Date: 19980130 Docket: C.A.C. 135715

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Eisenhauer, 1998 NSCA 60
Freeman, Flinn and Cromwell, JJ.A.

BETWEEN:

DORIS MAE EISENHAUER	)	Donald C. Murray
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Dana W. Giovannetti
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	November 12, 1997
	)	
	)	
	)	Judgment Delivered:
	)	January 30, 1998
	)	
	)	
	)	
	)	
	)	
	)	
	)	
	)	

THE COURT: Appeal dismissed per reasons for judgment of Cromwell, J.A.; Freeman and Flinn, JJ.A. concurring.

CROMWELL, J.A.:

I. INTRODUCTION

Doris Eisenhauer ("the accused") was convicted by Boudreau, J. and a jury of the second degree murder of Gisele Pelzman ("the deceased"). The accused appeals her conviction on three grounds. It is argued that the trial judge erred: (i) by failing to fairly and adequately review the evidence relating to the theory of the defence; (ii) in his directions to the jury concerning the appropriate use of certain witnesses' criminal convictions; and (iii) in his treatment of certain prior inconsistent statements of three witnesses at the trial.

II OVERVIEW OF THE EVIDENCE

The trial lasted over three weeks; 54 witnesses were heard. At this point, it is useful to provide a short overview of the main elements of the case for the Crown and the defence.

The Crown's case was a substantial one. The defence does not challenge the reasonableness of the verdict. However, the Crown concedes that, had the jury acquitted, that verdict could not be challenged on appeal as unreasonable. The accused testified and

denied involvement in the killing.

In the early morning of Thursday, September 9, 1993, golfers discovered the body of Gisele Pelzman near the second tee of the Ashburn Golf Club in the Fairview area of Halifax. She had received multiple head injuries. The evidence strongly suggested that the injuries had been inflicted with a rock which was found in four pieces weighing a total of 23 kg. near the deceased's body.

The Crown's theory was that the accused had motive and opportunity to kill the deceased and that she was identified as the killer by an eyewitness. The accused denied any involvement in the killing and testified that she had been asleep at a party at the crucial time. The defence submitted that the Crown evidence was not sufficiently reliable to prove guilt beyond a reasonable doubt.

The main elements of the Crown's case were these.

First, there was evidence that the accused was the deceased's

pimp and that the accused was angry and jealous about losing the deceased's services. There was also evidence of previous difficulties between them and of the accused threatening the deceased.

Second, there was eye witness testimony (from Claudette Chisholm) that she and the accused met the deceased in the early morning hours of September 9, that the accused began to punch, slap and kick the deceased as they moved along Dutch Village Road and that the assault culminated on the golf course when the accused got a large rock and struck the deceased with it while she was lying on the ground, crying. There was also eye witness evidence from Debbie Williams to the beginning of the assault. She was the superintendent of the apartment building on Dutch Village Road where the assault allegedly began.

Third, there was evidence of alleged incriminating statements made by the accused. Kim Turner testified that the accused twice claimed to have "bet" the deceased to death; Jodi Mycroft testified that she overheard the accused say (apparently the day after the murder,

September 10th) that there had been a fight with the deceased and that she was the last person to see her alive at the golf course. There was also evidence of other statements by the accused, to the police and others, which could have been considered as showing knowledge of the circumstances of the offence or consciousness of guilt.

The defence position at trial was that the deceased was beaten and killed “as a result of her contact” with Claudette Chisholm and Michael Borden and that the accused was passed out at a party at the time of the killing. The accused, according to the defence, was targeted because of her recent association with the deceased and as a result of suggestions made to the police by Chisholm and Borden. Overall, the Crown’s case was not sufficiently weighty, credible or convincing to convict according to the defence.

The defence pointed to what it said are weaknesses in the Crown’s case. I will briefly review, in general, the matters relied on by the defence as weakening the Crown’s case.

First, several of the Crown witnesses were, or had been at the time of the killing, teenage prostitutes and users of illicit drugs including crack cocaine. Many had criminal records. Some had made previous statements to the police that were very different from their evidence at trial; some, particularly Claudette Chisholm and Kim Turner, could have been considered to have had motives to lie.

Second, the defence pointed to other factors in relation to other Crown witnesses who were not part of the group just described.

For example, there was the eye witness testimony of Ms Williams. It placed the accused assaulting the victim at the apartment building on Dutch Village Road on the morning of the killing. Williams testified as to having seen the accused through a window at about 2:00 a.m. in the morning, less than ideal conditions for accurate observation. Her description of the accused's clothing to the police did not correspond to other evidence about what she was wearing that evening. Williams could not identify the accused when the police, a few days after the killing, showed her photographs of the deceased and the

accused. She, in fact, did not identify the accused as the other person outside her window until she saw video footage of the accused on television after the accused had been charged with murder.

By way of further example, there is the evidence of Jodi Mycroft. She testified to overhearing the accused state, the day after the killing, that she was the prime suspect, that there had been a fight with the deceased and that she was the last one to see her alive at the golf course. Mycroft reported that the accused had asked her companions how to beat a polygraph test. However, in an earlier statement to the police, Mycroft reported the accused as saying that she was really dubious about the polygraph in that she thought if she said the truth, it might tell she was lying.

III. FIRST GROUND OF APPEAL: FAILURE TO ADEQUATELY REVIEW THE EVIDENCE:

The defence submits that trial judge failed to review the evidence adequately. The submission is summarized in the accused's factum:

> In a case [such as the present one] where the defence advanced a theory relying largely upon motives to fabricate, dishonest conduct, patterns of inconsistencies including strikingly similar failures to recall the same points by different witnesses, and outright repudiation of prior statements under oath and otherwise, it was essential that the trial judge focus the trier of facts' attention to the material facts in order that those facts be considered in light of these key issues.

The trial judge gave the jury the theory of the defence as follows:

> I will now read to you the position of the Defence in this trial. The position of the Defence is that as a directionless teenager of seventeen, Doris Eisenhauer was led into drug abuse and working as a prostitute by several people, including Claudette Chisholm and Dougie Murray.
>
> The Defence contends that as a means of survival and as a means of feeding her drug habit, Doris Eisenhauer continued to work as a prostitute until she met her husband in the late fall of 1993. The Defence contends that in the course of working, according to the example set for her by Claudette Chisholm, Doris Eisenhauer hung from time to time with other girls who were working in the business, such as Lisa Sheppard, Sylvia Innes and Gisele Pelzmann. The Defence contends that this provided both girls with security of not having to work alone, as well as for the joint acquisition of drugs and, therefore, the girls would hang together until either developed a regular boyfriend.
>
> The Defence contends that Claudette Chisholm came into some conflict with Gisele Pelzmann in early September of 1993. The Defence said that for reasons undisclosed to anyone Claudette Chisholm has admitted that she came into contact with Gisele Pelzmann on the night of September 8th-9th, 1993, either because of or as a result of arrangements made by Michael Jerome Borden with Gisele Pelzmann.
>
> The Defence also contends that as a result of her contact with

Claudette Chisholm and Michael Borden, Gisele was beaten and killed, and that this occurred at approximately 1:30 a.m. on September 9th, 1993. The Defence further contends that at the time of the killing, Doris was passed out at a party in Fairview, several blocks away.

The Defence contends that as a result of this, that Claudette Chisholm and Michael Borden would know that Doris would not be able to contradict any later version of events which either of them might give about what had happened, and that this made Doris Eisenhauer a convenient person to blame if police attention was ever brought against themselves.

The Defence's position is that after the killing of Gisele, Claudette Chisholm returned to the party while Michael Borden went for a shower and disposed of the clothing he had, and then went to Claudette Chisholm's home to await the return of both Doris Eisenhauer and Claudette Chisholm.

The Defence contends that during the investigation of the killing of Gisele Pelzmann, Doris Eisenhauer was targetted because of her recent past association with Gisele Pelzmann and because of suggestions made to the police by both Claudette Chisholm and Michael Borden, and that these insinuations and accusations made about Doris Eisenhauer have increased in severity among Claudette Chisholm and her underworld companions as Doris Eisenhauer, herself, has managed to rebuild herself a life away from that underworld of drugs and prostitution.

