hostage and tortured, leaving no visible injury, in order to compel her to sign a letter stating that her earlier allegations were false and that she wished the charges withdrawn. The note further directed that she "better make sure not to show up for trial no matter what" and that she should not cooperate with the Crown but instead cooperate with the defence.

[19] The note also indicated that "plan B" was to "light her head on fire without saying anything more than 'don't snitch'." The note described how to inform the writer that the task had been accomplished and said that payment would be made.

[20] After the corrections officer disclosed the note to the OPP, the appellant was further charged with uttering a threat and obstruct justice.

(3) Convictions arising out of events occurring in 2000 – the "similar fact evidence"

[21] Similar fact evidence was admitted at trial relating to events in 2000 involving the appellant and the complainant. The complainant was approximately 19 years old at the time. In May 2000, the appellant and the complainant were dating. The appellant assaulted her in her apartment. She had the locks changed on the door and had a girlfriend stay over with her. The following day, the appellant broke into the complainant's apartment, assaulted her, and forced her to shave off her hair. He and two other men who were with him then beat her to the point she thought she was going to die. They transported her to Montreal from Toronto and held her captive until she was rescued by police from a closet in a hotel. She was repeatedly assaulted during the time she was held captive.

[22] In 2002, a jury found the appellant guilty of several offences relating to this conduct, including kidnapping. He was sentenced to four years, in addition to three years and four months' pre-trial custody time. During the proceedings, the appellant was not a cooperative witness.

C. THE CONVICTION APPEAL

(1) Did the trial judge err in characterizing part of the defence evidence as an alibi and rejecting it based on a lack of timely disclosure and the failure of the appellant to testify?

[23] This alleged error concerns a part of the evidence of one particular witness called by the defence, McFarland.

[24] McFarland's evidence was that he picked up the appellant in Pickering around 11 p.m. on Friday, August 3, and drove to Toronto where they attended Caribana festivities. He testified that the two walked up and down Yonge Street, were together off and on throughout the evening, and were otherwise in regular telephone contact until they left Toronto and returned to Pickering early in the morning of Saturday, August 4. Telephone records revealed calls made between the appellant and McFarland between 11:52 p.m. and 4:11 a.m. McFarland initially testified that he and the appellant finally parted company in the morning of Saturday, August 4th around 7 a.m., but later changed his evidence to the effect it could have been as early as 5 a.m.

[25] During the trial, the Crown objected to the lack of timely disclosure of this "alibi." The defence did not, at that time, take issue with the Crown's characterization of McFarland's evidence. During his closing submissions, defence trial counsel (who is not counsel on this appeal) at one point referred to McFarland's evidence as an alibi defence that the appellant had plans to go out with his friends that weekend, submitting that McFarland's evidence of "the alibi he provides for [the appellant] on Friday" was reliable.

[26] In response to this submission, the trial judge asked: "How do you say that counts for an alibi when the alleged home invasion is sometime in the early hours of – it might be two, three, four o'clock, five o'clock in the [Friday] morning? … How do you say that is an alibi?"

[27] Defence counsel acknowledged that that was part of the issue and that on the complainant's evidence she woke up to find the appellant in her apartment in the early hours of Friday. He stated: "It's not so much an alibi as, 'It couldn't have happened because I wasn't there', but what it is is a period of time that [ ] McFarland is suggesting [the appellant] was never there." The gist of the defence's submission was that if the appellant was not at the complainant's apartment but was instead with McFarland, he could not have unlawfully confined the complainant during that period of time.

[28] The defence position at trial was that the complainant was fabricating her allegation that the appellant had assaulted and confined her. Despite the injuries inflicted by the appellant on the complainant in 2000, she had continued to have contact with him. The defence submitted the complainant had been told by the CAS that if she continued contact with the appellant she would lose her children. When the appellant was arrested in the complainant's apartment, she concocted the allegations to prevent that from happening.

