<u>NOVA SCOTIA COURT OF APPEAL</u>
Citation: *R. v. Willis*, 2019 NSCA 64

Date: 20190731
Docket: CAC 479683
Registry: Halifax

Between:

Carie Willis

Appellant

v.

Her Majesty The Queen

Respondent

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

Judge: The Honourable Chief Justice Michael J. Wood

Appeal Heard: June 11, 2019, in Halifax, Nova Scotia

Subject: Evidence – Prior Consistent Statements
Evidence – The rule in *Browne v. Dunn*
Criminal Law – Appeal – Uneven Scrutiny of Evidence

Summary: The appellant was convicted of sexual assault, extortion and breach of trust for allegedly coercing a sexual relationship with A.A., a woman he was responsible for deporting from Canada, in exchange for not enforcing the deportation order. These events were alleged to have taken place in 2003. The appellant denied any sexual contact.

The trial judge found A.A. to be credible based, in part, on providing similar versions of events to other persons. She did not believe the appellant and gave less weight to portions of his evidence due to failure to cross-examine a crown witness on the topics.

The judge criticized the appellant's testimony on a number of peripheral points but did not apply the same scrutiny to A.A.

She did not address the contradiction between A.A. and the accused and his wife about whether he was circumcised.

Issues: (1) Did the trial judge use A.A.'s prior consistent statements for an improper purpose?
(2) Did the trial judge err in her application of the rule in *Browne v. Dunn* ?
(3) Did the trial judge apply uneven scrutiny to her consideration of the evidence of the crown and defence?

Result: The trial judge concluded that the defence had alleged that A.A.'s evidence was fabricated to avoid deportation and admitted the prior statements to rebut that allegation. Admission to rebut recent fabrication is permissible but the judge went further and used statements to corroborate A.A.'s evidence and support her credibility. This use was improper and an error of law.

The trial judge gave less weight to the appellant's evidence because a co-worker called by the Crown was not cross-examined on several topics because of the rule in *Browne v. Dunn*. The Rule is only engaged where the defence intends to impeach the crown witness on a point of substance. In most cases there was no contradiction or attempt to impeach, and issues noted by the judge were peripheral, at best. Misapplication of the rule was an error of law.

In her decision the trial judge subjected the appellant's evidence to a high degree of scrutiny, often on issues of marginal relevance. She did not apply the same standard to the evidence of A.A.. This was particularly so on the issue of whether the appellant was circumcised – A.A. said he was not but both the appellant and his wife said he was. The judge does not mention this potentially significant contradiction.

The combination of these errors by the trial judge resulted in the convictions being set aside and a new trial ordered. The *curative proviso* did not apply in the circumstances.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 18 pages.

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Judges:	Wood, C.J.N.S.; Beveridge and Farrar, JJ.A.
Appeal Heard:	June 11, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Wood, C.J.N.S.; Beveridge and Farrar, JJ.A., concurring
Counsel:	Roger A. Burrill, for the appellant Glenn Hubbard, 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 victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Reasons for Judgment:

[1] In February 2016, the appellant, Carie Willis, was charged with three offences arising out of events which were alleged to have occurred between June and December 2003 when he was employed with the Halifax Enforcement Unit of Citizenship and Immigration Canada. In late 2003, the Enforcement Unit became part of the Canada Border Services Agency. The charges were for sexual assault contrary to s. 271 of the *Criminal Code,* R.S.C. 1985, c.C-46 , extortion contrary to s. 346(1.1)(b) of the *Code* and breach of trust contrary to s. 122 of the *Code*.

[2] The complainant, A.A., arrived in Canada in 1996 as a student. Her authorization to remain in Canada expired in 2001 following which she made an application for refugee status which was turned down in early 2003. A deportation order was issued with respect to A.A. in April 2003, and Mr. Willis was given responsibility for implementing her removal from Canada. Arrangements were made for A.A. to fly out of Halifax in June 2003; however, she did not show up for her flight. She has remained in Canada since that time and obtained permanent resident status in 2014.

[3] The charges against Mr. Willis arose out of allegations by A.A. that he induced her to enter into a non-consensual sexual relationship in exchange for which he would make sure that deportation proceedings were not taken against her.

[4] Following a trial in April 2018, Mr. Willis was convicted of all three charges by the Honourable Justice Suzanne Hood of the Supreme Court of Nova Scotia (2018 NSSC 237). He was sentenced to a term of imprisonment of six years as well as ancillary orders requiring him to provide a DNA sample and comply with the *Sex Offender Information Registration Act*, S.C. 2004, c.10. There was also a firearms prohibition order.

[5] Mr. Willis appeals his conviction and sentence. He argues that the trial judge made legal errors in her consideration of the evidence and applied an unbalanced scrutiny to his evidence and that of A.A. In addition, Mr. Willis says that the sentence imposed was excessive having regard to his circumstances and the nature of the offences.

