NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Cooke*, 2020 NSCA 66

Date: 20201027
Docket: CAC 498196
Registry: Halifax

Between:

Catlin Cooke

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: 486.4 of the *Criminal Code*

Judge: The Honourable Justice Carole A. Beaton

Appeal Heard: October 5, 2020, in Halifax, Nova Scotia

Cases Considered: *Laframboise v. Millington*, 2019 NSCA 43; *R. v. N.M.*, 2019 NSCA 4; *R. v. J.C.*, 2018 NSCA 72; *R. v. G.E.H.*, 2012 NSCA 69; *R. v. Roth*, 2020 BCCA 240; *R. v. Laing*, 2017 NSCA 69; *R. v. Alisaleh*, 2020 ONCA 597; *R. v. D.K.*, 2020 ONCA 79; *R. v. Khelawon*, 2006 SCC 57; *R. v. Bradshaw*, 2017 SCC 35;

Subject: Criminal; Criminal—sexual assault; Evidence—credibility; Evidence—prior consistent statement; Evidence—hearsay; Evidence—burden of proof

Summary: Following a trial in the Provincial Court of Nova Scotia, the Appellant was convicted of sexual assault. Later sentenced to two years custody for the offence, he now appeals the conviction.

Issues: (1) whether the judge erred in the task of considering certain evidence relating to the credibility of the complainant;

(2) whether the judge erred by the improper use of prior consistent statements of the complainant;
(3) whether the judge erred by the improper use of certain hearsay evidence;
(4) whether the judge erred by shifting the burden of proof to the Appellant.

Result: The judge erred in not properly conducting a credibility assessment of the complainant's evidence, while overemphasizing prohibitions against stereotypical reasoning. The judge used both a prior consistent statement and hearsay statements by the complainant and hearsay evidence to bolster her credibility. The judge erred in shifting the burden of proof to the Appellant.
Appeal allowed and the matter remitted for a new trial.

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Judges:	Beveridge, Bourgeois and Beaton JJ.A.
Appeal Heard:	October 5, 2020, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Beaton J.A.; Beveridge and Bourgeois JJ.A. concurring
Counsel:	Roger A. Burrill and Drew Rogers, for the appellant Erica Koresawa, 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 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).

Mandatory order on application
(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences
(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application
(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography
(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness

who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Reasons for judgment:

[1] The Appellant Mr. Cooke was charged in a three-count Information with allegations of sexual assault, assault and theft. Following a trial before the Honourable Judge Jean Whalen of the Provincial Court of Nova Scotia ("the judge"), he was convicted of sexual assault on February 13, 2020.[1] Later sentenced to two years custody for the offence, he now appeals the conviction. For the reasons that follow, I would allow the appeal.

Background

[2] On the date in question, the Appellant and the complainant, known previously to one another, travelled from the complainant's home in Truro to a residence in Dartmouth, Nova Scotia. The complainant did not know where the Appellant was taking her, but once they arrived she recognized the occupants. She feared for her safety due to the presence of the homeowners and other occupants previously known to her.

[3] The complainant proceeded to ingest alcohol and drugs. While in the downstairs of the home, she was assaulted by the Appellant and eventually taken to an upstairs bedroom by A.A., an occupant of the home. Left alone to sleep in that bedroom for the night, the complainant stated she was sexually assaulted by a male occupant of the home who entered the bedroom uninvited. The complainant stated she was later sexually assaulted by the Appellant when he entered the room uninvited. Early the next morning, the complainant fled the home with bare feet and eventually found the home of an acquaintance, who then called 911.

[4] The evidence before the judge was that on the way to hospital, the complainant did not reveal the sexual assault to EMT personnel and was not truthful in telling them she remembered nothing of the events of the previous evening. Once at the hospital, the complainant refused to undergo a Sexual Assault Nurse Examiner (SANE) procedure. In speaking with a doctor the complainant reported a sexual assault but did not reveal any details.

