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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. McDonald, 2018 ONCA 369
DATE: 20180416
DOCKET: C44874

Doherty, LaForme and Paciocco JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Paul Arthur McDonald

Appellant

Erin Dann and Dan Stein, for the appellant

Amy Alyea, for the respondent

Heard: January 17, 2018

On appeal from the conviction entered on November 22, 2000 and the sentence imposed on October 27, 2003, with reasons released on November 4, 2003 by Justice Bruce C. Hawkins of the Superior Court of Justice, sitting with a jury.

H.S. LaForme J.A.:

OVERVIEW

[1] The appellant and the complainant met for the first time at the apartment of a mutual friend. The two departed around the same time and travelled in the appellant's car to his apartment. Sexual intercourse occurred, and then the

appellant and complainant returned to the friend's apartment. The appellant said the complainant came with him willingly, and that the two engaged in "normal" consensual intercourse. The complainant said the appellant forced her to go with him and forced intercourse on her.

[2] On November 22, 2000, a jury convicted the appellant of unlawful confinement, sexual assault causing bodily harm, and uttering a death threat. On November 4, 2003 - about three years later - after a lengthy hearing, the appellant was declared a dangerous offender and sentenced to an indeterminate period of incarceration.

[3] The appellant subsequently filed a timely inmate appeal against both his conviction and sentence. In February 2006, his former counsel filed a solicitor's Notice of Appeal and, in July 2007, transcripts from the trial and sentencing proceedings were filed.

[4] On September 22, 2008, the appellant's former counsel filed a notice of abandonment, and on October 3, 2008 his appeal was dismissed as abandoned.

[5] On April 21, 2016, this court granted the appellant's application to reopen his appeal against conviction and sentence. This court concluded that his former counsel had filed the notice of abandonment without clear instructions.

[6] Finally, on January 17, 2018 — approximately 17 years since his conviction and 14 years since he was sentenced — his appeal was heard. His appeal against

conviction is without merit, but a new dangerous offender hearing is required because procedural fairness and the appearance of a fair trial were compromised during his sentence hearing.

[7] Given that the disposition of this appeal is connected to the sentence only, it is unnecessary to recite the background facts in any great detail. To the extent they may be relevant to an issue; I will refer to them as part of the analysis.

ISSUES

[8] The appellant appeals his conviction on the basis that the trial Crown made three misleading and inflammatory statements in his closing address to the jury that required correction by the trial judge. This involved what I will refer to as: (i) the lobby video; (ii) music in the apartment; and (iii) the complainant's injuries.

[9] Regarding the sentence appeal, the appellant submits that: (i) the trial judge declined to hear oral closing arguments during the dangerous offender hearing; and (ii) the reasons for the dangerous offender designation do not allow for appellate review.

ANALYSIS

(i) The Conviction Appeal

[10] Briefly, the three claims of misleading and inflammatory comments by Crown counsel in his closing address to the jury can be described as follows:

1. The lobby video – involves Crown counsel's comments that it appeared the appellant was taking the same pathway as the victim and following her, as the Crown simultaneously showed the lobby video of the victim leaving the building at 4:51 a.m. and the appellant leaving at 4:53 a.m.

2. Music in the apartment – here, in relation to the testimony of a witness that he heard someone shout to turn down the music; Crown counsel remarked this was "strange" since "there is no suggestion music was playing".

3. The complainant's injuries – relates to Crown counsel characterizing as "ridiculous" the submission made by defence counsel for the first time in her closing that the victim's injuries were self-inflicted.

[11] We did not call upon the Crown to respond to the "music in the apartment" or "the complainant's injuries" issues. The trial Crown's comments in both instances were neither improper nor unfair. They did not require further instruction to the jury. The inferences suggested by the trial Crown were open on the record. The remarks would not have invited any deviation from proper decision-making, did not denigrate the defence and, most importantly, did not deprive the appellant of a fair trial.

[12] I see nothing inflammatory or improper about the trial Crown's submission regarding the path the appellant took from the apartment, shortly after the complainant took the same path, as shown by the lobby video. The trial Crown was properly suggesting an inference the jury could draw from the evidence.