[6] For the reasons that follow I would grant Mr. Willis' appeal from his conviction. As a result, it is unnecessary to deal with his arguments with respect to sentence.

Issues

[7] The amended Notice of Appeal describes the grounds of appeal from Mr. Willis' conviction as follows:

> 1. The learned trial judge erred in treating the complainant's prior consistent statements as evidence in support of the Crown case and in failing to direct herself on the proper use of such evidence.
> 2. The trial judge erred in the application of the rule in **Browne v. Dunn** (1893) 6 R 67 (H.L.) with respect to determinations of credibility.
> 3. The trial judge applied an unbalanced scrutiny to the evidence of the appellant and the evidence of the complainant.

Standard of Review

Issue #1 – Prior Consistent Statements

[8] Improper reliance on prior consistent statements is an error of law which is reviewable on a standard of correctness (*R. v. Laing*, 2017 NSCA 69 at paras. 85-86; *R. v. T(P),* 2014 NLCA 6 at para. 12).

Issue #2 – *Browne v. Dunn*

[9] An appeal based upon an alleged breach of the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.) has two aspects which are subject to different standards of review. The first is whether the principle is engaged, which is a question of law reviewable on a standard of correctness. The second involves the exercise of judicial discretion in fashioning a remedy for breach on which the trial judge is entitled to considerable deference. The Quebec Court of Appeal in *Chandroo v. R.*, 2018 QCCA 1429 described the proper approach to the issue of standard of review in a *Browne v. Dunn* case as follows:

> 13 The principle in *Browne v. Dunn* is typically, but misleadingly, described as a rule. It is misleading because the principle is not absolute and, where a breach is found, invites the exercise of judicial discretion in its application. The application of the principle requires attention to two questions. The first is a question of law that is reviewed on a standard of correctness while the second, which concerns the exercise of judicial discretion, requires considerable deference on appellate review:
>
> a) Is a party leading evidence in chief that would contradict or impeach the evidence of the opposing party's witness on a significant matter

> without having first cross-examined the opponent's witness on the same matter?
>
> b) If yes, what can be done about it to ensure the fairness of the trial?
>
> [Footnotes omitted]

[10] See also the decision of this Court in *R. v. Mauger*, 2018 NSCA 41 (at para. 47) where Beveridge J.A. held that the decision on whether the rule is engaged must be correct.

Issue #3 – Uneven Scrutiny

[11] It is an error of law to apply differential scrutiny to the evidence of the defence and Crown, and errors of law are reviewed on a standard of correctness (*R. v. Dim*, 2017 NSCA 80 at para. 48).

Analysis

[12] The testimony of A.A. and Mr. Willis cannot be reconciled. A.A. says that shortly after being advised by Mr. Willis of the particulars of her deportation he coerced her into a sexual relationship in exchange for turning a blind eye. According to her, this lasted from June 2003 until December of that year. During the last month they had intercourse several times a week. Mr. Willis says that after telling A.A. of the deportation arrangements she missed her flight and he never saw her again until the preliminary inquiry in relation to these charges, which took place in 2017.

[13] A trial judge must take care to ensure that evidence is properly admitted and only used for permissible purposes. Failure to do so may affect the fairness of the trial and, ultimately, the reliability of the outcome. That is particularly so in a case such as this which depends on an assessment of the testimony of two people with starkly different versions of events.

Issue #1 – Prior Consistent Statements

[14] Where a witness at trial has previously given a statement which is consistent with their testimony, that prior statement is generally inadmissible. The fact that they have said something similar previously does nothing to enhance the probative value of their evidence.

[15] There are some exceptions to the prohibition against using prior consistent statements, and one of these is where the witness is alleged to have fabricated their evidence at a particular point in time. In order to rebut such an assertion, it is permissible to prove that the witness gave a consistent version of events on a previous occasion. If accepted by the trier of fact, this would establish that there was no recent fabrication by the witness. It does not, however, prove that the statement is necessarily true. The witness could have been untruthful from the beginning.

[16] Where a prior statement is admissible to rebut an allegation of recent fabrication, it can only be used for that limited purpose. The statement is not admissible to prove the truth of its contents. To hold otherwise would suggest that repetition makes a story more credible which is a proposition that has been repeatedly rejected.