The Defence contends that Doris Eisenhauer killed no one and is only accused of killing anyone by the word of the one person, Claudette Chisholm, who the Defence argues is untrustworthy as she is still functioning in the world of drugs and prostitution. The Defence contends that on the whole of the evidence, the Crown's evidence is not sufficiently weighty, credible or convincing to convict the accused, and that the Crown has not proven the guilt of the accused on any offence beyond a reasonable doubt, and that a verdict of not guilty should be rendered.

The defence does not take exception to this statement of the

theory of the defence, but submits that the trial judge did not adequately review the evidence relating to it.

The defence contested the identity of the perpetrator, as Mr Murray put it, on three levels: first, the murder, and the events leading up to it, did not occur as described by Chisholm nor in the presence of the accused; second, the Crown evidence, which was led to support Chisholm's evidence, was not itself trustworthy or reliable; third, the motive alleged by the Crown did not exist. The defence makes specific complaints about the manner in which the trial judge reviewed the evidence bearing on each of these levels of attack on the Crown's case.

The eye witness evidence of Chisholm was an important element in the Crown's case and the attack on it was central to the defence. With respect to Chisholm's evidence, the trial judge drew attention to some of the matters which emerged in cross-examination and which bore on the theory of the defence:

> On cross-examination, Claudette Chisholm also stated she had made no deal with the police for her testimony in this trial. She testified she is not concerned because the police have no reason to charge her.

Claudette Chisholm also testified on cross-examination to a time when she and Doris Eisenhauer and Gisele Pelzmann were at Glen Niles' place and that she, Claudette Chisholm, had sent Gisele Pelzmann home in a taxi, but she and Doris Eisenhauer gave different accounts of the reasons for doing that. Claudette Chisholm testified that she did not hang around with Gisele Pelzmann and that she only knew her and had never been to her house.

On cross-examination, Claudette Chisholm testified she did not tell the whole story to the police until she was arrested in November, 1995 and at first, at that time, the police told her, according to her testimony, that she was only telling ninety percent of the whole truth. She said that she then decided to tell the police that Doris Eisenhauer did it.

Claudette Chisholm again stated in cross-examination that she did not testify against Doris Eisenhauer to get any advantage from the police; however, she appears to have testified differently at the Preliminary Inquiry on that subject. At this trial, Claudette Chisholm admitted she could not recall what she said at the Preliminary Inquiry in March of this year. She stated she still smokes dope and cannot remember little details, but she says the murder is serious business and that she can recall that.

Claudette Chisholm stated on cross-examination that she could not recall the walk through on the golf course with the police. She said she was on lithium at the time and this appears to be consistent with what Detective MacDonald said he observed on the day as the walk through progressed.

. . . . .

On cross-examination by the Defence, Claudette Chisholm denied having any blood on her clothing that night and said she did not get any blood on Michael Borden. She said that she was about six feet from Gisele Pelzmann when Doris Eisenhauer struck her with the rock. She said the golf course incident happened between 1:30 and 3:00 a.m., but that she did not know the exact time.

Claudette Chisholm admitted speaking with a girl who worked at Tim Horton's and that Claudette Chisholm had told this girl to say that she, Claudette Chisholm, was there on the evening

of September 8th-9th, 1993 if the police came around.

Claudette Chisholm readily admitted her first statement to the police was a lie. She said she did not want the police to know she knew Gisele Pelzmann because she wanted to protect Doris.

Claudette Chisholm testified she was drinking earlier on the afternoon of September 8th, 1993 with Mike Williams and Doris Eisenhauer in Victoria Park, and she confirmed they went by car to Timberley to Hector and Herbie's to get drugs. Claudette Chisholm also confirmed that Doris Eisenhauer had left Guilano's to go to Checker's Pizza later on the evening of September 8th, 1993 to get some donair meat.

Claudette Chisholm testified that Doris Eisenhauer did not fall asleep on the couch at Dwayne Goddard's party, but on cross-examination she did not deny that Doris Eisenhauer may have been on the couch. Claudette Chisholm testified she did not notice that Gisele Pelzmann was on drugs or drinking that night, and that she just looked normal to her.

Claudette Chisholm testified that she was wearing a slouch sock that night among other things. She said that the white sock, exhibit #15, when she was shown the exhibit, was not her sock. On cross-examination by Mr. Murray, she said she had sports socks. She said that any slouchies she owned were black.

On cross-examination, Claudette Chisholm also testified that she did not recall any sexual activity with Michael Borden at 5873 Stairs Street later on the morning of September 9th, 1993. Claudette Chisholm testified that Doris Eisenhauer moved out of the bedroom at her grandmother's place shortly after the death of Gisele Pelzmann and that no one else occupied Doris Eisenhauer's room.

Claudette Chisholm testified that no arrangements had been made to meet Gisele Pelzmann at the bus stop. She said she could not recall telling the police on November 3rd, 1993 that Doris Eisenhauer had laid down on the couch at Dwayne Goddard's party and slept for a while, even though the police notes of that interview indicate that she said that. Claudette Chisholm stated that she did not recall most of the things she may have told the police during the November, 1993 interview

> and she says she was not telling the truth back then to protect Doris.

The defence complains the judge failed to review several conflicts between Chisholm's evidence and that of other witnesses. With respect to several of these, the judge either, in fact, did deal with them in his charge to the jury or the point raised by the defence is not fairly arguable in the context of the evidence at trial. For example:

i. Chisholm testified that, after the altercation between the deceased and the accused at the apartment building, she (Chisholm) stayed there crouched down for a little bit --she could not estimate how long-- and then caught up with the accused and the deceased by the traffic lights at the intersection. The accused, she said, had the deceased by the scruff of the neck dragging her down the street. Defence witnesses White and Corkum testified they had observed someone they later identified as the deceased walking, apparently drunk, along Dutch Village Road sometime between 12:00 and 2:00. Neither testified that there was anyone with her although both said in cross-examination that there could

have been others in the vicinity. The trial judge reviewed this evidence. Although he did not specifically point out the possible discrepancy between this evidence and Chisholm's evidence, the relevant matters were drawn to the jury's attention.

ii. Staff Sgt Gorman testified that blood-stains on the deceased's skin got there while her clothing was off. He also testified that it was consistent with his observations that the deceased had been rendered unconscious, her clothing pulled up, her panties removed and then the wounds which produced the blood stains inflicted. The defence argues that if, as Staff Sgt Gorman's evidence suggests, at least some of the beating was done after the deceased's clothing had been removed, some of Chisholm's account of the beating and events thereafter could not be right because the perpetrator would not have had time to render the accused unconscious, remove the clothes and beat her again.

With respect to Gorman's evidence, the judge directed the jury that: "In my view, his evidence did not materially advance the case for either side, but that is a question of fact and is for you, the jury, to determine." Given that Chisholm testified that the accused caught up with her after the beating anywhere from "just a few minutes" to between 5 and 15 minutes later, the trial judge's assessment is fair, and he also clearly told the jury they were not bound by his view of the evidence.

iii. Chisholm testified that she was wearing white slouchy socks on the night in question. There was evidence that such a sock, stained with the deceased's blood, was seized by the police at Chisholm's home but in a room which had allegedly been occupied at the time of the killing by the accused. When asked specifically if this sock was hers, Chisholm said "I don't know. No, I had sport socks. That's a slouchy" and that she owned a slouchy but only in black. This inconsistency was specifically mentioned by the judge in his review of Chisholm's evidence.

iv. The defence also complains that the trial judge did not adequately review the evidence tending to negate motive, particularly evidence that tended to confirm that the accused was not the deceased's pimp and tended to show that the deceased was not under the accused's control.