[13] The appellant was aware that it was the trial Crown's position that when he left the apartment he was going after the complainant and not simply leaving as he had testified. He had full opportunity to respond to this part of the Crown's case. The Crown is not required to put by way of cross-examination of the accused all of the arguments it proposes to make in closing.

[14] Certainly, in light of the objection by the defence, the trial judge could have reminded the jury that it was the defence position that the video could not support the argument advanced by the trial Crown. His failure to do so, however, does not sufficiently taint the trial to warrant reversal.

[15] When the impugned remarks of trial Crown counsel are evaluated in the context of the trial, the addresses of both counsel, and the trial judge's response, it is clear that they did not cause a substantial wrong or miscarriage of justice. The conviction appeal should be dismissed.

(ii) The Sentence Appeal

[16] The appellant seeks a new dangerous offender hearing on the basis that: (i) procedural fairness required the trial judge to allow oral submissions at the conclusion of his dangerous offender hearing; and (ii) the sentencing judge's reasons were insufficient.

(a) Oral Submissions

[17] On May 26, 2003 - two and a half years after the jury had returned its verdict – the evidence at the dangerous offender hearing concluded. It is here that the appellant submits that his rights to procedural fairness were violated. He submits that, by denying him the right to make oral submissions at the conclusion of the hearing, the trial judge violated his right to a fair hearing under ss. 7 and 11(d) of the *Charter*, and his right to be present at his trial pursuant to s. 650(1) of the *Criminal Code*.

[18] The Crown, on the other hand, takes the position that the trial judge did not in fact deny the appellant the right to make oral submissions, and that in any event, oral submissions were not indispensable to procedural fairness in this instance. It argues that it is not necessary for this court to order a new dangerous offender hearing, simply so that the appellant may sit through oral submissions fifteen years after his original hearing. If necessary, the *curative proviso* should be applied.

[19] There are two crucial transcripts I set out below because of their importance to the analysis. The analysis will be broken down into two parts. First, I decide whether, in fact, the trial judge prohibited defence counsel from giving oral submissions. Second, I examine whether such a prohibition is fatal to the dangerous offender proceedings.

(1) The Transcripts: Exchanges about Oral Submissions

[20] The trial judge advised, on May 26, 2003, "[s]ince the defence is not calling evidence, I will require written argument in this matter". Dates were canvassed and agreed upon. Counsel[1] – the record is unclear as to which counsel – asked, "[n]ow, your Honour, were you anticipating this in lieu of argument or in addition to argument?" The following exchange then took place:

> **THE COURT:** In lieu. I will mark it to be spoken to then, so that the offender could be brought back to be spoken to on the 31st of July, which is a Thursday.
>
> So when I have all of those, if I feel that I can get further assistance by counsel I will do so, otherwise that completes this.
>
> ***
>
> **MR. RICHARDSON:** I apologize, but I was caught by surprise when you indicated that written argument would be made in lieu of oral argument.
>
> In my submission, Mr. McDonald, who has been represented and required to be present for the hearing will not be present for a significant phase of the matter, and this is the argument portion.
>
> In my respectful submission, Mr. McDonald, should and has a right indeed to hear the argument made by the Crown persuading or to attempt to persuade the court that he fits the legislation and ought to be designated as a dangerous offender and incarcerated. He should also

[1] Trial Crown counsel was Mr. A. Pilla; defence counsel was Mr. R. Richardson and Ms. S. Peeris.

> hear the arguments put forward on his behalf by his counsel arguing that he should not be [so] designated.

The sentencing judge overruled the objection resulting in the following exchange:

> **MR. RICHARDSON:** Written argument only.
>
> **THE COURT:** (Inaudible) – making him aware of the argument, and Crown is to make available a copy, and if there is a problem he can be assisted by counsel. And the same with argument on behalf of his counsel. He receives copies and you can – so that is how you partake in written argument, by seeing the written argument and seeing the assistance of the counsel.