[29] While there was evidence that could have given rise to the inference that the assault took place in the early hours of Saturday morning rather than Friday morning, the trial judge accepted the complainant's version of events as to when the break and enter and assault occurred. McFarland's evidence, if accepted by the trial judge, instead rebutted the complainant's evidence that she felt unable to leave the apartment at any time during August 3-5 and would have suggested that the complainant was being untruthful in her narration of the weekend's events.

[30] In his reasons relating to the "alibi" issue, after referring to *R. v. Wright*, 2009 ONCA 623, 98 O.R. (3d) 665, and observing that there was no timely disclosure of the alibi and that the appellant did not testify in support of the alibi, the trial judge stated that he was drawing "an adverse inference against the veracity of the defence of alibi." The trial judge concluded this section of his

reasons as follows: “In any event, the alibi defence proffered was a denial of involvement in the offences alleged on the basis that the accused was elsewhere. I reject the alibi defence and I find as a fact that [the appellant] was present in [the complainant’s] apartment August 3rd through 5th, 2007.”

[31] In light of the evidence he accepted as to when the break and enter and assault took place, the trial judge’s characterization of McFarland’s evidence as an alibi was an error in that even if that evidence was accepted in its entirety it would not have been determinative of the final issue of the appellant’s guilt or innocence: see *R. v. Rawn*, 2015 ONCA 396, 326 C.C.C. (3d) 128, at para. 23. On the evidence accepted by the trial judge, the absence of the appellant from the apartment over Friday night and until Saturday at 5 or 7 a.m. would not have resulted in an acquittal of the appellant because the facts making up the charges had already taken place a few hours after midnight Thursday. The trial judge accordingly erred in law in characterizing this portion of McFarland’s evidence as an alibi and in drawing an adverse inference against its veracity.

(2) Was the trial judge’s approach to and assessment of credibility issues flawed?

[32] The appellant puts forward two arguments under this ground of appeal. The first is that the trial judge subjected the defence evidence to a higher and more exacting level of scrutiny than that of the Crown. The second is that the trial judge over-relied on the similar fact evidence and the evidence of after the fact conduct.

(a) Did the trial judge subject the defence evidence to a higher and more exacting level of scrutiny than that of the Crown?

[33] The appellant submits that the trial judge ought not to have rejected the evidence of McFarland, another long-time friend of the appellant, Okoko, and the complainant’s neighbour, Gray. He submits that the trial judge inaccurately characterized McFarland and Okoko’s evidence as “vague and uncertain” in relation to the events of August 3-5 and as to the appellant and complainant being in a physical relationship. He further submits that the trial judge failed to reconcile inconsistencies between the complainant’s evidence and Gray’s evidence. Overall, the appellant submits that the trial judge subjected the defence evidence to a higher and more exacting degree of scrutiny than that of the complainant.

[34] In dealing with this submission I will first outline the general principles applicable to appellate review on this ground of appeal. I will then briefly outline McFarland's, Okoko's, and Gray's evidence and consider the trial judge's treatment of it. Finally, I will review the complainant's evidence and the trial judge's treatment of it.

(i) General principles

[35] An argument that the trial judge applied a more stringent standard when assessing the defence's evidence than when assessing the Crown's evidence is difficult to make successfully on appeal: see *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (Ont. C.A.), at para. 59. As this court has recently observed, this is so for two reasons: first, "credibility findings are the province of the trial judge and attract a very high degree of deference on appeal"; second, "appellate courts invariably view this argument with skepticism, seeing it as a veiled invitation to reassess the trial judge's credibility determinations": *R. v. Aird*, 2013 ONCA 447, 307 O.A.C. 183. Absent palpable and overriding error, an appellate court is not entitled to reassess and reweigh evidence: *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 20.

[36] To succeed on an "uneven scrutiny" argument, the appellant must demonstrate, through the trial judge's reasons or elsewhere in the record, that the trial judge applied a higher standard of scrutiny to the evidence of the defence: see *Howe*, at para. 59; *R. v. Rhayel*, 2015 ONCA 377, 324 C.C.C. (3d) 362, at para. 98. Arguments that amount to an assertion that a different judge could have reached a different conclusion are not enough to succeed on this ground: see *Howe*, at para. 59.