[17] The Supreme Court of Canada discussed the use which can be made of prior statements when admitted to rebut allegations of recent fabrication in *R. v. Stirling*, 2008 SCC 10. In that case Justice Bastarache, writing for the Court, said:

> 5 It is well established that prior consistent statements are generally inadmissible (*R. v. Evans*, [1993] 2 S.C.R. 629; *R. v. Simpson*, [1988] 1 S.C.R. 3; *R. v. Béland*, [1987] 2 S.C.R. 398). This is because such statements are usually viewed as lacking probative value and being self-serving (*Evans*, at p. 643). There are, however, several exceptions to this general exclusionary rule, and one of these exceptions is that prior consistent statements can be admitted where it has been suggested that a witness has recently fabricated portions of his or her evidence (*Evans*, at p. 643; *Simpson*, at pp. 22-23). Admission on the basis of this exception does not require that an allegation of recent fabrication be expressly made — it is sufficient that the circumstances of the case reveal that the "apparent position of the opposing party is that there has been a prior contrivance" (*Evans*, at p. 643). It is also not necessary that a fabrication be particularly "recent", as the issue is not the recency of the fabrication but rather whether the witness made up a false story at some point after the event that is the subject of his or her testimony actually occurred (*R. v. O'Connor* (1995), 100 C.C.C. (3d) 285 (Ont. C.A.), at pp. 294-95). Prior consistent statements have probative value in this context where they can illustrate that the witness's story was the same even before a motivation to fabricate arose.
>
> …
>
> 7 However, a prior consistent statement that is admitted to rebut the suggestion of recent fabrication continues to lack any probative value beyond showing that the witness's story did not change as a result of a new motive to fabricate. Importantly, 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, **and any admitted prior consistent statements should not be assessed for the truth of their contents**. As was noted in *R. v. Divitaris* (2004), 188 C.C.C. (3d) 390 (Ont. C.A.), at para. 28, "a concocted statement, repeated on more than one occasion, remains concocted"; see also J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 313. This case illustrates the importance of this point. The fact that Mr. Harding reported that the appellant was driving on the night of the crash before he launched the civil suit or had charges against him dropped does not in any way confirm that that evidence is not fabricated. All it tells us is that it wasn't fabricated *as a result of* the civil suit or the dropping of the criminal charges. There thus remains the very real possibility that the evidence was fabricated immediately after the accident when, as the trial judge found, "any reasonable person would recognize there was huge liability facing the driver" (Ruling on *voir dire*, June 21, 2005, at para. 24). The reality is that even when Mr. Harding made his very first comments about who was driving when the accident occurred, he already had a visible motive to fabricate — to avoid the clear consequences which faced the driver of the vehicle — and this potential motive is not in any way rebutted by the consistency of his story. **It was therefore necessary for the trial judge to avoid using Mr. Harding's prior statements for the truth of their contents.**
>
> [Emphasis added]

[18] This Court applied these principles from *Stirling* in *R. v. Laing*, 2017 NSCA 69 where Beveridge J.A. held that a trial judge committed an error of law when she interpreted prior statements as being consistent with, and therefore corroborative of, a witness' trial testimony.

[19] In this case, the trial judge admitted, and considered, prior statements made by A.A. concerning the alleged sexual relationship with Mr. Willis. In her decision, these statements, and the use made of them, were described as follows:

> 22 She discussed the sexual relationship with her brother within a few months after December 2003 and with her sister sometime early in 2004. She said R.D. knew, as well, but she did not recall telling him and believed F.A., her brother, had told him about it.
>
> …
>
> 29 There were other witnesses for the Crown: Katie Tinker, to whom I have just referred, and she said it would be unusual to live without status for years. She said A.A. disclosed the sexual relationship to her when they met in 2014. She said she believed the Humanitarian and Compassionate application claim would be strong even without it. Then, after they had the interview with the Canadian Border Services Agency people, A.A. changed her mind about disclosing it

> because they had told her they were going to go ahead with deportation, in any event.
>
> …
>
> 31 Sgt. John McNeil met A.A. in December of 2014. He gathered preliminary information. He said she said she had not seen Mr. Willis since 2003, and she had told him she had told her brother and perhaps others of the sexual relationship.
>
> …
>
> 34 He [F.A.] said that A.A. referred to the Immigration guy and said his name was Carie and that he said he could hide the deportation papers if she slept with him. He said they talked often. He said A.A. was uncomfortable with the relationship. He said he was first aware of it around the time just after her deportation was to have occurred. She said she was doing what she had to do and said he would show up at her apartment. He knew that Mr. Willis played hockey. He said he never spoke to anybody at the Canadian Border Services Agency with respect to A.A.
>
> …
>
> 44 She admitted lying on her refugee claim and misleading her parents, but I do not consider this to affect her credibility in court. It could have, except for the nature of her testimony. As I said, she gave details, was not shaken on cross-examination, and knew things she could not have known without Mr. Willis being with her and without him telling her about, for example, the change in her flight. Nor do I believe, as the Defence suggests, that she made all this up to get to stay in Canada. She only learned of the Humanitarian and Compassionate application in 2014 and had told her brother and her sister of these incidents many years before.
>
> …
>
> 74 For these reasons, I do not believe Mr. Willis' testimony, nor does his testimony raise a reasonable doubt. I accept the evidence of A.A. and of Mr. Lawrence, and there is confirmation of portions of her story in the testimony of her brother, F.A., and R.D. with respect to the move to C. Street. As well, A.A. told her brother and her sister, V.A., and Katie Tinker and Sgt. McNeil of the sexual relationship.

