NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Cain*, 2017 NSCA 96

Date: 20171228
Docket: CAC 460968
Registry: Halifax

Between:

Percy Cain

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 of the *Criminal Code*

Judge:	The Honourable Justice Joel E. Fichaud, van den Eynden, J.A. concurring; Scanlan, J.A. dissenting
Appeal Heard:	November 17, 2017, in Halifax, Nova Scotia
Subject:	Criminal law – prior consistent statements
Summary:	Mr. Cain was charged with sexually assaulting the Complainant. During the cross-examinations of the Crown witnesses, the Defence introduced the contents of the Complainant's oral and signed statements to the police, to challenge her with inconsistencies between her statements and her testimony. The Defence asked the judge to find that those inconsistencies impugned the Complainant's' reliability for the core allegations of assault. The trial judge found that the inconsistencies were insignificant and were attributable to the Complainant's short-term memory loss, caused by a stroke, while her relation of the central facts was consistent, and the inconsistencies did not impair the Complainant's reliability respecting the central allegations of sexual assault. The judge convicted Mr. Cain.

Issue:	Mr. Cain appealed to the Court of Appeal. His ground was that the judge infringed the rule against the use of a prior consistent statement.
Result:	The Court of Appeal (Fichaud, J.A., Van den Eynden, J.A., concurring) dismissed the appeal. The rule against the use of a prior consistent statement is subject to the contextual exception. That exception permits a trial judge to examine the context of the statement in order appraise the Defence's submission that the inconsistencies were material. The trial judge responded to the Defence's submission that the circumstantial inconsistencies impaired the Complainant's reliability on the core allegations of assault. The judge was entitled to consider the full statement in order to rule on that submission. Scanlan, J.A., dissenting, would have allowed the appeal due to the improper use of a prior consistent statement by the Complainant.

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Her Majesty the Queen

Respondent

Restriction on Publication: s. 468.4 of the *Criminal Code*

Judges:	Fichaud, Scanlan and Van den Eynden, JJ.A.
Appeal Heard:	November 17, 2017 in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Fichaud, J.A., Van den Eynden, J.A. concurring; Scanlan, J.A. dissenting
Counsel:	Roger A. Burrill for the Appellant James A. Gumpert, Q.C. for the Respondent

Order restricting publication – sexual offences

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 of Fichaud, J.A., Van den Eynden, J.A. concurring:

[1] Mr. Cain was charged with sexually assaulting the Complainant. During the cross-examinations of Crown witnesses, the Defence introduced the contents of the Complainant's oral and signed statements to the police and challenged her with inconsistencies between the statements and her testimony. The Defence's closing summation asked the judge to find that those inconsistencies impugned the Complainant's reliability for the core allegations of assault. The judge found that the inconsistencies involved only peripheral circumstances while the Complainant's relation of the central facts was consistent, and the inconsistencies did not impair her reliability respecting the sexual assault. He convicted Mr. Cain.

[2] On his appeal, Mr. Cain submits that the trial judge infringed the rule against use of a prior consistent statement.

[3] When the Defence introduces the prior statement of a Crown witness and submits that its inconsistencies with the witness' trial testimony on secondary facts so impair the witness' reliability to leave reasonable doubt on the central facts, may the judge consider the degree of consistency between the witness' statement and her trial testimony on those central assertions?

Background

[4] Mr. Percy Cain was charged with uttering a threat to cause bodily harm, sexual assault and assault, contrary to ss. 264.1(1)(a), 271(1)(a) and 266(a) of the *Criminal Code*. The charges related to events at the home of the Complainant on the evening of July 25, 2016.

[5] Mr. Cain was tried in the Provincial Court. Judge William Digby heard the evidence on October 26 and November 29, 2016 and January 31, 2017. After hearing submissions, on February 22, 2017 Judge Digby gave an oral decision.

[6] The judge acquitted Mr. Cain of uttering threats, found him guilty of sexual assault under s. 271(1)(a) and entered a judicial stay of the assault charge. On February 28, 2017, the judge sentenced Mr. Cain to thirty days' imprisonment.

[7] Mr. Cain appealed his conviction to the Court of Appeal on a question of law under s. 675(1)(a) of the *Criminal Code*. His ground is that the trial judge's use

of the Complainant's statements given to the police on the evening of July 25, 2016 infringed the rule against prior consistent statements. He requests a new trial.

[8] Critical to the appeal are the Complainant's prior statements to the police, how they were introduced into evidence, their tendered purpose by the parties and their usage by the trial judge. I will relate the background on these topics.

[9] **Evidence of the Complainant's prior statements:** Halifax Regional Police Constable Benjamin Rubarth was the Crown's first witness. On direct examination, he testified that, on July 25, 2016, he responded to a 911 call respecting an alleged sexual assault at the Complainant's home. He said:

> A. ...I responded, responded to the home of [the Complainant], collected a statement from her and spoke with her, learned information about the defendant's location, located him nearby, arrested him on a parole warrant and then arrested him for this trial.
>
> …
>
> Q. All right. Without getting into the specifics of what [the Complainant] said to you, could you explain exactly what happens from when you get to [the Complainant]'s apartment and what you do after that?
>
> A. Had a brief conversation with [the Complainant] about what had transpired. She advised that she was touched inappropriately, without getting into specifics, and provided me with a brief description of who had done that and the name of the person that had done that. She provided the direction of travel and when he was last seen.
>
> …
>
> Q. Okay. In your involvement with [the Complainant], did you note any signs of impairment?
>
> A. No. She indicated – I did ask actually while speaking with her at my first encounter with [the Complainant] at her front door had she been drinking. She advised that she had not, and I did not notice any indicia from her.
>
> …
>
> Q. Okay. How long – how long did you spend time with [the Complainant]?
>
> A. Not very long. I wasn't the officer who took a statement from [the Complainant]. So I spoke with her initially, gathered up the important information at that time regarding the offender and description, and I proceeded with my investigation, which was to locate him. Another officer, I believe, took a statement from [the Complainant].

[10] Cst. Rubarth said nothing else about the Complainant's written statement. The Crown did not offer the statement or its contents into evidence.

[11] On cross-examination, counsel for the Defence asked Cst. Rubarth to relate the details of the Complainant's verbal comments to him at the scene:

> Q. All right. How much detail did you get from her?
>
> A. Like I already described, clothing description, direction of travel and the name of the offender.
>
> Q. Okay. But no details with respect to what had happened?
>
> A. Briefly, that he had touched her inappropriately. I was – would you like me to go into the details as to exactly what she told me?
>
> Q. Please.
>
> A. Okay. She told me that Mr. Cain here had reached into her shirt and touched her breasts, and that he had also reached down her pants and touched her buttocks, that he had been there to change his clothes and had brought some alcohol that he put in her fridge, and that after he touched her she asked him to leave, called 911 and produced a knife in order to help encourage him to leave the home.

[12] The police officer who took the Complainant's written statement did not testify.