(ii) McFarland's evidence

[37] In addition to his evidence about attending Caribana with the appellant, McFarland testified that a few times he picked up and dropped off the appellant from a location that was consistent with the location of the complainant's apartment. On one occasion he came into the apartment and offered his credit card so that the young woman (whom he later learned from the appellant's sister had the same first name as the complainant) could process the woman's child's birth certificate online. McFarland was shown a photo of the complainant and testified he was 60% sure this was the same woman he had seen in the apartment with the appellant.

(iii) Okoko's evidence

[38] Okoko testified that when the appellant was first released from prison in 2006, the appellant resided with his father, then with Okoko and later with a woman named Stacey with whom the appellant was in a relationship. According to Okoko, the appellant and the complainant also appeared to be in a relationship. He saw the two together regularly during the summer months of June, July and August of 2007. He identified the complainant from a photo.

[39] Okoko also testified that he had made plans with the appellant to attend Caribana with friends on the weekend of August 3-5, but that, though he called the appellant numerous times, he could not reach him by phone on Friday or during the weekend.

(iv) Gray's evidence

[40] Gray testified that he was the complainant's neighbour and that he had known her for about a year, and that he would often see her and her children when he would bring his own niece to the park nearby. He also indicated that he had seen the appellant in the area or in the complainant's apartment several times.

[41] He testified that he had made plans with the complainant to attend Caribana, but that on Saturday, August 4, he went to her apartment and saw that her face was bruised. She refused to leave the apartment, so Gray instead took her son with him to Caribana that day. He testified that when he returned home early Sunday morning, he had a "vision" of the complainant in which her neck was bruised. This caused him to become scared and led him to call the police that morning. When the police had not arrived, he went to the complainant's house and convinced her to leave the apartment with him. He took her and her children to a tanning salon. While she was inside tanning, he again called the police, and by the time they returned to her apartment, the police had arrived and arrested the appellant.

[42] In cross-examination, Gray indicated that he had also been at the complainant's apartment on Friday, and that he had seen her from the top of the stairs. He agreed that when he had given his statement to the police immediately after the appellant was arrested, he had said that he couldn't recall seeing any injuries to the complainant's face on Friday, but also agreed that he had not seen her face very clearly until Saturday morning.

(v) The trial judge's treatment of McFarland's, Okoko's, and Gray's evidence

[43] The appellant submits the evidence of these three witnesses supported the defence's theory that the appellant was not an unwanted guest in the complainant's apartment, and that it also suggested the complainant was lying about not having ongoing contact with the appellant after his release from prison in 2007. The appellant argues that the trial judge unfairly characterized McFarland's and Okoko's evidence as vague and uncertain and too readily dismissed all of Grey's evidence, failing to reconcile inconsistencies between Gray's and the complainant's evidence.

[44] I disagree. The trial judge gave reasons for rejecting McFarland's evidence separate from his erroneous rejection of McFarland's "alibi" evidence. The trial judge also gave reasons for rejecting Okoko's testimony, and most of Grey's testimony, that were founded in the evidence.

[45] The trial judge found that "for the most part" McFarland was not a credible witness. The trial judge noted that McFarland testified to phone calls with the appellant that he later acknowledged were not shown in the phone records. McFarland stated he never lived with the appellant's father yet he acknowledged getting a speeding ticket the prior year and the address provided on his licence and insurance were that of the appellant's father. The trial judge noted that McFarland "was calculated, deliberately vague and indeed coy in terms of his answers and I also found him to be inaccurate in other aspects of his testimony." Quite apart from his consideration of the law relating to the alibi defence, the trial judge indicated: "[McFarland] was deliberately vague in his answers and calculating and I formed the impression that he was making up his evidence on the fly and in a manner that would place [the appellant] in the best light."

[46] With respect to Okoko's evidence, the trial judge noted that, contrary to Okoko's testimony that he had not been able to reach the appellant during the August 3-5 weekend, telephone records showed a number of completed calls from Okoko's cell phone to the appellant's cell phone. He further noted: "Okoko's testimony was vague and often unresponsive to the questions being asked … I do not find Matthew Okoko to be a credible witness." In his recitation of Okoko's evidence, the trial judge also noted that Okoko had been in custody for over a year awaiting trial on drug related charges, and that he had a criminal record for possession of stolen property.