[21] Mr. Richardson suggested there might be some difficulty with leaving the written submissions with the appellant and discussing them with him in the Metro Detention Centre. He added, "[y]ou are aware that there is a SARS issue, and it's difficult if not impossible to have a private interview with the client." This led to the following exchange:

> **THE COURT:** Let's not put the cart before the horse. It's worked out, if there is a difficulty at the time, but step one is to get the argument prepared and submitted.
>
> **MR. RISCHARDSON:** Yes. And I have absolutely no – I hope I am not being misunderstood. I have no difficulty preparing the argument. I am not suggesting that we don't.
>
> I just suggest that it's made in full and in Mr. McDonald's presence. I am not saying that we should not prepare argument to assist the court. That's not been suggested.

> **THE COURT:** Oral argument in full in the court would seem to me – would be satisfied by everyone standing there and reading out written argument.

[22] This exchange, in my view, makes it obvious that defence counsel wanted to present oral argument, which the trial judge did not accept was required. Rather, the trial judge appears to be of the view that if the appellant merely saw the written argument, this would be sufficient. I will say more about this later.

[23] Extensive written argument was prepared by the Crown and the defence, and was filed with the trial court sometime before July 31, 2003. On that date, the trial judge was not available, and the matter was adjourned to August 19th. Ultimately the trial judge received 110 pages in written submissions - 58 pages from the Crown, 52 pages from the defence.

[24] The parties returned to court on August 19, 2013 for the matter to be spoken to. On this occasion, after being advised by the trial judge that he was not in a position to render judgment, the matter was adjourned to September 26. The following exchange also occurred:

> **MR. PILLA:** …. I guess the only other thing before we break is there was some talk of enhancing any of the written submissions with oral submissions. I certainly have nothing to add. I just want to make sure that counsel for Mr. McDonald is in the same position. Or should we consider an interim date for that purpose or, I take it, I've heard nothing so that's the state of things, I just want to confirm that before we adjourn.

> **MR. RICHARDSON:** I'll let Miss Peeris speak to that.
>
> **MS. PEERIS:** Yes. Your honour, I'm the one who raised this on the last occasion. You recall that I requested that we make oral argument in front of the court, in front of my client, and Your Honour indicated at that time that you weren't permitting it.
>
> **THE COURT:** That I was not?
>
> **MS. PEERIS:** Yes. That written submissions were to be in lieu of.
>
> **THE COURT:** If I change my mind and feel that it would be useful, I'll let you know.

[25] It is not clear what Ms. Peeris is referring to when she says "I'm the one who raised this on the last occasion". Other than the May 26th transcript, there are no transcripts in the record where this was discussed. She may have been referring to the statement made by Mr. Richardson on May 26th. Or, there may well have been communications, perhaps out-of-court, about this. There is no way to know what those discussions were and we are left with the record filed.

(2) Did the Trial Judge Prohibit Oral Submissions?

[26] As I have already mentioned, it is clear to me from the transcript that on May 26, 2003 defence counsel wanted the opportunity to present oral argument. The trial judge, on the other hand, did not accept that this was legally required. Indeed, he believed it would be enough if the client merely saw copies of the written argument. Moreover, he was not prepared to change his position because of

logistical difficulties that may not even arise. In the end, he ordered written argument in lieu of oral argument.

[27] In my opinion, the trial judge's intention from the outset was to receive only written submissions from the parties. After discussing scheduling for the written submissions the trial judge said, "[s]o when I have all of those, if I feel that I can get further assistance by counsel I will do so, otherwise that completes this." He is advising counsel how it is going to be and that *if he wants* further assistance he may revisit the issue of written submissions only.

[28] Defence counsel raised the right to oral submissions and made it clear that he was open to alternative ways of combining written and oral argument. The trial judge disagreed that oral argument was required. To repeat, his view was that showing a copy of the written argument to the appellant would be sufficient: "He receives copies and you can - so that is how you partake in written argument, by seeing the written argument and seeing the assistance of counsel".

[29] Defence counsel raised the logistical challenges that could interfere with the appellant's ability to even see the written argument. The trial judge noted that the logistical challenges may not materialize and if they did they could be raised then: "let's not put the cart before the horse." I do not interpret this as the trial judge saying that he has changed his mind and is no longer ordering final argument to be in writing only.

