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), (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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,
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> (ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
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> (iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(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 complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, 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).

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. Poulos, 2015 ONCA 182
DATE: 20150317
DOCKET: C53022

Doherty, Cronk and LaForme JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

John Poulos

Appellant

David Humphrey, for the appellant

Amy Alyea, for the respondent

Heard: February 11, 2015

On appeal from the convictions entered on November 10, 2010 by Justice C.D.A. McKinnon of the Superior Court of Justice, sitting without a jury.

LaForme J.A.:

INTRODUCTION

[1] After a two-day trial, the trial judge convicted the appellant on two counts of sexual assault. The two complainants had waitressed at the appellant's restaurant during different times. Both testified that they quit their jobs because they could not tolerate the appellant's sexual touching and sexual comments.

[2] After the Crown led evidence from the two complainants and closed its case, the trial judge asked to see counsel in his chambers and suggested a plea bargain. The appellant was not present during this discussion. The matters discussed in chambers in the appellant's absence were not repeated on the record.

[3] The appeal turns on the propriety of this judge-initiated mid-trial discussion. The appellant seeks to introduce fresh evidence to establish that the trial judge's conduct deprived him of his right to be present throughout his trial as guaranteed by s. 650(1) of the *Criminal Code*, which requires the presence of an accused "during the whole of his or her trial." He also argues that the mid-trial discussion, in conjunction with the trial judge's questioning of a defence witness, gives rise to a reasonable apprehension of bias.

[4] The fresh evidence consists of affidavits sworn by the appellant, the appellant's son (a civil lawyer), the trial Crown and the trial defence counsel, and a transcript of the cross-examination on each affidavit.

[5] Each of the affidavits describes the trial judge's in-chambers comments in a slightly different way, but the essence remains the same. The trial judge said that the two complainants had testified well or had been "good witnesses". He then observed that the complainants had testified to relatively minor assaults and suggested that the parties resolve the case by guilty pleas to common assault.

[6] The appellant recalls that his trial counsel reported to him after the meeting and told him that the trial judge said he was impressed with the two complainants and that the defence faced an "uphill battle". The trial judge suggested that the Crown and the defence work out a plea to common assault.

[7] When court convened for the afternoon session, the trial resumed without anyone referencing the in-chambers discussion. The defence called a number of witnesses, including several who testified to the appellant's reputation for honesty. The appellant also testified and denied the allegations. The trial judge convicted him of sexually assaulting both complainants.

ISSUES

[8] The appellant raises three related grounds of appeal: (i) the trial judge exhibited a reasonable apprehension of bias; (ii) the trial judge excluded the appellant from a portion of his trial contrary to s. 650(1) of the *Criminal Code*; and (iii) the trial judge created the appearance of prejudgment and unfairness by asking challenging questions of a defence witness.

1. The Crown's position

[9] The Crown concedes that the mid-trial in-chambers discussion fell outside the exceptions to s. 650(1). However, she argues that the evidence as a whole, including the fresh evidence, demonstrates that the appellant did not suffer prejudice and that the mid-trial conference did not create a reasonable

apprehension of bias. Therefore, the *curative proviso* at s. 686(1)(b)(iv) of the *Criminal Code* should apply. She offers a number of points in support.

[10] First, the in-chambers discussion was brief and neither experienced defence counsel nor anyone else adverted to the appellant's absence. Second, defence counsel immediately apprised the appellant of the discussion. Third, defence counsel did not apply for a mistrial nor did he discuss that possibility with the appellant. In his view, there were no grounds for a mistrial. Fourth, by his comments in the meeting, the trial judge does not appear to have made up his mind about the outcome of the trial. Fifth, the appellant did not modify his behaviour as a result of the in-chambers meeting – he always intended to and in fact did plead not guilty, testify and call evidence.

[11] In sum, the Crown argues, the mid-trial discussion had no apparent or actual effect on trial fairness.

[12] I disagree with the Crown and would allow the appeal. The appellant was excluded from a portion of his trial in violation of s. 650(1). At the close of the Crown's case, the trial judge initiated a mid-trial conversation about the resolution of the trial in the absence of the appellant. In a judge-alone criminal trial, such a conversation will always prejudice the fair trial interests of the accused. Therefore, the *curative proviso* does not apply.

2. The fresh evidence

[13] Before addressing the merits of the appeal, I propose to speak to the appellant's fresh evidence application. In support of his application, the appellant relies on the well-known test for admission of fresh evidence set out in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759, at 775. *Palmer* requires that the evidence: (i) could not, through the exercise of due diligence, have been adduced at trial; (ii) must be relevant in that it bears on a decisive or potentially decisive issue; (iii) must be reasonably capable of belief; and (iv) must be such that, if believed, it could reasonably be expected to have affected the result at trial.