[47] Although the trial judge acknowledged that McFarland and Okoko testified they had seen the appellant and the complainant together, he found this evidence vague and ultimately he rejected it. In rather cryptic fashion the trial judge indicated that it was inconsistent for McFarland to say he had never seen the appellant with Stacey, the girl with whom he actually lived, yet he said he had seen the appellant and complainant together on numerous occasions over June, July and August and they were in a relationship. Instead, "McFarland testified

that he never knew Stacey." While the appellant quarrels with the trial judge's conclusion, it was clearly open to him to find that the evidence of these two witnesses was vague and uncertain.

[48] A review of the entirety of Gray's evidence demonstrates a number of concerns with the accuracy and reliability of his testimony. The trial judge demonstrated in his reasons that he was alive to these concerns, stating: "…it was apparent from the testimony of Adrian Gray that he has unfortunate medical issues which causes him to state that he has 'visions' and other mental delusions which makes his evidence unreliable in some aspects at this trial." Accordingly, the trial judge indicated that he did not accept any of Gray's evidence except (a) that he attended at the complainant's apartment on August 4, (b) that he saw injuries on her face, and (c) that he called the police on August 5 – in other words, aspects of his evidence that were corroborated by other evidence. Given the obvious concerns, the trial judge was properly entitled to be skeptical of this witness's evidence.

(vi) The complainant's evidence

[49] The trial judge began his assessment of the complainant's evidence by commenting, "While there is considerable difficulty with the evidence of [ ] Okoko and [ ] McFarland, there is [*sic*] equally troubling issues in relation to the evidence of [the complainant] as it relates to the phone records."

[50] In respect of the 2000 events, the complainant admitted to lying under oath in relation to the allegations of violence and abuse by the appellant both at the preliminary inquiry and at trial. She explained her failure to abide by her oath on the basis that back then she was young, infatuated with the appellant and driven to protect him. She admitted her actions might seem illogical.

[51] The trial judge reviewed the evidence relating to the records of telephone calls between the appellant and complainant and found, "[S]he is a stranger to the truth in terms of her involvement and her contact with [the appellant]." He stated, "I find her infatuation with [the appellant] continued even after the chance meeting in the grocery store in 2007. I find she made numerous calls to [the appellant] following his release from prison and prior to the present charges."

[52] The trial judge then observed that the case did not rest solely on the complainant's evidence: "There is other evidence which corroborates her evidence relating to the assault, as well as similar fact evidence and post offence and other discreditable conduct, all of which provide circumstantial evidence to weigh and assess in terms of [the complainant's] evidence."

[53] Having admitted the evidence pertaining to the 2000 charges as similar fact evidence, the trial judge noted the complainant began living with the appellant upon his release on bail in April 2000 and continued to reside with him until May 2000. After the kidnapping in May 2000, the CAS became involved and the complainant entered the witness protection program on the understanding she would stay away from the appellant. She continued to have telephone and written communication with him. Although the complainant first testified she could not remember why she was kicked out of the program, she did agree that it was possibly because of her continued communications with the appellant.

[54] The trial judge found the complainant also lied under oath about her contact with the appellant after his release from prison in 2006. After the appellant was arrested on August 5, 2007, she attended at the police station and provided a videotaped statement in which she said she had not been in contact with the appellant for seven years. During cross-examination, she admitted she saw him at a grocery store in November 2006. After the chance meeting in the grocery store, she called the appellant's father's house. Initially she stated that these were the only two instances of contact prior to August 3, 2007. However, telephone records demonstrated over 70 calls between her and the appellant during the months of June, July and August. The complainant refused to identify her telephone numbers or the number of the appellant.

[55] The defence evidence was introduced to show the complainant and the appellant were in a continuing physical relationship and that she fabricated her evidence to avoid losing custody of her children. The trial judge rejected the extent of contact to which the defence witnesses testified but he accepted that there had been further contact, at least through telephone calls, and rejected the complainant's evidence on this point.