[13] The Crown's only other witness was the Complainant. On direct examination, she said that Mr. Cain was the father of her daughter, who was 4 ½ years of age at the date of trial, but she had not been involved with Mr. Cain since April of 2012. The Complainant testified that, on July 25, 2016, at around 7:40 p.m., she was in her back yard with her children. She saw Mr. Cain next door, and Mr. Cain entered her back yard through a gate and introduced himself to her daughter. Then she entered her house to feed and bathe the children. Next:

> Q. Okay. So you feed your kids, give them the bath. What do you do after that?
>
> A. I was just in my living room watching TV with my kids. Around 7:40 I get a knock on my door and it's Mr. Cain.

[14] She testified he asked to come in to change his clothes, to which she said "No", but he persisted and she allowed him to enter, and he changed his clothes and left. Next was the crux of her evidence on the charges:

A. … And then he came back five minutes later asking to put wine in my fridge, in my freezer. So I put his wine in the freezer but I could see clearly that he had something else in mind because I wasn't – I don't drink wine anyway.

…

Q. Three bottles of wine. And what happens once he gets those bottles in the freezer?

A. He started counting money, counting his change out. And I would say I was standing in the kitchen, he was in the kitchen, and that's when he reached over to touch my chest.

Q. Okay.

A. And he put his hands in the back of my shorts to touch my bum.

Q. Okay.

A. And when I asked him not to touch me, he told me I was his. And so that's when I asked him to leave and I called the police. And while I was on the phone with the police, I grabbed a knife, and he still wouldn't leave and I was talking to the police officers.

…

Q. Okay, And …

A. When I told him I was calling the police. Told me he didn't care.

Q. All right. And did he do anything else?

A. He put his hands around my throat and when I – that's when I asked him to leave again and he told me – he proceeded to tell me he was just joking. He didn't mean nothing by it. But at that point in time, when it happened, my kids are only in the next room, and I cannot be too – I don't know him so I can't be too careful – like, I can't be too cautious with him.

…

Q. All right. Did you consent at all to him touching you the way that that he touched you that night?

A. No.

…

Q. You said that after what happened in the kitchen, you got the knife, and you said that you walked him out of the house with the knife pointed at him. Did you say anything to him at the time or did he say anything to you at that time?

A. He said he'll get me back for this.

...

[15] The Crown's direct examination of the Complainant did not elicit evidence of the written statement that she later gave to the police. The Crown did not offer that statement or its contents into evidence.

[16] On the first day of the Complainant's cross-examination, October 26, 2016, Defence counsel attempted to establish inconsistencies in her evidence. She acknowledged she had been intimate with Mr. Cain over several periods in the past, the last time in May of 2012. This was after the April 2012 occasion that she had related in her direct evidence. The Defence pointed out the contradiction. The Complainant explained that she suffered from short-term memory loss induced by a stroke:

> Q. Okay. But when Mr. McCarroll asked you initially about your relationship with Mr. Cain, you didn't mention May of 2012. Why is that?
> A. I -- I'm a stroke victim and I have short-term memory loss.
>
> Q. Okay. When did you have a stroke?
>
> A. June of 2013.
>
> Q. All right. And what you describe as short-term memory loss, I guess, what's the effect afterwards, after the stroke, on your memory?
>
> A. Um, I have a lot of things I really can't remember.

[17] Defence counsel then cross-examined extensively on the Complainant's signed statement given to the police in the evening of July 25, 2016. The objective was to impugn her reliability by showing inconsistencies with her testimony in court:

> Q. Okay. You recall giving a statement to the police?
>
> A. Yes.
>
> Q. All right. And that statement was given the same night of the alleged incident, on July 25th, 2016?
>
> A. Yes.
>
> Q. And when you met with the officer, did you do the writing on the – on the paper or did the officer do the writing on the paper?
>
> A. The officer did the writing.
>
> Q. Okay. So were you just telling the officer what happened and the officer was writing down what you were saying?
>
> A. Yes.

Q. All right. After you were done telling the officer what had happened, did you have a chance to read the statement over?

A. Yes.

Q. All right. And do you remember signing the statement?

A. Yes.

Q. And did you agree that that statement was accurate at the time that you signed it?

A. Yes, at the time.

Q. Did you have a chance to read that statement today before court?

A. Yes.

Q. Okay. I'm going to ask you a question and see if you recall this part of your statement, first of all. You were asked by the officer, "What was your relationship with William Cain?" And you answered, "We were in an intimate relationship for two weeks, we have one child together." Do you remember that question and answer part of your statement?

A. Yes.

Q. All right. That doesn't seem to match up with what you've said here today on the stand. You told the officer about two weeks, being involved with Mr. Cain for two weeks, but you didn't make any reference to any other periods of intimacy or …

A. Because it wasn't – it's not – it's not – it didn't mean nothing to me.

…

Q. You indicated you had a chance to review your statement before court today. I'm going to suggest to you that there is no reference in your statement to Mr. Cain leaving after five minutes and then coming back in five minutes, that according to your statement he was there on one occasion and one occasion only and everything took place during that one occasion.

A. No.

Q. Do you agree with me or disagree with me?

A. I -- I agree that it's in there but, like I said, I have short-term memory loss.

Q. Okay. So are you saying that your statement you gave to the police is inaccurate or are you saying your testimony here today is inaccurate?

A. My statement with the police is inaccurate probably.

Q. Your statement was inaccurate. Okay.

A. Because he came back to my house after he left.

Q. Okay. You would agree with me that the statement you gave to the police was given a very short time after the incident?

A. Um-hmm

Q. And that now we are months later?

A. Um-hmm.

Q. Okay. I'm going to suggest to you that most people, the memory would be better very shortly after an event than months later. Would you agree or disagree with that?

A. I would disagree.

Q. You'd disagree?

A. Yeah.

Q. Do you think people …

A. Because I wrote – I wrote my stuff down on my tablet. That's how I remember it.

Q. Okay. Did you write down what took place that night on your tablet?

A. Yes.

Q. Did you ever show it to anyone?

A. No.

Q. What was the purpose in writing down what took place?

A. My short term memory loss.

Q. Okay.

A. So I wanted to have everything written down.

…

Q. Okay. I'm going to suggest to you that in your statement to the police you presented that sequence of events differently. And to be fair to you, I'm going to ask if I can borrow Mr. McCarroll's [counsel for the Crown] statement just for a second and I'll read the appropriate portion next to him.

MR. SARSON: So I'll show her this part. I'll show her mine.

MR. MCCARROLL: Sure.

MR. SARSON: It's not marked. Okay.

BY MR. SARSON:

Q. I'm going to show you a document, [Complainant], and ask if you recognize that.

A. Yes.

Q. Okay. And what do you recognize it as?

A. My statement.

Q. All right. And there is a signature on the bottom right-hand page of one, two, three pages?

A. Yes.

Q. Do you recognize that signature?

A. Um-hmm.

Q. And that's your signature?

A. Um-hmm.

Q. All right. And this is the statement that you said that the police officer wrote and then you reviewed afterwards, right?

A. Um-hmm.

Q. And that was given the same night of the incident, correct?

A. Yes.

Q. I'm going to refer you to page 2 of that statement. One, two, three, four lines down. I'm going to read a portion to you and then see if you remember telling this to the police.

