NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Taweel*, 2015 NSCA 107

Date: 20151126
Docket: CAC 430344
Registry: Halifax

Between:

Stephen Nicholas Taweel

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: pursuant to s. 486 of the Criminal Code of Canada

Judges:	Beveridge, Saunders and Van den Eynden, JJ.A.
Appeal Heard:	June 17 and 18, 2015, in Halifax, Nova Scotia
Held:	**Appeal allowed, conviction set aside and a new trial ordered per reasons for judgment of Saunders, J.A.; Beveridge and Van den Eynden, JJ.A. concurring.**
Counsel:	Brian H. Greenspan and Robin K. McKechney, for the appellant Timothy O'Leary, for the respondent

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(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

(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 stepdaughter), 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).

Reasons for judgment:

[1] After an eight day judge alone trial in the Nova Scotia Supreme Court, the appellant was convicted of sexual assault and later sentenced to imprisonment for two years and four months.

[2] He appeals his conviction and also seeks leave to introduce fresh evidence. He has not appealed his sentence.

[3] For the reasons that follow I would allow his appeal and order a new trial.

[4] In broad terms I will present my analysis on two fronts. First, I will explain why, in my opinion, the evidence proffered by the Crown as similar fact evidence should not have been admitted in this case. Although the appellant's success in bringing this appeal does not turn on that question, it is hoped that my stated misgivings surrounding the attendant risks and frailties of that evidence will provide assistance to trial judges in future cases. The lesson here is that failing to maintain a strict and high level of vigilance over the admissibility of similar fact evidence may produce serious and unintended consequences. The second branch of my analysis will explain why, respectfully, the trial judge's improper use of that evidence tainted the judge's reasoning and undermined the verdict.

[5] To provide a better understanding of the serious issues raised on appeal, it will be necessary to introduce the facts and differing versions of events in considerable detail at the outset. Where appropriate, further particulars will be added later when I address the grounds of appeal and counsels' submissions related to them.

Background

[6] Mr. Taweel was charged by Indictment with sexually assaulting S.L. at Dartmouth, Nova Scotia, contrary to s. 271(1)(a) of the *Criminal Code of Canada*, R.S.C. 1989, c. C-46. He was also charged with touching S.L. (then said to be) a person under the age of 14, for a sexual purpose contrary to s. 151. When first charged, the offences were said to have occurred between July 1, 199<u>0</u> and December 1, 199<u>0</u>.

[7] The trial began on November 18, 2013, with Justice Patrick J. Murray presiding. The Crown and the defence filed an Admission of Fact entered as Exhibit #1 which read as follows:

> Pursuant to section 655 of the *Criminal Code*, **Stephen Nicholas Taweel** admits the following facts for the purpose of dispensing with proof thereof at trial:
>
> 1. Defence admits date for the purposes of this proceeding – there was contact and communication between [S.L.] and Stephen Taweel in 1991. (Underlining mine)

[8] Based on this formal admission as well as information provided to the Crown by Mr. Taweel's trial counsel, Mark Knox, Q.C., the Crown moved to amend the Indictment by changing the dates of the alleged offence to read:

> ...between the 1st of July, 1991 and the 31st of October, 1991.

The trial judge allowed the motion and the charge was revised accordingly.

[9] S.L. was born in 1977 and so was 14 years of age at the time of the *amended* offence dates. The effect of the amendment was to eliminate the possibility of Mr. Taweel being prosecuted for sexual touching of a person under the age of 14, as the section read at the time. As a result, the second count on the Indictment was withdrawn and the Crown only proceeded on the sexual assault charge.

[10] The sexual assault for which he was prosecuted was said to have occurred in Dartmouth, some 22 years earlier. S.L. resided there with her parents and attended school in the neighbourhood. The complainant and the appellant had known each other only briefly, from their contact and interactions in Prince Edward Island during the summer of 1991. They met on Stanhope Beach, outside Charlottetown. S.L. was staying with relatives at their cottage for the summer. They gave very different accounts as to both the frequency and the nature of the activities that took place between them during their PEI encounters. Whatever happened, first in PEI and later in Nova Scotia, became a central feature of the trial.

[11] Mr. Taweel's date of birth is September 28, 1958. Between July 1, 1991 and October 31, 1991 (which was the period of time caught by the amended Indictment) the appellant turned 33. At the time of trial in 2013, S.L. was 36 years old, a graduate student at the University of Ottawa and a resident of Ontario. Mr. Taweel was 55 years old, a professional engineer and businessman, residing in Charlottetown, Prince Edward Island.

[12] During the trial the Crown sought to introduce what was referred to as similar fact or discreditable conduct evidence. A *voir dire* was held. The evidence related to events that took place between the appellant and the complainant in PEI that summer, and described several alleged sexual encounters between the offence dates (2014 NSSC 103).

[13] At the conclusion of the *voir dire*, Murray J. ruled the evidence was admissible for a limited purpose. He summarized his ruling at ¶37-39 of the trial decision:

> [37] I remind myself further, that at a ruling made by me at trial, the Crown was permitted to call evidence as to the events, as alleged in PEI, even though Mr. Taweel is charged with committing the offence in Nova Scotia. In seeking to admit this (PEI) evidence from the Complainant, the Crown acknowledged that it is limited in scope. The purpose for which the Crown sought to admit this so-called "similar fact evidence" was to explain the relationship between the Complainant and the Accused, and to provide context for the evidence pertaining to and occurring in Nova Scotia.
>
> [38] Thus, in my ruling, I stated as part of my ruling, that the evidence may not be used to infer the guilt of the accused. Specifically, the evidence must not be used to the prejudice of the Accused by inferring guilt from disposition or from any inference of bad character.
>
> [39] I did state, in my ruling that this narrative evidence could be used to assess credibility and to allow the Crown to establish the unfolding of events. That is the probative value of the evidence. In short, the evidence of the Complainant as to what occurred in PEI is narrative evidence, which was not admitted for its truth. The Crown submits it may be used to assess the consistency of the Complainant's conduct and thus her credibility. (**R. v. R. (D.A.)**, 2012 NSCA 31, para.23)

[14] The prosecution of this historical sexual assault charge against Mr. Taweel proceeded as a classic "she said – he said" confrontation. The complainant described herself at the time of the alleged sexual assault as being a naive, shy and introverted "young adolescent" who virtually fell under the spell of Mr. Taweel and acceded to his sexual advances, too bewildered and confused to resist or ever confide in an adult. She testified that she had since been diagnosed as having "Asperger's Disorder" with an IQ score she described as "... in the 150s... that score put me in ... what's called the Triple Nine Club, the 99.9% percentile". When these events occurred both in PEI and Dartmouth she said she was "intimidated" because of the "massive power imbalance" and age difference between the two.

[15] By contrast Mr. Taweel described the complainant as a vivacious, outgoing and mature individual whom he believed to be a confident and sexually experienced 16 to 18 year old young woman. He said S.L. was the instigator and that throughout their brief relationship all of their sexual contact was consensual. Further, after seeing her testify on the witness stand, the appellant was startled by her appearance and demeanour which portrayed someone who seemed withdrawn, morose and disengaged. He implied that such behaviour on the complainant's part was either contrived for the purposes of the trial, or reflected other problems and setbacks in S.L.'s life as an adult.

[16] Because the "similar fact" evidence concerning these events was critical to the prosecution's case, and its application led to reversible error on the judge's part, I must now review what each said happened in PEI and NS that year. I will start by summarizing the complainant's testimony describing each of those encounters. At the outset I have deliberately used quotation marks around "similar fact" evidence, as that is how it was characterized by counsel and the judge at trial. Respectfully, as will become obvious, the proffered evidence was nothing of the sort.

Prince Edward Island – According to the Complainant

[17] At trial the complainant was not sure of the exact dates on which any of the alleged PEI encounters took place. Despite the Admission of Fact and the amendment to the Indictment sought and obtained at the Crown's request, S.L. remained adamant that the encounters occurred in the summer of 1990, when she was 13 years of age. She said there were eight separate encounters with Mr. Taweel in PEI that summer, six of which involved sex.

[18] S.L. said their first encounter took place on Stanhope Beach sometime during the "middle-end" of July. She was alone on the beach when she was approached by the appellant who engaged her in conversation. He asked her age. She claimed she told him she was 13 although the complainant eventually conceded during cross-examination that she must have been 14 at the time. He said he was from Toronto. She told him she was from Dartmouth, attending junior high school there. The rest of the conversation was about nothing in particular. They agreed to meet the following day at the same place on the beach.

[19] The second encounter began as planned. S.L. was unsure as to who arrived first. They took a walk along the beach until the appellant suggested they sit down

by the dunes on a large beach towel he had brought with him. Once seated, the appellant allegedly instigated non-consensual sexual touching, including digital penetration. She did not express any aversion to what took place. This encounter is said to have ended with Mr. Taweel warning S.L. to "not tell anyone about" what had taken place. S.L. said she could not remember how she later arrived back at her grandparents' cottage.

[20] The third encounter occurred "a few days later" after the appellant telephoned S.L. at her grandparents' cottage and urged her to meet him on the beach. She was uncertain as to whether she had given Mr. Taweel the telephone number to her grandparents' cottage, but agreed she could have. The two ended up meeting at a populated area of Stanhope Beach in plain view of beachgoers. She did not know whether she wanted to meet with Mr. Taweel, but claimed to be confused, bewildered and intimidated. She "went with the flow". The pair took a walk and at some point retreated to a sand dune back from the beach where, as in the previous encounter, Mr. Taweel suggested they sit down. S.L. testified that once seated, Mr. Taweel put his arm around her, and then engaged in non-consensual sexual touching using her hand to stroke his penis until he reached orgasm. The incident ended with the appellant telling the complainant not to mention their encounter because "people wouldn't understand this and I would get in trouble". Later, on cross-examination, she admitted that she could not be certain of the precise words used by Mr. Taweel.

[21] The fourth encounter occurred sometime in August following a telephone call from Mr. Taweel a week or two later. The two met again one afternoon on Stanhope Beach. After spending some time sitting on the sand Mr. Taweel suggested they go for ice cream. During the ride in his car Mr. Taweel told the complainant to call him "Uncle Stephen" in public. After eating ice cream she said they drove to a clearing, Mr. Taweel took off all his clothes, and he then engaged in non-consensual sexual acts with S.L. on a blanket in the clearing. She said this included oral sex she performed on him. At one point he shoved her violently but she was not hurt. S.L. described seeing cars pass by as they engaged in the alleged sexual acts. She recalled concentrating her attention on a crow in a tree during the alleged assault. She said the appellant seemed to be crying after the sexual act was over.

[22] The fifth encounter took place "a few days later" but nothing of a sexual nature occurred. S.L. did not remember much about what happened during the occurrence.

[23] She described the sixth encounter in PEI as taking place “a few days” after the previous one. Once again, S.L. did not clearly recall this occasion. She described being taken to a field by Mr. Taweel, similar to but not necessarily the same location as the previous encounter, where again he engaged in non-consensual sexual acts with the complainant, including oral sex.

[24] She said the seventh PEI encounter took place “a day or two” after the previous one. She believed it was instigated by a phone call from Mr. Taweel, but was uncertain as to the exact details. After they met at Stanhope Beach it began to rain, so they went for a drive to an old campground where they engaged in non-consensual sex, including oral sex and intercourse in his car. She claimed she submitted to the appellant’s will and did not verbally complain or attempt to remove herself from the situation. She said it felt surreal. As with the other encounters in PEI, Mr. Taweel was said to be talkative throughout the sexual acts, while S.L. described herself as uncommunicative.