(vii) Conclusion on the "uneven scrutiny" ground of appeal

[56] As the review of the evidence above demonstrates, the trial judge was alive to the issue of the complainant's credibility and the many inconsistencies in her evidence. He appropriately dealt with those contradictions. This was not a "he said" "she said" case. As the trial judge noted, the case against the appellant did not rest solely on the complainant's credibility.

[57] The trial judge appropriately scrutinized the defence evidence and also extensively reviewed and scrutinized that of the complainant. I see nothing in the trial judge's reasons or the record to suggest that he subjected the evidence of the defence witnesses to a higher level of scrutiny than that of the Crown witnesses.

(b) Did the trial judge over-rely on the similar fact evidence and the evidence of after the fact conduct?

[58] This ground of appeal can be disposed of summarily.

[59] The appellant does not challenge the admissibility of this evidence. The trial judge properly admitted the evidence for the following purposes: (i) background and context of the relationship; (ii) possible motive or *animus*; (iii) state of mind of the complainant; (iv) actus reus; and, (v) to rebut the allegation of recent fabrication.

[60] The appellant submits that the trial judge inferred guilt through pure disposition reasoning. However, the trial judge's reasons indicate that he cautioned himself against the prohibited line of propensity reasoning and that he properly used the evidence for the purposes for which it was admitted, namely, as pieces of circumstantial evidence to be considered in the context of the evidence in its entirety.

[61] The appellant's submission that the trial judge placed over reliance on this evidence is in effect a request for this court to reweigh it. As I have noted earlier, the weight to be given to each piece of evidence is for the trial judge to decide, and an appellate court is not entitled to reassess and reweigh evidence, absent the demonstration of a palpable and overriding error: see *Gagnon*, at para. 20. That has not been shown here.

(3) Should the curative proviso be applied to the alibi error?

[62] In the face of an error of law by a trial judge, an appellate court may nevertheless dismiss the appeal, "if it is of the opinion that no substantial wrong or miscarriage of justice has occurred" under s. 686(1)(b)(iii) – the curative proviso.

[63] The prerequisites for the application of the proviso are succinctly stated by Moldaver J. on behalf of the majority in *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 53:

> As this Court has repeatedly asserted, the curative proviso can only be applied where there is no "reasonable possibility that the verdict would have been different had the error … not been made"…. Flowing from this principle … there are two situations where the use of s. 686(1)(*b*)(iii) is appropriate: 1) where the error is harmless or trivial; or 2)

> where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict. [Citations omitted.]

The Crown bears the burden of demonstrating that the curative proviso is applicable and of satisfying the court that the conviction should be upheld notwithstanding the legal error: *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34.

[64] On appeal, the Crown submits that the trial judge did not simply reject McFarland's evidence of attending at Caribana with the appellant because of its problems as alibi evidence, but also because his evidence generally was calculated, deliberately vague, coy and inaccurate. The Crown submits that these credibility findings were supported by the record, and that the alibi evidence "formed an inconsequential part of the trial judge's reasons in an otherwise strong case against the appellant." As to the effect of the alibi error, although the trial judge rejected McFarland's "alibi" evidence, he did not convict the appellant of unlawful confinement for the entirety of the August 3-5 period. The trial judge referred to the jurisprudence in *R. v. Pritchard*, 2008 SCC 59, [2008] 3 S.C.R. 195, among other cases, for the proposition that what must be proved is restraint for a "significant period of time." The trial judge accepted the complainant's evidence that the assault by the appellant during the early hours of Friday, August 3 had gone on for over an hour and that this amounted to confinement for a significant period of time. Thus, the unlawful confinement as found by the trial judge does not include the period of time for which McFarland's evidence was put forward. Therefore, no substantial wrong or miscarriage of justice was occasioned by the alibi error.