Reference is made to Campbell's evidence tending to show that the deceased made her own decisions. In fact, the trial judge did refer to Campbell's evidence that the deceased chose to stay with him rather than go with the accused even though the accused threatened her. I doubt that a more extensive review of this evidence would have been helpful to the defence. No fair reading of Campbell's evidence would tend to negate the accused's alleged motive. Reference is also made to the evidence of the deceased's mother. Again the trial judge did review aspects of this evidence which tended to show that the deceased did not do what the accused wanted her to, although most other aspects of the witness's testimony were anything but helpful to the defence.

v. The defence also complains that the trial judge did not specifically refer to the evidence of Innes to the effect that the deceased was, in fact, working for herself and not, as the Crown alleged, for the accused. It appears that the trial judge misstated Innes' evidence. He said that she had testified on cross-examination that the deceased was working for the accused, whereas in fact, Innes admitted that she had told the police in a written statement that the deceased didn't work for anybody and that she had no reason not to be truthful with the police at that time. However, the judge also did not review Ms Innes' evidence that the accused had told her that she had "beat up" on the deceased "one time when she was drunk."

The defence also complains that certain conflicts in Sheppard's evidence were not reviewed. Sheppard's testimony, that she worked as a prostitute for the accused, was shaken, says the defence, by a conflict between it and Wentzell's evidence. The inconsistency relied on is that Sheppard denied that she continued to do tricks with Wentzell once the accused was no

longer going there; whereas, on Wentzell's evidence, he had a difficult time discouraging Sheppard from coming when he no longer wanted her around. The judge specifically referred to this evidence. In any case, Wentzell testified that when the accused brought young women to him, he gave the money to the accused.

In each of these examples, there was no unfairness in relation to the trial judge's directions when they are realistically viewed in the context of the evidence at trial.

The defence relies on certain other examples.

vi. The defence complains that the trial judge did not adequately review the evidence relating to an incident involving Borden and Newhook stripping for Chisholm and the accused. Chisholm and Borden denied the incident on the one hand and the accused and Newhook affirmed that it had happened on the other. The trial judge mentioned Chisholm's denial of

sexual activity with Borden at her home later on the morning of September 9 in his review of her evidence: p 2566. He did not mention Borden's denial of this in his evidence or his earlier statement to the police that the stripping incident had in fact occurred or Newhook's evidence which substantially confirmed the accused's evidence about the stripping incident.

vii. The defence submits that the judge's review of the trial evidence relating to the timing of events was inadequate. The timing, says the defence, is crucial because if there were any reasonable doubt that the accused had been asleep at the relevant time, she would have been acquitted. The accused's evidence was that she "thought" she was at the party until around 3:00 or 3:30 am. Amanda Brake had her leaving the party somewhere about 1:30 to 2:00 am or perhaps as late as 2:30 am. There was a good deal of other evidence about timing, including the time of the altercation at the apartment building, the spotting of the deceased by Corkum and White

and the time screams were heard from the golf course.

The trial judge did not review all of the evidence about the timing of various sightings and incidents, but he did refer to many of them, including the evidence of Chisholm and Borden about when the former and the accused arrived at home to be met by Borden and Newhook, Chisholm's evidence about the timing of events on the golf course, Brake's evidence about when Chisholm and the accused left the party, Woods and Phillips evidence about the timing of the deceased's visits to the donut shop on the morning in question, the evidence of White and Corkum about seeing the deceased walking along Dutch Village Rd, the evidence of Cottreau about the timing of screams coming from the golf course as well as the accused's testimony about when she left the party. The accused's evidence about timing is plausible on the trial judge's review of the evidence.

viii. The defence submits that the evidence of the "confirmed

movements" of the deceased ought to have been reviewed because it conflicted with the evidence of Sheppard and Turner. Sheppard's evidence was damaging to the defence in three respects. Sheppard claimed that the accused had been her pimp while the accused denied being anyone's pimp. Sheppard's evidence placed the accused and the deceased together on Dutch Village Road the night of the murder. Sheppard also testified that the accused had threatened her because the accused had heard that Sheppard had been "ratting to the cops".

Turner's evidence was damaging to the defence because she testified that the accused had twice said to her that she had "bet" the deceased to death. Although the trial judge did not deal with the particular conflicts in the evidence about which the defence complains, he did deal, at some length, with potentially problematic aspects of Turner's evidence and certain aspects of Sheppard's cross-examination.

The defence submits, on the basis of these examples, that the trial judge's review was "inadequate to the point that it did not fairly draw the attention of the jury to the significance of particular pieces of evidence or the conflicts or weaknesses or significance of that evidence in relation to the theory of the defence".

The defence submission, it seems to me, amounts to this. Where, as here, the defence relies on inconsistencies in the evidence as part of its theory, the trial judge is required to put virtually every one of them to the jury in his directions. I do not accept this as a correct statement of the law.

The obligation of the trial judge in relation to the review of the evidence is that set out by the Supreme Court of Canada in **R. v. Jacquard,** [1997] 1 S.C.R. 314. The judge's charge will be adequate if "...an appellate court, when looking at the trial judge's charge as a whole, concludes that the jury was left with a sufficient understanding of the facts as they relate to the relevant issues". In the earlier decision of **Azoulay v. The Queen**, [1952] 2 S.C.R. 495, Taschereau. J. stated:

> The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they must appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them.

The accused places particular reliance on the decisions of this Court in **R. v. Pace** (1992), 108 N.S.R. (2d) 226 and **R. v. Reddick** (1989), 91 N.S.R. (2d) 361. In **Reddick**, the accused was charged with various offences including break and enter. The theory of the defence was that the accused entered the room by invitation. The accused testified that he had knocked on the door and, as a joke, said “city police” after which he was let in. That this had occurred was admitted by one of the occupants of the place allegedly broken into. In his charge to the jury, the trial judge did not refer at all to conflict in the evidence of the two Crown witnesses on this point or to the evidence about the accused knocking on the door and saying “city police.” As Macdonald, J.A. pointed out in his majority reasons allowing the accused’s appeal, the “police” episode gave rise to a real issue as to whether the accused broke and entered. He said:

> In this case, the defence to the first count was that the

> appellant entered the apartment with consent. In my view, the trial judge should have reviewed the evidence touching that defence including that of Ms. McInnis to which I have referred. His error to do so in my opinion was nondirection amounting to misdirection.

This case is an illustration of the principle set out in **Azoulay, supra**, that the trial judge is under a duty to review the substantial portions of the evidence and relate that evidence to the issues. It does not support the view that the trial judge is obliged to review every inconsistency in the evidence of every Crown witness.

In **Pace, supra**, the trial judge did not say a word about the theory of the defence or relate the evidence to the law. The approach of the trial judge in that case affords no parallel to the trial of this accused at which the judge put the theory of the defence to the jury and devoted over 30 pages of transcript to his review of the evidence.

It may be that a review of the evidence which was more clearly focused on the inconsistencies of the testimony of the various witnesses would have been more helpful to the jury. However, the obligation of the trial judge is not simply to review the theory of the defence and the

evidence which supports it, but the theories of both the Crown and the defence and the evidence in relation to them. The trial judge would have been well aware that the accused's testimony in this case was inconsistent, on various points and in various ways, with the evidence of many other witnesses. Had he embarked on a detailed review of inconsistencies in the Crown evidence, fairness would have required him to be evenhanded in that review which, in my opinion, would not have assisted the accused.

Such an approach might have given rise to another danger. It is well established that the jury should not be told to approach the evidence of the accused as a credibility contest between the Crown and defence witnesses but from the point of view of whether, on all the evidence, there is any reasonable doubt: see for example, **R. v. S.(W.D.)**, [1994] 3 S.C.R. 521. An evenhanded review of all of the major inconsistencies in both the Crown and defence evidence might have risked giving the wrong impression to the jury that there was, in fact, a credibility contest being played out before them. Although this would not have been the inevitable result of such an approach, and I do

not want to venture any firm opinion on that question in this case, the possible risk just identified provides some further support for the manner in which the trial judge chose to review the evidence in this case.