[25] The eighth and final PEI encounter took place a day or two later. S.L. was unsure as to who had initiated the contact. It was raining. As in the previous encounter, they drove to a campground in the appellant’s red sports car. There she said they engaged in various sexual acts, including sexual intercourse, without her consent, in his car. On this occasion S.L. was less passive and more co-operative. She said this was the last time the two saw each other in PEI. As with the previous encounters, she did not tell anyone.

Prince Edward Island – According to the Appellant

[26] Mr. Taweel’s testimony was in marked contrast to the complainant’s evidence. He insisted that he met S.L. on only three occasions in PEI. He said these encounters took place sometime during the last week of July and the first week of August, 1991.

[27] He said their first contact occurred on Stanhope Beach and was initiated by the complainant. She was in the water and approached him as he was walking along the shoreline. S.L. told him that she was 16 years of age and a Grade 10 high school student in Dartmouth. He believed her. She seemed friendly, talkative, outgoing and very attractive. They walked together along the beach. Nothing of a sexual nature occurred. From her physical appearance he thought she was 16 to 18 years of age. The first meeting ended with the complainant suggesting they meet at the beach the next day.

[28] The second encounter occurred the following day as planned. They met one another at Stanhope Beach. Mr. Taweel said he was not looking for a romantic encounter, but was open to the possibility. After going for a walk, they went to a secluded area away from the beach and engaged in consensual sexual touching, which involved S.L. using the appellant's fingers to masturbate herself. He said S.L. did not resist in any way. Mr. Taweel did not recall any other sexual act taking place. They then returned to his parked car where they exchanged telephone numbers. Mr. Taweel also provided the complainant with his business card, which included his address and his telephone number for his residence in Brampton, Ontario.

[29] Mr. Taweel testified that their third and final PEI encounter occurred the following week, when he returned to the island after tending to work and family obligations at his stores in Dartmouth. He said he initiated the contact by telephoning the complainant. They agreed to meet the next day, as they had before, on Stanhope Beach. After they met it began to rain. They left the beach for the appellant's car. There, he said they engaged in consensual sexual touching, during which S.L. was brought to orgasm. This encounter lasted approximately half an hour and ended with S.L. asking to be dropped off at the parking lot near the beach where Mr. Taweel had originally parked. The appellant denied taking the complainant for ice cream during this incident.

[30] According to Mr. Taweel, no oral sex or intercourse took place during their three encounters in PEI. He said his intentions were not primarily motivated by the chance for sexual gratification, although that possibility had certainly occurred to him. He said his contact with S.L. was neither planned nor intended. He never tried to hide their brief sexual relationship. He said he had never asked the complainant not to tell anybody about their encounters, nor did he tell her to call him "Uncle Stephen" around other people. Mr. Taweel insisted the sexual nature of their encounters was entirely consensual, and involved someone he believed to be a confident and sexually experienced 16 to 18 year old young woman.

[31] The Crown sought the admission of the PEI evidence on the basis of a "modified application" of the test in *R. v. Handy*, 2002 SCC 56, so as to "advance the narrative" and "assist the trier in understanding the relationship between the parties".

[32] The judge admitted the PEI evidence for the reasons urged by the Crown. He found that the prejudice to Mr. Taweel was limited by the purposes for which

the Crown sought its admission, and by the fact that the evidence was not being relied upon for the truth of its contents.

[33] Having reviewed the differing accounts of their contact with one another in PEI, I will now address the conflicting evidence of their time together in Nova Scotia which led to the single charge for which Mr. Taweel was prosecuted. I will start by briefly discussing what each said about how they came to continue their relationship in Nova Scotia. That will be followed by a more detailed comparison of their evidence surrounding their contact at the appellant's sister's home in Dartmouth.

Meeting Again in Nova Scotia

[34] It was the complainant's evidence that following their encounters in PEI, she returned to Colby Village, Dartmouth to continue her studies at Astral Drive Junior High School. Sometime after Labour Day Mr. Taweel contacted her by telephone and by post. She said there were two or three letters and a call from the Halifax Shopping Centre Second Cup franchise but S.L. was unsure of the date of the call or the actual content of those communications. She did believe that the call included the mention of a job offer and an off-handed comment about age. S.L. said she was no longer in possession of the letters she received from Mr. Taweel. She believed her mother threw them out. She did remember one letter had included mention of kayaking. The complainant was adamant that she would not have called the appellant, nor would she have written to him because she could not get stamps to post a letter without her mother's help. It was also the complainant's evidence that the appellant told her he had made his voice "sound younger" so as not to raise any suspicion on the part of family members who might answer the telephone.

[35] The appellant presented a very different story. He said it was in fact S.L. who had first contacted him at his residence in Brampton, Ontario, following their P.E.I encounters. According to Mr. Taweel, S.L. made a few telephone calls to his Brampton residence, and she either left a message on the answering machine or spoke to Alexander Kennedy, Mr. Taweel's house mate at the time. It was the appellant's evidence that he and S.L. spoke directly on the telephone only once. That conversation concerned the appellant's Second Cup stores and an anticipated timeline for his return to Nova Scotia. Mr. Taweel denied making his voice sound younger in an attempt to trick anyone.

[36] Mr. Taweel's evidence was corroborated by Mr. Kennedy. The two men shared accommodations in Brampton, each having found employment there as recently graduated engineers. Mr. Kennedy said he answered any calls and would retrieve messages left on the answering machine for the residents of his home. He specifically remembered listening to two or three messages and also having had a very brief telephone conversation with a person "that claimed to be _____ [S.L.]" during the relevant time. (Note to reader: the witness said the caller identified herself using the same first name as the complainant's. That name has been initialized in this decision). It was Mr. Kennedy's evidence that the call was memorable because it came from a +902 area code, the same area code where Mr. Kennedy was born and reared. He described this as "something special" for someone who had moved so far from home. He was also struck by the fact that the caller had asked to speak to "Stephen", whereas Mr. Kennedy and all their friends knew Mr. Taweel as "Mel".

[37] This brings me to the evidence concerning the events in Dartmouth, Nova Scotia which gave rise to the charge of sexual assault and the prosecution of Mr. Taweel. Once again, these encounters were portrayed very differently by the appellant and the complainant at trial. While S.L. testified that they met in Dartmouth on three occasions, Mr. Taweel maintained throughout his direct and cross-examination that they met only once, and that no sexual activity took place.

[38] I will begin by summarizing the appellant's version of the events in Dartmouth.

Dartmouth – The Appellant's Account

[39] Mr. Taweel testified that the only time he met with S.L. in the Dartmouth area was sometime after the last weekend in September, 1991. He said he happened to be in Dartmouth while travelling back to Toronto from Charlottetown, where the family had gathered to celebrate his and his father's birthday. He was about to start a new job in Toronto. He stopped in Dartmouth to spend time with his sister, Jeanette, and look in on his two Second Cup franchises in the Halifax area.

[40] Shortly after arriving in Dartmouth he contacted the complainant at her home using the telephone number she had given him during the summer. S.L. suggested a time and place to meet. Mr. Taweel said he drove to the pre-

determined location in his red sports car, the same car that he had driven in PEI that summer.

[41] Mr. Taweel suggested they drive to Jeanette's house in Dartmouth, where he was staying. When they got there no one else was home. He said they chatted in the living room about his new job, his Second Cup stores, and the possibility of the complainant working at one of those stores, as well as a timeline for the appellant's possible return to Dartmouth.

[42] It was Mr. Taweel's recollection that at some point they went downstairs to his bedroom in the basement and continued their conversation. The complainant went to the washroom. She was gone a long time and then returned to the bedroom and asked Mr. Taweel to drive her home. He said that although he had some hope they would have sex together, nothing happened, and he was happy to drive her back to the location where she asked to be dropped off. He said this was the last interaction between them.

Dartmouth – The Complainant's Account

[43] The complainant's version of events in Dartmouth was much different. She said there were multiple encounters with Mr. Taweel in Dartmouth during the autumn of 1991. According to her, the first of these interactions took place sometime on a Friday in late September. She claimed that the meeting did not occur as the result of any pre-planning, but rather, resulted from her spotting him sitting in a parked car, streets away from her school, as she walked home. S.L. said it was a different car than the one he had used to drive her around in PEI over the summer.

[44] Following Mr. Taweel's instructions, S.L. said she got into his car willingly, but also not knowing what else to do. They drove to what she was led to believe was the appellant's sister's house. She was sure there was conversation between the two but she was unable to recall anything said.

[45] On arriving at the house, S.L. remembered being skeptical that the residence belonged to a woman, but did not seek verification of her suspicion. Once inside she said they went downstairs to a bedroom where they both undressed. There she said Mr. Taweel engaged in non-consensual sexual touching and kissing and then had sexual intercourse. During her evidence-in-chief, the complainant said it was during this encounter when Mr. Taweel forced her to perform oral sex on him, but after a court recess she returned to the witness stand and said that in fact this

reported act took place during their next encounter. The complainant blamed her mistake on low blood sugar.

[46] After having sex, S.L. said they got dressed and the appellant dropped her off a few blocks from her home, after urging her to tell her parents she had been playing with a "Marjorie Baker", if they wondered where she had been.

[47] S.L. said the second round of sexual activity occurred "several weeks to a month later", sometime in October, also on a Friday. It followed a "small handful" of phone calls made by the appellant to the complainant at her home in Dartmouth in which the two conversed on topics of travel, shopping, kayaking, and lingerie. During these calls she said Mr. Taweel bragged about manipulating his voice to sound younger to whomever answered the phone. In one telephone call she said Mr. Taweel had offered to buy her a plane ticket to meet him in Toronto. However, no specific arrangements were ever made.

[48] The second Dartmouth encounter occurred in a nearly identical fashion to the first. She said Mr. Taweel appeared in his car a few streets from her school, while she walked home. She entered his car willingly. They drove to the same house which she had been told was his sister's residence.

[49] There Mr. Taweel started to grope her without her consent as they descended the stairs to his bedroom in the basement. She did not reciprocate, but neither did she complain or resist. She said the appellant forced her to fellate him. Initially she hesitated before submitting. Eventually S.L. said they had sexual intercourse.

[50] The encounter ended as the previous one. Mr. Taweel dropped her off a few streets from her home, told her not to tell anyone what happened, and simply say to her parents that she had been out playing with a "Marjorie Baker". Later that evening, sometime between 8-9 p.m., she said Mr. Taweel called her to arrange to meet the following day.

[51] They met as planned, a few streets away from her home. She said it was a Saturday in October. She got in his car and was again driven to the same house. S.L. said he instigated all of the non-consensual sexual acts, including sexual intercourse with a condom. She said she facilitated the sexual acts. She recalled that on this occasion Mr. Taweel was completely nude when he walked up and down the basement stairs. He had tears in his eyes following the sexual acts. Once again, as before, he dropped her off some distance from her home and told her to tell her parents that she had been out with "Marjorie Baker".

[52] It was the complainant's evidence that she never objected to what they did together during the Nova Scotia encounters. She said she participated and assisted in certain aspects of the sexual activity, more so in Dartmouth than in PEI. On the one occasion when she protested about how she was being touched (which may have been an intentional or accidental anal penetration; she wasn't sure), the appellant stopped immediately. She insisted the relationship between her and Mr. Taweel was always non-consensual. S.L. felt that any sexual relationship between a 14 year old girl and a 32 year old man would always be viewed as non-consensual, even if technically "legal".