[30] Defence counsel advised that he has no objection to preparing written argument, but "I just suggest that it's made in full and in Mr. McDonald's presence." In the context of everything else the trial judge said, his next comment is, in my view, a dismissive response to counsel's claim that written submissions alone are inadequate: "Oral argument in full in the court would seem to me – would be satisfied by everyone standing there and reading out written argument. So…". The trial judge is not suggesting that the parties proceed in this way; rather, he countered defence counsel's claim with, "[s]o that will be the timetable then", referring to written submissions.

[31] In connection with the August 19, 2003 transcript, even if it could be said that the Crown believed oral submissions were open, the issue is not what the Crown believed; rather, it is what the trial judge ordered. The transcript is clear. The trial judge maintained his position that there would be no oral submissions.

[32] Specifically, in connection with oral submissions, Ms. Peeris noted to the trial judge, "you weren't permitting it", which implies that permission was sought, probably on May 26th, but denied. Clearly, the defence was not abandoning its request to have an opportunity to make oral submissions. After the trial judge questioned Ms. Peeris' statement — "That I was not?" — this exchange occurs:

> **Ms. Peeris:** Yes. That written submissions were to be in lieu of.

> **The Court:** If I change my mind and feel that it would be useful, I'll let you know.

[33] The trial judge's reference to "change my mind" affirmed that defence counsel was right in describing his position; that written submissions were to be in lieu of oral submissions. His response demonstrates that he was aware that the defence continued to want oral submissions. Whether Ms. Peeris' reference to having raised this issue is to the May 26th appearance or another appearance is of no moment. The meaning of this exchange on August 19th does not change; the trial judge responded to a reminder that he would not permit oral submissions by saying that if he changes his mind he would let counsel know.

[34] I am of the firm conclusion that the appellant has met his burden of showing that he was denied the right to make oral submissions at the close of his dangerous offender hearing. That failure on the part of the trial judge constitutes a breach of fundamental due process which is fatal to the dangerous offender proceedings. I reach this conclusion for the following reasons.

(b) Was it Fatal to Prohibit Oral Submissions?

[35] Part XXIV of the *Criminal Code* sets out the provisions dealing with dangerous offenders and long term offenders. Section 758(1) mandates the procedural right of an offender to be present at his or her dangerous offender

application. Section 758 is a replication of s. 650(1), which provides similar rights to be present at trial.

[36] Although nothing in Part XXIV or s. 650 specifies that the offender has a right to make oral submissions the appellant claims that his rights to a fair hearing and to be present at his trial were violated. He says the principles of fundamental justice required an oral hearing that included the opportunity to make final submissions in person. I agree with the appellant.

(1) Fundamental Justice

[37] Fundamental justice in Canadian law is the fairness underlying the administration of justice and its operation. The principles of fundamental justice are specific legal principles that command "significant societal consensus" as "fundamental to the way in which the legal system ought fairly to operate": *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113. The more a person's rights or interests are adversely affected, the more procedural or substantive protections must be afforded to that person in order to respect the principles of fundamental justice: see *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 25.

[38] Procedural fairness speaks to the principle that persons affected by the proceedings should have the opportunity: (i) to present their case fully and fairly, and (ii) have any decision affecting their rights, interests, or privileges made using

a fair, impartial and open process: see *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, at pp. 837-841. As the Supreme Court emphasized in *Suresh v Canada (Minister of Citizenship and Immigration),* 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 118, "[t]he greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter.*"

[39] The greater procedural protections just referenced can include the right to an oral hearing, where questions can be answered and submissions made in open court, "with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker": *Baker* at p. 837. In *Singh v. Canada (Minister of Employment and Immigration),* [1985] 1 S.C.R. 177, at para. 58, Wilson J. commented that where physical liberty is at stake "it would seem on the surface at least that these are matters of such fundamental importance that procedural fairness would invariably require an oral hearing". This view – that where the stakes are serious enough an opportunity for oral submissions must be given — is in keeping with recognition that there are cases where the demands of natural justice can require an oral hearing: see *Baker*; *Re Spalding*, (1955) 16 W.W.R. 157 at 169; *Joly v. Canada (Attorney General)*, 2014

FC 1253, 471 F.T.R. 190; *Patchett v. Law Society of British Columbia*, [1979] B.C.J. No. 1097.