Having reviewed the trial judge's charge in light of the deficiences in it alleged by the accused, I do not think that the charge, read as a whole and in the context of all the evidence at trial, constituted misdirection. There were two places in which the trial judge appears to have somewhat misstated the evidence and there were points which both the defence and the Crown would prefer to have been given more emphasis. The applicable test from **Jacquard, supra**, is that an appellate court must be satisfied that the judge's charge left the jury with a sufficient understanding of the facts as they relate to the relevant issues. What is required is a proper charge not a perfect one. In my opinion, this charge meets the **Jacquard** standard.

IV. SECOND GROUND OF APPEAL: THE JUDGE'S DIRECTIONS ON THE CRIMINAL RECORD OF VARIOUS WITNESSES

The defence argues that the trial judge erred in suggesting to the jury that, as he put it, “In my opinion, the criminal records of the witnesses or of the accused are not particularly helpful because they have no direct bearing on the present charge before the court.” It is submitted that these remarks are “dismissive” of the significance of the criminal records of the witnesses. Given that the defence position was that the trustworthiness, weight and credibility of the Crown evidence was insufficient to convict, it is submitted that the judge’s statement “critically undermined” the theory of the defence.

No objection was taken at trial to this aspect of the charge.

Several witnesses at trial had criminal records. The trial judge referred specifically to several of these in his review of the evidence. The judge’s comments on these witnesses were as follows:

> Kim Turner: A conviction that involves dishonesty may have more bearing on credibility than one that does not. Also, a recent conviction may be more relevant to credibility than one dating back years ago. In this particular case, Kimberley Turner appeared to have the more lengthy criminal record for fraud and theft related charges. Eighteen offences between 1989 and 1994.
>
> . . . . .

> ..... Kim Turner testified that she was currently in custody, and that she had left things out in her earlier statements to the police.
>
> . . . . .
>
> Ms. Turner had, as I indicated earlier, a lengthy criminal record for fraud and theft convictions during the period 1989 to 1994 - eighteen offences in total.
>
> Michael Borden: Michael Borden had a criminal record in November, 1994 - two charges of theft under, where he was sentenced to seven days, and in July of 1995 he was sentenced to sixty days for possession of stolen property and ten days for failure to comply with a court recognizance.
>
> . . . . .
>
> Denika Mayo: Denika had a criminal record as a young offender between the years 1989 and 1993.
>
> Philip Newhook: Philip Newhook had a criminal record - 1994, for theft and possession of stolen property. He had been sentenced to fourteen days at that time.

The judge did not refer to the criminal record of the accused or Claudette Chisholm. The evidence with respect to their records was sketchy. With respect to the accused, the only evidence before the jury was that she had been convicted of an unspecified offence as a young offender. As for Chisholm, the evidence consisted of one question and answer in a lengthy cross-examination:

> Q. You have a criminal record of two or three fraud charges, Ms Chisholm?

A. Yes I do.

The defence had made a **Corbett** application in relation to the criminal record of the accused. She had been convicted as a young offender, along with Claudette Chisholm, of assault causing bodily harm. The application was granted by the judge on the defence undertaking not to cross-examine Crown witnesses on their records other than those relating to offences of dishonesty and disobedience to court orders. The result was, for example, that Michael Borden's extensive record of violent offences was not before the jury. There is no suggestion that the judge erred on the **Corbett** ruling.

The judge gave the standard charge with respect to the use of a criminal record in weighing the evidence of witnesses:

> I will now explain to you how you may make use of a witness' or an accused's criminal record. Again, in this case, you heard the criminal record of many of the witnesses, including that of the accused. And again, I will review those criminal records in more detail when I review those witnesses' evidence. But you may only use the evidence of criminal record to judge the individual credibility of these witnesses or of the accused.
>
> The criminal record is simply one factor you may consider when you decide how much weight to give to the evidence of any witness. You may not use the criminal record of one

> witness to assess the credibility of another witness or of the accused - only to assess their own individual credibility.
>
> A conviction that involves dishonesty may have more bearing on credibility than one that does not. Also, a recent conviction may be more relevant to credibility than one dating back years ago. In this particular case, Kimberley Turner appeared to have the more lengthy criminal record for fraud and theft related charges. Eighteen offences between 1989 and 1994.
>
> However, you are free to decide that the evidence of any witness or the accused should be believed despite their individual criminal records. It is for you to decide if any witness' evidence should be believed or not believed.

No objection is taken to this part of the charge. The allegedly improper part of the direction immediately followed the passage just quoted:

> In my opinion, the criminal records of the witnesses or of the accused are not particularly helpful because they have no direct bearing on the present charge before the court and are unrelated. However, in the final analysis, it is for you, the jury, to decide the importance, if any, to give to the criminal record of any individual.

The judge had also, earlier, told the jury that :

> "I ... may express an opinion on the evidence , but you are not bound to follow my opinion.... indeed you should not and must not do so unless what I say agrees with your own judgment..."

In deciding what to say to the jury about the criminal records

of the witnesses, the trial judge had to take into account that the accused had a criminal record and had testified. Accordingly, what he said about the witnesses, in general, could damage her credibility as a witness. The judge reminded the jury of the records of several of the witnesses and correctly instructed the jury on the use they could make of such convictions. His comment about the importance of the criminal records was identified as his own opinion and was, to some degree, helpful to the accused given that she, too, had a record. The jury were told clearly in this passage, as they had been told earlier, that it was for them to decide on the importance of the criminal records. In all of the circumstances, I cannot say that this passage of the judge's charge, read in the context of the charge as a whole, constituted misdirection. There was, therefore, no error of law in this regard at the trial.

V. THIRD GROUND OF APPEAL: SUBSTANTIVE USE OF CERTAIN PRIOR STATEMENTS OF WITNESSES

The defence submits that the trial judge erred in failing to admit, as evidence of the truth of their contents, certain statements made prior to trial by the Crown witnesses Chisholm and Borden and by the defence witness Derouin. In the case of Chisholm, there is a

subsidiary issue as to whether proof that the statements were made was wrongly excluded.

a. The Chisholm Nov. 3, 1993 Interview:

Claudette Chisholm was a key Crown witness. She testified that she witnessed the killing.

On November 3, 1993, she had a long interview with the police. Detailed, but certainly not *verbatim* notes were kept which the officers testified fairly reflected the conversation.

There were many inconsistencies between the conversation, as recorded by the police, and Chisholm's testimony at trial. The defence refers to three matters as being the most significant.

Chisholm's November 3, 1993, interview provided some support for the accused's testimony that she had fallen asleep at a party the night and early morning of the killing. The police notes of that conversation (which were *Voir Dire* Exhibit 7) record Chisholm as saying

that the accused returned to a party at “something to 1:00 a.m.”, that she was doing dope and drinking, that she passed out “for about an hour or two on the couch” and then left at about 3:30 or 4:00 a.m. At trial, Chisholm testified that the accused did not fall asleep on the couch at the party at any time. The prior statement was, therefore, potentially significant not only because of the inconsistency, but because it related to the accused’s whereabouts around the time of the killing.

The second matter is this. At trial, Chisholm’s position was that she had lied to the police in November, 1993, to protect the accused.

During her evidence-in-chief at trial, Chisholm was referred to her interview with the police on November 3, 1993:

> Q. and on ... did you ... did you tell them [i.e. the police] at that time what had actually happened.
>
> A. No.
>
> Q. and again, why not Ms. Claudette? (sic)
>
> A. I was protecting Doris [i.e. the accused].

The defence points out that this is in marked contrast to what the police notes of the November 3 interview show to be the case.

Contrary to her position at trial, those notes indicate that Chisholm strongly implicated the accused in the killing. The notes record Chisholm stating that the accused had admitted beating up the deceased a few times. Chisholm offered the police her opinion that the accused was trouble wherever she went and that she (Chisholm) thought the accused killed the deceased.