[53] Having provided an extensive summary of their conflicting evidence in order to better understand the arguments raised on appeal, I will turn now to a consideration of the specific issues that require our attention.

Issues

[54] On appeal, counsel for Mr. Taweel (not his lawyer at trial) advanced three principal issues and five subsidiary issues. Referring to his factum the appellant says:

> 1 **Fresh Evidence** - the fresh evidence of his sister Jeannette Taweel and his brother Douglas Taweel confirming that he was only in Nova Scotia on one occasion between September 1, 1991 and October 31, 1991 is well worthy of belief and could be expected to have affected the result;
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> 2 **Differential Standard of Scrutiny** –the judge erred by applying a differential standard of scrutiny to the evidence of the defence versus the evidence in support of the case for the Crown. On this issue Mr.Taweel makes five specific complaints.
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> (i) The judge improperly used neutral evidence as corroborative of the complainant;
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> (ii) The judge improperly relied on demeanor evidence;
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> (iii) The judge failed to fairly consider the impact of the complainant's evidence regarding her age;
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> (iv) The judge applied an unbalanced standard of scrutiny to the PEI evidence, and
>
> (v) The judge applied an unbalanced standard of scrutiny to the Dartmouth evidence.
>
> 3 **Improper use of the P.E.I. Evidence** –the judge erred by using the P.E.I. evidence for the truth of its contents to reject the evidence of the appellant,

> rather than for the limited and express purpose for which it was admitted – as narrative and to explain the relationship between the appellant and the complainant.

[55] In these reasons I need only address Issues 1 and 3. In my respectful view, the trial judge committed a serious, reversible error in the use he made of the PEI evidence. That is reason enough to set aside the verdict and order a new trial. Accordingly, I need not go on to consider the several other substantive arguments put forward by the appellant's counsel.

Analysis

Fresh Evidence

[56] On appeal Mr. Taweel sought leave to admit for our consideration the evidence of his sister Jeanette and his brother Douglas which purported to establish that he was only ever in Nova Scotia on one occasion between September 1, 1991 and October 31, 1991. He argued that had such evidence been given at trial, it could have seriously impugned the credibility and reliability of the complainant's testimony.

[57] In her affidavit Jeanette Taweel deposed that her brother, the appellant, did not have his own key to her home in Dartmouth. On each visit she provided him with a key and he always returned it to her when he left. She swore that he could not have used her home without her knowledge. For his part Douglas Taweel swore that in 1991 the appellant lived in Brampton, Ontario and visited Dartmouth only rarely. As he recalled, the appellant was only in Dartmouth on one occasion in the fall of 1991 while travelling back to Toronto after collecting his car in Charlottetown. He said his brother's next visit to Nova Scotia was not until December of that year when the appellant came to Halifax to celebrate Christmas with his family. In their affidavits both Jeanette Taweel and Douglas Taweel swore they were neither contacted nor interviewed by their brother's trial lawyer, Mark Knox, Q.C.

[58] In the face of such criticism surrounding his handling of the case, Mr. Knox retained counsel and filed his own affidavit in response to the fresh evidence application. Jeanette Taweel, Douglas Taweel and Mark Knox were all questioned on their affidavits at the hearing.

[59] As is this Court's practice, that evidence was received by the panel on a provisional basis so that its ultimate admission could be decided as part of the panel's overall deliberations on the merits. After careful consideration I am satisfied that this evidence need not be admitted nor addressed in order to dispose of the appeal. While noting the odd but significant variance between Jeanette and Douglas Taweel's description of the contents of the basement in the home as compared to the appellant's testimony, it is enough for me to say that I have serious reservations as to whether the proffered fresh evidence meets the necessary, well-settled criteria for admission. Recognizing the Crown's prosecutorial discretion and prerogative in deciding whether to proceed with a second trial, there is no need to comment further on evidence which may or may not be presented in subsequent proceedings. I think it wise to simply conclude our consideration of the issue by confirming that the proffered fresh evidence was not admitted and has had no bearing on the outcome of the appeal. That is all I propose to say.

[60] I turn now to what I consider to be the fatal flaw in the trial judge's *use* of the PEI evidence.

[61] As will become clear, I am not persuaded the PEI evidence was admissible for the purposes advanced by the Crown, they being to establish "narrative" and "context". Respectfully, had I been the trial judge, I would not have been inclined to admit it. It was highly prejudicial to the appellant and skewed the entire focus of the case. However, as I will explain, that is not the point upon which this appeal turns. Rather, it was the judge's use of that evidence, once admitted, that led to reversible error and obliges us to order a new trial.

[62] Whereas this next issue involves the trial judge's legal ruling I must now briefly address the appropriate standard of appellate review.

Standard of Review

[63] It is settled law that a trial judge's decision *to admit* similar fact evidence is owed considerable deference on appeal. Nonetheless, the ultimate decision to allow the introduction of such evidence obliges the judge to properly assess its relevance, its probative value, and its prejudicial effect, and then carefully balance that probative value against the prejudicial impact of the evidence, were it admitted. In *Handy*, Justice Binnie explained it this way:

> 153 A trial judge has no discretion to admit similar fact evidence whose prejudicial effect outweighs its probative value. Nevertheless, a trial judge=s decision to admit similar fact evidence is entitled to substantial deference: *B. (C.R.), supra*, at p. 739; and *Arp, supra*, at para. 42. In this case, however, quite apart from the other frailties of the similar fact evidence previously discussed, the trial judge=s refusal to resolve the issue of collusion as a condition precedent to admissibility was an error of law. A new trial is required.
>
> [Underlining mine]

[64] Watt J.A. put it similarly in *R. v. Stubbs*, 2013 ONCA 514 at ¶58:

> 58 Fourth, when evidence of other discreditable conduct is excluded under the general rule, or admitted by exception, the standard applied on appellate review is deferential: *Handy*, at para. 153; R. v. B. (C.R.), [1990] 1 S.C.R. 717, at p. 733; and *R. v. James* (2006), 213 C.C.C. (3d) 235 (Ont. C.A.), at para. 33. Appellate courts will defer to the trial judge's assessment of where the balance falls between probative value and prejudicial effect unless an appellant can demonstrate that the result of the analysis is unreasonable, or is undermined by a legal error or a misapprehension of material evidence: *Handy*, at para. 153; *James*, at para. 33.
>
> [Underlining mine]

[65] While I have serious concerns about the trial judge's exercise of discretion in admitting the evidence in this case, I have confined my reasons for setting aside the verdict and ordering a new trial to the *use* he made of the evidence. That error does not involve the exercise of discretion. It requires the proper application of legal principles. The misapplication of the rules governing the use of similar fact evidence raises an issue of law and is reviewable for correctness. *R. v. C.J.*, 2011 NSCA 77 at ¶19. As the Crown concedes in its factum:

> 43. Whether the Trial Judge improperly used the PEI evidence is a question of law. The standard of appellate review for a question of law is correctness.

[66] That is the standard I will apply in my evaluation of the judge's actions in this case.

[67] However, before demonstrating the various ways in which the judge came to misapply that evidence, I think it would be helpful and offer guidance to trial judges in future cases if I were to explain why, in my view, this evidence ought not to have been admitted in the first place.

Why the PEI Evidence should have been excluded

[68] I begin by considering the leading case on similar fact evidence, *R. v. Handy*, 2002 SCC 56. There, Justice Binnie, writing for a unanimous Court, described the onus and standard of proof borne by the Crown at ¶55:

> 55 Similar fact evidence is thus presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception.

[69] Both counsel cited *Handy* in their written and oral submissions, as did the trial judge in his ultimate ruling. As I will show, the admission of the PEI evidence and the time spent in dealing with it, was so highly prejudicial to the appellant as to be out of all proportion to the limited, if any, probative value attached to it. In my respectful opinion, on any reasonable view of this record, the Crown failed to meet its onus of convincing the trier that such evidence, so highly prejudicial and presumptively inadmissible, should nevertheless be received because its probative worth exceeded its obvious prejudice.

[70] It is necessary to recall the facts from *Handy* in order to set the stage for the Supreme Court of Canada's explicit warnings concerning the introduction of such evidence in any given case. Let me begin by saying that I would have refused to admit the "similar fact" evidence in this case for virtually the same reasons it was rejected in *Handy*. While it is true that the proffered evidence in *Handy* was being given in a jury trial and by a third party (the accused's ex-wife), I do not consider the difference to be material in this case, nor the risk attached to its admission, lessened to any degree.

[71] There, the accused was charged with sexual assault causing bodily harm. His defence was that the sex was consensual. The complainant's position was that she had consented to vaginal sex but not rough or anal sex. The Crown sought to introduce similar fact evidence from the accused's former wife to the effect that the accused had a propensity to inflict painful sex, including anal sex, and when aroused would not take no for an answer. The similar fact evidence concerned seven alleged prior incidents. The accused denied assaulting the complainant, or committing any of the alleged assaults on his ex-wife. He argued that his ex-wife and the complainant had met and colluded, which then led to false charges against him. The jury convicted the accused of sexual assault. The Ontario Court of Appeal ruled that the former wife's testimony was wrongly admitted and ordered a new trial. The Supreme Court of Canada agreed and dismissed the Crown's

appeal. Writing for a unanimous Court, Justice Binnie undertook a comprehensive review of the authorities which have consistently:

> 58 ... fully recognized the potentially poisonous nature of propensity evidence, and sharply circumscribed the circumstances in which it can be introduced.

[72] After describing the nature of the onus and burden on the Crown (quoted at ¶68 above), Binnie J. explained how the requisite analysis would require the trial judge to assess the probative value of the evidence in relation to the issue in question for which the Crown sought its introduction; assess the prejudicial impact of the evidence which meant that it was "necessary to evaluate both moral prejudice (i.e., the potential stigma of "bad personhood") and reasoning prejudice (including potential confusion and distraction of the jury from the actual charge ...)"; and ultimately weigh and compare the probative value versus prejudice, emphasizing that the starting point of such a balancing was:

> ...of course, ... that the similar fact evidence is presumptively inadmissible. It is for the Crown to establish on a balance of probabilities that the likely probative value will outweigh the potential prejudice. (¶99-101)

[73] In then applying his framework to the facts of that case and in particular the second step which was to assess the prejudice of the proffered evidence, Binnie J. highlighted the dangers associated with the admission of such evidence. His comments are particularly apt in this case:

> 138 The poisonous potential of similar fact evidence cannot be doubted. Sopinka, Lederman and Bryant, *supra*, at §11.173, refer to the observations of an English barrister who has written of that jurisdiction:
>
> > Similar fact evidence poses enormous problems for Judges, jurors and magistrates alike. The reason for this is the headlong conflict between probative force and prejudicial effect. Often, in the Crown Court, <u>it is as close as a Judge comes to singlehandedly deciding the outcome of a case</u>. [Emphasis added, in original.]
> >
> > (G. Durston, "Similar Fact Evidence: A Guide for the Perplexed in the Light of Recent Cases" (1996), 160 *Justice of the Peace & Local Government Law* 359, at p. 359)
>
> Canadian trial lawyers take the same view.
>
> > <u>(a) *Moral Prejudice*</u>

139 It is frequently mentioned that "prejudice" in this context is not the risk of conviction. It is, more properly, the risk of an unfocussed trial and a *wrongful* conviction. The forbidden chain of reasoning is to infer guilt from *general* disposition or propensity. The evidence, if believed, shows that an accused has discreditable tendencies. In the end, the verdict may be based on prejudice rather than proof, thereby undermining the presumption of innocence enshrined in ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

140 The inflammatory nature of the ex-wife's evidence in this case cannot be doubted. It is, to the extent these things can be ranked, more reprehensible than the actual charge before the court. The jury would likely be more appalled by the pattern of domestic sexual abuse than by the alleged misconduct of an inebriated lout in a motel room on an isolated occasion. It may be noted that s. 718.2 of the *Criminal Code*, R.S.C. 1985, c. C-46, reflects society's denunciation of spousal abuse by making such abuse an aggravating factor for the purposes of sentencing.