[65] The appellant's position is that the trial judge's erroneous rejection of McFarland's evidence on this point negatively affected his assessment of McFarland's credibility generally, and led him to reject McFarland's evidence in its totality, including his evidence that the appellant and complainant had ongoing physical contact. The appellant refers to *R. v. Rohde*, 2009 ONCA 463, 246 C.C.C. (3d) 18, at paras. 16-18 and *Rawn*, at para. 24, in this regard. McFarland's evidence was important to the defence' theory that the appellant and complainant were in an ongoing relationship, that the appellant was not an uninvited guest in the complainant's apartment, and that the complainant was fabricating the allegations to avoid losing her children to CAS. The appellant argues that this court cannot be sure that the trial judge would have reached the same conclusions as to the complainant's credibility and so it cannot be said that the verdicts would inevitably have been the same absent the error. The appellant cautions that, where credibility issues are involved, an appellate court must be very cautious in applying the curative proviso.

[66] While I agree that an appellate court must be very cautious in applying the proviso, I would not agree with the appellant's submission that the alibi error alone led him to reject McFarland's evidence in its totality including that the appellant and complainant were in a relationship. The reason the trial judge specifically gave for rejecting McFarland's evidence that the appellant and complainant were in a relationship was that it appeared inconsistent with McFarland's acknowledgment he had never met Stacey, the girl with whom the appellant actually lived. Significantly, he found McFarland's relationship evidence vague and uncertain. The trial judge also observed that McFarland was lying when he testified that he had never lived with the appellant's father, yet when he received a speeding ticket, the address listed on his license and insurance certificate were that of the appellant's father. The trial judge's rejection of McFarland's evidence was informed by other specific reasons.

[67] Moreover, even if, contrary to the complainant's evidence, the complainant and the appellant were in a relationship, that fact would not be a defence to the charges. While an appellate court must be cautious in applying the proviso where a case turns on credibility, there is no rule excluding its application in such a case: see *R. v. Raghunauth* (2005), 203 O.A.C. 54 (C.A.). As LeBel J. observed with respect to both branches of the proviso in *Van*, at para. 36, "the underlying question is always whether the verdict would have been the same if the error had not been committed: *R. v. Bevan*, [1993] 2 S.C.R. 599."

[68] The trial judge was alive to the credibility issues respecting the complainant's evidence. He did not accept the complainant's evidence that she had no ongoing contact with the appellant because the telephone records indicated otherwise. He accepted her evidence that on this occasion the appellant was not an invited guest because it was supported by circumstantial evidence. Evidence corroborative of the complainant's account includes: the damage to the door frame of the complainant's apartment; the injuries to the complainant's face; the blood stain found on the complainant's mattress; and the presence of the accused in the complainant's apartment when police arrived. The complainant's identification of the appellant as the perpetrator of the assault on her is further supported by the evidence of the appellant's post-offence conduct as well as the earlier similar fact evidence. Even if the conclusion that the appellant and complainant had ongoing physical contact can be drawn, the only reasonable conclusion on the evidence is that on this occasion he was not a welcome guest.

[69] The submission that the complainant's motive for saying that the appellant assaulted her was that she risked losing custody of her children to CAS if she had ongoing contact with the appellant was simply that, a submission made by defence counsel. It was not evidence. In his cross-examination of the complainant at trial, defence counsel put to her that during her evidence at the

preliminary inquiry she testified that her mother had told her she should go to the police station and blame the appellant for something or else she would risk losing her children. The complainant testified that what she had said at the preliminary inquiry was not true. She said the CAS became involved after the 2007 events to make sure she was alright and that she had voluntarily entered into a six-month supervision order with respect to her children. The complainant's response could be used to assess her credibility. However, inasmuch as the complainant did not adopt her evidence from the preliminary inquiry but said she lied, and defence counsel did not seek to admit that part of the preliminary inquiry transcript for the truth of its contents – for example, under the principled exception to the hearsay rule (see e.g. *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 799) – what the complainant said at the preliminary inquiry was not evidence of the truth of its contents.

[70] The fact that the accused did not give evidence in the face of inculpatory facts "may properly be taken into account in deciding whether or not a substantial wrong or miscarriage of justice has occurred": *R. v. Nalon* (1973), 14 C.C.C. (2d) 49, at p. 63, *per* Martin J.A.; see also *Avon v. R.*, [1971] S.C.R. 650, at p. 657; *Sellars v. R.*, [1980] 1 S.C.R. 527, at p. 535.