The third matter emphasized by the defence was trial testimony and earlier statements concerned with sexual activity involving the accused, Chisholm, Borden and Newhook, early in the morning of, but after, the killing. At trial, Chisholm testified that although Borden and Newhook came to visit the accused and herself, there was no sexual activity involving Borden and the accused at that time. She also denied that she had Borden “stripped down that night to see what he had.” However, the police notes of the November 3, 1993, interview record Chisholm saying that a week after the killing, Borden and Newhook showed up at her place and that in the presence of the accused and herself, both stripped. It could have been concluded that her timing concerning this incident was incorrect in the interview as there was

considerable evidence that Borden and Newhook were waiting at Chisholm's residence when she and the accused arrived home in the early morning of September 9.

Newhook confirmed the stripping incident in his trial testimony as he had in his earlier statement to the police. The accused testified in similar terms. Borden denied it at trial but had referred to the incident in a statement to the police before trial.

During the cross-examination of Chisholm at trial, an issue arose as to whether the defence could show to the witness a copy of the November 3, 1993, interview notes. This was refused on the basis that the notes were not a statement in writing but only notes of an oral statement. No issue is taken with that ruling.

The defence cross-examined Chisholm, putting to her various alleged prior statements, some of which were based specifically on the November 3, 1993, notes. With respect to the three matters just described, she claimed no recollection of having made the statements

attributed to her. The witness testified that she did not recall telling the police that the accused had beaten up the deceased a few times, that the accused was trouble or that she thought the accused did the killing. She could not remember telling the police that the accused had been asleep at the party or that Borden and Newhook stripped at her house the morning of the murder. Thus, with respect to the three matters relied on by the defence, Chisholm testified that she could not remember making the statements attributed to her. However, she gave trial evidence that was inconsistent with the statements attributed to her in the November 3, 1993, interview notes.

After the Crown had closed its case, the defence applied to prove, through the evidence of the interviewing officers, certain portions of the Chisholm November 3, 1993, interview. The relevant portions have been described above.

As argued at trial, there were two purposes for doing so. First, the defence wished to prove simply that the particular statements had, in fact, been made by Chisholm. Second, and this was the main thrust

of the defence position at trial and on appeal, the defence argued that these portions of the Nov 3, 1993, interview should be placed before the jury as evidence of the truth of their contents. The Crown's position at trial was that the defence could not prove the statements before the jury for either purpose.

The judge ruled that the evidence of the November 3 interview was not admissible as evidence of the truth of its contents, stating:

> The interview took place of November 3rd, 1993, and lasted more than five hours. There are sixteen handwritten pages of notes taken by two police officers at different times during the interview. Two officers have testified that the notes are a fair representation of what took place during the interview, however, they do not profess to be the entire contents of those five-plus hours, nor a verbatim record. The interview was not a cautioned statement and it was not taken under any kind of oath or recorded except for the police notes. On this point, I am not satisfied the notes are complete or accurate representation of the five-plus-hours interview with Claudette Chisholm. Contrast that with the two-plus-hours interview with Doris Eisenhauer, which was videotaped and which made up eighty pages of typed transcript. The police officers, especially Officer Carmichael, said the notes would reflect the important points of the interview. It should also be noted the police investigators had a great deal of information regarding Claudette Chisholm and Doreen (sic) Eisenhauer and they were attempting to steer the interview in a particular direction. The interview notes are replete with otherwise inadmissible evidence as well. The use of the notes made during the interview was permitted for the purpose of the cross-examination of Claudette Chisholm. Are these notes also then admissible for a substantive purpose in this trial? For the reasons I have already stated, I find they are not. They do not remotely come close to satisfying the necessity or reliability

> tests enunciated in the **R. v. K.G.B.** or **R. v. F.J.U.** cases - quite the opposite. The notes have no reliability whatsoever.
>
> I find that these notes are inadmissible for any substantive purpose in this trial and they are not admissible for the truth of their contents nor to show any state of mind or special knowledge on the part of Claudette Chisholm. In fact, the alleged utterances regarding special knowledge has a high risk of significant potential prejudice to either side and, of course, this could not be further tested at this time. The use of these notes will, therefore, be restricted to the cross-examination of Claudette Chisholm, which incidentally has already occurred and she has been challenged on the alleged utterances to the police during the November 3rd interview.

Although it is not clear, it appears that the trial judge also ruled that proof that the statements had, in fact, been made could not be given but that the defence could use the alleged statements for the purposes of cross-examination which, as the judge observed, had already been done in any event.

There was not, strictly speaking, any evidence before the jury that these statements had, in fact, been made. However, the defence did not press this point in its factum and for good reason. Given the way the matter was dealt with at trial, the absence of formal proof of the statements is little more than a technical detail. There was evidence before the jury that Chisholm had been interviewed by the police on

(among other dates) November 3, 1993, as Chisholm herself admitted, that notes were taken and, in fact, that Sgt Reeves had the notes in his hand while testifying. It was also clear that defence counsel used notes of the interview for the purposes of cross-examination. At least some of these statements were treated by both defence counsel and the trial judge as if they were before the jury. In his submissions to the jury, defence counsel said:

> Consider how she expressed her distress to the police when they were interviewing her on November 3, 1993. "I didn't kill the fucking girl, I think Doris did do it." Did Claudette Chisholm say that? You decide.
>
> . . . . .
>
> You may want to think back to the interview that Claudette Chisholm had with the police on November 3, 1993 and consider whether or not she told them that Doris had passed out at the party for an hour or two.

In his charge to the jury, the judge said

> ..... She said she [Chisholm] could not recall telling the police on November 3rd, 1993 that Doris Eisenhauer had laid down on the couch at Dwayne Goddard's party and slept for a while, even though the police notes of that interview indicate that she said that. Claudette Chisholm stated that she did not recall most of the things she may have told the police during the November, 1993 interview and she says she was not telling the truth back then to protect Doris.

In light of these circumstances, failure to permit formal proof of

the statements could have had no impact on the jury's consideration of the case. However, as the matter was raised at trial and touched on in oral argument before us, I will address this aspect briefly.

I agree with the Crown's position at trial that the police notes of the November 3, 1993, interview with Chisholm do not constitute a statement in writing or reduced to writing within the meaning of s.10 of the **Canada Evidence Act**, R.S.C. 1985, c. C-5.

Section 11, however, is relevant. It provides:

> **11.** Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

The witness did not "distinctly admit" making the statements in question. She claimed not to remember making them. The statements attributed to the witness in the police notes were inconsistent with her trial testimony: in each of the three matters relied on by the defence, the

witness did not simply fail to remember making the statements, she gave evidence at trial inconsistent with the statements which the police attributed to her.

In order to be proved under s. 11, the statements must be "relative to the subject matter of the case". The evidence about the accused being asleep around the time of the murder obviously qualifies. It goes to the whereabouts of the accused around the time of the killing. The evidence relating to the stripping incident and whether Chisholm lied to protect the accused is more debatable. The Ontario Court of Appeal seems to imply in **R. v. Varga** (1994), 90 C.C.C. (3d) 484 (Ont. C.A.) that this phrase means that the evidence must relate directly to a fact in issue. I would not confine it in that way. I think Professor Bryant accurately stated the law in this regard in his article **"The Adversary's Witness: Cross-examination and Proof of Inconsistent Statements"** (1984), 62 Can. Bar Rev. 43 at 62 (citations omitted) :

> Another issue which arises is the meaning that should be ascribed to the phrase "relative to the subject-matter of the case"? Because relevance is a matter of degree, an exhaustive construction is impossible. Obviously, a statement concerning a substantive issue falls within the proviso. For example, a statement purporting to identify the culprit as a person other than the accused is a statement relative to the

> subject matter of the case. In civil matters, a statement relating to the colour of a traffic light in a motor vehicle right of way suit similarly meets the statutory requirement. However, it could be argued that in an appropriate case, a former statement relating only to the witness's credibility may come within the meaning of these words. For example, the theory of the defence may be that the Crown's chief witness has fabricated his testimony to exculpate himself, or that the witness's credibility is the very issue in the case and the inconsistency is extremely important evidence on that issue.

Chisholm was put forward as the only eye witness to the murder. The stripping incident was alleged to have taken place shortly afterward. If Chisholm was thought to be lying about that incident, her credibility might have been affected. I think that evidence about this incident is sufficiently connected to the material issues in the case so that it falls within the requirement of being "relative to the subject matter in issue" within the meaning of s. 11. I reach the same conclusion as regards the evidence about her reasons for lying to the police.