...

143 I conclude that this evidence has a serious potential for moral prejudice.

(b) *Reasoning Prejudice*

144 The major issue here is the distraction of members of the jury from their proper focus on the charge itself aggravated by the consumption of time in dealing with allegations of multiple incidents involving two victims in divergent circumstances rather than the single offence charged.

145 Distraction can take different forms. In *R. v. D. (L.E.)* (1987), 20 B.C.L.R. (2d) 384 (C.A.), McLachlin J.A. (as she then was) observed at p. 399 that the similar facts may induce

> in the minds of the jury sentiments of revulsion and condemnation which might well deflect them from the rational, dispassionate analysis upon which the criminal process should rest.

146 Further, there is a risk, evident in this case, that where the "similar facts" are denied by the accused, the court will be caught in a conflict between seeking to admit what appears to be cogent evidence bearing on a material issue and the need to avoid unfairness to the right of the accused to respond. The accused has a limited opportunity to respond. Logistical problems may be compounded by the lapse of time, surprise, and the collateral issue rule, which will prevent (in the interest of effective use of court resources) trials within trials on the similar facts. Nor is the accused allowed to counter evidence of discreditable conduct with similar fact evidence in support of his or her credibility (as discussed in Sopinka, Lederman and Bryant, *supra*, at § 11.74). Thus the practical realities of the trial process reinforce the prejudice inherent in the poisonous nature of the propensity evidence itself.

> 147 In my view, the evidence of the ex-wife had the potential to create, in addition to moral prejudice, significant reasoning prejudice at the respondent's trial.

(Underlining mine)

[74] Applying the final step of the requisite analysis which requires a careful balancing of the probative value versus prejudicial affect, Binnie J. said:

> (3) *Weighing Up Probative Value Versus Prejudice*
>
> 148 One of the difficulties, as McHugh J. pointed out in *Pfennig*, *supra*, at p. 147, is the absence of a common basis of measurement: "The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial." The two variables do not operate on the same plane.
>
> 149 As probative value advances, prejudice does not necessarily recede. On the contrary, the two weighing pans on the scales of justice may rise and fall together. Nevertheless, probative value and prejudice pull in opposite directions on the admissibility issue and their conflicting demands must be resolved.
>
> 150 In *Director of Public Prosecutions v. P.*, [1991] 2 A.C. 447 (H.L.), at p. 460, Lord Mackay suggested that similar fact evidence should be admitted when its probative value is "sufficiently great to make it just to admit the evidence", notwithstanding its prejudicial value. Lord Wilberforce in *Boardman*, at p. 442, also referred to "the interests of justice". See also *Pfennig*, *supra*, at pp. 147-48. Justice is achieved when relevant evidence whose prejudice outweighs any probative value is excluded *(R. v. Marquard*, [1993] 4 S.C.R. 223, at p. 246) and where evidence whose probative value exceeds its prejudice (albeit an exceptional circumstance) is admitted. Justice includes society's interest in getting to the truth of the charges as well as the interest of both society and the accused in a fair process. A criminal justice system that has suffered some serious wrongful convictions in part because of misconceived notions of character and propensity should not (and does not) take lightly the dangers of misapplied propensity evidence.
>
> 151 In this case, the similar fact evidence was *prima facie* inadmissible and I agree with Charron J.A. that the Crown did not discharge the onus of establishing on a balance of probabilities that its probative value outweighed its undoubted prejudice. The probative value of the evidence, especially with respect to potential collusion, was not properly evaluated. The potential of such evidence for distraction and prejudice was understated. The threshold for admission of this sort of evidence was set too low.
>
> ...

[75] Considering the misplaced emphasis on the PEI evidence in this case, I am satisfied it became a distraction from the proper consideration of the charge before the Court. It was applied in such a way as to undermine Mr. Taweel's presumed innocence by attaching an unintended moral prejudice and reasoning prejudice to the analysis of the record. It caused the judge to discredit the appellant's testimony and then apply that reasoning to proof of guilt on the offence as charged.

[76] The Crown attorney and defence counsel each filed a comprehensive pre-trial brief on the so-called similar fact evidence sought to be introduced by the Crown. Each brief, as well as the trial judge's eventual ruling, contain the labels "Similar Fact Evidence". For the most part this is the way everyone chose to characterize the nature of the Crown's application and the evidence to which it related. The admissibility of that evidence was the subject of a *voir dire* and lengthy oral submissions. The "evidence" sought to be admitted by the Crown was presented to the court in the form of two substantial exhibits.

[77] *Voir dire* exhibit #1 was a 106-page transcript of an interview given by the complainant to Detective Constable Dennis Chevalier of the Ottawa Police Service on January 11, 2011.

[78] By way of background, the videotaped and transcribed interview S.L. gave to Detective Chevalier was the first time the complainant had told her whole story to anyone. She provided the police with information about Mr. Taweel which she had acquired after conducting an online search on her computer. She said she was concerned the appellant might be engaging in unlawful activities with adolescent girls whom she'd seen on the appellant's Facebook page. Initially, her evidence was that she had conducted only one search. She later agreed that she did not recall how many searches she had done.

[79] The resulting Ottawa police report was conveyed to Detective Constable Lisa MacDonald, an investigating officer with the Halifax Regional Police, who then became involved in the investigation. Following her receipt of the report, Detective Constable MacDonald was able to identify Jeanette Taweel's property. Prior to trial the officer asked S.L. to view Google Maps in an attempt to locate the house. Eventually S.L. was able to identify Jeanette Taweel's residence or the house next door, as being the location of the alleged sexual acts.

[80] V*oir dire* exhibit #2 was the 189-page transcript of the preliminary inquiry conducted by Nova Scotia Provincial Court Judge Frank P. Hoskins on January 7,

2013. The only two witnesses who testified at the preliminary inquiry were the complainant and her mother, P.L.

[81] The information contained in these two exhibits was the "evidence" the Crown sought to have admitted as "similar fact evidence". The only other evidence presented at the *voir* dire was brief testimony given by Donald Alexander Kennedy, a former colleague of the appellant, the purpose of which was to establish that the complainant had initiated contact with Mr. Taweel at a time he lived in Ontario and shared a residence with him.

[82] The bulk of the transcript from the *voir dire* hearing at trial is made up of lengthy convoluted exchanges between the court and counsel which, respectfully, seem sown with confusion. In the more than 200 pages of transcript taken up with this matter, the dialogue seems very unfocussed, with little in the way of crisp questioning or meaningful answers. One is left with the impression that counsel and the judge were all perplexed as to the issue(s) to which the so-called similar fact evidence related, or the purpose(s) for which the Crown sought its introduction. I will say more about that confusion in a moment.

[83] In the opening paragraph of his pre-trial brief the Crown Attorney began by describing the source of the "evidence" upon which the Crown relied. The brief states:

> **THE FACTS**
>
> To follow is a summary of the facts as they are relevant to this similar fact application. These facts have been taken from police statements and the transcript from the preliminary inquiry ...

Incidentally, the defence did not admit any of those facts relied upon by the Crown.

[84] After laying out these "facts" and citing case authorities on the steps to take when analyzing the admissibility of such evidence, Crown counsel concluded his brief by describing the purpose for which its admission was sought:

> The only reason this discreditable conduct application is necessary is because part of the alleged sexual activity falls outside of the territorial jurisdiction of Nova Scotia. Had Mr. Taweel's behaviour transpired within this province, it would be contained in the Indictment before the Court.

> The Prince Edward Island evidence is essential to understanding the complainant's account of what transpired and why. The sexualized relationship in Nova Scotia cannot be evaluated without understanding how their relationship developed. The narrative is nonsensical without understanding what comes between [S.L.] building a sandcastle on Stanhope Beach and Mr. Taweel's arrival outside of Astral Drive Junior High School ....

[85] At the *voir dire* Crown counsel expanded on the reasons why the evidence ought to be admitted. We see this exchange:

> **MR. MORRISON:** ...The Crown is attempting to introduce similar fact evidence here of activities that took place between Mr. Taweel and Ms. L. ... including six alleged sexual encounters, as well as the contact and communication and the relationship that developed between the parties in Prince Edward Island ... the Crown would say that it seeks the admission of this similar fact evidence on two basis ... the first being narrative, the second being to understand the nature of the relationship between the parties ...

[86] In his written and oral submissions, Mr. Taweel's trial counsel, Mr. Knox, strongly opposed the admission of such evidence arguing that there was nothing "similar" about it; that it did not meet the requirements for similar fact evidence; that it would not assist in providing a narrative; that it was neither necessary nor relevant; and that its prejudicial effect greatly outweighed its probative value.

[87] During the course of the Crown's oral submissions at the *voir dire*, its two stated purposes morphed into two more. We see this argument from the Crown:

> **MR. MORRISON:** ...the purpose of this evidence is to .... understand ... their relationship ... it's a relationship that quickly became sexualized ... It's consistent with a pattern that is creating fear or intimidation in the complainant. ...

[88] Later, when the trial judge asked Crown counsel to provide more specifics as to the evidence upon which it intended to rely, we see this exchange and a fourth purpose behind the Crown's attempt to admit it:

> **THE COURT:** What is the evidence that you are looking to admit? ... Is it the evidence of everything that occurred in P.E.I.?
>
> **MR. MORRISON:** Uh, huh.
>
> ...
>
> **THE COURT:** - - I need to know what evidence it is that we're referring to.
>
> ...

MR. MORRISON: Yeah. It's basically everything that was contained within Prince Edward Island, My Lord, and -- and the discreditable portion of it is obviously the sexual contact that existed between the parties. And the Crown can try to ask oblique questions about their dealings in Prince Edward Island that don't explain the fact that there was sexual activity.

But in the Crown's theory of the case this is a progressive sexualization of ____ [S.L.]. And so we need to understand exactly what sexual -- what sexual activity occurred and when and how it unfolded.

So certainly the Crown would expect to elicit -- there are six prior incidents of sexual activity. Two that took place in sand dunes on Stanhope Beach, two that took place in a field near an ice cream stand and two that took place in a car. And the Crown would want to elicit the details of those sexual encounters. So that is the discreditable conduct that the Crown seeks to -- to introduce.

[89] The trial judge then wanted to understand what the "issue" was, to which the proposed similar fact evidence related. After hearing the reasons for which the Crown sought to introduce the evidence, the judge asked:

THE COURT: And that consent is the central issue.

MR. MORRISON: Consent is the central issue.

THE COURT: But, as Mr. Knox has indicated, credibility is -- is also an issue as it would relate to consent.

MR. MORRISON: Well, consent -- credibility forms an important part of the consent analysis.

THE COURT: Yeah. And so I guess -- there was some discussion the other day but the purpose for which it's being admitted can impact on the extent that the trier of fact can use the evidence to infer guilt or innocence.

MR. MORRISON: Yes.