[20] The decision does not refer to admitting any prior statements to rebut recent fabrication. It was not clear when the alleged fabrication was said to arise, since the defence position was that A.A. had lied about the allegations from the very beginning. The Crown confirmed that it was not seeking to admit the statements for the truth of their contents.

[21] The statement by A.A. to Sgt. McNeil was made in November 2014 and the trial judge admitted it for “narrative” but not the truth of its contents. The

complainant's sister, V.A., did not testify. However, the complainant said in cross-examination that she had "mentioned" the sexual relationship to her and in re-direct she said the following:

> A. I would have told her -- I can't give you an exact date, but it would have been after the incident, the events had ceased to happen, so it would have been after December of 2003. It would have been at some point in 2004.

[22] Over the objections of defence counsel, the trial judge admitted the statements to A.A.'s brother, her sister, and Ms. Tinker to rebut allegations of recent fabrication. There never was any evidence of what A.A. said to her sister beyond those passages noted above. In other words, the alleged prior statement to her was never proven.

[23] The statement to Sgt. McNeil was only admitted as "narrative" and not for its truth. It should not have been considered at all in relation to the assessment of A.A.'s evidence.

[24] Even if the complainant's previous statements were admissible for the purposes described by the trial judge, they could never be used to corroborate her trial evidence because they were not admissible for their truth. In para. 74 of her decision, the trial judge indicates this is precisely what she did with the statements made by A.A. to those individuals. This use for an improper purpose is an error of law which undermines a fundamental part of the trial judge's reasoning, her assessment of the credibility of A.A.

[25] I would allow this ground of appeal.

Issue #2 – The Rule in *Browne v. Dunn*

[26] This rule arises out of the House of Lords decision in *Browne v. Dunn* and is fundamentally a question of trial fairness. The basic premise is that if defence counsel intends to lead evidence to contradict a Crown witness on a material point, they should put to that witness the potential contradictory evidence and give them an opportunity to provide any explanation they may have. Justice Watt of the Ontario Court of Appeal described the underlying considerations in *R. v. Quansah*, 2015 ONCA 237:

> 76 The rule in *Browne v. Dunn*, as it has come to be known, reflects a confrontation principle in the context of cross-examination of a witness for a party opposed in interest on disputed factual issues. In some jurisdictions, for example

> in Australia, practitioners describe it as a "puttage" rule because it requires a cross-examiner to "put" to the opposing witness in cross-examination the substance of contradictory evidence to be adduced through the cross-examiner's own witness or witnesses.
>
> 77 The rule is rooted in the following considerations of fairness:
>
> i. Fairness to the witness whose credibility is attacked:
>
> The witness is alerted that the cross-examiner intends to impeach his or her evidence and given a chance to explain why the contradictory evidence, or any inferences to be drawn from it, should not be accepted: *R. v. Dexter*, [2013] O.J. No. 5686, 2013 ONCA 744, 313 O.A.C. 226, at para. 17; *Browne v. Dunn*, at pp. 70-71.
>
> ii. Fairness to the party whose witness is impeached:
>
> The party calling the witness has notice of the precise aspects of that witness's testimony that are being contested so that the party can decide whether or what confirmatory evidence to call; and
>
> iii. Fairness to the trier of fact:
>
> Without the rule, the trier of fact would be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict.
>
> 78 In addition to considerations of fairness, to afford the witness the opportunity to respond during cross-examination ensures the orderly presentation of evidence, avoids scheduling problems associated with re-attendance and lessens the risk that the trier of fact, especially a jury, may assign greater emphasis to evidence adduced later in trial proceedings than is or may be warranted.

[27] The rule is only triggered when the potential contradiction relates to a matter of substance. The Court in *Quansah* described this requirement in the following terms:

> 81 Compliance with the rule in *Browne v. Dunn* does not require that every scrap of evidence on which a party desires to contradict the witness for the opposite party be put to that witness in cross-examination. The cross-examination should confront the witness with matters of *substance* on which the party seeks to impeach the witness's credibility and on which the witness has not had an opportunity of giving an explanation because there has been no suggestion whatever that the witness's story is not accepted: *Giroux*, at para. 46; *McNeill*, at para. 45. It is only the nature of the proposed contradictory evidence and its significant aspects that need to be put to the witness: *Dexter*, at para. 18; *R. v. Verney* [1993] O.J. No. 2632, 87 C.C.C. (3d) 363 (C.A.), at pp. 375-376; *Paris*, at para. 22; and *Browne v. Dunn*, at pp. 70-71.

[28] If a trial judge is satisfied that there has been a breach of *Browne v. Dunn*, they have a broad discretion to determine an appropriate remedy which could include recalling the witness and giving them an opportunity to provide an explanation.