> "Then when I told him, 'Don't touch me', he said, 'You're mine. I can touch you if I want.' That's when I grabbed the knife, and then he walked out saying, 'I'll get you back.' Then I was on the line with the police. Then he ended up leaving."

Okay?

A. Um-hmm.

Q. Do you agree that that's what it says in your statement?

A. Yes.

Q. So in your statement he makes a comment to you, you grab the knife, you walk him out, he says, "I'll get you back," and, "Then I was on the line with the police." Do you agree that that's different than what you testified earlier?

A. Yes.

Q. Okay. Can you account for those differences, explain those differences?

A. No, because I thought I was on the phone.

Q. Okay. So are you – are you adopting what was said in your statement or are you maintaining what you said on the stand today as accurate?

A. I'm not sure.

…

[18] On November 29, 2016, when the Complainant's cross-examination resumed, counsel for the Defence took an unusual step. As the Complainant's reading literacy was inadequate, counsel read the complete statement to her and had her identify it. Counsel then questioned her about its inconsistencies with her testimony in court:

> Q. Okay. I'm guessing you probably didn't have a chance to read your statement today before court, did you?
>
> A. No.
>
> Q. Okay. A couple of things. One, you just talked about the children falling asleep on the sofa in the living room of the main level of your house when Mr. Cain was at your residence. Do you recall being asked in your statement, "Did the children witness the incident?" and you answering, "No, they were upstairs sleeping"?
>
> A. Yes.
>
> Q. You remember saying that to the police?
>
> A. Yes, but he had come back again.
>
> Q. Okay. How many times did he come back to your place that night?
>
> A. Three times.
>
> Q. Three times he came back. Okay. I'm going to suggest to you that in your statement to the police, your statement only indicates he was there one time that evening.
>
> A. Um-hmm.
>
> Q. Do you agree with me or disagree with me or would you like to review your statement, have a chance to look at that again?
>
> A. I don't know.
>
> Q. How about I give you – I'd like you to review your statement, if you could. Is your reading okay?
>
> A. No.
>
> Q. It's not okay?
>
> A. No.
>
> Q. Okay.
>
> **MR. SARSON:** Sean, I'm going to propose to read it to her.
>
> **MR. MCCARROLL:** That's fine.

MR. SARSON: Okay.

BY MR. SARSON:

Q. I'm going to ask you first if you recognize this, I guess. I'm showing you three pages of paper. Do you recognize those pieces of paper?

A. Um-hmm.

Q. All right. And what do you recognize those as?

A. My statement.

Q. Okay. Statement given to the police?

A. Yes.

Q. And there's a signature down on the bottom right-hand corner of page 1, page 2 and page3?

A. Yes.

Q. All right. And that's your signature on each page?

A. Yes.

Q. Now, the handwriting on the statement, is that your handwriting or the police officer's handwriting?

A. Police.

Q. Okay. So the police officer asked you what happened, you just talked and the police officer wrote down what happened, what you said?

A. Um-hmm.

Q. Okay. Before signing the statement, did you either have a chance to read the statement or have the police officer read the statement to you?

A. I can't remember.

Q. Okay. All right. I'm going to read your statement into the record and I'd like you to listen carefully, okay? And you actually start:

> "Um, it was around 7:40 p.m. and I was just getting my kids ready for bed and he knocked at the door. He asked to change his clothes. I said no. Then he showed me his clothes and said, 'I don't have anything else to wear.' So I said okay and he went to the bathroom. He came back down and asked if he could put his wine in my freezer, and, um, that was fine. Then he was counting up his change on the table, he was counting money. Then he got up and proceeded to touch my chest and my bum. I told him, 'I don't want you like that.' He was touching me all over my shirt, then went to my bum and went under my pants. Then when I told him, 'Don't touch me,' he said, 'You're mine. I can touch you if I want.' That's when I grabbed the knife and then he walked out saying, 'I'll get you back.' Then I was on the line with police, then he ended up leaving."

And then you were asked a series of questions by the police and you answered the questions. The first question is:

> "When you say 'he', who do you mean?"

And your answer was:

> "William Cain. He goes by Percy."

The next question was:

> "Did he hit or push you?"

And your answer was:

> "No. When I told him to go, he grabbed me with both hands by the neck."

Next question was:

> "Was he choking you?"

And your answer was:

> "No, he tried to choke me and that's when I grabbed the knife. That's when he took his bag and his wine and left."

The next question was:

> "When you say, 'He tried to choke me,' what do you mean?"

And your answer:

> "He had his two hands on my throat, he wasn't squeezing. He then said, 'I'll get you for this.'

And then you're asked:

> "What was your relationship with William Cain?"

And you answered:

> "We were in an intimate relationship for two weeks. We have one child together."

Then you were asked:

> "Did you ever ask him to touch you tonight [*sic*]?"

And you answered:

> "No, I didn't want it. We were together four years ago."

And, finally, you were asked:

> "Did the children witness the incident?"

And you answer:

> "No, they were upstairs sleeping."

Okay? So I'm going to suggest to you that that's the statement you gave to the police.

A. Um-hmm.

Q. Do you recall giving that statement to the police?

A. Yes.

Q. Okay. So the first thing I'm going to suggest to you is that your statement to the police does not indicate that Mr. Cain came to your residence on three separate occasions that night. Do you agree with me or disagree with me?

A. I agree.

Q. All right. But your testimony here today is that he came to your residence on three separate occasions that night.

A. Um-hmm.

Q. Or that day. When was the first of those occasions?

A. I can't remember.

Q. When was the first time he came to your house that day?

A. I can't remember.

Q. Okay. You talk about him coming and knocking on your door and asking to change his clothes, right?

A. Um-hmm.

Q. Was that the first time he came to your house that day, the second time or the third time?

A. I think that would have been the third.

Q. You think that was the last time? All right. And when he came and knocked on your door and asked to change his clothes, when had he been there earlier that day, a little while ago, a long while ago?

A. I don't remember. I'm not sure.

Q. You're not sure. Okay. Do you think – because you talked about him coming – last day you talked about him coming twice in the evening and a little bit ago you talked about him coming a few hours later. So of the three times you're thinking about, were all of them in the evening or the night or were some of them earlier that day?

A. I'm not sure.

Q. I asked you a minute ago about where the children were when the incident took place and you talked of the kids being asleep on the couch in the living room.

A. That was – that was – that was at the – they were asleep the time he wanted to bring the wine in. By the time he came up, I was holding the baby, yeah.

Q. Okay. But when you were asked by the police if the children witnessed the incident that we're talking about, you answered, "No, they were upstairs sleeping."

A. Well, that's what I call upstairs because that's where they like to sleep.

Q. Okay. So you call the living room "upstairs"?

A. Yeah, because that's where they like to sleep.

Q. Okay. But the living room is on the main level of your house, right?

A. Um-hmm.

Q. And there is a separate upstairs with bedrooms in it, right?

A. Um-hmm.

Q. So you don't call the bedrooms upstairs "upstairs," you call the living room "upstairs"?

A. Yeah.

Q. You also talk about, in your statement, Mr. Cain having "his two hands on my throat, he wasn't squeezing. He then said, 'I'll get you for this.' " You may recall last day you talked about Mr. Cain putting his hands on your throat, not squeezing but then saying, "Oh, I'm just joking with you" or, you know, "I'm not serious."