... So I guess what I'm saying is without understanding how quickly these parties engaged in sex and the kinds of things that Mr. Taweel was saying to _____[S.L.], you can't properly evaluate whether or not you believe her when she went to engage in sexual activity outside of Astral Drive Junior High. You don't have that -- that background and that pattern in place, so you're -- you're poorly positioned to make that evaluation.

THE COURT: If I accept her evidence.

MR. MORRISON: If you accept her evidence.

...

[90] Obviously the judge was puzzled as to the use he could make of the P.E.I. evidence when assessing the charge against Mr. Taweel in Nova Scotia. In the exchange that follows we see the confusion that had arisen in the judge's mind between "truthfulness", "credibility", and "guilt":

> **THE COURT**: So it's more than merely to explain the nar -- you know to explain what happened and to explain the relationship. I mean the Crown intends to rely -- you're -- you're going to be saying she's -- presumably you're going to be arguing she is credible --
>
> **MR. MORRISON**: Well --
>
> **THE COURT**: -- and that I should rely on that evidence of what occurred in P.E.I. to make that assessment for -- in terms of Nova Scotia. I guess that's what I'm asking because I think that is relevant on this -- on this *voir dire* application.
>
> ...
>
> **THE COURT**: -- P.E.I. evidence cannot be used to confirm the truthfulness --
>
> **MR. MORRISON**: That's right.
>
> **THE COURT**: -- of the alleged events here -- here or in Nova Scotia.
>
> **MR. MORRISON**: Absolutely correct.
>
> ...
>
> **THE COURT**: -- you're submitting that this -- you know, about the -- if it's -- if a decision were made to admit it and of course obviously that has not been made --
>
> **MR. MORRISON**: Yes.
>
> **THE COURT**: -- that you end up relying -- you know to what extent you know you're -- I don't want to repeat myself --
>
> **MR. MORRISON**: No.
>
> **THE COURT**: -- but it -- it seems to me that you do intend to rely on it to some extent.
>
> **MR. MORRISON**: Maybe a -- maybe this is the best way I --
>
> **THE COURT**: And here I'm -- by it I'm referring to the P.E.I. evidence.
>
> **MR. MORRISON**: Yeah. What Your Lordship is going to be called upon to do -- let's think about the moment outside Astral Drive Junior High and [S.L.] goes with Mr. Taweel and has sex and she's going to say to you I did not

want to have sex with him. Now in order to understand that you need to understand what came before.

And if she (sic) think about two extreme situations which just didn't exist here it might help. Imagine for example a person who said that was (sic) married to the individual, they had a lifetime of sexual encounters behind them and they had made a plan to go to this location and have a sexual encounter.

You would be evaluating that person's statement, no, I didn't want to have sex, with that background in mind. If the parties were completely unknown to one another and then there's this encounter outside of Astral Drive Junior High you would assess that credibility differently.

And what I'm saying is you need the story of what came before not for the truth of its contents, or not to suggest that because all these things happened that it happened in similarly in Nova Scotia, but just so that you understand the complainant's version on the say (sic) in question outside Astral Junior High without that background there's just a void to evaluate that no (sic).

THE COURT: Well, so again, I go back to the statement I referred to. For me as I understand it the Crown is looking to -- will be looking to the court for me to evaluate the evidence in Nova Scotia --

MR. MORRISON: Uh, huh.

THE COURT: -- with an eye to what happened in P.E.I. but not to rely on it for the truth of what happened in --

MR. MORRISON: Correct. That's --

THE COURT: -- in P.E.I. --

MR. MORRISON: -- absolutely correct.

THE COURT: -- but I mean how can I do both in the sense that for example do -- do I -- you know if the statements you can't tell anybody about that impacts on the consent --

MR. MORRISON: Absolutely.

THE COURT: -- issue, do I not have to make some assessment of that particular evidence in terms of credibility if -- and that occurred in P.E.I. in order for me to -- to do what the Crown is going to ask me to do which is to assess the truthfulness of what occurred in Nova Scotia and I'm going to stop there because it's the best I -- I can explain it.

MR. MORRISON: Okay, I see. So you're saying the statement -- is it the statement that is different, My Lord? Because the Crown is asking you to rely on that statement differently than we are in the factor of the narrative between the parties? Is that --

THE COURT: I guess that's --

> **MR. MORRISON**: -- the sticking point?
>
> **THE COURT**: -- what I'm trying to understand. I mean aren't I -- is the court not -- although you're not relying -- so -- so you're simple -- is it -- is the simple summary of your position that you're not intending to rely on any of the P.I. [sic] -- P.E.I. evidence for the truth of it?
>
> **MR. MORRISON**: Correct, absolutely correct. ...
>
> **MR. MORRISON**: No. You're entitled to use it to make that evaluation of credibility. You don't have to confirm it's -- it's truthfulness at all. You have to accept what she saying to you is believable.
>
> **THE COURT:** Okay. So I can use it for credibility but not for truthfulness.
>
> **MR. MORRISON:** Exactly.
>
> **THE COURT:** Okay. That clarifies my question.

[91] The Crown then urged the trial judge to apply "a modified version of a *Handy* analysis ..." and admit the proffered evidence.

[92] After considering counsels' submissions the judge retired for a couple of hours and then delivered a short oral decision in which he accepted the Crown's submissions and admitted the proffered evidence.

[93] Respectfully, I fail to see how the Crown met its burden in having the PEI evidence admitted. It is enough for me to say that I agree with the points made by Mr. Taweel's trial counsel, and referenced earlier, as a proper basis for rejecting the Crown's application. In my view, there was nothing "similar" about the evidence at all. In view of the Admission of Fact introduced as an exhibit at trial, I would not have considered it necessary to canvass the PEI encounters in such detail in order to provide "narrative" or "context" for S.L.'s testimony as to what she alleged occurred in Dartmouth. I fail to see the relevance or necessity of calling the extraordinary (by comparison) amount of evidence surrounding their PEI encounters when contrasted to the single charge, said to have occurred in Dartmouth.

[94] In fact, had counsel merely added a word or two to the Admission of Fact, the introduction of such highly prejudicial and unnecessary evidence could have been avoided entirely. As noted in ¶7, *supra*, the Admission read:

> ...Defence admits date for the purposes of this proceeding – there was contact and communication between [S.L.] and Stephen Taweel in 1991.

Had the Admission been worded to say:

> ...there was intimate physical contact and communication ...

or

> ...there was sexual contact and communication between ...

the need for any reference to PEI at all would have been eliminated. This is precisely the point made by Justice Binnie in *Handy*:

> 74 The issues in question derive from the facts alleged in the charge and the defences advanced or reasonably anticipated. It is therefore incumbent on the Crown to identify the live issue in the trial to which the evidence of disposition is said to relate. If the issue has ceased to be in dispute, as for example when the fact is admitted by the accused, then the evidence is irrelevant and it must be excluded: ...
>
> [Underlining mine]

[95] While the merits of any appeal will never be decided by counting pages, it is fair to compare, both quantitatively and qualitatively, the amount of time taken up in the record with the so-called "narrative" and "context" having to do with the P.E.I encounters, as contrasted to the testimony surrounding their contact in Dartmouth. Simply by way of illustration, the direct examination of S.L. as to what she alleged happened in PEI occupies 75 pages of the transcript. Her cross-examination of those same events fills 179 pages for a combined total of 254 pages devoted to their contact at Stanhope Beach. By contrast, her direct examination as to what she alleged happened in Dartmouth takes 55 pages and her cross-examination surrounding those same events fills 61 pages for a total of 116 pages. Thus, the complainant's evidence as to what she alleged happened in PEI surpasses her allegations surrounding their encounter(s) in Dartmouth by more than 2:1.

[96] The comparison, when considering the appellant's testimony, is even more striking. The combination of Mr. Taweel's direct and cross-examinations surrounding events in PEI fills 95 pages. Whereas the direct and cross-examinations surrounding his account of their contact in Dartmouth is less than half, some 37 pages.

[97] I mention these results, in addition to the many other substantive points contained in these reasons, as another way to illustrate the fact that whatever was said to have occurred in Dartmouth was totally eclipsed by the testimony

describing their encounters at Stanhope Beach. PEI became the story; Nova Scotia was relegated to a footnote.

[98] The judge's decision to admit the evidence effectively obliged the appellant to defend himself against two allegations: first, the single charge in the Indictment relating to their encounter(s) in Dartmouth; and then, in addition, the "unindicted" charges for six sexual "offences" said to have occurred in PEI. With this misstep, the whole focus, the whole dynamic of the case shifted and what ought to have been the single subject of prosecution, was overlooked.

[99] If one were to "flip" the approach taken in this case to its direct opposite, whereby the events said to have occurred in PEI led to Mr. Taweel's prosecution in *that* province, one would be hard pressed to understand how the "Dartmouth evidence" could ever be said to qualify as "similar", thus, justifying its admission in a courtroom in PEI.

[100] Given the quantitative and qualitative emphasis attached to the encounters between the appellant and the complainant in PEI, I would have no hesitation in concluding that the prejudicial effect of this evidence greatly outweighed its limited, questionable value, and on that basis alone its reception should have been denied.

[101] It is hoped that the frailties and weaknesses I have identified in the proffered PEI evidence here will provide some assistance to trial judges in future cases.

[102] I will now present a detailed explanation of the manner in which the judge misapplied that evidence in convicting the appellant. This is the error which obliges us to intervene, set aside the verdict and order a new trial.

Improper Use of the PEI Evidence

[103] Assuming, simply for the purposes of analysis, that the PEI evidence was admissible for certain discrete and limited purposes, the judge used it improperly as a means of discrediting Mr. Taweel. The trial judge felt comforted in his decision to admit the PEI evidence because it was not being admitted "for its truth". As I will demonstrate later, the trial judge did just that when he rejected the appellant's evidence denying any sexual assault based on a substantive comparison of the details of the PEI evidence given by the appellant and the complainant.

[104] In fairness to the trial judge, this is a complex area of law. He delivered his decision quickly, and perhaps too hurriedly, with the trial having started, a *voir dire* under way, and out-of-province witnesses and the parties set to testify. Based on the exchanges between the judge and counsel during submissions, the guidance sought or offered does not appear to have been particularly helpful. In my view, the admissibility of, and reliance placed upon, similar fact evidence is a matter that requires the exercise of considerable care and caution by trial judges if they are to properly perform their gatekeeper function. This is because its admissibility and ultimate application is fraught with danger.

[105] One of the most comprehensive and enlightening considerations of the subject can be found in Christopher Nowlin's excellent analysis, *Narrative Evidence: A Wolf in Sheep's Clothing*, Part I, 2006 51 C.L.Q. 238; and Part II, 2006 51 C.L.Q. 271. I would certainly encourage its reading by judges and lawyers alike.