[14] The *Palmer* criteria speak to new evidence tendered in relation to a factual or legal issue at trial. The *Palmer* criteria do not apply where, as here, a party submits fresh evidence to attack the validity of the trial process. In such a case, the court will admit the fresh evidence as long as it complies with the normal rules of evidence: see *R. v. W.(W.)* (1995), 25 O.R. (3d) 161 (C.A.), at 169-70; see also *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307, at paras. 76-77.

[15] As my colleague, Doherty J.A., noted in *W.(W.)*, at paras. 169-70, this court's authority to receive evidence on appeal resides in s. 683(1) of the *Criminal Code*, which provides that the court may receive evidence on appeal where it is "in the interests of justice" to do so. The "interests of justice" in this case require that the court admit the affidavits and the cross-examinations on

those affidavits to determine whether the mid-trial in-chambers discussion in the absence of the appellant violated s. 650 and prejudiced the appellant's right to a fair trial.

[16] I will now turn to the merits of the appeal.

ANALYSIS

[17] On the facts of this case, the appellant was denied his right to "be present in court during the whole of his... trial". The Crown quite appropriately concedes the s. 650(1) breach, but argues that the *curative proviso* should save the verdict.

[18] Not every in-chambers discussion will constitute part of the accused's "trial". The classification of an in-chambers discussion as part of the trial will depend on whether the context and contents of the discussion involved or affected the vital interests of the accused or whether any decision made bore on "the substantive conduct of the trial": *R. v. Simon*, 2010 ONCA 754, 104 O.R. (3d) 340, at para. 116, leave to appeal refused, [2010] S.C.C.A. No. 459.

[19] In this case, the discussion of the evidence and of a possible plea bargain involved or affected the vital interests of the appellant. This inevitably arose once the trial judge expressed a view about the complainants' testimony and proposed that the accused enter a guilty plea, although to a lesser and included offence.

[20] This court has warned that "the default position in all criminal trials is that any conversation involving trial counsel and the judge ought to take place in the

[accused's] presence, in open court, and on the record": *R. v. Dayes*, 2013 ONCA 614, 117 O.R. (3d) 324, at para. 68. Such a practice would avoid the time-consuming and occasionally discomforting inquiry into whether this court can salvage a verdict tainted by a s. 650(1) violation through resort to the *curative proviso*.

[21] In spite of the cautions, however, in-chambers discussions without the accused continue to take place. Some of those discussions, as here, canvas ways and means of resolving the trial. For the following reasons, such discussions constitute an error of law for which the appropriate remedy is a new trial. That is to say, where a trial judge in a criminal judge-alone trial initiates discussions with counsel after the commencement of the trial about the possibility of a resolution — in other words, a plea bargain — in the absence of the accused, trial fairness will be compromised such that the *curative proviso* will not salvage the verdict.

The s. 650(1) breach and the *curative proviso*

[22] This case is very similar to *R. v. Schofield*, 2012 ONCA 120, 109 O.R. (3d) 161, where this court made it abundantly clear that a breach of s. 650(1), in circumstances such as those on this appeal, is fatal to trial fairness.

[23] MacPherson J.A. writing for the court, observed that an in chambers discussion with counsel about a possible plea clearly affected the appellant's vital

interests and triggered his right to be present under s. 650 of the *Criminal Code*. He further held that the absence of the accused during those discussions, that were vital to his interests, undermined the fairness and openness of the trial.

[24] I agree with my colleague's analysis. An accused is entitled to have first-hand knowledge of matters vital to his interests as they unfold at trial so that he can properly seek and receive legal advice and otherwise properly exercise his right to make full answer and defence. Furthermore the accused's presence, when matters vital to his interests are being discussed, brings a transparency and appearance of fairness to those proceedings that would otherwise be lacking.

[25] In my view, *Schofield* has direct application here. Just as in *Schofield*, the in chambers discussions in the absence of the accused violated s. 650. And, just as in *Schofield*, the Crown cannot demonstrate that the violation of s. 650 did not prejudice the appellant.

CONCLUSION

[26] In this case, the trial judge, after hearing the testimony of two Crown witnesses, initiated a mid-trial discussion in the absence of the accused about a possible plea bargain. The discussion was a manifest breach of s. 650(1). Though he acted with the best of intentions, the trial judge undercut the

presumption of innocence and compromised trial fairness. In such circumstances, I would not apply the *curative proviso* under s. 686(1)(b)(iv).

DISPOSITION

[27] For the above reasons, I would admit the fresh evidence and allow the appeal. I would set aside the convictions and order a new trial.

Released: "DD" MAR 17 2015

"H.S. LaForme J.A."
"I agree. Doherty J.A."
"I agree. E.A. Cronk J.A."