A. Yeah.

Q. Do you remember saying that last day?

A. Yeah.

Q. Okay. Well, it seems to me that last day his hands were being on your throat wasn't serious, it was a joke, but in your statement you talk about him trying to choke you and then saying, "I'll get you for this," So was he serious or was he not serious when he put his hands on your throat.

A. He was not serious.

Q. He was not serious. So the part where you say he says, "I'll get you for this," did he say that when his hands were on your throat or a different time?

A. When he was walking down the steps.

…

[19] On her re-direct examination, the Complainant was asked to elaborate on her stroke-induced memory lapses:

Q. When was it that you had the stroke?

A. June 2013.

Q. All right. And can you explain how that has affected you?

A. I have a hard time remembering things. I forget a lot of things. I misplace things, lose a lot of stuff.

Q. Okay. What sort of things do you forget?

A. Keys, remotes, stuff, phone or something like that.

Q. All right. And you said last time, you claimed it was short-term memory loss?

A. Um-hmm.

Q. From your experience dealing with that, how does it differ between things that happened a couple of days ago as opposed to things that happened a long time ago?

A. I'm not sure because I can remember things from a long time ago.

Q. All right. What about things that happened yesterday?

A. I can do pieces.

Q. You've talked about – you've talked a lot about what happened on this particular day, the day that Mr. Cain came over to your house.

A. Yes.

Q. How is your memory with regards to those matters?

A. I can remember bits and pieces.

Q. All right. And when you look back on it, is it – when you say bits and pieces of it, exactly what do you mean by you remember just bits and pieces?

A. I can remember some things, some things it might take me a little longer to remember.

[20] **Mr. Cain's evidence:** Mr. Cain was the only witness for the Defence. He testified that he had a prior sexual relationship with the Complainant, but was not the father of her daughter. He said that, on July 25, 2016, he went to the Complainant's house to dispute her suggestion that he was the father. His direct evidence described the events at the Complainant's home:

A lot of people was telling me that [the Complainant] was going around telling people that she had my daughter. At that time I had three bottles of wine in my bag with me. It was an LCB Liquor Store bag, three bottles of wine was in there. Before I went to my niece's house, I went over to [the Complainant]'s and we confronted her about her daughter. She started laughing. I was getting ready to leave, she said, "Give me a bottle of" – she asked me what I had in the bag. I told

> her. She said, "Well, give me a bottle." I said – I said – "No." She said, "All the alcohol that you took from my house, you can't give me a bottle of wine?" I was on the second step, she asked me for $10 to buy a pack of cigarettes. I looked at her, I said, "Are you serious?" She said, "Give me $10 to buy a pack of cigarettes." I went back upstairs, took the change out of my pocket, I counted out $10 in change on her table for the cigarettes and I walked out.

[21] Mr. Cain denied that he touched the Complainant's chest, buttocks or throat, and denied that he told her "I'll get you for that".

[22] **Summations respecting the Complainant's prior statements:** The closing summation for the Defence focused on the inconsistencies between the Complainant's testimony and her prior statements:

> I would respectfully submit that based on the inconsistencies you saw in her testimony, as well as her acknowledgement that her medical condition has caused her to have some issues with respect to his memory, that the Court cannot … this Court simply cannot be satisfied beyond a reasonable doubt that [the Complainant]'s testimony is reliable. I would, therefore, ask Your Honour to find Mr. Cain not guilty on all three counts.
>
> …
>
> Just wanted to highlight some of the inconsistencies of the complainant [name of Complainant]. And I guess I would start with her acknowledgement that her statement to the police was not accurate ….
>
> Anyways, the … I would suggest that the list of inconsistencies was long, they were significant and not just on minor details. I would suggest that her memory clearly was impacted by the stroke. She acknowledged her statement to the police was not accurate. And in all the circumstances, I would suggest that her evidence simply is not reliable to the extent that it can be relied on to prove the Crown's case beyond a reasonable doubt.

[23] The Crown responded that the Complainant's inconsistencies involved peripheral matters that were attributable to her stroke, but that she clearly recalled and related the core allegations of assault, for which her testimony was reliable:

> … I would submit that [the Complainant] is a trustworthy, credible witness, a woman that comes before the Court with no criminal record whatsoever. She is, as my friend quite rightly mentions, a stroke victim. On redirect she was asked about that and she does say that she remembers bits and pieces, that it takes her a longer time to think about things. She says she can remember some things. "Some things, it might take me a little bit longer to remember."

> I agree with my friend that there were some inconsistencies that arose during [the Complainant]'s testimony, but those inconsistencies were all details on the periphery of the alleged assault here. And when you go back and look at her testimony, it's clear that [the Complainant] was confused by some of the questions, by the timelines of this event. But one thing she was absolutely not confused about was the actual allegation of assault, of what happened inside that apartment.

[24] **Trial Judge's use of the Complainant's prior statements:** Judge Digby gave an oral Decision on February 22, 2017.

[25] After reviewing the burden of proof and the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, the judge recited the positions of the parties. He described the Defence submission:

> The Defence position in this case is that [the Complainant] gave such conflicting versions of events between her statement to the police officer, the oral statement given to Cst. Rubarth, the statement given in writing to an officer later that evening, and her testimony on the two days that she testified in court should not be considered reliable.

[26] Prefacing his comments on the Complainant's credibility and reliability, Judge Digby noted:

> With respect to [the Complainant]'s evidence, it has to be viewed in view of her stated medical condition.

The judge then related the evidence of the Complainant's stroke, its impact on her short- term memory and her exchange on re-direct examination that I have quoted earlier (para. 19).

[27] The judge then focused on the Defence position that the contradictions impaired her reliability:

> Mr. Sarson, on behalf of Mr. Cain, in his final portion of his summation, went through the various contradictions in Ms. Cain's [*sic*] evidence in great detail. I accept Mr. Sarson's point that the contradictions are numerous. In my view, a number of them can be accounted for by the short-term memory loss. That, of course, still leaves the question of whether or not the core allegation of touching her breasts and Mr. Cain's insertion of his hand or hands inside her pants and touching her buttock without her consent are accurate.

[28] After discussing some inconsistencies in the Complainant's evidence, Judge Digby turned to her statement and said:

> The other issue aside, that **if she was to be making up a complaint for someone with short-term memory issues, trying to maintain a story over a period of time would be difficult**. **And with respect to the core of her story, it's … it shows a great deal of consistency over time.**
>
> …
>
> … And I note there is a slight discrepancy between her evidence at trial and the timing of the 9-1-1 call. She said in her oral evidence after further expanding on the touching on the chest and the touching of the buttocks, that she had a cell phone … a cordless phone. She was using it to call 9-1-1.
>
> **There's a consistent thread about the complaint that goes from one part to the other. There are some minor discrepancies, but I don't view them as significant. I'm satisfied that Mrs.** *[sic]* **[**the Complainant**] was doing her best to be truthful in her evidence. I find that with respect to the touching of her chest and the touching of her buttocks, that her evidence is correct and it's not mistaken. I'm satisfied beyond a reasonable doubt with respect … that those events happened.**
>
> With respect to many of the other events that night, I'm not prepared to make the same finding. Often, in cases of this, there is an attempt to discredit a witness by going through events surrounding the incident and hoping thereby to weaken their credibility with respect to the allegations which form the charge. **I'm satisfied there are reasons for the problems with the evidence which arise from her stroke, but I find that doesn't affect her evidence with respect to the particular allegations.** [emphasis added]

The bolded passages are central to the submissions on this appeal.