[5] The complainant explained during cross-examination that she did not discuss the sexual assault because she felt she was being judged by EHS personnel, who

[1] Upon completion of the trial evidence on November 20, 2018, counsel for Mr. Cooke advised the court his client did not contest the offences of assault and theft, and a conviction was entered for each of those offences on that date.

she said were joking around and asking questions that made her uncomfortable. The complainant agreed with defence counsel she had not been truthful with EHS when she told them she remembered nothing about the prior evening. She further testified while she had not provided any details to the physician who examined her at the hospital, save stating she had been sexually assaulted, the examination resulted in certain medications being prescribed to her.

[6] At trial, defence counsel challenged the complainant on what she did and did not report to medical personnel in an effort to highlight internal inconsistencies in the complainant's evidence, and to elicit her admission she had been untruthful in aspects of her disclosure. Cross-examination also illustrated contradictions in her evidence with that of Crown witness A.A., who had taken the complainant to the upstairs bedroom on the evening in question.

[7] In her decision, the judge found the complainant to be a credible witness, and explained why none of the contradictions within her evidence or with the evidence of A.A. impacted the judge's conclusions. In doing so, the judge invoked several cautions against stereotypical reasoning to support her conclusions, and asked herself, rhetorically, why the complainant would have lied about the alleged sexual assault when disclosure of it required her to take medications prescribed for her at the hospital. The judge was satisfied the complainant did not have "a motive to lie" and her explanations were "plausible".

Grounds of appeal

[8] The Appellant identifies four grounds of appeal:

(a) whether the judge erred in the task of considering certain evidence relating to the credibility of the complainant;

(b) whether the judge erred by the improper use of prior consistent statements of the complainant;

(c) whether the judge erred by the improper use of certain hearsay evidence;

(d) whether the judge erred by shifting the burden of proof to the Appellant.

[9] The applicable standard of review is determined by whether the assertion of error relates to matters of fact, law or mixed fact and law. In *Laframboise v. Millington*, 2019 NSCA 43 Saunders J.A. explained the standards this way:

> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 *ff*.; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten,* 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.

[10] Both parties recognize in relation to the first ground of appeal the judge's findings of credibility are entitled to considerable deference, as she was in the best position to assess the evidence of the witnesses. On matters of credibility, appellate intervention must be confined to legal errors: *R. v. N.M.*, 2019 NSCA 4 at para. 17. As noted by Beveridge J.A. in *R. v. J.C.*, 2018 NSCA 72:

> [50] Material errors made in the course of credibility determination on the path to conviction can be fatal (see *R. v. C.L.Y.*, 2008 SCC 2; *R. v. P.(J.)*, 2014 NSCA 29; leave to appeal denied, [2014] S.C.C.A. No. 255).

[11] As to the remaining grounds of appeal, the parties agree these are questions of law reviewed on a standard of correctness.

Issue No. 1—Assessment of credibility

[12] The Appellant advances two areas of concern in relation to the credibility assessments made by the judge. The first relates to her application of specific prohibitions against stereotypical reasoning. The second relates to the scaffolding erected by the judge to support her positive credibility and reliability findings.

[13] The Appellant asserts the judge, in articulating certain impermissible reasoning principles throughout her decision, allowed the application of those same principles to overtake a proper consideration of the evidence before her to conduct credibility assessments. The Appellant is concerned that in an effort to avoid falling into the trap of applying stereotypical reasoning to assess the evidence of the alleged offence, the judge set aside her responsibility to fully examine the evidence.

[14] The Respondent contends the judge's appreciation of the perils of impermissible reasoning, as articulated at the outset of the decision, inform the entirety of the decision she made. The Respondent submits this Court, in conducting its task, must be mindful of the whole of the judge's reasons. This approach, as opposed to a microscopic examination of the reasons, was endorsed by the Court in *R. v. G.E.H.*, 2012 NSCA 69 at para. 15. Nonetheless, the Appellant asks us to undertake an examination of specific areas of the decision, where he maintains the judge erred.

