COURT OF APPEAL FOR ONTARIO

CITATION: R. v. T.L., 2026 ONCA 190[1]
DATE: 20260317
DOCKET: COA-23-CR-0134

Fairburn A.C.J.O., Wilson and Rahman JJ.A.

BETWEEN

His Majesty the King

Respondent

and

T.L.

Appellant

Jeffery Couse, for the appellant

Deepa Negandhi, for the respondent

Heard: September 12, 2025

On appeal from the convictions entered by Justice Andrew W. Brown of the Ontario Court of Justice, on June 10, 2022.

Wilson J.A.:

A. OVERVIEW

[1] The appellant was convicted of two counts of sexually assaulting the complainants, C.E. and S.S. He appeals his convictions on three grounds:

[1] This appeal is subject to a publication ban pursuant to s. 486.4 of the *Criminal Code*, R.S.C. 1985, c. C-46.

2026 ONCA 190 (CanLII)

(1) the trial judge erred in finding that surveillance footage corroborated the testimony of S.S.;

(2) the trial judge erred in relying on the demeanour of the appellant in his assessment of credibility, especially given the intellectual disabilities of the parties; and

(3) the trial judge failed to consider evidence of inadvertent tainting in his assessment of the complainants' credibility and reliability.

He asks that the convictions be set aside and a new trial ordered.

[2] I agree that the trial judge erred in failing to properly consider the evidence of inadvertent tainting in his assessment of the complainants' credibility and reliability. As a result, I would allow the appeal and order a new trial. Given this disposition, it is unnecessary to deal with the other two grounds of appeal.

B. BACKGROUND

[3] At the material times, the appellant, the complainants, and another female student, N.D., were in high school and enrolled in a special education program for students with cognitive issues. At the time of trial, C.E. was 19, S.S. was 21, the appellant was 23, and N.D. was 24. All four have some form of intellectual disability.

[4] C.E., S.S. and N.D. were friends, and each alleged that the appellant sexually assaulted them at the school. Although no charges were laid in respect of

2026 ONCA 190 (CanLII)

N.D., her evidence was proffered by the Crown in support of a similar fact evidence application. She testified at the *voir dire* that the appellant had sexually assaulted her in a storeroom or "cubby" on two occasions between September 2, 2013 and June 27, 2014. C.E. and S.S. testified to similar experiences with the appellant in the cubby occurring between September 15, 2016 and November 27, 2018.

[5] C.E., S.S. and N.D. told each other about the assaults, although the timing of those conversations was not clear. N.D. testified that she had met with C.E. and S.S. to discuss the assaults and that the three of them had agreed to go to the police. She agreed with trial counsel's suggestions that the three of them were "pissed off" with the appellant and that they had agreed to "get" the appellant and "stick it" to him.

1. The evidence of S.S.

[6] S.S. reported to the school that, on June 14, 2017, she had been sexually assaulted on school grounds. The police attended at the school and spoke with S.S. She gave a video-taped statement on June 26, 2017 which led the police to believe that the sexual assault had taken place outside of the school building. The police reviewed video surveillance footage and were unable to find any evidence of the appellant and S.S. outdoors. As a result, the investigation was closed without any charges being laid.

2026 ONCA 190 (CanLII)

[7] The police investigation was reopened after C.E.'s complaint in November 2018. A second video interview of S.S. was conducted on February 18, 2019, after she had spoken to C.E. and N.D. In that interview, she said the sexual assault occurred in the cubby inside of the school. As noted, this is where C.E. and N.D. also said the sexual assaults occurred. S.S. stated that the appellant was pestering her to have sex and, eventually, she went with him to the cubby where he pulled down her pants and, without her consent, had vaginal sex with her. She said that, following the sexual assault, she told N.D. about it and, a few days later, she told the school and her parents.

[8] At trial, S.S. testified she remembered giving video statements to the police, but she could not recall the sexual assault or what she told others, including the police, about it. She agreed she had discussed the sexual assault with N.D. but gave inconsistent answers about whether N.D. had asked her to make up allegations about T.L. She first said she did not know if N.D. asked her to make up the allegation. When asked again, she said it was "true" that N.D. had done so. When asked a third time, S.S. said "no", N.D. had not done so.

2. The evidence of C.E.

[9] In November 2018, the vice principal heard about a possible sexual assault at the school. On November 26, 2018, she met with C.E. and the police were called. C.E. reported to the police that she had been sexually assaulted by the appellant in the cubby at the school.