[29] The judge separately discussed Mr. Cain's testimony, and found his reliability to be wanting.

[30] He found there was no consent:

> I'm satisfied that … beyond a reasonable doubt that [the Complainant]'s allegations that Mr. Cain's touching of her breasts and touching of her buttocks was without her consent.

[31] Judge Digby concluded:

> I find him guilty with respect to the charge of sexual assault. I find that the Crown has proven all the elements of that offence beyond a reasonable doubt. …

Issue

[32] On March 2, 2017, Mr. Cain appealed his conviction. His Amended Notice of Appeal of May 11, 2017, after he retained appeal counsel, cites as a ground: "the Trial Judge erred in his use of the prior consistent statement of the complainant." His factum makes submissions on this single issue.

Analysis

[33] Mr. Cain submits that Judge Digby's reasons offended the rule against prior consistent statements. His factum says:

> 33 Prior consistent statements … are presumptively inadmissible. They lack probative value and constitute hearsay.
>
> 34 Justice Paciocco, in his seminal academic work on the topic [David M. Paciocco, "The Perils and Potential of Prior Consistent Statements: Let's Get it Right" (2013), 17 Can. Crim. L. Rev. 181] explained the principle as follows:
>
> > The most common explanation for the general exclusion of the "declaration part" of prior consistent statements is that prior consistent statements lack probative value. The theory is that "consistency is a quality just as agreeable to lies as to the truth". Yet there is a risk that decision-makers may not appreciate this. They are apt, it is believed, to mistakenly treat a prior consistent statement as corroborative when logically it cannot be. Corroboration requires support from an independent source, but here the declarant and the witness are the same source. It is therefore considered to be sage in protecting the integrity of the factual findings to exclude proof of the potentially distorting fact that the witness made a prior consistent statement.
> >
> > This thinking not only supports the general exclusionary rule, it has also produced two important rules that apply even where prior consistent statements are admissible pursuant to exceptions. The first is the prohibited inference. Even where a prior consistent statement is admitted, "it is impermissible to assume that because a witness has made the same statement in the past, he or she is more likely to be telling the truth". The second is the "rule against corroboration". Even where a prior consistent statement is admitted, it is an error to treat the prior consistent statement as corroborating the in-court testimony.
>
> …
>
> 39 The appellant says that the manner in which the Trial Judge treated the prior consistent statement shows that he used it for purposes of "confirming" the in-court testimony of the complainant. The Trial Judge reviewed the circumstances

> of the prior consistent statement(s) and was impressed with the "consistent thread about the complaint that goes from one part to the other."…
>
> …
>
> 46 The Trial judge erred in using the prior consistent thread of the complainant to confirm the in-court testimony of the complainant. …

[34] There are exceptions to the rule. Mr. Cain's factum cites two of them and submits: (1) this is not "narrative" as explained in *R. v. Dinardo*, [2008] 1 S.C.R. 788; and (2) as the Complainant's stroke in 2013 preceded both her statement and her testimony, the "rebuttal of recent fabrication" exception explained in *R. v. Stirling*, [2008] 1 S.C.R. 272 does not apply.

[35] In my view, the judge did not err in his use of the Complainant's prior statement. I agree that the narrative and recent fabrication exceptions do not apply. However, the issue is governed by the contextual exception which permits a trial judge to fully appraise the Defence's submission that the inconsistencies were material. That is what Judge Digby did.

[36] The Defence, not the Crown, introduced the Complainant's prior statements into evidence. These were: (1) her verbal recitation that she related to Cst. Rubarth at the scene, elicited in Cst. Rubarth's cross-examination (above, para. 11); and, more significantly (2) her signed statement later in the evening, elicited in her cross-examination (above, paras. 17-18). The Defence's closing summation asked the trial judge to find that inconsistencies between the prior statements and the Complainant's trial testimony, on several collateral matters, showed she was so unreliable that her evidence was not probative on the core allegation of sexual assault (above, para. 22).

[37] The judge dealt with the Defence's theory. Judge Digby found that the inconsistencies cited by the Defence were only peripheral and were explained by the Complainant's stroke-induced memory loss. He rejected the Defence's submission that those inconsistencies showed the Complainant to be unreliable on the central events (above, paras. 27-28).

[38] The judge's use of a prior statement for that purpose is both sensible and well-supported.

[39] I adopt the following explanation of the contextual exception from Justice Paciocco's article which Mr. Cain cites as seminal (above, para. 33). Paciocco, J.A. (as he now is) said:

While the basic rule is simple enough, there are numerous exceptions to that basic rule that complicate the law. An exception, of course, exists where the law permits decision-makers to learn that witnesses have made prior statements consistent with their current testimony. **Those exceptions include**:

…

(4) Prior consistent statements that provide context for admissible statements;

…

(d) Exception (4) – Prior Consistent Statements that Provide Context for Admissible Statements

The "entire statement rule" can lead to the presentation of prior consistent statements. It holds that where a party proves an admissible statement, this must not be done in a misleadingly selective way. As a matter of fairness, the party proving that statement should not take it out of context – it should prove the entire statement. …

The same principles, therefore, operate where counsel confronts a witness with a prior inconsistent statement. The party launching that challenge should, as a matter of fairness and even ethical obligation, put the entire statement to the witness so that the context of the inconsistencies can be understood, failing which opposing counsel will be permitted to unfold the entire related conversation. Indeed, this tactic can result in related statements being admitted. …

There is nothing, therefore, to prevent a party from pointing to the consistency between the prior related statement and the testimony of their witness. This is not done to prove that the witness was being truthful in their testimony on those matters – the mere making of prior consistent statements does not prove credibility nor do prior consistent statements of a witness corroborate their in-court testimony. **The consistencies are relevant solely to enable the decision-maker to judge whether the relevant statement is really materially inconsistent when looked at as a whole, and to gauge the impact that any differences in detail should have on the overall credibility and reliability of the witness**. In effect, the consistent features of the prior statement do not add affirmative weight to the party's scale**. They are used simply to knock the "inconsistency" challenge off the opposing party's scales, or to reduce the weight of those inconsistencies that may remain**. [emphasis added]

[40] As an example, in *R. v. Smith*, 2010 ONCA 229 Justice Sharpe for the Court said:

23 I reach the same conclusion with respect to the prior consistent statement issue. It was the defence that led virtually all of the relevant evidence in an effort to undermine the complainant's credibility. While the Crown overstated the

> significance of the prior consistent statements at issue, **it was nonetheless entitled to rebuff any suggestion that the complainant had been inconsistent**.
>
> [emphasis added]

[41] Similarly, in *R. v. Demetrius*, [2003] O.J. No. 3728 (C.A.) Justice Sharpe for the Court said:

> 18 … Had the defence not advanced the position that the prior statements made its case more plausible, the Crown would have been limited to using the prior statements for its original purpose, as part of the narrative. However, in view of the argument advanced by defence counsel in his closing address**, the Crown was entitled to respond with its own explanation** of the significance of Jack's hospital statements. [emphasis added]

[42] To like effect: Justice S. Casey Hill and David M. Tanovich, *McWilliams' Canadian Criminal Evidence* (Toronto: Thomson Reuters Canada Limited, 2014), 5th ed. loose-leaf, vol. 2, para. 11:40.60 and footnote 267, with the accompanying text, citing *Smith* and *Demetrius*.