[15] The first concern relates to the complainant's evidence she had unwittingly and unwillingly attended at the home where the sexual assault occurred, and was fearful for her life once there. At trial, defence counsel challenged that evidence during cross-examination. In her decision, the judge said the following about that evidence:

> Defence counsel posed the question why socialize with them, meaning Ms. [A.], if she was brought against her will, or antagonize Mr. Cooke? **No adverse inference against the credibility of a complainant may be drawn that is based solely on the fact that the Defendant was previously known to the complainant or on post-offence relationships between the parties.** Credible complainants may or may not avoid further contact with an accused, and there are a number of reasons for that. (Emphasis added)

[16] The Appellant argues the judge "abrogated her responsibility to consider the actual evidence" of the complainant's prior involvement with the homeowners, the occupants and the Appellant. The Appellant's objection is the judge did not examine the contradictory evidence concerning the prior relationship between the Appellant and the complainant, and instead concluded there was no reason for the complainant to fabricate. Later in her decision the judge found "a lack of animosity" between the complainant and the Appellant.

[17] The Respondent properly concedes it was an error for the judge to rely on an absence of motive to lie in assessing the credibility of the complainant. Despite

that concession, the Respondent asks us to conclude, on the entirety of the decision, that such a misstep was not fatal. The difficulty with the Respondent's suggestion is that we are left uncertain about what degree of weight, if any, the judge may have placed on that determination.

[18] The second aspect of the Appellant's concern relates to the judge's discussion of a lack of forensic evidence, which a SANE procedure would have offered.

[19] Regarding the absence of that type of evidence, the judge said:

> Mr. Rogers also argued on behalf of his client that there was no examination, no SANE kit. **No adverse inference against the credibility of a complainant may be drawn that is based on a lack of evidence of physical injury or struggle.** (Emphasis added)

[20] The judge was correct to say no adverse inference could be drawn from a lack of physical evidence. The complainant's evidence reveals that at the hospital she refused an opportunity to undergo the SANE process. Her explanation was vague—she asserted she was uncomfortable with the attending EMTs, who she reported had joked in her presence and demeaned her. The Appellant submits the complainant's lack of disclosure should have been considered by the judge in assessing the complainant's credibility.

[21] The Appellant asserts the judge improperly overemphasized the prohibition against consideration of the presence or absence of evidence. This impaired her obligation to look at the circumstances surrounding the complainant's evidence, not for the purpose of considering why certain evidence was not available, but rather to examine the complainant's **reasons** for not participating in the SANE process.

[22] The refusal to participate in the SANE process is not a basis for disbelieving a complainant. However, the judge's task was to assess whether the complainant's evidence was credible. One cannot draw an adverse inference from the lack of a SANE kit, but the factual matrix surrounding why the complainant refused participation in such an exam—her explanation about contact with intimidating EHS personnel—does not appear to have been considered by the judge.

[23] The judge was not free to ignore the complainant's reasons for not participating in the SANE process or declining to disclose details of the incident to the treating doctor. I agree with the Appellant that the complainant's lack of

disclosure to the paramedics and limited disclosure to the treating doctor, while not in and of itself indicative of anything, were relevant to the task of assessing her credibility.

[24] Thirdly, the Appellant takes issue with the judge's observation that no adverse inference could be drawn from post-offence demeanour or behaviour of the complainant. The judge said this:

> And lastly, Mr. Rogers argues there are no details of the sexual assault given to the doctor. **No adverse inference against credibility of a complainant may be drawn that is based on post-offence demeanour or behaviour of the complainant.** They may or may not be emotionally distraught or exhibit a change in behaviour post-offence. (Emphasis added)

[25] The Appellant asserts this was much too broad a statement; while the complainant's post-offence response did not have to meet a prescribed pattern of behaviour, her post-offence statements could be relevant to her credibility, especially when made to a medical professional. It is the **reason** for the lack of communication with the medical professionals given by the complainant that the Appellant maintains should have been considered by the judge in assessing the complainant's credibility; that is, the complainant did not take the SANE exam because the EMTs made her uncomfortable.

[26] The Respondent again asks that we read the judge's reasons as a whole. The Respondent says it was within the judge's purview to accept the complainant's explanations for why she socialized with the homeowners, why she didn't submit to the SANE process, why she did not disclose a sexual assault to EHS and why she made only partial disclosure of a sexual assault to the doctor.