2026 ONCA 190 (CanLII)

[10] Later, on February 5, 2019, C.E. gave a videotaped statement to the police. C.E. indicated that the appellant had sexually assaulted her a number of times, perhaps 5 or 6, but she recalled only one of the assaults, which occurred in 2018 in the cubby at lunch time. The appellant asked C.E. to meet him in the cubby and when she arrived, he pulled down her pants and had vaginal intercourse without her consent.

[11] C.E. told the police that she had spoken to her friends S.S. and N.D. about the sexual assault and that she was "sticking up for three people: me, N.D. and my friend, [S.S.], because he did it to them as well and they never said anything."

[12] At trial, C.E. testified that she could not remember much of what happened, partly because she didn't want to recall it and partly because of her issues with memory. She gave inconsistent answers regarding the number of sexual assaults that had occurred and who she had told about them. She admitted that S.S. was the first person she had talked to about being assaulted by the appellant but had no recollection of speaking with N.D. As noted, N.D. testified that they had all spoken together during the "get him" conversation. She denied that anyone suggested that she make up anything about the appellant.

3. The evidence of N.D.

[13] N.D. also provided a videotaped statement to the police on February 18, 2019. She described two incidents that had occurred in the cubby in

2026 ONCA 190 (CanLII)

2013 or 2014, when she was 14 or 15 years old. She stated that, on the first occasion, the appellant tried unsuccessfully to pull her pants down to have sex. She resisted, pushed him away and escaped to the bathroom. A month later, he tried to do the same thing and was successful in pulling down her pants. He asked her to have sex, but she refused, and she was able to escape and hide from him. Her brothers were in the area, and they told the appellant to leave N.D. alone. N.D. did not tell the school about these assaults at the time.

[14] At the *voir dire*, N.D. admitted she had difficulty with memory. Her evidence was also contradictory. She testified that she did not tell anyone about the assaults until after she had graduated but also stated that she had warned C.E. and S.S. about the appellant when they first came to the school. She also described a conversation she had had with S.S., after the incident involving S.S. and the appellant, where the two shared their experiences.

[15] N.D. recalled that she had talked about the appellant a great deal with C.E. and S.S. and that they agreed he was a “problem”. They decided together that the police should be told about his conduct. N.D. thought this discussion took place around the time she was graduating in June 2019; however, she was not certain of the date of the conversation. She acknowledged that they had agreed they would “get” the appellant and “stick it to him”.

2026 ONCA 190 (CanLII)

4. The ruling on the similar fact evidence application

[16] The Crown brought a similar fact evidence application, seeking to use the off-count evidence of N.D., and the cross-count evidence of C.E. and S.S., to prove the appellant's guilt on the two counts of sexual assault.

[17] When considering the probative value of the evidence, the trial judge considered, as he was obligated to do, whether there existed anything that could shake one's confidence in the objective improbability of coincidence in this case. Specifically, he turned his mind to whether there had been any collusion or inadvertent tainting as between C.E., S.S. and N.D. The trial judge found as a fact that there had been no intentional collusion. Even so, he had concerns over the fact that the three women may have inadvertently tainted one another's evidence:

> Tainting or actual collusion could explain how three young women could come up with similar but untrue, misremembered or misinterpreted accounts. Given the acknowledged intellectual challenges faced by each of the witnesses, and in particular admitted issues with memory and recall, the potential of the tainting of evidence, even inadvertently, is not to be discounted.
>
> […]
>
> The potential for tainting of evidence was large from the outset. The complainants and N.D. all knew each other. They went to the same school. They were in the same programme. The class size was small. They all were friends. Two had dated T.L. in the past. They all admitted to speaking to each other and or other friends at times proximate to the incidents they allege. There were some delays between initial reports to school officials and video

2026 ONCA 190 (CanLII)

interviews by police. This is not simply the case about the "opportunity" for tainting, but the real possibility of tainting.

[...]

ND recalled that the girls agreed to deal with the TL “problem”. She indicated that all three were “pissed off” and agreed with defence counsel that there was an agreement to “stick it to [him].”

Re-examination by the Crown of ND clarified what she meant as to why she, ND, was “pissed off” but did little to assuage any concerns raised about the possible sharing of information and the possibility, although, seemingly remote, that the other women’s testimony might have been affected or influenced.

[…]

The above strongly points to a lack of any deliberate or concerted acts on the part of any of the three complainants to collaborate in a collective complaint against TL. The objective time line does not support this.