[106] The author begins his analysis with this warning:

> **Introduction**
>
> There is an evidentiary wolf running loose through Canadian criminal courts, disguised as a harmless, storytelling sheep. Lawyers recognize the wily guest simply as "narrative", or "context", or "background" evidence – evidence tendered to make sense of other evidence, to put other evidence in its proper perspective, or to fill gaps in the Crown's case. It slips in easily through the open doors of a policy that permits into evidence "everything logically probative of some fact in issue", unless such evidence poses too real a risk to trial fairness or some other recognized societal value. ...
>
> ...This is a real problem because narrative evidence is often highly prejudicial and not especially probative or even material. And its reach appears to be getting longer. Paciocco and Steusser recently observed, "The idea that evidence can be admitted because it forms part of the 'narrative' or part of the story is a potentially dangerous one. It has been used, sometimes successfully, as a way to get otherwise inadmissible evidence before the trier of fact." (case references omitted)
>
> This article shares Paciocco and Steusser's concern and endeavours to show just how troublesome the use of the narrative evidence concept has become in Canada. ... Narrative evidence does not necessarily invite questions of truthfulness and reliability, and strictly speaking, it is not supposed to have probative value.
>
> ...this article analyzes an established line of jurisprudence that permits the admission of an accused person's prior acts as narrative, where it appears that the

> broader "relationship" between an accused person and the complainant is somehow relevant to the specific allegation(s) before the court. ...
>
> Of course, the predictable response to concerns raised almost every time prejudicial evidence is tendered as narrative is that appropriate limiting instructions will be provided to the trier of fact. The fifth part of this article proposes that this standard mechanical response to narrative evidence quarrels is inadequate at best and ineffectual at worst. Canada's inclusionary policy is making relevant trial narratives longer and the application of rules of evidence more complicated. ...This article asks whether judges are paying sufficient heed to the potential for prejudicial, bad character narrative evidence to distract the trier-of-fact when they rely simply on limiting instructions in their decisions to admit such evidence. (Part I, pp. 1-2)

[107] The author then goes on to explain (correctly in my view) the important difference between narrative evidence and circumstantial evidence, and why, on account of that difference, careful attention must be paid by trial judges to the purpose for which the evidence is introduced and the proper standards to be applied when deciding its admissibility:

> ..."narrative" evidence ... must denote a different kind of evidence than probative circumstantial evidence, ...
>
> ..."narrative" evidence should be restricted to evidence that fills in chronological gaps in the Crown's case. It should enable the trier of fact to understand why, from a purely chronological perspective, one germane event follows from another. ...
>
> In principle, narrative evidence should have *explanatory* value without having probative value, so that it can be distinguished from circumstantial evidence that is probative of material issues. ... narrative evidence, properly speaking, lacks probative value. ...narrative evidence will sometimes be needed to make the chronology of the case clear or intelligible, but in doing so it is not supposed to *furnish proof* of a fact in issue, directly or indirectly. ...ascribing probative value to narrative evidence simply turns that evidence into circumstantial evidence tending to prove a material issue and makes the very notion of "narrative" superfluous. (Part I at pp. 3 and 8-9).

[108] Citing many examples, the author challenges the current tendency:

> ...of admitting prior bad act evidence in cases where the acts are alleged to have been committed during marital or other involved "relationships". The rule appears to have evolved specifically in relation to evidence of prior violent or sexual acts committed by one sexual or marital partner who is facing trial for committing a sexual or violent offence against the other. It has been extended, however, to apply to various kinds of misconduct and various kinds of

> relationships. Indeed, it has been used to furnish the admission of prejudicial similar fact evidence *as relationship evidence* – that is, as probative simply of the nature of the relationship between the accused person and the complainant.

and goes on to ask:

> whether the practice of admitting "relationship" evidence under the narrative rubric is principled or defensible. (Part II, pp. 4-5)

[109] Finally, the author reminds us that:

> ...In any case, as a matter of principle, evidentiary clarity or narrative cohesion is not somehow *more important than* trial fairness. (Part I, p. 10)

The author adds a further reference to Binnie J.'s caution that the "poisonous potential of similar fact evidence cannot be doubted" invoking "the need to maintain a high awareness of its potentially prejudicial effect". (*Handy*, ¶138 and ¶141).

[110] In my opinion, failing to maintain such a keen and heightened level of awareness produced the problems that arose in this appeal, where the evidence became a "distraction and prejudice", the effect of which was "to shift the focus of the factfinder from the facts in issue to an evaluation of the extra episodes" (Part II, p. 12, quoting from I. Dennis, *The Law of Evidence*, 2nd ed. (London: Sweet & Maxwell, 2002), p. 122).

[111] I share and endorse Mr. Nowlan's expressions of concern. In this case, as we shall see, the judge did not exercise sufficient vigilance in his evaluation or weighing of the proffered evidence. He did not appreciate that any prosecutorial efforts to introduce similar fact evidence under the guise of "narrative" or "context" should be greeted with a healthy dose of scrutiny and skepticism. Then, after deciding that the PEI evidence was admissible for a specific and limited purpose, the declared limitation became broadened or distorted during the course of the trial such that the evidence came to be applied for an entirely different purpose that was neither sanctioned nor declared.

[112] In his able submissions on behalf of the Crown in this appeal, Mr. O'Leary properly acknowledged the problematic language chosen by the trial judge when admitting the proffered evidence. The Crown's factum reads:

> 115. In his *voir dire* ruling, the Trial Judge considered the potential prejudice of the PEI evidence to the Appellant. The Trial Judge stated:
>
> > Is it necessary to admit the evidence notwithstanding the potential for prejudice to, in this case, Mr. Taweel?
> >
> > In my view the risk of an un-- an unfair trial is reduced by the limited purpose for which the Crown seeks to admit the evidence. Not being admitted for its truth lessens the risk of prejudice and consequently lessens the risk -- risk of an unfair trial, in my view. [Emphasis added]
> >
> > (Transcript, p. 250, line 18 to p. 251, line 6)
>
> 116. The phrase "not being admitted for its truth" is confusing in this case.

[113] Counsel then suggested that any confusion or alarm arising from the judge's statements, could be allayed by referring to parts of what he said in his ultimate decision. The Crown's factum reads:

> 120. The Trial Judge reviewed S.L.'s evidence about what occurred in PEI at paras. 116 – 125 of the Trial Decision. He then stated at para. 126:
>
> > [126] I have recounted these events not for the purpose of assessing whether they are true, as they are not admitted for that purpose. This evidence was admitted for purpose, other than to show any propensity of the accused or to prove bad character.
>
> 121. The Trial Judge's comments from his voir dire ruling when combined with paragraph 126 from the trial decision may give insight into what the Trial Judge meant. It appears the Trial Judge is stating he does not have to decide if it is true the Appellant sexually assaulted S.L. in PEI. Therefore, there would be less risk of prejudice from the PEI evidence. Prejudice would occur if the PEI evidence was used improperly. It would be improper to infer the Appellant's guilt for what occurred in Dartmouth from impermissible propensity reasoning.
>
> 122. Despite the confusion over the awkward phrase used by the Trial Judge, it is clear the Trial Judge did not use the PEI evidence for propensity reasoning. The Trial Judge did not find the Appellant guilty of sexually assaulting S.L. in Dartmouth because he made a finding or decision that the Appellant had sexually assaulted her in PEI.

[114] Respectfully, I draw no such comfort. As I am about to demonstrate, the trial judge, on at least four significant occasions, used the PEI evidence to discredit the appellant and then applied that conclusion as a basis for satisfying himself that Mr. Taweel was guilty of assaulting S.L. in Dartmouth.

[115] I begin by considering the judge's articulation of the test for admitting the PEI evidence. He said:

> ... And so the law is that this type of evidence is inadmissible unless the Crown demonstrates there are exceptional circumstances which merit – which merits its admission. Thus, there is a need for this *voir dire* to determine its admissibility and whether the Crown has established exceptional circumstances.

[116] That was the judge's first mistake. He referred to the Crown having to establish "exceptional circumstances" in order for the PEI evidence to be admissible. With respect, *Handy* does not prescribe a test based upon exceptional circumstances.

[117] The judge then turned to the *Handy* framework. The judge starts by stating that the Crown is seeking admission to explain the narrative and to explain the relationship. However, the judge then says later in his ruling:

> In these circumstances, I am satisfied that the Crown has established that the evidence is relevant to an issue at trial. The main issue is consent. The proffered evidence is relevant to the narrative because, one, it is PEI where the parties first met. Two, it explains the relationship between the parties as alleged. Three, the evidence is within the time frame … contained in the indictment. [Emphasis added] (AB, p. 247-8)

[118] It is not clear from this passage whether the trial judge is identifying "consent" or the "narrative" as "the issue at trial". As I will explain below, the judge had been told by both counsel at this stage of the proceeding that consent was the critical issue at trial. Neither the judge nor the Crown (and perhaps even the defence at that point) knew whether the appellant would elect to take the stand and testify on his own behalf at trial. Once Mr. Taweel had given his testimony it should have been obvious to everyone in the courtroom that consent was not the "issue" at all. Mr. Taweel had testified that nothing of a sexual nature had ever occurred between the two when they met on a single occasion (by his account) at his sister's home in Dartmouth. Thus, the only "issue" regarding the charge against the appellant was *not* whether S.L. had consented, but rather whether the incident, as she alleged, *had occurred at all*.

[119] As appears in the transcript, the Crown Attorney grasped this nettle in his closing submissions. Unfortunately, both defence counsel and the judge did not. This then led to the trial judge's erroneous consideration of a defence of honest but mistaken belief in consent, when in fact the accused had based his only defence on the assertion that there was no sexual activity between him and the complainant in Dartmouth.

[120] Responding and reacting to the way issues and positions change during the course of a trial is fundamental to the adversarial process. During the *voir dire* and up until the time the defence elected to call evidence, both Crown and defence counsel had repeatedly stressed that the trial "was all about consent". Yet, the moment Mr. Taweel's testimony had concluded, it was clear that consent was no longer in issue, given his assertion that he and S.L. never had any kind of a sexual encounter in Nova Scotia. This was a material shift in direction and, respectfully, ought to have signalled the need to revisit the earlier ruling regarding the utility and relevance of the PEI evidence. The wise course would have been for the judge to have called upon counsel to make thorough submissions on what ought to be done in light of those changed circumstances.

[121] Quite apart from the uncertainty and fluidity that surrounded a proper defining of the issue(s) in this case, the judge also stumbled during the next stage in the analysis which is to assess the probative value of the proffered evidence. This step is different from, and in addition to, sorting out the material issue to which the evidence relates. Justice Binnie explains the difference in *Handy*:

> 73 The requirement to identify the material issue "in question" (i.e., the purpose for which the similar fact evidence is proffered) does not detract from the probative value/prejudice balance, but is in fact essential to it. Probative value cannot be assessed in the abstract. The utility of the evidence lies precisely in its ability to advance or refute a live issue pending before the trier of fact.

[122] In his *voir dire* ruling (1 AB, 248) the trial judge made the following comments about probative value:

> Secondly, in terms of probative value, I am of the view that without this evidence the court is left with … a major gap in the narrative, or half the story, as alleged.
>
> It is probative also to explain the relationship between the parties which is critical to the issue of consent. I concur in this respect that *R. v. A.B.* [sic – *R. v. D.A.R., supra*] is instructive where it said – where it stated at paragraph 30, without the PEI evidence the court would have been left without context or explanation for what … allegedly transpired in Truro. And so applying that to the evidence here, I -- I'm of the view the same rationale applies.

[123] This analysis has several deficiencies. The stated purpose for which the trial judge is admitting the evidence is to explain the narrative and to explain the relationship between the parties. The trial judge explains that the value of this evidence is that it prevents the Court being left with half the story and it explains the relationship between the parties. There is another fleeting mention of consent.

However, it is problematic when the purpose for which the evidence is admitted and the reasons why the evidence is said to have probative value are identical. In other words, once narrative is identified as essential to the issue in question, it appears that the required probative value and prejudicial effect analysis almost melts away into irrelevancy. It seems to me there is a real risk of accepting narrative as the rationale and then forgetting to perform the necessary balancing exercise between probative value and prejudicial effect. The result is largely a *fait accompli* because once "narrative" is given as the purpose, this appears to trump all other considerations. I suspect that is what happened in this case.