As for timing of the proof of the prior statement, there are few authorities. The predominant view is that, as a general, but not inflexible rule, in cases such as this, in which the witness does not distinctly admit making the statement, the proof of the statement should be offered as part of the case of the party seeking to prove the

statement, in this instance the defence: see **Bryant, supra**, at 65; E.W. Ewaschuk, **Criminal Pleading and Practice in Canada** (2d, updated to 1997) at 16-41; **R. v. Mandeville** (1992), 14 C.R. (4th) 209 (Que C.A.); **R. v. Proverbs** (1983), 9 C.C.C. (3d) 249 at 261 -2 (Ont. C.A.)

The defence was in the position to offer proof through the evidence of the police officers who had conducted the November 3, 1993 interview. In my view, the defence ought to have been allowed to offer this evidence before the jury. However, having regard to the manner in which the trial proceeded, which I have set out above, I do not think anything turns on this.

The main thrust of this part of the appeal relates to the judge's refusal to allow evidence of Chisholm's oral statements to be introduced as evidence of the truth of their contents (or as this is often referred to, "substantively admissible"). The appellant submits in her factum:

> .....that the learned judge erred in misdirecting himself on the law on the admissibility of the "hearsay" evidence of the statements of these three witnesses. In particular, he erred in failing to apply the correct admissibility threshold to the recorded statements, and in assuming the role of the trier of fact in deciding the ultimate reliability of certain utterances recorded and contained within those statements.

It is important to remember some general principles before turning to detailed consideration of this issue. A witness's prior inconsistent statement is generally placed before the jury only for the purpose of showing the inconsistency; the prior statement cannot be used as evidence of the truth of its contents. It is hearsay and inadmissible if used for the purpose of proving the truth of the matters contained in the statement: **R. v. B. (K. G.)**, [1993] 1 S.C.R. 740 at 763. However, the statement is no longer hearsay if the witness, while testifying at trial, adopts it as true. The prior statement may also become evidence of its truth if it falls within a hearsay exception. In this case, the relevant one is that described in the **R. v. B. (K. G.)** case.

The question of substantive admissibility only arises if the prior statement is to be used for a hearsay purpose--i.e., to prove the truth of the assertions made in it. With respect to the Chisholm statements that the accused was trouble and that she killed the deceased, the defence argument for substantive admissibility seems to me to be misconceived. As I understand it, the importance of this evidence from the defence

perspective was that it showed that Chisholm, contrary to her trial evidence, was not motivated to lie to the police by any desire on her part to protect the accused. This, however, is not a hearsay purpose. The fact that these statements were made is, of itself, evidence of her lack of desire to protect the accused. This is a situation in which, to use the words of Proulx J.A. in **R. v. Beriault** (1997), 6 C.R. (5th) 382 (Que. C.A.) at 386, the prior inconsistent statement (if proved to have been made) may be used if the fact that it was made is of itself of probative value. In my opinion, therefore, there was no error in failing to admit this evidence under a hearsay exception because, in light of the purpose for which the evidence was relied on by the defence, it was not hearsay.

That leaves for consideration the other two aspects of Chisholm's November 3, 1993, police interview relied on by the defence: that the accused had passed out on the couch at the Goddard party and that Borden and Newhook had stripped. Both of these, on the approach taken by the defence, were to be advanced for hearsay purposes. That the accused was asleep on the couch around the time

of the killing was central to the defence theory. While the fact that Borden and Newhook stripped was, of itself, not material, evidence that this, in fact, occurred could corroborate the accused's testimony that it did. Since this evidence was to be relied on for its truth, substantive admissibility must be considered with respect to both of these statements.

Prior statements of a witness which the witness does not adopt as true while testifying may be substantively admissible if their admission is necessary in the sense that evidence of equal value is not otherwise available and if, in addition, they meet a threshold of reliability justifying their consideration by the jury. The Crown accepts that the necessity criterion is satisfied. That leaves for consideration the reliability aspect.

The defence submits that several factors support reliability. The interviewing officers could provide detailed evidence about the demeanor of the witness at the time of making the prior statement. The interview was conducted after an arrest, a **Charter** caution, the offer of

counsel and the advice that anything said could be used as evidence. These factors, according to the defence, combine to satisfy the reliability threshold required for substantive admissibility.

The trial judge, in his ruling, noted that the statement was not a “cautioned statement”. By this he meant that the interview notes were not on a formal criminal caution statement form. However, the evidence on the *voir dire* was clear that on the day of this interview, Chisholm had been arrested, advised of her **Charter** rights and given the police caution.

The Crown argues that the threshold reliability requirement is not satisfied because the evidence of the November 3, 1993, interview was not under oath, no warning was given to impress upon the witness the consequences of lying, the interview was not recorded in its entirety and there were no other substitute factors to provide some assurance of reliability.

Before turning to examine the cases, I should touch on two

matters that were not contested before us. First, the accused does not argue for substantive admissibility of everything Chisholm is recorded as having said to the police on November 3, 1993, but only the specific matters mentioned earlier. The Crown does not suggest that this, of itself, is fatal to substantive admissibility. It is not suggested, for example, that there were other portions of the interview that ought, in fairness, to have been included in the defence application. I will therefore approach the case on the basis that the fact that the defence application relates only to a portion of what the police attribute to the witness during the November 3 interview is not, of itself, determinative against substantive admissibility. This is consistent with the rule about putting prior statements to the witness in cross-examination: see **Bryant, supra**, at 64

Second, cases such as **B. (K. G.), supra** and **F.J.U. v. The Queen**, [1995] 3 S.C.R. 764 involved the Crown seeking substantive admissibility for statements of its own recanting witnesses. Of course, in the case before us, the defence is arguing for substantive admissibility of a prior oral statement of a Crown witness. There was no

argument presented to us that the same general principles should not apply, of course adapted as necessary for the new context, and I agree with Proulx, J.A. in **Beriault, supra** and Quinn, J. in **R. v. Scozzafava**, [1997] O.J. No. 4430 that they do. It may be, though, that where a party seeks substantive admissibility of the prior statement of the opposite party's witness, the reliability threshold may be somewhat relaxed as compared to the more usual **B. (K.G.)** situation in which a party wishes to rely on the statement of its own recanting witness.

The line of cases dealing with the substantive use of a witness's prior statement grew out of the Supreme Court's development of a new, principled approach to the admission of hearsay evidence: see e.g. **R. v. Khan**, [1990] 2 S.C.R. 531; **R. v. Smith**, [1992] 2 S.C.R. 915. Those were cases in which the makers of the statements were not available to testify. The evidence thus satisfied the requirement of necessity. The thrust of the judgments was to identify "circumstantial guarantees of trustworthiness" - appropriate substitutes to compensate for the absence of cross-examination of the maker of the statement. As Lamer, C.J.C. said in **Smith** [S.C.R., p. 926]:

> "Guarantee", as the word is used in the phrase "circumstancial guarantee of trustworthiness", does not require that reliability be established with absolute certainty. Rather, it suggests that where the circumstances are not such as to give rise to the apprehensions traditionally associated with hearsay evidence, such evidence should be admissible even if cross-examination is impossible.

When the principled approach to hearsay was extended to a witness's prior statements, the Court acknowledged that the requirements of necessity and reliability on which the principled approach was founded needed to be "..adapted and refined in this particular context, given the particular problems raised by the nature of such statements" : **R. v. B.(K.G.)** per Lamer, C.J.C. at 783.