[43] Judge Digby found:

> The other issue aside, that if she was to be making up a complaint for someone with short-term memory issues, trying to maintain a story over a period of time would be difficult. Ans with respect to the core of her story, it's … it shows a great deal of **consistency over time**.
>
> …
>
> I accept Mr. Sarson's point that the contradictions are numerous. In my view, a number of them can be accounted for by the short-term memory loss. …
>
> There's a **consistent thread** about the complaint that goes from one part to the other. There are some minor discrepancies, but I don't view them as significant. I'm satisfied that Mrs. [*sic*] [Complainant] was doing her best to be truthful in her evidence. I find that with respect to the touching of her chest and the touching of her buttocks, that her evidence is correct and it's not mistaken. I'm satisfied beyond a reasonable doubt with respect … that those events happened.
>
> [emphasis added]

[44] Mr. Cain's submission focuses on the judge's phrases "consistency over time" and "consistent thread". He says those forbidden words red flag an infringement of the rule against prior consistent statements.

[45] With respect, the submission ignores the contextual exception. Judge Digby did not appropriate the Complainant's statement as free-standing confirmation of her testimony. Had he done so, this would be a different matter. Rather, he responded to the *Defence*'s theory that the Complainant's prior statement, introduced in full by the Defence, was so *inconsistent* on circumstantial matters as to impair her reliability for the central allegation of assault. Absent this Defence theory, the judge's reasons would not have mentioned the prior statement.

[46] To repeat the Defence's closing summation:

> … the list of inconsistencies was long, they were significant and not just minor details. I would suggest her memory clearly was impacted by the stroke. She acknowledged her statement to the police was not accurate. And in all the circumstances, I would suggest that her evidence simply is not reliable enough to the extent it can be relied on to prove the Crown's case beyond a reasonable doubt.

[47] The "consistency over time" and "consistent thread" on the core events assisted the judge to infer that the inconsistencies cited by the Defence on collateral matters were attributable to the Complainant's stroke-induced memory loss, but did not signify an impaired recollection of the actual assault. The Defence argued that the discrepancies spilled over to tarnish the Complainant's reliability on the central facts. Judge Digby was not persuaded.

[48] There is no ground of appeal for unreasonable verdict. The only issue is whether the judge could consider the consistent aspects of her prior statement under the contextual exception.

[49] A judge may fully appraise the Defence's submission on the impact of the inconsistencies. The judge is not constrained to examine only the extracts cited by the Defence, and precluded from considering the context. Judge Digby performed the decision-maker's function that Justice Paciocco's article identifies as within the contextual exception:

> The consistencies are relevant solely to enable the decision-maker to judge whether the relevant statement is really materially inconsistent when looked at as a whole, and to gauge the impact that any differences in detail should have on the overall credibility and reliability of the witness. In effect, the consistent features of the prior statement do not add affirmative weight to the party's scale. They are used simply to knock the "inconsistency" challenge off the opposing party's scales, or to reduce the weight of those inconsistencies that may remain.

[50] On the appeal, Mr. Cain's counsel asserted that, as the Complainant's reading ability was below par, the Defence trial counsel had no option but to read her the entire statement. With respect, that circumstance does not affect the application of the contextual exception. There often are pros and cons to adopting a strategy on cross-examination. The Defence weighed them and, on the second day of the Complainant's cross-examination, decided it was worthwhile to read her the full statement. As Justice Paciocco's article says, "the party providing the statement should not take it out of context – it should prove the entire statement" (above, para. 39). Had the Defence read her only extracts, then on re-direct examination the Crown could have entered other extracts to give proper context. At the end of the day, the trial judge would have the context as a resource to appraise the Defence's submission on the impact of the inconsistencies.

[51] The judge's use of the prior statements did not err in law.

Conclusion

[52] I would dismiss the appeal.

Fichaud, J.A.

Concurred: Van den Eynden, J.A.

Dissenting Reasons for Judgment: (Scanlan, J.A.)

[53] I have the benefit of reading the decision of my colleagues. For the reasons set out below, I reach a different conclusion. It is not necessary that I repeat all of the background as set out by my colleague but I do repeat some of the evidence for ease of reference.

[54] The analysis that follows begins with what I consider is well settled law, that unless prior consistent statements of a witness fall into certain exceptions they cannot be used as corroborative of the in-court testimony of a witness. (See *R. v. Laing*, 2017 NSCA 69.) I am satisfied the trial judge improperly used prior consistent statements of the complainant to corroborate her in-court statement. That error was an error in law, of sufficient import to warrant the verdict of guilty being set aside and ordering a new trial before a different judge.

Analysis

[55] The circumstances as to how the evidence came to be before the court in the first place and the purpose for which defence counsel asked the court to use the prior statements of the complainant is critical on this appeal. Those factors are relevant to the issue of the lawful limitations on the trial judge's use of prior consistent statements. I will also review the testimony of the complainant in court compared to prior statements. I do so only to highlight some of the inconsistencies, and how defence counsel urged the trial judge to consider the inconsistencies when assessing credibility. I will look at the use the trial judge made of the prior statements. As I do that, I am cognizant of the fact that the rule excluding prior statements of a witness can be described as a rule of exceptions; there are a number of ways that prior statements can be admitted for limited purposes or based on the peculiar circumstances of each case. With the greatest respect to the trial judge and to my colleagues, I am satisfied the trial judge in this case improperly considered a prior consistent statement to weigh the evidence of the complainant.

[56] Counsel often use prior statements made by witnesses as the basis of cross-examination of a witness. In fact counsel could be said to be negligent in many cases if they fail to highlight inconsistencies between a witness's prior statements and the in-court evidence. In most cases we would see counsel give a witness an opportunity to review his/her prior statement or statements. When that is done, counsel have a duty as an officer of the court to allow the witness the opportunity to review the entirety of their prior statement/statements. (See David M. Paciocco,

"The Perils and Potential of Prior Consistent Statements: Let's Get it Right", (2013) 17 Can. Crim. L. Rev. 181 where he states:

> (… where counsel confronts a witness with a prior inconsistent statement.) The party launching that challenge should, as a matter of fairness and even ethical obligation, put the entire statement to the witness so that the context of the inconsistencies can be understood, failing which opposing counsel will be permitted to unfold the entire related conversation.