[29] The trial judge made no reference to *Browne v. Dunn* in her decision. The only time it was mentioned was in closing submissions by the Crown when counsel said the following:

> MS. SCHURMAN: …And the last case I provided with you is the case from the Ontario Court of Appeal called *Paris*. And *Paris* is a case that deals with the rule in *Browne v. Dunn*. And I'm going to say that I think there's been two -- violations is a bit of a strong word -- but two violations of the *Browne v. Dunn* rule with Mr. Lawrence's testimony. And these are key points of Mr. Willis's story. First of all, Mr. Lawrence -- sorry, Mr. Willis said, "I couldn't do a warrant because I wasn't trained." Mr. Lawrence was not asked about that. And Mr. Willis also indicated, "I wasn't working any overtime or any call outs because my wife was pregnant." Mr. Willis was also not asked about that.
>
> THE COURT: Mr. Lawrence.
>
> MS. SCHURMAN: Lawrence. Sorry. Mr. Singleton, my friend, indicated that no one contradicted Mr. Willis on his explanation, the no training or no help, but that's because it wasn't put to anyone else. It wasn't put to Mr. Lawrence to respond either positively or negatively. It's just out there. And what Paris says is that the court has a lot of options on how to treat a *Browne v. Dunn* issue, and one of the ways the court can treat that is to give the accused's testimony on those points less weight, and that's what I'm going to suggest, My Lady, would be the appropriate thing to do. And the relevant paragraphs for *Paris* are 22 to 24. And, again, it's not a hard and fast legal rule, and it's certainly very much in the discretion of the trier of fact on law and depends on the circumstances of the case. But in this case these are such key elements of Mr. Willis's explanation, the fact that they weren't put to Mr. Lawrence, whether he remembered or not, whether he could confirm or not, whether he could deny or not, we'll never know because they weren't put to him. That decreases Mr. Willis's weight on that point.

[30] The witness being referred to was Guy Lawrence, a co-worker of Mr. Willis' in 2003. His evidence consisted mainly of his recollection of office practices and procedures. According to the documentary exhibits, he assisted Mr. Willis in some dealings with A.A. although he had no recollection of those.

[31] As we can see from the Crown submissions, they asked the trial judge to apply *Browne v. Dunn* and put reduced weight on Mr. Willis' evidence on two points. The first is his testimony about not completing the paperwork to issue an arrest warrant for A.A. until December even though she failed to appear for her

deportation flight in June. The explanation which he offered was that he had not taken the course required in order to prepare those documents and did not have the assistance of co-workers due to the volume of work in the office at the time.

[32] The second area where the Crown says *Browne v. Dunn* arose was when Mr. Willis said he did not work extra hours in 2003 because his wife was pregnant and having some difficulties. He said his hours of work were generally 7:00 a.m. – 3:00 p.m. or 8:00 a.m. – 4:00 p.m.

[33] In her decision, the trial judge gave less weight to Mr. Willis' evidence on the two points raised by the Crown because of the failure to cross-examine Mr. Lawrence on those issues. The trial judge said:

> 69 He said it was a lack of training which caused the six-month delay in issuing the warrant, but he did not mention a lack of training to D/Cst. Buell, nor did his counsel cross-examine Mr. Lawrence about the extent of training that the officers received. I, therefore, give little weight to this explanation. Mr. Lawrence said a warrant would be issued immediately after a no-show so it would be on CPIC in case the police picked the person up. Furthermore, the date of the warrant coincides with the time period when A.A. said she last saw Mr. Willis. Also, he said it was his first warrant and it had to be redone because of errors but he said he did not recall it was with respect to A.A.

[34] And later she added:

> 72 He testified he did not work overtime or on call in 2003 because of his wife's difficult pregnancy. However, Mr. Lawrence was not questioned about overtime in 2003. Therefore, I give little weight to this testimony as well. Also, it is not consistent with A.A.'s testimony about their second meeting at Tim Hortons on a Saturday, when he said he had to deal with stowaways and was busy all that day until almost 9 00 p.m.

[35] In addition, although the Crown did not raise this in argument, the trial judge gave less weight to Mr. Willis' evidence about his use of notebooks because Mr. Lawrence was not questioned about that practice either. On this issue she said:

> 70 He also testified about a notebook he said he kept and from which he wrote the case highlights in Exhibit 6 and 7. He said he left it behind when he went to his new position in Montreal. However, Mr. Lawrence was not asked about their use of notebooks and this lessens the weight I would give to that testimony. A.A. had said that Mr. Willis told her if they had a relationship he could put her file away for five years; otherwise, he would have had to refer the matter to another officer. Exhibit 8 shows that Mr. Willis, in fact, did put the file

> away for a period of three years. Mr. Lawrence said the usual practice was to be BF the file every six months to one year.