Two notable distinctions between the case before us and the situations discussed in **Smith** and **Khan** are, first, that in this case, as in **B.(K.G.)**, but unlike **Smith** or **Khan**, the maker of the earlier statement is not only available to testify but is, in fact, a witness at trial. Therefore, admission of the statement does not deprive the opponent of the opportunity to cross-examine the maker of the statement at trial. Reliability, in this context, is concerned with the comparison of the witness's present testimony in court and the prior statement. As the

Chief Justice noted in **B. (K.G.)**, the reliability concern:

> "...is sharpened in the case of prior inconsistent statements because the trier of fact is asked to choose between two statements from the same witness...In other words the focus of the inquiry in the case of prior inconsistent statements is on the comparative reliability of the prior statement and the testimony offered at trial, and so additional *indicia* and guarantees of reliability to those outlined in *Khan* and *Smith* must be secured in order to bring the prior statement to a comparable standard of reliability ..." (emphasis added)

In the case before us, there is the added distinction that it is the defence seeking to admit a statement of a Crown witness, not as in **R. v. B.(K.G.)**, a party seeking admission of an earlier statement made by its own recanting witness. This is an important difference. The hearsay rule is concerned not only with keeping potentially unreliable evidence from the trier of fact, but also with fairness in an adversary trial. : see e.g. E. M. Morgan **"Hearsay Dangers and the Application of the Hearsay Concept"** (1948), 62 Harv L. Rev. 177; Sopinka, Lederman and Bryant, **The Law of Evidence in Canada** (2d, 1992) at 159 and see generally **R. v. Potvin**, [1989] 1 S.C.R. 525 per Wilson, J at 543 ff. Concerns about adversary fairness are less acute when, as here, one party seeks to rely on the earlier statement of the opposite party's witness than when one party seeks to rely on the earlier statement of

its own recanting witness.

In **B.(K.G.)**, three witnesses had told the police prior to trial that the accused had told them that he thought he had caused the death of the victim. At trial, the three witnesses admitted making these statements but claimed they were untrue. The Supreme Court held that prior statements could be substantively admissible if they were necessary and there were sufficient guarantees of reliability of the statements. It is important to the decision that the prior statements contained admissions by the accused to these witnesses and that their statements respecting these admissions were made while they were being questioned by the police. With respect to reliability, Lamer, C.J.C. said:

> ...., the requirement of reliability will be satisfied when the circumstances in which the prior statement was made provide sufficient guarantees of its trustworthiness with respect to the two hearsay dangers a reformed rule can realistically address: if (i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, (ii) the statement is videotaped in its entirety, and (iii) the opposing party, whether the Crown or the defence, has a full opportunity to cross-examine the witness respecting the statement, there will be sufficient circumstantial guarantees of reliability to allow the jury to make substantive use of the statement. Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that

> the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those which the hearsay rule traditionally requires.

In concurring reasons, Cory, J. (L'Heureux Dubé, J. concurring) stated the new rule more broadly. Specifically, he felt that the Chief Justice's approach gave undue weight to desirability of the trier of fact being able to observe the making of the earlier statement in order to better assess its reliability. In his view, cross-examination at trial and the ability to observe the demeanor of the witness at trial will compensate for the inability to observe the making of the earlier statement.

In **F.J.U., supra**, the Court continued with the development of the law relating to the substantive use of prior statements which it had begun in **B.(K.G.)**. The statement at issue in **F.J.U.** was that of a young complainant to the investigating officer. This statement was not under oath and not recorded on video or audio tape. It appears that there was not a *verbatim* record of the interview. The investigating officer prepared a summary of the complainant's anticipated evidence based in part on notes he had made during the interview and in part on his

memory. At trial, the complainant admitted having made the allegations set out in the "will-say" statement, but claimed they were untrue.

Lamer, C.J.C. summarized the earlier developments, in part, as follows:

> In my analysis in *B. (K.G.)*, I next proceeded to construct a reformed rule concerning prior inconsistent statements based on the principles set down in *Khan, supra*, and *Smith, supra*. These cases established that the traditional inflexible approach to the hearsay rule and its exceptions, which relied on fitting different types of evidence into rigid categories or pigeon-holes, was to be rejected in favour of an approach which would allow evidence to be admitted and used substantively when it is shown to be reliable and necessary ...
>
> *Khan* and *Smith* establish that hearsay evidence will be substantively admissible when it is necessary and sufficiently reliable. Those cases also state that both necessity and reliability must be interpreted flexibly, taking account of the circumstances of the case and ensuring that our new approach to hearsay does not itself become a rigid pigeon-holing analysis. My decision in *B. (K.G.)* is an application of those principles to a particular branch of the hearsay rule, the rule against the substantive admission of prior inconsistent statements. The primary distinction between *B. (K.G.)*, on the one hand, and *Khan* and *Smith*, on the other, is that in *B. (K.G.)* the declarant is available for cross-examination. This fact alone goes part of the way to ensuring that the reliability criterion for admissibility is met. The case at bar differs from *B.(K.G.)* only in terms of available *indicia* of reliability. Necessity is met here in the same way it was met in *B. (K.G.)*: the prior statement is necessary because evidence of the same quality cannot be obtained at trial. For that reason, assessing the reliability of the prior inconsistent statement at issue here is determinative. .....
>
> Cross-examination alone, therefore, goes a substantial part of the way to ensuring that the reliability of a prior

> inconsistent statement can be adequately assessed by the trier of fact. (emphasis added)

In **F.J.U.**, the Chief Justice found that, in the particular circumstances of that case, the striking similarity between the complainant's prior statement coupled with the negation of other explanations for that similarity could be a sufficient substitute for the lack of oath and video recording of the earlier statement. In addition to the particular holding on the facts, the case is, in my view, important for two other points. It emphasizes that the criteria of reliability and necessity must be applied flexibly to avoid the new, principled approach becoming "a rigid, pigeon-holing analysis": see e.g. 787. The case also makes clear that the most significant hearsay danger associated with prior statements is the absence of contemporaneous cross-examination and that this danger is largely overcome when the maker of the statement is available for cross-examination at trial:

> In sum, I held in *B. (K.G.)* that the gravest danger associated with hearsay evidence simply does not exist in the case of prior inconsistent statements because the witness is available for cross-examination. ..... (**p. 787)**
>
> In keeping with our principled and flexible approach to hearsay, other situations may arise where prior inconsistent

> statements will be judged substantively admissible, bearing in mind that cross-examination alone provides significant indications of reliability. It is not necessary in this case to decide if cross-examination alone provides an adequate assurance of threshold reliability to allow substantive admission of prior inconsistent statements. (**p. 793**) (emphasis added)

The development of the reformed rule continued in **R. v. Hawkins**, [1996] 3 S.C.R. 1043. **Hawkins** concerned the admissibility of a spouse's preliminary inquiry evidence and, therefore, it is not at all close, factually, to this case. However, from the point of view of the development of the applicable principles, there is a point of particular relevance in **Hawkins**. The Chief Justice and Iacobucci, J. elaborate on the meaning of threshold reliability for the purposes of admitting the evidence and how this requirement is to be distinguished from the ultimate reliability assessed by the trier of fact. Their observations in this regard were concurred in by Gonthier and Cory, JJ. and appear to have been approved by L'Heureux Dubé and LaForest, JJ. The thrust of this elaboration is that the key consideration for threshold reliability is whether the trier of fact will have an adequate basis for assessing the weight to be given to the witness's earlier statement. As the Chief Justice and Iacobucci, J. put it:

> The criterion of reliability is concerned with threshold reliability, not ultimate reliability. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient *indicia* of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. (emphasis added)

This elaborates the concept of "comparative reliability" referred to by the Chief Justice in **B.(K.G.)**. In order to meet the threshold requirement of reliability, where the maker of the statement is available for cross-examination, there must be an adequate basis for the trier of fact to assess the reliability of the prior statement in relation to the testimony in court.