[57] Counsel are not required to put the entirety of prior statements before the court, but they are obliged to allow the witness to consider the entirety of her/his prior statements. On October 26th, 2016, the complainant said she had read her statement before signing it and before coming to court that day. On the second day of her cross-examination, November 29, 2016, it became apparent that she had difficulty reading and was not able to read her statement in court. My colleague, in the evidence quoted at paragraph 17 above, shows how that evidence on October 26, was being presented as one would normally expect, defense counsel referring the witness to the statement and cross-examining her as to inconsistencies.

[58] Had the normal practice continued, the trial judge would likely never have heard the parts of the prior statement that were consistent with her in-court testimony. At no point on October 26, 2016 did defence counsel refer to the consistent portions of the out-of-court statements.

[59] The trial adjourned to continue on November 29, 2016. Only then did it become apparent that the witness was not able to read the statement that had been reduced to writing. As I have noted above, defence counsel was duty bound to read the entirety of the statement to the witness. There was no attempt by defence counsel to use the prior consistent statement as part of the defence case. That is distinct from what occurred in *R. v. Demetrius*, [2003] O.J. No. 3728. There the defence advanced the position that the prior consistent statement made its case more plausible (¶ 18). That is not what occurred here and *Demetrius* is to be distinguished.

[60] My colleague referred to *R. v. Smith* where the court noted that it was the defence that led virtually all of the relevant evidence in an effort to undermine the complainant's credibility. In this case the consistent portions of the prior statements were not read into the record to bolster the appellant's case. They were read into the record because the complaint could not read. That said, the mere reading of the out-of-court statements into the record, as the unique circumstances

of this case required, does not alter the rules as to admissibility, nor limitations of the use of the consistent parts of that evidence. The rule limiting the use of that evidence remains the same.

[61] I refer to *Laing* again as it highlights the difficulty trial judges face when dealing with prior consistent statements, and it offers some guidance as to the proper limits on the use of that evidence:

> [80] In certain circumstances, the way a complaint came forward can amount to circumstantial evidence relevant to assessing the credibility and reliability of the complainant's in-court testimony (see: *R. v. G.C.*, [2006] O.J. No. 2245 (C.A.); *R. v. Curto*, 2008 ONCA 161; *R. v. Khan*, 2017 ONCA 114 (leave to appeal filed)). But prior consistent statements introduced as part of the narrative cannot be used as corroborative of the in-court testimony (see: *R. v. D.D.S.*, 2006 NSCA 34 at paras. 82-85; *R. v. Dinardo, supra*; *R. v. Zou*, 2017 ONCA 90).
>
> [81] The key is to distinguish between proper and improper use. It is not always easy. In *Dinardo*, the trial judge referred to the consistency of the complainant's in-court testimony with her prior statements. Justice Charron referred to the challenge for courts:
>
> > challenge for courts:
> >
> > [37] In some circumstances, prior consistent statements may be admissible as part of the narrative. Once admitted, the statements may be used for the limited purpose of helping the trier of fact to understand how the complainant's story was initially disclosed. The challenge is to distinguish between "using narrative evidence for the impermissible purpose of 'confirm[ing] the truthfulness of the sworn allegation'" and "using narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then assist the trier of fact in the assessment of truthfulness or credibility" *McWilliams' Canadian Criminal Evidence* (4th ed. (loose-leaf)), at pp. 11-44 and 11-45 (emphasis in original); see also *R. v. F. (J.E.)* (1993), 85 C.C.C. (3d) 457 (Ont. C.A.), at p. 476).
>
> [82] In *Dinardo*, the Court found the trial judge erred by relying on the consistency to be corroborative:
>
> > [40] The Court of Appeal correctly concluded that the trial judge erred when he considered the contents of the complainant's prior consistent statements to corroborate her testimony at trial, noting in his judgment that [TRANSLATION] "there is a form of corroboration in the facts and statements of the victim, who never contradicted herself" (para. 68). I am unable to agree with the majority, however, that the accused suffered no prejudice from the trial judge's improper use of the statements. The trial judge relied heavily on the corroborative value of the complainant's prior

> statements in convicting Mr. Dinardo. He was clearly of the view that the complainant's consistency in recounting the allegations made her story more credible. Accordingly, I would also allow the appeal on this basis.
>
> [83] Much depends on the language found in the decision and the live issues presented to the judge to decide. Here, the Crown argued to the judge that the electronic communication was consistent with what she said took place and the way it took place. It was also the Crown's suggestion that the judge should rely on the absence of evidence that the complainant was impaired. These were two of the very factors the judge relied on to find the allegation proved beyond a reasonable doubt.
>
> [84] The trial judge twice referred to the prior statement as demonstrating consistency with her claim. First, she said: "The question that I had considered as well is why would Ms. M send a text to the defendant saying, "It hurt, it didn't feel right, and I don't want to be around you anymore," and then follow through with that statement by having no further contact or communication with Mr. Laing". The second time, when she reasoned: "This text is how she let him know one final time that she had not consented and that she did not want to have sex under those circumstances."

[62] It is for the judge to act as gate-keeper and ensure that the prior statement is used only for the purpose which the rules of evidence permit. In this case the trial judge's decision suggests that the prior consistent statements were part of the thread of consistency, which weighed heavily on the scales.

[63] Had this matter proceeded before a jury, the trial judge would have been obliged to instruct the jury as to the limited use of the out-of-court statement. Failure to do so would have been an error in law. In a non-jury trial judges are presumed to know the law and are not required to recite each legal principle into the record. The record here however suggests the trial judge did not properly apply the law as it relates to the limited use of the prior consistent statement.

[64] For ease of reference I reproduce here the complainant's two prior statements. The first was an oral statement to Constable Rubarth as recorded in that officer's notes. It was referred to by the trial judge in his decision [AB page 19]:

> Cst. Rubarth responded, indicating what Mr. (sic) L…* said to him,
>
> > He said, Okay, she told me that Mr. Cain here had reached **into** her shirt and touched her breast, that he had also reached down her pants and touched her buttocks, that he had been there to change his clothes and brought some alcohol that he put in her fridge. And that after he touched her, she asked him to leave, called 9-1-1 and produced a knife in order to help him leave. (emphasis added)

(* name deleted to protect the identity of the complainant)

[65] I will return to the issue of inconsistencies later but at this point I note the trial judge referred to the complainant being consistent throughout her evidence on the "core" issues related to the sexual assault. It appears to have been lost to the trial judge that, on the issue of touching of the breast, the complainant testified repeatedly that the touching of her breast was **outside** of her clothing. I would not have considered that consistency on a *core* issue. Having said that, it is not my role to embark upon a fact-finding exercise in this case given the grounds of appeal and the limits of this Court in relation to findings of fact.

[66] The second statement that was in evidence is found at pages 98 through 101 of the Appeal Book. For ease of reference, I reproduce those pages here, including the questions that were interspersed with the reading of the statement to the complainant.