[36] Although she does not expressly say so, I infer that the only reason for the trial judge giving reduced weight to Mr. Willis' evidence, as a result of a failure to cross-examine Mr. Lawrence, was her belief that the rule in *Browne v. Dunn* applied. In my view, she was wrong; the rule was not engaged because there was no contradiction between the evidence of Mr. Willis and Mr. Lawrence on a point of substance. The issues were peripheral, at best, and there is nothing to suggest that Mr. Lawrence had any knowledge about Mr. Willis' use of notebooks, overtime practices, or training.

[37] By incorrectly identifying these as *Browne v. Dunn* violations, the trial judge reduced the weight of Mr. Willis' testimony on these points which ultimately diminished his credibility in her eyes.

[38] The application of the rule in *Browne v. Dunn*, when it was not engaged, is an error of law which adversely affected the trial judge's assessment of Mr. Willis' evidence.

[39] I would also allow this ground of appeal.

Uneven Scrutiny

[40] This ground of appeal is generally difficult to make out. The Ontario Court of Appeal described the standard to be met in *R. v. Kiss*, 2018 ONCA 184 as follows:

> 83 This is a notoriously difficult ground of appeal to succeed upon because a trial judge's credibility determinations are entitled to a high degree of deference, and courts are justifiably skeptical of what may be veiled attempts to have an appellate court re-evaluate credibility: *R. v. D.T.*, 2014 ONCA 44, at paras. 71-73; and *R. v. Aird*, 2013 ONCA 447, at para. 39. An "uneven scrutiny" ground of appeal is made out only if it is clear that the trial judge has applied different standards in assessing the competing evidence: *Howe*, at para. 59. Where the imbalance is significant enough, "the deference normally owed to the trial judge's credibility assessment is generally displaced": *R. v. Rhayel*, 2015 ONCA 377, at para. 96; *R. v. Gravesande*, 2015 ONCA 774, 128 O.R. (3d) 111, at para. 19; and *R. v. Phan*, 2013 ONCA 787, at para. 34.

[41] The error which led the Court to overturn the trial decision in that case was the manner in which the judge treated contradictions on minor or collateral issues. The Court describes the problem in the following passage:

> 84 In my view, this error occurred here. Whereas the trial judge took even the leanest opportunities to find reason to reject Mr. Kiss's evidence, he was uncommonly forgiving of similar and even more serious problems with K.S.'s testimony.
>
> 85 To be clear, I do not take issue with the trial judge's ultimate finding that Mr. Kiss was not credible. There was ample evidence to support this conclusion. As the trial judge found, Mr. Kiss provided confident, self-serving answers at trial on matters he was unsure of in his police statements. It is also a fair inference that Mr. Kiss changed his trial story for the better by falsely claiming that he obtained verbal consent for sexual intercourse from K.S. Mr. Kiss also admitted to lying to the police. This foundation would have been sufficient to support the trial judge's conclusion that he could not believe, or have a reasonable doubt, based on Mr. Kiss's testimony.
>
> 86 The problem is that the trial judge supplemented these important considerations with a range of far less compelling factors, yet he discounted comparable or even more significant problems with K.S.'s testimony. Had the trial judge applied as exacting a standard of scrutiny to the testimony of K.S. as he imposed on Mr. Kiss, he may well have been left with a reasonable doubt.

[42] By way of illustration, the Court gave examples of what it considered inconsistent treatment between the Crown and defence in the following passage:

> 90 Third, the trial judge treated the contradiction over who was awake when Mr. Kiss arrived home as a significant contradiction, even though it was a collateral point. He also placed "significant" reliance on Mr. Kiss's inconsistent accounts of his sobriety, another collateral point. This included inconsistencies in Mr. Kiss's evidence about the alcohol he consumed. The problem is that the trial judge did not treat the collateral inconsistencies in K.S.'s testimony the same way.
>
> 91 K.S.'s descriptions about what happened after Mr. Kiss left, including her meeting next door with D.B. and R.R., and with A.S. and A.W., was more problematic than Mr. Kiss's descriptions of who was awake when he got home. K.S.'s post-event accounts were internally inconsistent and externally contradicted on the timing, location, and order of events. Yet the trial judge placed no importance on these inconsistencies.
>
> 92 The trial judge also discounted K.S.'s inconsistent testimony about the amount of alcohol she consumed because there was no issue with how intoxicated she was. In fact, Mr. Kiss claimed that she was as intoxicated as he was.

> 93 To be clear, there is no problem with discounting contradictions because they are collateral. This will often be the right thing to do. The instant point is that the same measure should be used for both parties, and in this case it was not.

[43] Indeed, the use which the trial judge makes of minor or collateral inconsistencies or contradictions appears to be a theme in some successful appeals based upon uneven scrutiny. When those issues are used to undermine the credibility of the defence evidence, but ignored or diminished in relation to the Crown evidence, a successful appeal may result as happened in *Kiss*. This was also the case in *R. v. Gravesande*, 2015 ONCA 774 where the Court said:

> 42 When read as a whole, the trial judge's reasons demonstrate a degree of scrutiny of the prosecution evidence that was tolerant and relaxed as compared to the irrelevant, tenuous and speculative observations largely about collateral matters applied to unfairly discount the appellant's evidence.