[124] At trial both Crown counsel and the judge relied upon this Court's decision in *R. v. R.(D.A.)*, 2012 NSCA 31 as a basis for admitting the "similar fact evidence" in this case. Respectfully, while some of the background in that case may appear to be similar, a closer reading will demonstrate that any resemblance to the issues before us in this appeal is superficial at best.

[125] There, D.R. was charged with indecent assault and gross indecency following offences alleged to have occurred in Truro between 1978 and 1980. D.R. was an adult at the time and the complainant, L.K., was under the age of 14. Coincidentally, the Crown sought to lead evidence of sexual activity between D.R. and L.K. during the same time period in PEI where L.K.'s family had a cottage. The Crown said the evidence was part of the narrative, would provide context, and explain the nature and development of the relationship between the complainant and the accused. The defence objected, saying the evidence was not probative, could not be used to show the truthfulness of the charge, and the Crown's attempt to introduce evidence of bad character was highly prejudicial. Without first conducting a *voir dire* the trial judge admitted the evidence and convicted the accused.

[126] On appeal to this Court, D.R.'s conviction was challenged on several fronts, one of them being alleged error on the judge's part in failing to hold a *voir dire* and then admitting the evidence, or at least not properly qualifying its use for a limited purpose.

[127] This Court determined that while a *voir dire* would have been preferable, its absence was not fatal. In dismissing that particular ground of appeal in *R.(D.A.)*, my colleague, Justice Bryson, writing for the Court, said:

> [38] With respect, nothing in the judge's decision indicates that he relied upon evidence of discreditable, similar acts in PEI. There is no suggestion in the

> judge's reasoning that he inferred guilt from evidence of bad character which could be implied from Mr. R.'s prior misconduct. Nor did he use the PEI evidence to conclude that Mr. K. was credible and Mr. R. was not. ...

By contrast, as I will demonstrate, the potential missteps identified by Bryson, J.A. as *not having occurred* in that case, were precisely the errors that *are present* in this one.

[128] It is obvious but bears repeating, that when the trial judge delivered his oral ruling following the *voir dire* and admitted the proffered "similar fact evidence", neither the complainant nor the appellant had testified. Thus, the only "facts" known to the judge were those set out in the Crown's pre-trial brief, which the Crown had lifted from the transcript of the preliminary inquiry and the transcript of S.L.'s earlier interview with the Ottawa Police Service, neither of which was evidence of anything as far as the trial proper was concerned. Until S.L. took the witness stand at trial, Murray J. had no way of knowing whether S.L. would confirm, adopt, or deviate from what she had described on those two previous occasions. Further, neither the judge, nor the Crown (nor perhaps even the appellant's trial counsel, Mr. Knox) could predict whether the appellant would take the stand in his own defence.

[129] In those circumstances, particularly during a judge alone trial, the wiser course for the judge to have taken would be to *provisionally* admit the proffered evidence but reserve on its ultimate admissibility until all of the evidence had been heard. In that way the judge would not have bound himself to a position tied to a "central issue", which later turned out to be completely irrelevant by the time the trial ended. At the *voir dire* both counsel had insisted that "consent" was the principal issue in dispute. As I have already explained in detail, the Crown's declared purpose in introducing the PEI evidence was to explain the quick "progressive sexualisation" of their relationship which would then enable the judge to understand why this couple – according to the complainant – would so readily engage in sexual intercourse in a home in Dartmouth.

[130] But once Mr. Taweel testified that nothing of a sexual nature had ever occurred at his sister's residence in Dartmouth, "consent" was off the table. Whereas consent had been the issue that anchored the Crown's application in the first place – their theory being that S.L. had been repeatedly sexually assaulted, without her consent – now the principal issue the judge had to decide was whether *any* sexual assault had occurred in Dartmouth. In the face of Mr. Taweel's denial, the issue of S.L. consenting to any intimacy between the two had become

irrelevant. Such a prudent approach by the trial judge in only provisionally accepting the "similar fact evidence" would have properly focused his attention on the single issue he then had to decide – whether the Crown had proved beyond a reasonable doubt the guilt of the accused for the charged offence in Dartmouth – and the judge (and defence counsel at trial) would not then have embarked upon a needless and erroneous consideration of the defence of honest but mistaken belief.

[131] My description of these missteps has set the stage for my consideration of the judge's critical error in the use he made of the PEI evidence. In his comprehensive submissions on behalf of the appellant, Mr. Greenspan argued very persuasively that the judge employed the PEI evidence improperly. This meant that the judge rejected Mr. Taweel's evidence based on a substantive comparison of the details of the PEI evidence between the appellant and the complainant. I agree.

[132] The door which the judge had been persuaded to open slightly so as to permit the introduction of such evidence for the limited purpose of narrative and context was ultimately left completely ajar, with the result that the evidence was relied upon for much different reasons, and issues. The stated purposes had broadened to now include: narrative; context; nature of the relationship; its quick and progressive sexualisation; the claimed consistency with a pattern of creating fear or intimidation; while at the same time, the list of issues had expanded to involve consent; credibility; truthfulness; and guilt.

[133] I will now explain where, and in what respects, the judge erred.

The trial judge misapprehended his own *voir dire* ruling

[134] In his reasons for judgment, the trial judge mistakenly states he is relying upon his previous *voir dire* ruling where he said that he *would* use the PEI evidence to assess the complainant's credibility.

[135] The impugned paragraph of his reasons reads:

> [39] I did state, in my ruling that this narrative evidence could be used to assess credibility and to allow the Crown to establish the unfolding of events. That is the probative value of the evidence. In short, the evidence of the Complainant as to what occurred in PEI is narrative evidence, which was not admitted for its truth. The Crown submits it may be used to assess the consistency of the Complainant's conduct and thus her credibility. (**R. v. R.(D.A.)**, 2012 NSCA para.23).

[Underlining mine]

[136] In the first sentence of this paragraph, the judge begins with a declaration that he had expressed in his *voir dire* ruling an intention to use the narrative evidence to assess credibility. However, the judge's *voir dire* reasons say nothing of the sort. They are completely silent on whether the PEI evidence would be used to assess credibility. If anything, the judge implied the opposite when he declared: "The complainant will be the same witness whose credibility will have to be assessed on the Nova Scotia evidence at the trial for the events here."

The trial judge provided mixed messages as to whether the PEI evidence would be used to assess credibility and, if so, of whom?

[137] As I have indicated, both counsel provided extensive oral and written submissions before the judge delivered his oral ruling on the *voir dire*. After a long and somewhat confusing back-and-forth, Crown counsel suggested the judge could use the PEI evidence to assess credibility:

> **MR. MORRISON:** No. You're entitled to use it to make that evaluation of credibility. You don't have to confirm it's – it's truthfulness at all. You have to accept what she saying [sic] to you is believable.
>
> **THE COURT**: Okay. So I can use it for credibility but not for truthfulness.

[138] The trial judge then asked defence counsel whether he agreed that the evidence could be used to assess credibility and the following exchange ensued:

> **THE COURT**: Do you agree with the Crown that if it the – if the evidence is admitted that I can rely upon it for credibility but not the truth as what he –
>
> **MR. KNOX**: That – that –
>
> **THE COURT**: -- has indicated the Crown's position is?
>
> **MR. KNOX**: I'm – I'm having a – I'm having a hard time with that. I – I – I'm not able to distinguish the – the concepts in the way that Mr. Morrison proposes.
>
> He – he may be right, there may be a judicial commentary to support that, but I'm -- I'm having some difficulty with that. If it's – if it's – if it's just a description in the complainant's view of what happened to – to describe how these two persons got together and how they wound up having a relationship in Dartmouth, I can't logically understand how that could be the case.
>
> And what's going to happen I think is there's going to be an appropriate (sic – evidently a typo and should read "inappropriate") amount of time if that evidence was admitted, talking about it and cross-examining it and referring to

> previous descriptions that the complainant may have made about it. So I know the purpose is not to introduce it for the truthfulness of it. I know the purpose is not to introduce it … to show disposition of the defendant but I – I'm having some difficulty keeping that distinction that my … friend proposes. So I … can't concur with him at this point in time.

[139] From this we know Mr. Knox's position was that the evidence could not be used to assess credibility. It is equally clear from the trial judge's questions, both initially of Crown counsel and in reply following Mr. Knox's submissions, that he continued to be troubled by the distinction the Crown was attempting to draw between using the evidence to assess credibility but not using it to assess truthfulness.

[140] As I have already demonstrated, the trial judge's *voir dire* ruling was silent on whether he would use the PEI evidence to assess credibility. However, his reasons for judgment, read as a whole, certainly show that he purported to restrict using the narrative evidence to assess the complainant's credibility. In contrast to the first sentence in paragraph 39 where the judge vaguely says the PEI evidence could be used to assess credibility, the trial judge clarifies in the final sentence of that paragraph: "The Crown submits it may be used to assess the consistency of the Complainant's conduct and thus her credibility." His decision to use the PEI evidence to assess the complainant's credibility is in accord with two other comments he makes elsewhere in the reasons for judgment:

> [117 The Crown says her passive behaviour there (PEI), continued when they met in Nova Scotia. The Crown submits her credibility is high, when this evidence is used to "carry the narrative" into Nova Scotia. Once again, I have concluded I may use it in that context and for that purpose, but not to infer guilt of the Accused.
>
> * * *
>
> [129] In terms of Ms. L.'s evidence, it provides a useful framework for me as trier of fact to assess her credibility and to assist me in understanding the relationship between she and Mr. Taweel (much of which is denied by him) and the context within which the alleged offence in Nova Scotia is said to have occurred.
>
> [Underlining mine]

[141] In this appeal the parties have not challenged the judge's reliance upon the PEI evidence in his evaluation of S.L.'s general creditworthiness. Assuming, for the sake of argument, that this evidence could be applied for that purpose when

assessing the *complainant's* credibility, he went much further than that and used it as the basis for convicting the appellant. While the judge's *voir dire* ruling is silent as to his employing the PEI evidence to assess the *accused's* credibility, a thorough review of his reasons for judgment show that he did not restrict his use of the PEI evidence to assess S.L.'s credibility but that he also applied it to assess and reject Mr. Taweel's credibility, such that he was not left with any reasonable doubt as to his guilt on the offence as charged. I will provide four specific examples to illustrate where the judge improperly applied the PEI evidence to find that the appellant was not credible.

(a) *The Long Walk on the Beach*

[142] After they initially met at Stanhope Beach, the appellant and complainant both testified that they agreed to meet there the next day (although they dispute who orchestrated this second meeting). They both said they went for a walk on the beach and then sat down on a towel in the sand dunes where the appellant digitally penetrated the complainant.

[143] The judge mischaracterized the appellant's evidence about the length of the walk on the beach and then used this evidence from P.E.I to draw negative conclusions about the accused's credibility. The trial judge said:

> [78] In addition, when asked on cross what was discussed during their long walk he could offer nothing. He couldn't estimate how long, except to say it wasn't 10 hours.

[144] This characterization of the facts was unfair to the appellant. A review of the transcript showed that Mr. Taweel was unable, on cross-examination, to estimate the length of their walk on the beach. Crown counsel sarcastically asked him whether it was a ten hour walk to which he responded "no". However, Mr. Taweel then agreed, in short order, that it was "probably an hour". The judge ignored Mr. Taweel's clarification that the walk was an hour, preferring to characterize him as appearing evasive by saying that the walk was not 10 hours.