[27] The record illustrates the judge focussed on avoiding impermissible inferences rather than scrutinizing certain aspects of the evidence to properly assess the complainant's credibility. The judge's reasons do not allow me to conclude she took into account the complainant's lack of memory nor her inconsistent statements, nor her problematic admission to the court during cross-examination that she had lied to medical personnel at the hospital.

[28] The complainant's evidence contained internal inconsistencies regarding the EMTs, the SANE examination, and her communications with the doctor, coupled with external inconsistencies with the evidence of witness A.A. These matters were not addressed by the judge, or if they were, it is not evident from the record.

With respect, it is not apparent the judge considered inconsistencies she could or should have; doing so would not have necessitated the judge engaging in impermissible reasoning or stereotypical thinking. Avoiding pitfalls does not equate to not completing the task of taking into account and assessing the evidence.

[29] A similar problem arose in *R. v. Roth*, 2020 BCCA 240. There, the British Columbia Court of Appeal concluded the trial judge failed to appreciate and resolve significant inconsistencies in the complainant's evidence in a sexual assault trial. Specifically, the judge correctly rejected a suggestion the fact the complainant did not say anything about a sexual assault to a cab driver, nor call the police, would go to the issue of consent. Agreeing it would have been an error to ground an adverse credibility finding in stereotypes about how a sexual assault complainant "should" act, DeWitt-Van Oosten J.A. went on to discuss the need to properly assess and deal with inconsistencies in the evidence:

> [130] However, this does not mean that the evidence surrounding the driver's attendance at the home, including the complainant's conduct during that interaction, was not open for consideration in the credibility assessment and the trial judge was obliged to steer away from it. The risk of myths and stereotypes distorting a judge's fact-finding or reasoning process does not prohibit use of a complainant's behaviour for all analytical purposes (assuming the evidence surrounding that behaviour is properly before the court). Although a piece of evidence may carry the potential for impermissible reasoning, it may also have a permissible role to play as a circumstance to consider in assessing the evidence as a whole, in the context of the case's particular "factual mosaic": *R. v. D.(D.)*, 2000 SCC 43 at para. 65; *Kiss* at paras. 101–102. In my view, what *A.R.D.* and like cases warn against is the improper use of this type of evidence, not any use at all.
>
> [131] On this point, I agree with the comments of professor Lisa Dufraimont in "Myth, Inference and Evidence in Sexual Assault Trials", (2019) 44 Queen's L.J. 316 at 353:
>
> > Criminal courts … carry the heavy responsibility of ensuring that every accused person has a fair trial. Subject to the rules of evidence and the prohibition of particular inferences, this requires that the defence generally be permitted to bring forward all evidence that is logically relevant to the material issues. <u>Repudiating myths and stereotypes means rejecting certain discriminatory lines of reasoning, but it does not make whole categories of evidence irrelevant or inadmissible. Indeed, sweeping prohibitions that would rule out any consideration of particular forms of evidence are avoided as inconsistent with the accused's right to make full answer and defence and with our overall approach to finding</u>

> facts. Outside the prohibited lines of reasoning identified as myths, relevance remains an elastic concept that leaves a wide scope for reasoning from logic and human experience. [Internal references omitted.]

[30] As in *Roth*, here there is no indication the judge considered or resolved the inconsistencies and contradictions in the complainant's evidence in assessing credibility.

[31] While each passage pointed to by the Appellant, taken in isolation, might not weigh as heavily if the appropriate credibility assessment had otherwise been conducted, it does not appear that was done. The judge's repeated reliance on impermissible reasoning jettisoned the task at hand and was an error sufficient to impact the deference otherwise due to a judge's credibility assessment.

[32] The second aspect of the Appellant's objection to the judge's credibility assessments concerns positive credibility findings made by the judge. During the trial, defence counsel asked the judge to assess what had occurred, taking into account both the details and the lack of details in the complainant's evidence. The Appellant says rather than conduct that exercise, the judge instead relied on neutral factors to make positive credibility findings, which ultimately had a bearing on the outcome of the trial. The Appellant points to the following portions of the judge's decision:

> There are a number of factors that support the complainant's version of events. These are ... excuse me. There are a number of factors that support the inference that the complainant's version of the events is accurate.
>
> […]
>
> Given the nature of the relationship between the two, her lack of disclosure to hospital personnel, her hesitancy to disclose to police initially, and the lack of [the complainant's] certainty regarding some things leads me to infer that [the complainant] is not lying about the events that took place on the night in question. I find no reasonable doubt in her evidence.