[44] Uneven scrutiny may also be found when there is no critical assessment of inconsistencies which could undermine the Crown evidence. *R. v. D.D.S.*, 2006 NSCA 34 was such a case. In that decision Saunders J.A. described the approach to be taken as follows:

> 51 The judge was obliged to look at all of the evidence not simply to see if there was other evidence which supported and enhanced that of the complainant, but also to determine if there were evidence that contradicted or tended to contradict that of the complainant; and more importantly, whether that evidence, or lack thereof, created a reasonable doubt.

[45] That matter involved a father who was alleged to have sexually assaulted his daughter. The trial judge identified five evidentiary inconsistencies raised by the defence in relation to the complainant's evidence, which he subsequently discounted. One related to the complainant's evidence of the relationship with her father and her testimony that she tried to avoid having contact with him. Justice Saunders discussed the responsibility of the judge as follows:

> 58 The trial judge appears to have accepted the evidence of defence witnesses who described a typical father-daughter relationship between the complainant and the appellant, and who said that they did not observe any tension between the two. However, the judge discounted the evidence by noting that the observations were made when the complainant was with her parents at family outings, and not when she was alone with the appellant. With respect, the evidence of the various defence witnesses described not just their relationship, but regular contact between the two that was completely inconsistent with the complainant's evidence.

> 59 The evidence was overwhelming that the complainant was affectionate towards her father in the company of others, much preferred to talk about things with him than with her mother, and certainly appeared to enjoy being around him.
>
> …
>
> 63 These significant conflicts in the evidence obliged the judge to subject the complainant's testimony to a very critical eye. In my respectful view that wasn't done.

[46] In this case, both A.A. and Mr. Willis testified and the assessment of their evidence was crucial to the trial judge's decision. A.A. said that there was a sexual relationship which spanned several months, and Mr. Willis testified that there was limited interaction between them and only in relation to his work in the Halifax Enforcement Unit of Citizenship and Immigration of Canada. A.A. testified that all of the sexual activity took place in her home and nobody else was present. There were no witnesses that saw them together, nor any physical evidence such as photographs, emails, text messages, etc. In a case such as this, the importance of a balanced assessment of the witness' testimony is obvious.

[47] In my view, the errors made by the trial judge in relation to the first two grounds of appeal tilted the balance in favour of the Crown and against Mr. Willis. The trial judge buttressed the credibility of A.A. by improperly using prior consistent statements to corroborate her evidence. She then undermined Mr. Willis' credibility by incorrectly applying the rule in *Browne v. Dunn*.

[48] There are other examples of this unequal treatment. As was the case in *Kiss* and *Gravesande*, the judge relied on what could only be described as collateral or minor inconsistencies to assist in her conclusion that Mr. Willis was not credible.

[49] Both A.A. and Mr. Willis testified that they had a meeting at Tim Hortons to discuss her file. Mr. Willis said that he drove his own car to the meeting since he intended to carry on and pick up his daughter at Mount Saint Vincent University and then go home. Mr. Willis' co-worker, Mr. Lawrence, said that they would not use their personal vehicles for work without authorization from their manager. In cross-examination, Mr. Willis said that he had the manager's authorization. The trial judge's decision comments on this evidence as follows:

> 67 He also said he drove his own vehicle to the meeting at Tim Hortons, whereas Mr. Lawrence said they did not use their own vehicles for work.

[50] This appears to suggest a contradiction which does not exist between the testimony of Messrs. Willis and Lawrence and, more importantly, is on a matter of no significance.

[51] The trial judge provided additional criticism of Mr. Willis' testimony about picking up his daughter:

> 68 He also said he could not have met her at the times A.A. said because he had to pick up his daughter from Mount St. Vincent University to take her home so that they could prepare the evening meal, as his wife was ill. However, some visits were in the summer, and there is no evidence about whether his daughter had classes in June, July, and August of 2003.

[52] Mr. Willis did not, in fact, say this. His only testimony about picking up his daughter from Mount Saint Vincent was in relation to the meeting at Tim Hortons. Mr. Willis' wife testified generally about how the household ran in 2003. She said that Mr. Willis would usually pick up their daughter at Mount Saint Vincent University at 5:00 p.m. and when they got home would cook supper. The trial judge appears to discount Mr. Willis' evidence on a point that he did not testify about and which was of no significance. A.A. only provided general information about when the incidents took place. Her testimony was that the first two took place at 9:00 p.m. and 7:00 p.m. She said the first intercourse took place on an evening in October 2003. She also said that Mr. Willis stayed overnight once and arrived at her home in the early morning on another occasion.