[145] The judge also drew the following negative conclusions about the accused's credibility from this exchange:

> [73] The Crown submitted further that Mr. Taweel was being less than candid when on cross examination he, all of a sudden, added that there had been a "long walk" on the beach with Ms. L. before they engaged in any sexual activity. This

> was added in cross examination when the issue of timing arose, but he failed to mention the "long" walk in his direct evidence.
>
> [74] To be fair Mr. Taweel did indicate in direct that she suggested that they would go for a walk, and re-iterated in cross that that is what they had planned to do.
>
> [75] None the less, I think the introduction of the word "long" was introduced by him at an opportune time. The Crown's position on this point has merit.
>
> [Underlining mine]

[146] It is difficult to see how one can draw a negative inference from the omission of the word, "long". One person's "long" walk is another person's afternoon stroll. In direct, the appellant was not asked how long he and the complainant had walked on the beach. Nor was the complainant asked about it.

[147] The judge then said:

> [99] The law tells us the best way to determine credibility is to identify inconsistencies in the witnesses own evidence and in consideration of the other evidence. It is important to try to resolve these inconsistencies and determine whether a finding of credibility can be made. This is a question of fact for which the standard is beyond a reasonable doubt.
>
> [100] One inconsistency is the Accused's addition of the word "long" to the walk which he took on the beach with the Complainant on the second encounter in PEI. In fairness, neither he nor the Complainant recalled much of the conversations. The Complainant often referred to "innocuous chit chat". Nonetheless, it was the timing of the the [sic] Accused's evidence which causes me concern. He appeared to be adding to the time that he spent with the Accused prior to sexual activity, or attempting to in his evidence given on cross examination.

[148] This passage reveals several errors. The judge was attempting to resolve an inconsistency, regarding an event in PEI, that he had only admitted for the purpose of narrative and to explain the relationship between the parties, but which the judge had now expanded to "determine whether a finding of credibility can be made". First, contrary to his stated intentions, the trial judge improperly used the PEI evidence to decide the accused's credibility. Second, as already described, while the Court must afford greater deference to the trier of fact's credibility findings, it is difficult to understand how the omission of the word, "long", represents an objective inconsistency in the appellant's evidence. Third, even if this were an inconsistency, the judge did not need to resolve it. The PEI evidence was not adduced so that the trier of fact could hunt through it in a search for

inconsistencies. While the length of a walk on the beach – and how much time the complainant and the accused spent together in total – before they engaged in sexual activity for the first time may be tangentially relevant to the issue of whether the accused and complainant consented to sexual activity in PEI, it is not relevant or probative of anything in Nova Scotia. Moreover, even if it had been relevant or probative, the PEI evidence was not admitted for this purpose.

(b) *Movements on the Blanket*

[149] The second piece of PEI evidence Murray J. used to judge Mr. Taweel's credibility relates to movements and body positioning between the accused and the complainant as they sat down on the blanket after completing their "long walk":

> [79] There are additional factors which I find are relevant in assessing Mr. Taweel's reliability and credibility. During cross examination he struggled on several occasions, giving vague accounts of what had transpired. For example, he was asked about his direct evidence, that he and the Complainant sat side by side on the blanket. First he said "yes, that's what I remember" and when pressed somewhat, said "yeah, I don't think we'd be sitting… yes that is what I remember." Then along the same line of questioning he was asked about him having his arm around her, and was asked to confirm his direct evidence and said "I believe it was around her comfortably. I don't know it was there, there, or there." He was then asked pointedly, "Was your arm around her or was your arm not around her?" He said, "Eventually, it went around her, exactly where, but eventually it went around her," he said.

[150] It is not clear how this evidence could affect Mr. Taweel's credibility or reliability. His answer as to whether they sat side by side on the blanket was consistent in both direct and cross-examination: "this is what I remember." So too with respect to the position of his arm, Mr. Taweel's answer was consistent: his arm went around her. He may not recall exactly when he moved his arm around her or how his arm was positioned, but his evidence was unchallenged. Again, it is hard to comprehend how this constitutes one of the "additional factors" that was relevant to negatively assess Mr. Taweel's reliability and credibility.

(c) *The Sexual Activity on the Beach*

[151] The third example refers directly to the appellant's evidence about their sexual activity on the beach. The judge says:

> [80] There was as well a lengthy exchange on cross examination, when Mr. Taweel was asked whether the Complainant touched him in any way. Without reading the entire exchange:
>
> Q.. … And did she touch you in any way?
>
> A. Other than that?
>
> Q. Uh huh.
>
> A. And kissing?
>
> Q. Uh huh.
>
> A. No.
>
> Q. Okay, so….
>
> A. Not that I can remember no, she may have but I can't remember.
>
> Q. Okay, so you can't describe all of the touching that took place within this physical encounter, is that what you're telling us?
>
> A. No, I can describe that because I, I remember that, that's why, that was very clear to me.
>
> …
>
> Q. Okay, but there are other moments that took place that you can't describe, is that true?
>
> A. That's true.
>
> …
>
> Q. And so, not to belabor this but I'm genuinely confused, do you remember all of this incident or do... are you unsure whether you remember all of this incident?
>
> A. No, I remember what I'm telling you.

[152] The judge's decision continues with another reference to the PEI evidence:

> [81] There are other instances when Mr. Taweel was hesitant when being asked about which hand or hands of hers guided his.

[153] At trial Mr. Taweel described how the complainant guided his fingers into her vagina. Crown counsel then questioned the appellant about whether there was any other touching or physical contact between the two of them at the same time. The appellant's testimony was clear that he recalled touching the complainant's vagina, and that there was no other sexual contact between them during that meeting. However, he could not recall, 22 years later, whether they were also kissing or whether they were touching each other's bodies while he was digitally penetrating her. Again, with respect, I do not understand how a lack of recall or

memory of every detail involved in this incident negatively affected Mr. Taweel's credibility.

(d) *The PEI Evidence in General*

[154] The final excerpt is difficult to fully comprehend:

> [87] Beginning with his description of how he met the Complainant, while walking in water up to his waist, I did not find him or his evidence convincing or particularly genuine. He did not seem to have a good memory, and as I have said the manner in which he testified, left me questioning his credibility with respect to these events.

[155] Here the judge is again referring back to their initial meeting on the beach and then says he is left "questioning his credibility with respect to these events." It is not clear whether by "these events", the trial judge is referring to the "incidents" in PEI or to both PEI and Dartmouth. Either way, the judge is assessing the accused's credibility based on his testimony of their encounters in PEI.

[156] Quite apart from these four discrete examples which I have outlined to illustrate the judge's misuse of the PEI evidence, it is also obvious that his discrediting of the appellant on that basis was then applied as a way of satisfying himself beyond a reasonable doubt of Mr. Taweel's guilt for the charged offence in Dartmouth. The judge's reasons show that he relates his conclusions concerning the PEI evidence, to the fundamental principle of proof beyond a reasonable doubt.

[157] Under the heading, "Issue #3 - Has the Crown established the guilt of the accused, Mr. Taweel based on all of the evidence?" the judge, over a number of pages, reviews the complainant's evidence regarding the events in PEI. On three separate occasions, he says he was only using the complainant's evidence for narrative and to explain the relationship. However, he concluded this part of his reasons as follows:

> [135] At this point, I will state I have not yet dealt with the cross examination of Ms. L. or the Nova Scotia evidence of Ms. L.. Further, I am aware of the numerous inconsistencies at play between the Crown and Defence. I must make every attempt to resolve these which include: whether there was any sexual activity; whether there was a threat; if I conclude there was touching, what does her acceptance or any co-operation have on the issue of consent. Mr. Taweel is entitled to have any and all defences considered by the court. (**R. v. Ewanchuk**, (1999) 1999 CanLII 711 (SCC), 1 S.C.R. 330 at paragraph 55.)

[158] Here and in subsequent paragraphs the judge again referred to inconsistencies he was attempting to resolve. I cannot discern whether the inconsistencies he was attempting to resolve relate to Dartmouth, or PEI, or both. Certainly he would not have to resolve "whether there was any sexual activity" in PEI since both principals had acknowledged that there was. More to the point, there was no need for the judge to attempt to resolve inconsistencies with respect to any of the events in PEI, because he had supposedly only admitted the evidence to provide narrative and context.

[159] Paragraph 136 is the most troubling part of the judge's reasons. He says:

> [136] In terms of reasonable doubt, what about the openness, his arm being around her on a public beach, him phoning her, did she provide her phone number, why show up, why not bring an adult, was it surreal, did it happen to her?

[160] The judge rhetorically asks himself eight questions "in terms of reasonable doubt". Although arguably, one or two are somewhat ambiguous – "what about the openness", "did it happen to her?" the remaining six questions all refer to the complainant's testimony regarding the PEI incidents. It is clear the judge has used the complainant's evidence about events in PEI in deciding whether this raised a reasonable doubt with respect to Mr. Taweel's guilt of the crime in Nova Scotia for which he was charged and prosecuted. Effectively the judge sifted through the differences in the testimony of the complainant and the appellant surrounding their encounters in PEI; found that the complainant was credible and therefore truthful in her description of those many encounters, six of which involved sex; found, accordingly, that the appellant was not credible because his account could not be true in the face of S.L.'s completely different account; which then led the judge to conclude that her description of what happened in Dartmouth was credible, and true, and based on the evidence which the judge did accept (her testimony, and not the appellant's), the judge was not left with any reasonable doubt as to his guilt, as charged.

[161] Respectfully, the judge applied the PEI evidence as a way of satisfying himself of Mr. Taweel's guilt beyond a reasonable doubt regarding the sexual assault in Dartmouth. By employing the "similar fact evidence" in such a manner, the judge unintentionally did, what he said he would never do. He ate the fruit of the poisonous tree. That error obliges us to set aside the conviction and order a new trial.

Conclusion

[162] The vast amount of detail concerning their encounters and relationship in PEI was largely unimportant. The sole narrative aspect for which the evidence was admitted was that Mr. Taweel and the complainant met previously on an undetermined number of occasions in PEI and that they likely continued some form of communication prior to their meetings in Dartmouth. In other words, the PEI evidence provided context to their relationship. The connection to the Dartmouth incident(s) was that the relationship in PEI was sexual, and that there could be a reasonable expectation the sexual activity would continue should they meet again.

[163] Arguably, the appellant's Admission of Fact made the PEI evidence irrelevant and unnecessary. Nothing more was required to provide narrative or context.

[164] Assuming the evidence had any probative value at all, it was nominal at best, and so grossly disproportionate to its prejudicial effect as to be easily rejected as inadmissible from the outset. On any reasonable view of this record, the judge ought to have concluded that the Crown had failed to satisfy the requirements for its admission.

[165] That said, the point on which this appeal turns was the judge's error in law when applying that evidence. Instead of restricting its use to the limited purpose of supplying narrative or context, the judge sifted through the PEI evidence that described in copious detail events for which the appellant had never been charged, in a searching comparison of the accounts given by the complainant and the appellant, pulling out statements the judge perceived as "contradictions" and "inconsistencies". The judge then applied those findings to discredit the whole of the appellant's evidence and to find him guilty of the offence in Nova Scotia for which he had been prosecuted.

[166] Such an approach allowed the poisonous nature of this similar fact evidence to infect the judge's reasoning and conclusions, with the result that the verdict was seriously compromised.

[167] I would allow the appeal, set aside the conviction, and order a new trial.

Saunders, J.A.

Concurred in:

Beveridge, J.A.

Van den Eynden, J.A.