[40] The *Criminal Code* provisions regarding dangerous offenders authorize the most extreme and clearest form of preventive sentence that can be imposed on an offender in Canada. They permit the imposition of indeterminate detention in order to protect the public from persistent criminals with a propensity for committing violent crimes against the person: see *R. v. Boutilier*, 2017 SCC 64, 42 C.R. (7th) 251, at para. 3.

[41] The indeterminate sentence allows for control of offenders found to be dangerous for the rest of their lives. This is a significant deprivation of liberty. As such, procedural fairness must be jealously guarded and strictly enforced in this context. Subject to the right of the parties to agree otherwise, the closing arguments must therefore include oral submissions, held in open court, in the presence of the accused, counsel, the trial judge and the court reporter.

(2) Section 650 of the Criminal Code

[42] Section 650 of the *Criminal Code* gives the appellant the right to be present in court during the whole of his trial subject to exceptions that do not apply in this case. Closing arguments are part of an accused's trial, and thus are subject to the requirement that the accused be present. This right gives effect to the principle of fairness and openness that are fundamental values in our criminal justice system.

Presence gives the offender the opportunity of acquiring first-hand knowledge of the proceedings leading to the eventual result. The denial of that opportunity may well leave the offender with a justifiable sense of injustice, which is the “implicit and overriding principle underlying” the right to be present: see *R. v. Hertrich* (1982), 67 CCC (2d) 510, at para. 81.

[43] It is true that we can infer from the record that all counsel were satisfied with the contents of the written arguments filed. Furthermore, with the evidence complete, the content of the written argument could not have affected the conduct of the appellant’s defence. Indeed, it could be argued that oral submissions of the appellant would have had no meaningful impact on the written submissions made by his counsel.

[44] Nevertheless, the appellant's prohibition from the opportunity to make oral arguments at the close of his dangerous offender hearing limited the appellant’s right to be present when the arguments were received by the trial judge. This fouled the appearance of fairness, compromised the transparency of the proceedings, and was at odds with the open court principle. This amounted to a miscarriage of justice. A review of written submissions in jail with his counsel through a plexi-glass barrier was no substitute for being present during oral argument.

[45] In holding that counsel for the appellant was entitled to make oral submissions in the presence of the appellant, I do not suggest that the trial judge

could not require written submissions as a first step in the argument process. It is now common practice in the criminal courts to require written submissions, not only at the end of the evidence in judge alone cases, but also in respect of various evidentiary motions, or pre-charge discussions held before or during trial. In those cases, written argument is used, not in lieu of oral argument, but in addition to and usually as a precursor to oral argument.

[46] If a trial judge requires written argument as a first step in the argument process, the trial judge must allow counsel, after a written argument has been exchanged, to make oral arguments in the presence of the accused to supplement, correct, or otherwise amplify the written argument. The trial judge, of course, controls oral argument as he does other facets of the trial. The right to make oral submissions is not the right to repeat what has already been said in written or oral submissions, or to otherwise waste valuable court time. Counsel may, of course, agree to waive oral argument either entirely or as a supplement to written argument.

[47] In the normal course, when a trial judge requires written submissions and allows counsel the opportunity to make additional oral submissions in the presence of the accused, procedural fairness requirements and the accused's right to be present throughout his trial will be satisfied by the combination of written and oral argument. The trial judge is entitled to assume that counsel has taken the steps

necessary to ensure that the accused, to the extent that he or she wishes to do so, has had the opportunity to review the submissions with counsel and participate in the formulation of defence submissions.

[48] Circumstances may arise, however, in which the accused does not have the opportunity to review written submissions with counsel and participate in the preparation of oral submissions. When counsel for an accused brings those circumstances to the attention of the trial judge, the trial judge must take the appropriate procedural steps to ensure procedural fairness and to protect the accused's right to be present at trial. In some cases, it may even be necessary to require that the submissions be made orally and without regard to any prior written submissions that were filed.