[33] The Respondent asks us not to lose sight of the context in which the judge situated her reasons. The absence of detractors that might negatively impact the credibility of the complainant would make that evidence neutral, not automatically raise it to a level of "support" for "the complainant's version" as was stated by the judge in the above-noted passage. This confirms the judge was not simply inferring on matters of credibility, but was in fact making findings about credibility, despite labelling them as inferences.

[34] While the judge did not find any troublesome credibility detractors in the complainant's evidence, the absence of them did not constitute the proper basis upon which the judge could then make positive findings of credibility and reliability: *R. v. Laing*, 2017 NSCA 69 at para. 68.

[35] I am persuaded the judge's overemphasis on prohibitions against stereotypical thinking, to the detriment of the task of assessing credibility, combined with unsupportable positive credibility findings, amount to errors of law.

Issue No. 2—Shifting of the Burden of Proof

[36] The Appellant asks us to conclude the judge "watered down" the burden of proof by repeatedly finding certain aspects of the complainant's evidence were "plausible". Did this have the effect of diminishing the Crown's burden of proving the charge beyond a reasonable doubt, to one of establishing a possible explanation that supported guilt? The following comments in her decision illustrate the judge's exercise of "explaining" the complainant's evidence:

> [The complainant] testified in a straightforward manner. She didn't embellish her testimony. Admitted if she could not remember something and offered plausible explanations for refusing to reveal details of the alleged assault or why she didn't leave the residence.
>
> […]
>
> [The homeowner] and her son came out of the house, and she said she had missed [the complainant]. [The complainant] said she was fearful and didn't get out of the car at first. But then subsequently got out of the car because there was nowhere else to go. Based on [the complainant's] previous dysfunctional relationship, I find that this to be a plausible explanation. [The complainant] went in the house where everybody was drinking.
>
> […]
>
> Is the witness's evidence - [the complainant's], that is – that bizarre or far-fetched or grossly exaggerated as to be untrue or unreliable? I found earlier that [the complainant] offered a plausible explanation for how she ended up at Roleika Drive.
>
> The fact that in the first statement to the police officer, she thought [the homeowners] were in the car and in the second statement she was mistaken does not detract from the plausibility of her explanation. Even if she went willingly without a ruse, the alleged sexual assault could still occur.
>
> […]

> [The complainant] conceded she was not truthful when she told the medical staff she had no recollection until she woke up. But she offered a plausible explanation - they were joking, and she felt she was being judged.
>
> […]
>
> [The complainant] gave a plausible explanation regarding unwillingness to disclose to EHS - she was upset, felt she was being judged and they were joking.
>
> […]
>
> Mr. Cooke's counsel questioned her in saying no one heard her scream. But [A.A.] testified she was asleep within five minutes. And if I accept [the complainant's] testimony, [occupant] had just sexually assaulted her, and [the homeowner] was in another room after having taken sick earlier in the night. That doesn't mean she wasn't heard. It's just as plausible that someone heard her but did not respond given the previous dysfunctional relationship between the parties.
>
> […]
>
> The details of the disclosure. Initially [the complainant] did not disclose details to EHS or the doctor, I found there was a plausible ex- ... or I find there is a plausible explanation for this.

[37] Again the Respondent urges the judge's reasons be read as a whole to permit us to conclude that regardless of her use of the words "plausible" and "plausibility" on a number of occasions, the judge reminded herself credibility was only one aspect of the ultimate question of proof beyond a reasonable doubt. The Respondent argues the use of the words "plausible" and "plausibility" was in the context of the judge's examination of contradictions in the complainant's evidence, which then led to her determinations on credibility, and then to her consideration of the evidence as a whole.

[38] It is not our task to focus on the frequency of a turn of phrase or use of a word(s) that might, with the luxury of second thought, have been differently expressed. The concern here is not with the multiple uses of the word "plausibility", but its obvious implication for the judge's reasoning process.