[53] Mr. Willis testified that he did not know where A.A. was employed when he was dealing with her in June 2003. Whether he knew or not was irrelevant to the Crown's case. However, Mr. Lawrence testified that he would usually ask a client for this information. The trial judge found this to be a contradiction that formed part of her justification for not believing Mr. Willis. In her decision she said:

> 71 Mr. Willis testified he did not know where A.A. worked, but Mr. Lawrence said it was usual to ask this. Furthermore, A.A. said he knew, because he said he would not go there for two weeks after her failure to show at the airport. Mr. Willis said he did not contact her brother or her coworkers because he did not know of F.A. or where A.A. worked.

[54] In addition, the three pieces of evidence which were given less weight by the trial judge, due to her misapplication of the rule in *Browne v. Dunn*, were insignificant and further illustrate the critical evaluation applied to Mr. Willis' testimony.

[55] The trial judge does not appear to have subjected A.A.'s evidence to the same degree of scrutiny as she did for Mr. Willis. There are a number of examples that illustrate this point.

[56] A.A. admitted lying on several previous occasions, including to her parents with respect to whether she was continuing her university studies and in her application for refugee status. She also omitted any reference to the alleged sexual relationship with Mr. Willis in her initial application for permanent residence status in 2014. The trial judge discounted this evidence:

> 44 She admitted lying on her refugee claim and misleading her parents, but I do not consider this to affect her credibility in court. It could have, except for the nature of her testimony. As I said, she gave details, was not shaken on cross-examination, and knew things she could not have known without Mr. Willis being with her and without him telling her about, for example, the change in her flight. Nor do I believe, as the Defence suggests, that she made all this up to get to stay in Canada. She only learned of the Humanitarian and Compassionate application in 2014 and had told her brother and her sister of these incidents many years before.

[57] The reference to a change in A.A.'s flight relates to arrangements being made for her deportation in June 2003. The fact that A.A. seemed to have some internal information concerning these arrangements gave the trial judge more confidence in her credibility. She said:

> 43 She had information about the change of travel date, which was internal Immigration information to which she would have had no access. She said the last time she saw Mr. Willis was in early December 2003 and that was the time the warrant was issued, of which she would have had no knowledge.

[58] A.A.'s testimony was that Mr. Willis told her that she had originally been booked for deportation on her birthday and would be travelling on a flight with criminals. He said he made arrangements to move her to a commercial flight which would leave Halifax on June 24, 2003. The internal CIC records indicate that A.A. was never booked on a flight on her birthday or any flight other than the one on June 24th. There were emails exchanged in May about the possibility of including A.A. on a flight with the Justice Prisoner and Alien Transport System, but no arrangements were finalized. The proposed date for that flight was not on A.A.'s birthday.

[59] The information which A.A. said she had concerning flights, on which the trial judge relied, was inaccurate in a number of respects. The trial judge does not explain why, despite these inconsistencies, she put such weight on this testimony by A.A.

[60] A.A. testified about a sexual relationship which spanned several months and included intercourse 1-2 times a week for the last month or so. At trial she was asked to describe Mr. Willis, and she said that she knew his penis was not circumcised. Both Mr. Willis and his wife testified that he was circumcised. This obvious contradiction, on a point about Mr. Willis' anatomy, was potentially significant in the context of a case with so little corroborating evidence on either side.

[61] If the evidence of Mr. Willis and his wife, about circumcision, was accepted, it could seriously undermine A.A.'s version of events. It might well raise a reasonable doubt with respect to Mr. Willis' guilt. The trial judge did not mention this contradiction in her decision. She sets out the testimony of A.A. on the issue but not the evidence of Mr. Willis or his wife. We do not know why. Mr. Willis' evidence is criticized on immaterial and sometimes non-existent contradictions whereas this evidence, which potentially goes to the heart of the complainant's credibility and reliability, is not referred to.

[62] I am satisfied that these examples illustrate unbalanced scrutiny placed by the trial judge in her assessment of the evidence of the Crown and the defence. This amounts to an error of law which, in a case such as this, undermines the fairness of the trial, and I would allow this ground of appeal.

Conclusion and Disposition

[63] The errors committed by the trial judge directly relate to her assessment of the evidence of A.A. and Mr. Willis, which was central to her decision. It is not possible to discern how her conclusions may have differed without these mistakes. In my view, they are sufficiently serious and significant that they may have impacted her ultimate finding of guilt, and for this reason a new trial should be ordered. The *curative proviso* in s. 686(1)(b)(iii) should not be applied in these circumstances. The errors are not of such a minor nature that it could be said that they had no impact on the verdict. In addition, the evidence was not so overwhelming that I would conclude that there would be no substantial wrong or miscarriage of justice by leaving the verdict undisturbed.

[64] I would allow the appeal and remit the matter for a new trial. The amended Notice of Appeal requests a trial by judge and jury. Mr. Willis shall be released on the same bail conditions which were applicable prior to his trial with the exception that his residence is now in Montreal.

Wood, C.J.N.S.

Concurred in:

Beveridge, J.A.

Farrar, J.A.