As improbable as it is that there was any “tainting” of evidence as suggested, particularly in respect to the evidence of ND, the evidentiary record is somewhat incomplete. It may have been difficult, but would have been of some assistance, had the Crown, once alerted to the admissions of some communication between the parties, to have explored with each CE, SS and ND exactly what was said as between them. Without those inquiries, the “faint” prospect of tainting, even inadvertently, has not been displaced.

[…]

In my view, the similar act evidence proffered, particularly that in respect to the count to count application in respect

2026 ONCA 190 (CanLII)

> to CE and SS was compelling and may well have given rise to supporting the inference sought by the Crown. This is not the case, as given the possibility, (however remote) of tainting of evidence, especially in light of the evidence of ND.
>
> […]
>
> For the reasons above, while the evidence is compelling, the court is of the view, potential of tainting has not been displaced by the Crown. As a result, the similar fact application is therefore dismissed.

2026 ONCA 190 (CanLII)

[18] Therefore, the entire similar fact evidence application was dismissed over concerns about inadvertent tainting as between C.E, S.S. and N.D. In other words, the Crown had failed to meet its onus of establishing on a balance of probabilities that there had been no inadvertent tainting of the complainants' evidence.

5. The trial proper

[19] On the trial proper, the trial judge accepted the evidence of C.E. and S.S., finding it completely credible and reliable, despite inconsistencies in their evidence and problems with their memory and narration.

[20] In the assessment of the credibility and reliability of C.E. and S.S., an assessment that was central to the verdicts in this case, the trial judge did not avert to the evidence of N.D. This is despite the parties' agreement that N.D.'s comments, specifically about the meeting in which the three had discussed the matter and had agreed to "get" the appellant, was relevant to his consideration of C.E. and S.S.'s credibility and reliability. In addressing the credibility and reliability

of C.E. and S.S. on the trial proper, the trial judge only had this to say about the issue of tainting:

> For the reasons already canvassed in my ruling concerning the similar act application, I reiterate that I take none of the proffered similar act evidence into consideration in my assessment of the evidence available at this point. Indeed, the similar act evidence application was dismissed. I do add, that although the application failed in large measure because the Crown failed to rebut its onus of possible tainting, the court found no tainting, in regard to the evidence of SS or CE.
>
> […]
>
> I have found as a fact that there was no evidence or tainting of evidence as between CE and SS. Nor do I find that there has been any tainting of evidence which might have affected their recall or veracity. I am aware that CE testified she told SS then her mother about the incident. [Emphasis added.]

[21] The trial judge did not accept the evidence of the appellant, finding it "illogical", "self-serving", "contrived", "fabricated", and "fraught with inconsistencies". He concluded that it did not leave him with a reasonable doubt as to the appellant's guilt. As a result, he convicted the appellant of sexually assaulting C.E. and S.S.

2026 ONCA 190 (CanLII)

C. POSITIONS OF THE PARTIES

[22] The appellant submits that the evidence of inadvertent tainting needed to be addressed in the trial judge's assessment of C.E. and S.S.'s credibility and reliability.

[23] The respondent submits that the trial judge considered and rejected the issue of tainting and collusion with respect to the evidence of C.E. and S.S. and that his ultimate findings of fact are therefore not at odds with his earlier findings on the similar fact evidence application regarding the possibility of tainting. In any event, the trial judge characterized the likelihood of tainting as "improbable". Although the trial judge determined, on the similar fact evidence application, that the Crown had failed to discharge its burden of disproving tainting, it remained open to the trial judge to accept the evidence of C.E. and S.S. on the trial proper. The respondent relies on this court's decision in *R. v. O.M.*, 2014 ONCA 503, 313 C.C.C. (3d) 5 for this proposition.

[24] In the event this court finds an error in the trial judge's analysis, the respondent relies on the *curative proviso* under s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C., 1985, c. C-46.

D. ANALYSIS

[25] I agree with the appellant: the trial judge erred by failing to properly resolve the issue of tainting, inadvertent or otherwise, of C.E. and S.S.'s evidence.

2026 ONCA 190 (CanLII)

[26] On the similar fact evidence application, the trial judge concluded that the prospect of tainting had not been displaced by the Crown, and the application was dismissed on that basis. However, on the trial proper, he declined to provide any explanation as to why his concerns over tainting, however remote they may have been, on the similar fact evidence application, did not give rise to similar concerns in the context of the trial proper. Instead, the trial judge simply said, in the context of his reasons for judgment, that there was "no evidence of collusion or tainting of evidence as between CE and SS" (emphasis added). While it may be that the trial judge had resolved his earlier concerns, expressed in the context of his similar fact evidence ruling that there had been possible inadvertent tainting between all of C.E., S.S. and N.D., he needed to explain why that was so. If concerns over possible tainting were enough to dismiss the similar fact evidence application, it was incumbent on the trial judge to explain why those same concerns did not adversely impact his credibility and reliability findings when it came to C.E. and S.S.