[39] I agree with the Respondent's statement: "While linguistic precision and analytical organization are ideal in a trial judge's reasons, a trial judge's reasons need not be ideal". However, the effect of the judge's efforts to explain away contradictions or problems in the complainant's evidence impacted on an objective consideration of whether the Crown had proven the offence beyond a reasonable doubt. If the judge had any lingering doubts about the complainant's evidence, it seems they were resolved by repeatedly providing explanations for them.

[40] I am persuaded the judge's repeated acceptance of the "plausibility" of certain possibilities to furnish explanations means that for her those other likely, probable or conceivable ways to view the evidence led her to resolve difficulties or inconsistencies presented by the complainant's evidence.

[41] The Appellant maintains it was inappropriate for the judge to make a positive credibility finding by resting on an absence of exaggeration. The Appellant points to the following passage in the decision:

> Is the witness's evidence – [the complainant's], that is – that bizarre or far-fetched or grossly exaggerated as to be untrue or unreliable? I found earlier that [the complainant] offered a plausible explanation for how she ended up at Roleika Drive.

[42] An absence of exaggeration in a complainant's evidence may hardly be surprising, but the trier of fact must exercise care in the application of that characterization of the evidence. The recent decision in *R. v. Alisaleh*, 2020 ONCA 597 illustrates the difficulty. There, the trial judge had treated the complainant's lack of embellishment as enhancing her credibility. The Ontario Court of Appeal found:

> [15] When addressing why she believed the complainant, the trial judge explained: "[t]here are two important factors that I find enhance [the complainant's] credibility". One of those two important factors pertained to the view that the complainant had not embellished during her evidence. As the trial judge explained, although every allegation of sexual assault is serious the allegations made by the complainant were "relatively modest" and that the complainant "gave a measured description of what took place between them without apparent exaggeration." The trial judge also emphasized that the complainant's description of the assault was "understated".
>
> [16] To be clear, it is not an error to simply note that there is an absence of embellishment in the complainant's testimony. This court has held that the presence of embellishment can be a basis to find the complainant incredible, and there is nothing wrong with noting the absence of something that could have diminished credibility. **However, it is wrong to reason that because an allegation could have been worse, it is more likely to be true:** *R. v. Kiss*, 2018 ONCA 184 at para. 52, citing *R. v. G.(G.)* (1997), 115 C.C.C. (3d) 1, at p. 10 (Ont. C.A.); *R. v. L.L.*, 2014 ONCA 892, at para. 2; *R. v. G. (R.)*, 2008 ONCA 829, 243 O.A.C. 1, at para. 20. (Emphasis added) Our colleague Paciocco J.A. put it this way in *Kiss* at para. 52:
>
> > On the other hand, in my view, there is nothing wrong with a trial judge noting that things that might have diminished credibility are absent. As

> long as it is not being used as a makeweight in favour of credibility, it is no more inappropriate to note that a witness has not embellished their evidence than it is to observe that there have been no material inconsistencies in a witness' evidence, or that the evidence stood up to cross-examination. These are not factors that show credibility. They are, however, explanations for why a witness has not been found to be incredible.

[43] While the judge correctly reminded herself credibility was one aspect of the ultimate question of proof beyond a reasonable doubt, it would seem from the decision, read as a whole, she was searching for a way to justify her positive treatment of the complainant's evidence. It is reasonable to conclude that, in effect, the judge was suggesting the lack of bizarreness or exaggeration in the complainant's evidence helped to erase any reasonable doubt. The cumulative effect was to undermine the Appellant's right to a fair trial by effectively shifting the burden of proof to him to show how that evidence was bizarre, far-fetched or grossly exaggerated.