> Um, it was around 7:40 p.m. and I was just getting my kids ready for bed and he knocked at the door. He asked to change his clothes. I said no. Then he showed me his clothes and said, 'I don't have anything else to wear.' So I said okay and he went to the bathroom. He came back down and asked if he could put his wine in my freezer, and, um, that was fine. Then he was counting up his change on the table, he was counting money. Then he got up and proceeded to touch my chest and my bum. I told him, 'I don't want you like that.' He was touching me over my shirt, then went to my bum and went under my pants. Then when I told him 'Don't touch me,' he said, 'You're mine. I can touch you if I want.' That's when I grabbed the knife and then he walked out saying, 'I'll get you back.' Then I was on the line with the police, then he ended up leaving."
>
> And then you were asked a series of questions by the police and you answered the questions. The first question is:
>
> "When you say 'he', who do you mean?"
>
> And your answer was:
>
> "William Cain. He goes by Percy."
>
> The next question was:
>
> "Did he hit or push you?"
>
> And your answer was:
>
> "No. When I told him to go, he grabbed me with both hands by my neck."
>
> Next question was:
>
> "Was he choking you?"

And your answer was:

> "No, he tried to choke me and that's when I grabbed the knife. That's when he took his bag and his wine and left."

The next question was:

> "When you say, 'He tried to choke me,' what do you mean?"

And you answer:

> "He had his two hands on my throat, he wasn't squeezing. He then said, 'I'll get you for this.'

And then you 're asked:

> "What was your relationship with William Cain?"

And you answered:

> "We were in an intimate relationship for two weeks. We have one child together."

Then you were asked:

> "Did you ever ask him to touch you tonight?"

And you answered:

> "No, I didn't want it. We were together four years ago."

And, finally, you were asked:

> "Did the children witness the incident?"

And you answer:

> "No, they were upstairs sleeping."

[67] A review of the evidence suggests there is little in the complainant's trial testimony that was consistent with the first and second statement. The two statements were inconsistent with one another with regard to the touching of the breast. The evidence at trial was inconsistent with the statement to Constable Rubarth as it related to the touching of the breast inside verses outside of the clothing. There was inconsistency as to the nature and extent of appellant's and the complainant's relationship. There was inconsistency as to how many times as well as the time the appellant had attended at the complainant's house on the date of the alleged incident. The same in relation to where her children were at the time of the incident. There were even inconsistencies as to whether and when the appellant returned to the complainant's house after the police came to investigate the incident. On the latter point, counsel on appeal agree, and the evidence is clear, the appellant could not have returned to the complainant's residence any time after the

incident. He was arrested and has been incarcerated since the date of the alleged incident.

[68] I could go on in referencing the inconsistencies but it is easier to refer to the consistent parts for they are few. The date, place and identity of the appellant was consistent. The appellant was at the complainant's residence on July 25th and the complainant said he touched her buttocks under her shorts/pants. She said that in her first oral statement, in her second statement reduced to writing and several times at trial.

[69] I remind myself that there are some exceptions which allow the introduction of prior consistent statements. Some permitted uses are referred to in the David Paciocco paper:

> (1) Prior consistent statements as circumstantial evidence;
>
> (2) Recent fabrication;
>
> (3) Prior consistent admissible hearsay;
>
> (4) Prior consistent statements that provide context for admissible statements;
>
> (5) Pure narrative;
>
> (6) Narrative as circumstantial evidence;
>
> (7) Exculpatory statements when found in possession of contraband;
>
> (8) Exculpatory statements made on arrest; and
>
> (9) Identification evidence.

[70] The author goes on to note that even when prior consistent statements fall into one of those categories:

> … while each exception permits a prior consistent statement to be proved, the use that can be made of that proof is limited and differs between exceptions.

[71] The prior statements here were clearly used to cross-examine the complainant as to inconsistencies. The cross-examination extended over two days, beginning on October 26th. The trial judge was not told of the consistent portions of the earlier statements on that day. The record makes it clear the entire statement was only put to the witness on the second day of cross-examination, November 29th, when it became apparent the witness had difficulty reading.

[72] Had the complainant been able to read the trial judge may well have been left with evidence that was inconsistent on just about every single substantive issue, or circumstance surrounding the events of the alleged incident.

[73] The prior consistent portions would not have been something the Crown could have produced as it would not fall within the exceptions for admissibility.

[74] With the greatest respect to the trial judge, and to my colleagues, I suggest that what the trial judge did was clear. Once that evidence was before the court he used that consistent part of the prior statement in weighing the complainant's credibility on a key issue. His misuse of the offending evidence is highlighted by the following passage:

> (AB 30) In terms of the actual assault, although there was an unwelcome touching, from her point of view, she doesn't relate that there was any punching or physical violence. In terms of the physical interaction, it's a relatively mild complaint. So for those reasons, I don't find that this is a made-up complaint.
>
> The other issue aside, that if she was to be making up a complaint for someone with short-term memory issues, trying to maintain a story over a period of time would be difficult. **And with respect to the core of her story, it's … it shows a great deal of consistency over time.**

[75] The trial judge should have left the prior consistent statement off the scale completely. He should not have used the prior consistent statement in weighing the evidence. In the majority decision my colleague twice refers to Justice Paciocco's article quoting, even highlighting, a portion of it in paragraph 39. I reproduce here what is the relevant portions quoted by my colleague:

> **The consistencies are relevant solely to enable the decision-maker to judge whether the relevant statement is really materially inconsistent when looked at as a whole, and to gauge the impact that any differences in detail should have on the overall credibility and reliability of the witness**. In effect, the consistent features of the prior statement do not add affirmative weight to the party's scale. **They are used simply to knock the "inconsistency" challenge off the opposing party's scales, or to reduce the weight of those inconsistencies that may remain.** [emphasis added]

[76] I reply by saying my emphasis is on the sentence

> ... In effect, the consistent features of the prior statement do not add affirmative weight to the party's scale….

[77] The trial judge here used the consistency to add affirmative weight.

[78] What the trial judge did here was not a simple slip of the tongue or turn of phrase. Clearly, he relied on the "consistency over time" in relation to the allegation of the touching of the buttocks. This was repeated in relation to the touching of the breast, perhaps even compounding the error, when saying there was a consistency in the touching over versus under the shirt.

[79] I wish to make it clear that this case is not about second guessing a trial judge in relation to his finding of facts. It is a rare case indeed that an appeal court would interfere with a trial judge's finding of facts. This case is about whether the trial judge erred in law by improperly relying upon a prior consistent statement when weighing the evidence on a core issue. As I noted earlier, I am satisfied that it is clear that such an error in law occurred in this case.

[80] In some cases a trial judge may be said to have made a slight error, as in *Smith* at ¶24:

> … when considered in the context of this trial as a whole, these were relatively minor errors and fleeting moments in a week-long trial that, in my view, would not have affected the outcome. … I am satisfied that the minor errors I have identified had no meaningful bearing on the outcome of this case and that, had they not occurred, the result would have been the same.

[81] Repetition of an error or a lie does not make a statement true. It is for that reason the veracity of evidence must be ascertained through something more than mere repetition. In the context of this case it is not at all clear that absent the trial judge's perception as to the thread of consistency, that the verdict would have been the same.

Conclusion

[82] I would set aside the conviction, noting that if the Crown is of the opinion that there is a reasonable likelihood of conviction the matter should be set for retrial before a different judge.

Scanlan, J.A.