

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Mwanz, 2026 ONCA 318¹

DATE: 20260504

DOCKET: COA-23-CR-0987

Miller, Paciocco and Wilson JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Joyce Mwanz

Appellant

Brandon Chung, for the appellant

Jennifer Epstein, for the respondent

Heard: March 24, 2026

On appeal from the conviction entered by Justice Frank D. Crewe of the Ontario Court of Justice, on December 19, 2022.

REASONS FOR DECISION

[1] This is an appeal from the appellant's sexual assault conviction. He raises a single ground of appeal,² arguing that the trial judge's exchanges with defence

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.

² In his factum, the appellant also raised a ground of appeal relating to the dismissal of his re-election application. At the outset of the hearing, the appellant advised that he would not be relying on that ground of appeal.

counsel³ during the trial betrayed a reasonable apprehension of bias. After hearing submissions, we dismissed the appeal with reasons to follow. These are our reasons.

ANALYSIS

[2] The test for assessing whether a trial judge has displayed a reasonable apprehension of bias is well-established. The question is whether a reasonable and informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude that the trial judge did not decide the case fairly: *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394. The test is buttressed by a strong presumption of judicial impartiality and a heavy burden on those who seek to rebut it: *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, at para. 59; *R. v. S. (R.D.)*, [1997] 3 SCR 484, at paras. 32, 117.

[3] The appellant points to several exchanges between defence counsel and the trial judge which he asserts, taken cumulatively, give rise to a reasonable apprehension of bias.

[4] The first exchange that the appellant takes issue with occurred during the hearing of the appellant's re-election application. During submissions, the trial judge interrupted defence counsel several times, repeatedly asking him to provide

³ Not counsel on appeal.

support for his arguments and explain the distinctions he was drawing in the caselaw. Defence counsel was unable to do so to the trial judge's satisfaction. Eventually, the trial judge concluded that the back-and-forth between him and defence counsel was going nowhere and the following exchange occurred:

MR. GILBERT: No. I, I, I understand what you what Your Honour is saying, but....

THE COURT: You don't seem to. Because you keep, you keep saying the same thing to me over and over. All right. When did you sit down? Let me hear from the Crown because you're not being terribly helpful — no offence, Mr. Gilbert.

[5] The appellant argues that the trial judge's interruptions and his final comment demonstrates that he was not open to defence counsel's arguments. We do not agree. The trial judge's final comment came after a lengthy dialogue between the trial judge and defence counsel in which the trial judge had acknowledged defence counsel's position and engaged with the arguments and the caselaw provided by him. The trial judge's interruptions, while not the most effective way of engaging with defence counsel's arguments, were an attempt by the trial judge to do so. There is no basis to conclude that the trial judge had already made up his mind before hearing from counsel. Indeed, the trial judge explicitly told defence counsel, near the end of his submissions, that he was open to being persuaded by his arguments.

[6] The remainder of the impugned exchanges occurred during the trial proper. They centered around improper questioning of witnesses by defence counsel. On three separate occasions, defence counsel attempted to ask questions of witnesses that relied on prohibited myth-based reasoning. In one question, defence counsel suggested to the complainant that, following the assault, she had acted in a manner that was “unusual” for someone who had just experienced a traumatic sexual assault. In two others, defence counsel attempted to follow-up on evidence of the complainant’s prior sexual history that had been inadvertently solicited by the Crown. In each case, the trial judge, upon being alerted by Crown counsel of the issue, quickly interceded to prevent the questioning. Eventually, after the third question, the trial judge became frustrated with defence counsel’s conduct and said:

THE COURT: And, you know, it sounds to me like you're not very fond of the section 276 legislation and the case law that flows from it. Well, you may not be fond of it but you better take a look at it and understand what it allows you to do and what it prohibits you from doing and what it tells me I cannot have — allow to have heard in the courtroom, because it's — makes pretty clear that what you're trying to do here is, is not, is not allowed in that section. Period. And if you have a problem with that, then you better learn to deal with it because that's the law, my friend, and that has been the law for some time.

[7] The appellant submits that the trial judge’s treatment of the defence and the Crown was asymmetrical. He points to the fact that the Crown also solicited evidence of prior sexual history without any objection from the trial judge. We reject

this submission. The fact that no objections were raised to the improper evidence proffered by the Crown did not make defence counsel's questioning appropriate: *R. v. Kuzmich*, 2020 ONCA 359, 388 C.C.C. (3d) 243, at para. 56. Nor did the trial judge's lack of objection to the Crown's evidence mean that he was treating the Crown and the defence asymmetrically. Unlike defence counsel's questioning, no one alerted the trial judge to the improper Crown evidence until defence counsel attempted to use it for his own impermissible purposes.

[8] To be clear, the trial judge's comments to defence counsel were not appropriate. He may have been frustrated, but that is not a reason to be short-tempered with counsel. However, not all criticism of counsel – justified or otherwise – can be equated with bias. As explained in *R. v. Marrone*, 2023 ONCA 742, 169 O.R. (3d) 161, at para. 121: “[t]he critical question is not whether counsel was fairly criticized or fairly treated, but whether the criticisms were advanced in a way that gave rise to a reasonable apprehension that the trial judge was predisposed to one side.” We are not convinced that the trial judge's comments in this case rise to the level of rebutting the strong presumption of judicial impartiality.

Disposition

[9] The appeal is dismissed.

“B.W. Miller J.A.”

“David M. Paciocco J.A.”

“D.A. Wilson J.A.”