[49] The trial judge has discretion to decide how best to address the kinds of problems referred to above. This discretion, however, must be exercised in a manner that protects the fairness of the proceeding. Experience indicates that in the vast majority of cases there will be no problems. Written argument coupled with the opportunity to make additional oral submissions after written argument has been exchanged and filed will suffice.

(3) The Curative Proviso

[50] The Crown takes the alternative position that the appellant was not actually prejudiced in the sense that no substantial harm or miscarriage of justice was

occasioned, and that any error was harmless. Sections 686(1)(b)(iii) and (iv) of the *Criminal Code* provide:

> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii)2 the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby

[51] Justice Trotter, when he was a trial judge, properly noted in *R. v. Kankis*, 2012 ONSC 378, 281 C.C.C. (3d) 113, at para. 37 that factors such as the appearance of fairness are engaged when considering whether there was a miscarriage of justice within the meaning of s. 686(1). As he observed, this court has held on numerous occasions that "a miscarriage of justice need not always be supported by the demonstration of actual prejudice to an appellant; sometimes, public confidence in the administration of justice is just as shaken by the appearance as by the fact of an unfair proceeding": see also *R. v. Cameron* (1991), 2 O.R. (3d) 633, at p. 639; *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at pp. 541-542.

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[2] That section provides: (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law

[52] The term "prejudice" in s. 686(1)(b)(iv) refers not only to prejudice to an individual accused's ability to properly defend her or himself and to receive a fair trial, but also to prejudice in the broader sense of prejudice to the appearance of the due administration of justice: see *R. v. Kakegamic*, 2010 ONCA 903, 265 C.C.C. (3d) 420, at para. 36; *R. v. F.E.E.*, 2011 ONCA 783, 108 O.R. (3d) 337, at para. 33.

[53] A breach of s. 650(1) by exclusion of an accused from a part of his or her trial is a procedural irregularity to which s. 686(1)(b)(iv) can apply. However, unless there are exceptional circumstances, s. 686(1)(b)(iv) will not save a breach of s. 650(1) caused by the absence of the accused during closing arguments at the conclusion of dangerous offender proceedings. This is precisely what occurs when exclusively written argument is ordered by the trial judge and an opportunity to provide oral argument by the offender is denied. Such circumstances impair the appearance of fairness, compromise the transparency of the trial proceedings and are at odds with the open court principle: see *F.E.E.*, at paras. 50-52.

[54] Closing argument to a trial judge in dangerous offender proceedings is of the utmost importance to the person whose liberty - perhaps permanently - is at stake. Those arguments explain the basis upon which the offender’s designation will be decided and his or her period of incarceration will be assessed. The exclusion of an offender from the hearing of closing arguments, where his or her

opportunity to make oral submissions is denied, undermines both the appearance and the reality of the due administration of justice.

[55] For these reasons, the appearance of fairness at the appellant's dangerous offender hearing was seriously undermined by his prohibition from making oral submissions during closing argument. Accordingly, I would allow this ground of appeal.

(c) Adequacy of Reasons

[56] When evaluated in the context of the record as a whole, the reasons for sentence are adequate. While brief and somewhat conclusory, this was a single-issue case turning on the manageability of the appellant in a non-custodial context. The evidence was strongly against the appellant.

[57] The reasons sufficiently inform the appellant why the trial judge found that there was no reasonable possibility of eventual control of the appellant's risk in the community such as would warrant a long term offender finding. The reasons also demonstrate consideration of the then recent Supreme Court of Canada decision in *R. v. Johnson,* 2003 SCC 46, [2003] 2 S.C.R. 357. And finally, the reasons are sufficient to allow for appellate review.

[58] I would dismiss this ground of appeal.

DISPOSITION

[59] For the reasons given, I would dismiss the appeal against conviction. I would allow the appeal against sentence and quash the order declaring the appellant a dangerous offender as well as the indeterminate sentence. I would order a new dangerous offender hearing.

Released: “DD” APR 16 2018

“H.S. LaForme J.A.”
“I agree. Doherty J.A.”
“I agree. David M. Paciocco J.A.”