[71] The case against the appellant was overwhelming and the verdict would have been the same if the error had not been committed. I would apply the curative proviso in s. 686(1)(b)(iii).

D. THE SENTENCE APPEAL

[72] After the appellant was convicted, the Crown applied under s. 752.1(1) for the preparation of an assessment report. A psychiatrist, Dr. Hucker, prepared that report and it was introduced as evidence during the appellant's dangerous offender hearing. Dr. Hucker was also cross-examined during the hearing.

[73] The appellant contends primarily that Dr. Hucker's opinion was weakened significantly during the course of his cross-examination and that the trial judge, though demonstrating in his reasons that he was aware of the need to critically assess reports prepared by psychiatrists in connection with a dangerous offender application, nevertheless erred in not according minimal weight to Dr. Hucker's opinion.

[74] While I agree generally with the appellant's observation that Dr. Hucker conceded that the scores the appellant received on the various tests completed as part of his assessment report should be revised, I would disagree that this alone suggested that the trial judge should have accorded minimal weight to Dr. Hucker's evidence. Indeed, it would appear that a large part of the reason why Dr. Hucker was forced to revise his scoring on the various tests was

because the appellant refused to participate in any assessment. As a result Dr. Hucker was forced to complete his assessment based on materials provided to him by the Crown.

[75] The trial judge did not accept Dr. Hucker's evidence uncritically. He noted the legal principles applicable to the assessment of this evidence, including the need to critically assess and not merely "rubberstamp" a psychiatrist's opinion. As the Crown notes, the standard of review that applies to a trial judge's finding that a person is a dangerous offender is reasonableness: see *R. v. Sipos*, [1997] 2 S.C.R. 260, at para. 35. Further, "deference is to be accorded to the sentencing judge on issues of fact finding and credibility, including the critical question of the reasonable possibility of eventual control of the offender in the community": *R. v. Ramgadoo*, 2012 ONCA 91, 293 C.C.C. (3d) 157, at para. 42.

[76] Therefore, the question is whether the trial judge's conclusion was reasonably supported by the evidence. In my view, it was. Here, even after Dr. Hucker revised his opinion on the scoring of the various psychiatric assessment tests, he testified that he remained of the opinion that the appellant remained a risk to re-offend. Another significant factor in Dr. Hucker's assessment was the appellant's ongoing refusal to participate not just in the preparation of the assessment report, but in treatment generally. For example, in connection with the discussion of his "bottom line" assessment of the appellant's risk in light of his adjustment of the VRAG ("Violence Risk Assessment Guide") and PCL-R ("Psychopathy Checklist-Revised") scores, designed to assess the appellant's risk for violent re-offence and possibility of eventual control in the community, he noted that:

> That risk is based primarily on the record but also on his lack of co-operation with individuals who might have been able to point him in the direction of counseling, relevant programming, and all the things that were identified in the correction plan that was made for him in the early 2000's.

[77] Dr. Hucker also further commented that:

> …the big problem is his failure to cooperate with professionals and get into treatment programs. So there's been nothing done to ameliorate his risk, so that although psychopathy is one major variable in making treatment approaches successful, the other reasons are failure to accept responsibility and to realize that you've got a problem and in this case, a very serious problem.

[78] In other words, while the scores were one part of Dr. Hucker's opinion, the appellant's failure to participate meaningfully in previous treatment possibilities was also an important factor driving his conclusion.

[79] In my view, the trial judge's reasons demonstrate that he was aware of the relevant legal principles and appropriately took into consideration the shortcomings in Dr. Hucker's report. His conclusions, that the appellant met the criteria for a dangerous offender designation and that there was no reasonable possibility of eventual control in the community, are accordingly entitled to deference.

[80] I would dismiss the sentence appeal.

Released: "GE" June 14, 2016

"K.M. Weiler J.A."

"I agree Janet Simmons J.A."

"I agree Gloria Epstein J.A."