[27] While N.D.'s evidence could not be used on the trial proper as similar fact evidence, the parties acknowledged in their closing submissions that N.D.'s evidence was important to resolving credibility and reliability issues on the trial proper. In this context, it was important that the trial judge address why he had no concerns about tainting, including why he had no concerns about N.D. tainting the evidence of C.E. and S.S.

2026 ONCA 190 (CanLII)

[28] The trial judge's failure to explain how he resolved, for the purposes of the trial proper, the concerns he had about tainting in the context of his admissibility analysis, constitutes a reversible error of law: *R. v. Burnie*, 2013 ONCA 112, 294 C.C.C. (3d) 387, at para. 41; *R. v. J.F.* (2003), 177 C.C.C. (3d) 1, at para. 88 (Ont. C.A.). As this court noted in *R. v. R.I.*, 2024 ONCA 185, 97 C.R. (7th) 169, at para. 31, a trial judge cannot ignore evidence of possible tainting in their assessment of credibility and reliability:

> It is well-established that hearing the evidence of other witnesses "can have the effect, whether consciously or unconsciously, of colouring and tailoring [a witness's] descriptions of the impugned events": *R. v. C.G.* 2021 ONCA 809, 158 O.R. (3d) 721, at para. 28, citing *R. v. C.B.* (2003), 167 O.A.C. 264, at para. 40. For this reason, a trial judge faced with evidence of potential collusion must directly address the evidence and consider its impact on the witness's credibility and reliability. It remains open to the trial judge to rely on the witness's testimony, but only if the trial judge is demonstrably satisfied that the alleged collusion did not taint the witness's credibility or reliability: *C.G*., at paras. 33-40; *R. v. Burnie* 2013 ONCA 112, 303 O.A.C. 76, at paras. 36, 41.

[29] *O.M.* does not assist the respondent. In *O.M.*, the trial judge dismissed a similar fact evidence application on the basis that the Crown had failed, at the time of the application, to disprove collusion. Later, on the trial proper and after considering the evidence as a whole, the trial judge found there to be no collusion and convicted the appellant. This court upheld the convictions. Clearly, in *O.M*., there was consideration of the possibility of collusion in the assessment of the

2026 ONCA 190 (CanLII)

witnesses' credibility and reliability. The trial judge in *O.M.* addressed the possibility "head on", rejecting that it impacted the credibility and reliability of the witnesses and explaining why he came to that conclusion. Here, there was no explanation as to why the trial judge found "no evidence of collusion or tainting" for purposes of the trial proper. As long as there is an air of reality to the possibility of tainting, which the trial judge's evidentiary ruling demonstrates was the case, it is necessary to explain why that possibility did not adversely impact the complainants' credibility and reliability.

2026 ONCA 190 (CanLII)

a. The *proviso* cannot save the convictions

[30] As noted, the respondent relies on the *curative proviso* in this case, arguing that any of the trial judge's errors were merely trivial. I reject this argument.

[31] The *proviso* is generally inapplicable in cases such as this, which turn entirely on credibility and reliability: *R. v. Perkins*, 2016 ONCA 588, 339 C.C.C. (3d) 438, at para. 32. Moreover, this is not a case in which the trial judge's error can be considered trivial. There was significant evidence of, at the very least, inadvertent tainting which the trial judge entirely ignored in his assessment of credibility and reliability.

[32] The failure to consider the possibility of tainting was particularly serious in this case given the intellectual disabilities of the witnesses. The complainants were quite suggestible in their interviews with police and on cross-examination. Further,

by the time of trial, C.E. and S.S. both testified that they had little to no memory of the assaults. The absence of any independent memory of the events increased the risk that their evidence was tainted by what others had told them.

[33] In these circumstances, the trial judge's failure to consider the possibility of tainting was serious and the *proviso* is clearly inapplicable.

E. DISPOSITION

[34] The appeal is allowed, the convictions are set aside, and a new trial is ordered.

Released: March 17, 2026 "J.M.F."

"D.A. Wilson J.A."
"I agree. Fairburn A.C.J.O."
"I agree. M. Rahman J.A."

2026 ONCA 190 (CanLII)