Issue No. 3—Improper use of a prior consistent statement

[44] The judge heard evidence about the complainant's lack of disclosure to EHS and the attending physician. In her reasons, she assessed that aspect of the evidence:

> [The complainant's] testimony regarding the sexual assault is consistent regarding the elements of the offence. She was not questioned on that, only on the furniture in the room, whether or not she was mistaken about who it was, and her lack of disclosure to EHS and the doctor.
>
> …
>
> [The complainant] gave a plausible explanation regarding unwillingness to disclose to EHS - she was upset, felt she was being judged and they were joking. She agreed she didn't give any particular details to the doctor save and except she did tell them she was sexually assaulted which resulted in her being given over I think 30 HIV medication. Why claim to be sexually assaulted? Why not just an assault? And then having to take all this medication.

[45] The Appellant argues rather than use this information as part of the narrative, the judge went further and used it as confirmation or support for the allegation being made by the complainant.

[46] Once again, the Respondent urges us to read the judge's analysis in the greater context of the decision as a whole. The Respondent maintains the judge's comments about medical personnel were for an appropriate and narrow "narrative purpose".

[47] It is well-established prior consistent statements are presumptively inadmissible (*R. v. Laing*, *supra*, at para. 72). The Appellant also draws our attention to *R. v. D.K.*, 2020 ONCA 79 asking us to draw a parallel between that case and the matter before us.

[48] In *D.K.*, *supra*, the complainant responded to a doctor's question about how she had sustained an injury by replying "forced intercourse". At trial, the Crown argued the utterance was admissible as part of the narrative of disclosure and could be used to assess the complainant's credibility. Trotter J.A. on behalf of the Court set out the law and the exception that may permit use of the prior consistent statement:

> [34] Prior consistent statements are presumptively inadmissible. There are several rationales for this rule, including that prior consistent statements (1) lack probative value; (2) are often self-serving; and (3) are hearsay: see S. Casey Hill, David M. Tanovich and Louis P. Strezos, eds., *McWilliams' Canadian Criminal Evidence*, 5th ed. (Toronto: Thompson Reuters, 2019) (loose-leaf updated 2019), at p. 11-2; *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, at para. 5; and *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 36.
>
> [35] The overwhelming danger is that a trier of fact may improperly use the mere repetition of a statement as a badge of testimonial trustworthiness. As Hourigan J.A. said for the majority in *Khan*: "[S]uch evidence cannot be used for the prohibited inference that consistency enhances credibility, or the incorrect conclusion that the simple making of a prior consistent statement corroborates in-court testimony": at para. 41; see also *Stirling*, at para. 7; *R. v. Divitaris* (2004), 188 C.C.C. (3d) 390 (Ont. C.A.), at para. 28; *R. v. D.C.*, 2019 ONCA 442, at para. 19; and *R. v. S.K.*, 2019 ONCA 776, 148 O.R. (3d) 1, at para. 90.
>
> [36] The rule against prior consistent statements is subject to a number of exceptions. For example, a prior consistent statement may be admitted for the limited purpose of rebutting an allegation of recent fabrication: *Stirling*, at paras. 5-7.
>
> [37] Prior statements may also be admitted where they are "necessary to the unfolding of the events or narrative of the prosecution": see *Dinardo*, at para. 37. On this basis, a prior consistent statement may be admitted to assist with understanding how the case came before the court or to appreciate the "chronological cohesion" of the case: *R. v. Fair* (1993), 16 O.R. (3d) 1 (C.A.), at

> p. 18; *Khan*, per Hourigan J.A., at para. 30. To be admissible under this exception, the statement must be "truly essential" to the unfolding of the narrative: *R. v. M.C.*, 2014 ONCA 611, 314 C.C.C. (3d) 336, at para. 91.
>
> [38] Further, prior statements may be admissible under the narrative as circumstantial evidence exception. Admissibility on this basis of such does not hinge on the mere repetition of the same information. As explained by Hourigan J.A. in *Khan*: "A prior consistent statement can be used not to corroborate the evidence of the witness, but to provide the surrounding circumstances and context to evaluate the credibility and reliability of the witness's in-court testimony": at para. 39; see *Dinardo*, at para. 31.

[49] He found the complainant's utterances to the doctor had played a dominant role in the trial judge's analysis:

> [46] The trial judge failed to properly explain how J.D.'s utterance to Dr. Sved "greatly assists the Court in assessing her credibility and reliability." Considering the trial judge's reasons as a whole, it appears that the real value derived from her utterance was the repetition of the same allegation made at trial (and to the police). The utterance was not admissible on this basis. This improper use of the utterance permeated the trial judge's reasons.

[50] As in *D.K.*, *supra*, here the complainant's prior reporting to the doctor should only have gone to the matter of narrative, not to an assessment of the complainant's credibility. In posing her rhetorical questions as to why the complainant would claim to have been sexually assaulted, as opposed to "just" assaulted, if that were not true, the judge demonstrated she was clearly relying on the prior consistent statement in weighing the credibility of the complainant.

[51] I am not persuaded by the Respondent's argument the judge's comments about what was said to medical personnel were merely for a narrative purpose. Clearly, the judge was reaching conclusions, rather than placing events along a continuum. She used the prior consistent statement to bolster the complainant's credibility, which constitutes an error.

Issue No. 4—The improper use of hearsay evidence

[52] The Appellant objects to the judge having used a hearsay statement in assessing credibility. Hearsay statements are presumptively inadmissible when used for the truth of their contents (*R. v. Khelawon*, 2006 SCC 57 at paras. 56–59; *R. v. Bradshaw*, 2017 SCC 35 at paras. 20–21).

[53] The witness A.A. testified to a conversation she had on the day in question with one of the homeowners, concerning why the complainant attended the home that day. That evidence included A.A.'s recitation of a specific reason purported to have been uttered to her by the homeowner. The homeowner was not called as a witness at trial.

[54] I consider what the judge said about that aspect of A.A.'s evidence:

> I find there was a call made by Mr. Cooke before they left. Mr. Cooke had [the complainant's] phone and he used it, and she didn't know who he was talking to. I find that [A.A.] testified that [the complainant] was coming for the Defendant and that [A.A.] had asked [the homeowner] why was [the complainant] coming and [the homeowner] said, "To make us money."
>
> [...]
>
> Upon arrival, Mr. Cooke went into the house first, and [the homeowner] and [the homeowner's] son came out of the house, and [the homeowner] said [the homeowner] had missed [the complainant]. [The complainant] said she was fearful and didn't get out of the car at first. But then subsequently got out of the car because there was nowhere else to go. Based on [the complainant's] previous dysfunctional relationship, I find that this to be a plausible explanation. [The complainant] went in the house where everybody was drinking.

[55] The Respondent asks us to conclude the judge's references to the homeowner's explanation for why the complainant attended at the home were offered merely as narrative and did not impact upon the credibility assessment. The Respondent argues there is nothing in the reasons that demonstrate the judge relied on comments attributed to the homeowner. With respect, I do not agree.

[56] I conclude the judge went further than reciting a chronology of events; she accepted the evidence of A.A. about why the complainant was at the home, including as it did the out of court statement attributed to the homeowner, to resolve an inconsistency in the evidence of the complainant regarding her concern about being at that location. This constituted an impermissible use of the homeowner's hearsay explanation by the judge to assist in making factual determinations, and ultimately, to making credibility findings.

Conclusion

[57] Throughout the written and oral arguments, the Respondent has asked us to consider the judge's decision as a whole, and to avoid overemphasizing particular aspects of it to find fault in the expense of the judge's credibility findings and

conclusions about proof beyond a reasonable doubt. The Respondent reminds us that adequacy of reasons as a whole can overcome any lack of specificity in the judge's decision-making process.

[58] Nonetheless, I am persuaded by the Appellant's arguments that despite the deference owed to the judge's findings of credibility, her overemphasis of cautions against stereotypical reasoning fettered her task of making credibility assessments. She also used otherwise neutral features to make positive credibility assessments. Furthermore, the judge improperly used both a prior consistent statement of the complainant and hearsay evidence in assessing the credibility of the complainant.

[59] With respect, any one of these errors could warrant intervention. Taken together, they impact on the integrity of the judge's conclusion the Crown proved the charge of sexual assault beyond a reasonable doubt.

[60] For the foregoing reasons, I would allow the appeal and remit the matter for a new trial before a different judge of the Provincial Court.

Beaton J.A.

Concurred in:

Beveridge J.A.

Bourgeois J.A.