The most recent decision on this issue from the Supreme Court of Canada is **R. v C.L.,** [1997] S.C.J. No 99 in which the Court, in a brief oral decision, dismissed the appeal "essentially for the reasons" of the Quebec Court of Appeal reported at (1996), 112 C.C.C. (3d) 472. The Court of Appeal held that the trial judge had erred in finding that certain statements by the alleged young victim of sexual assault, which she repudiated at trial, did not meet the threshold requirement of reliability. The statements included a note by the child to her mother,

oral statements to two doctors, oral statements to two child protection workers and a statement to the police. So far as the reasons reveal, none of these statements was under oath or videotaped. The Court of Appeal stated that in **F.J.U.**, the Supreme Court ..."established ... the pre-eminence of cross-examination" and "made it the centre-piece in the assessment of prior inconsistent statements". The Court also noted that **F.J.U.** did not go so far as to say that cross-examination alone is sufficient. The Court concluded :

> ..... I am of the view that certain parts of the evidence called by the Crown on the *voir dire*, in particular: the first statement made to Dr. Gravel who was, in the circumstances, an independent witness, the note from the child to her mother, the statement to the police in the presence of the mother who encouraged, strongly and on several occasions, her child to tell the truth and finally, the unanimous opinion of the three experts as to the state of problematic dependency on the part of the child towards her mother, contained, in the case at bar, sufficient *indicia* of reliability to satisfy the judge, on a balance of probabilities that it was possible that the prior statements were reliable.

In the case before us, the witness was, of course, available for cross-examination at trial. It follows, therefore, that what the Supreme Court of Canada has referred to as the greatest danger of admitting prior statements -- the lack of contemporaneous cross-examination -- is largely overcome by the fact that the witness is testifying at trial. The

key question then becomes whether there is an adequate basis for the jury to assess the reliability of the earlier statement. As the Quebec Court of Appeal noted in **R. v. C.L., supra**, the fact that the witness is available for cross-examination has not yet been held to be sufficient, on its own, to satisfy the reliability requirement of the principled approach to hearsay. It is, therefore, necessary to decide whether there are other adequate substitute guarantees of reliability. In making that assessment, I think it should be recognized that the witness is available and the statement is that of an adverse party's witness. Therefore, the dangers inherent in the admission of hearsay evidence are not as acute as they are in many of the cases canvassed above.

The admissibility of prior statements must not take on a pigeon-holing approach. That is exactly what the Supreme Court of Canada wished to do away with in adopting the principled approach to hearsay evidence. Each case must be examined in light of the principles emerging from the cases and the evidence adduced. I think that Doherty, J.A. summed it up well in **R. v. Tat** (1997), 117 C.C.C. (3d) 481 (Ont. C.A.) at 513:

> I realize that it is the principles in *R. v. B. (K.G.)* and later cases, and not the facts of those cases, which control the admissibility of prior inconsistent statements for substantive purposes in other cases. It may well be that sufficient *indicia* of reliability will be present in fact situations which are very different from those which arose in those cases. I also recognize that the reliability assessment is a holistic one which must address the hearsay dangers as they actually arise in the particular case and the *indicia* of reliability as revealed by the evidence. Each case will be different. There is no single feature which secures the admission for substantive purposes of a prior inconsistent statement or demands the exclusion of such a statement.

Although Chisholm was not under oath or told about the penalties for knowingly providing false information to the police, the seriousness and importance of what she was saying could not have been clearer to her. This is not a situation, such as in **R. v. Vanezi**, [1997] O.J. No. 4662 in which the statement was made in a social milieu while the speaker was joking and apparently intoxicated (see also **R. v. Luke** (1993), 85 C.C.C. (3d) 163 (Ont. C.A.)). Nor is this a situation in which the witness denies having made the prior statement.

Chisholm had been arrested as a suspect in the killing on the day the interview took place. She was given the usual cautions. She was confronted with the fact that her earlier alibi did not check out . She

confirmed that what she said was the truth. Although there is not a complete *verbatim* record of what was said, the record of the interview was said to be a fair representation of it. The record includes not only the contents of the discussion, but also notes about the witness's demeanor. The officers who questioned her were available to testify about the interview as they did in detail on the *voir dire*.

It seems to me that the seriousness of the occasion which was obvious to the witness, the cautions given to her and her affirmation to the police at the time that everything she was saying was the truth together constitute some substitute for the absence of oath and the presence of the trier of fact at the time the statement was made. It is also significant, in my judgment, that there was available for the jury detailed evidence from the police officers who did the questioning about the way the interrogation was conducted. **B. (K.G.), F.J.U.** and **Hawkins** make clear that threshold reliability of a prior statement by a witness who is available for cross-examination is concerned primarily with whether the trier of fact can assess the weight to give the prior statement and compare it to the trial testimony. Given the

circumstances in which this statement was made, the jury would have been well able to assess the weight which Chisholm's earlier statements should be given.

In my respectful view, the judge erred in law in his approach to the question of substantive admissibility of these statements. He appears to have considered that the absence of video taping and the oath practically disposed of the question and not to have directed his mind to whether the jury would have an adequate basis for assessing the weight to give the proposed evidence. In my respectful view, he erred in law in refusing to allow evidence of these statements to be put before the jury as evidence of the truth of their contents.

The same result applies to the statement about the sexual activity involving the accused, Borden, Newhook, and Chisholm. The exclusion of this evidence was also in error.

(b) The Borden Statements:

At the trial, no application was made by the defence to have

prior statements of Borden admitted as evidence of their truth. No *voir dire* was held on this issue and no ruling was made. Given those circumstances, I find no error in relation to Borden's prior statements.

(c) The Derouin Statement:

The defence called Mandy Derouin. Her signed statement to the police, which became *voir dire* Exhibit 6, was given on September 14, 1993--just a few days after the killing. This witness was not only independent of the parties but came forward with her evidence on her own initiative after she learned of the killing. She felt that what she had seen was " kind of suspicious."

The part of her statement which was excluded at trial indicates that at lunch time on September 8, 1993--about 36 hours before the killing--she saw an encounter between the deceased and "a short stocky black guy." She told the police that

> He was standing there by the student services door walking back and forth. Adam [her companion who was not called as a witness at trial] and I were walking in and he [the "short, stocky, black guy"] was talking to Gisele [the deceased] and his voice was very forceful. He was pointing his finger at her and

> from the conversation we heard he wanted her to work the streets for him.

There were two difficulties about this evidence. First, the Crown, primarily on the basis of the hearsay rule, objected to Derouin testifying as to what the black male said to the deceased. Second, as anticipated by counsel at trial, the witness said she could not remember at the time of trial (over 3 years after the events) the part of her observations which has been set out above.

A *voir dire* was held and, as expected, the witness did not recall the "forceful voice" or the conversation about the deceased working the streets. At trial, the witness was allowed to read over the statement in order to see whether it refreshed her memory. She testified that she had no present memory of "any kind of interaction between the two". The witness was prepared to admit having made the statement and that it was accurate when she made it. As she put it, "I mean, I'm not going to call the cops and lie about it and joke about it, because this is not a--it's not a joke. It's not something to joke around with". She also testified on the *voir dire* as follows:

> Q. What is your position today as whether those events

> happened? .....
>
> A. ... I think my memory was pretty well, I pretty much knew what happened six days before [i.e. before making the statement] otherwise, I wouldn't have called the police.

And further:

> Q. What would be your position with respect to whether or not you could adopt what you told the police back then as accurate, even though you don't today recall it happening?
>
> A. I think it's pretty much accurate.

The judge excluded the witness's evidence of her impression of the conversation between the black male and the deceased (i.e. "from the conversation we heard he wanted her to work the streets for him") commenting that it was, "worse than hearsay". He further ruled that the witness's statement that "his voice was very forceful" was an opinion and also inadmissible.

The focus of the argument in this Court was on whether the prior statement of Derouin should have been substantively admissible under **B.(K.G.)** although there was also some argument as to its admissibility as a record of past memory which the witness could swear was honest and accurate when recorded.

It is important to remember, as the trial judge clearly did, that the first requirement for substantive admissibility under the hearsay exception developed in **B. (K. G.)** or the exception for past memory recorded is that the evidence would have been admissible as the witness's testimony at trial: see, e.g., **B. (K. G.)** at 784 :" ...if the witness could not have made the statement at trial during his or her examination-in-chief or cross-examination, for whatever reason, it cannot be made admissible through the back door...". Therefore, if the prior statement of Derouin contains otherwise inadmissible hearsay (for example, because the recorded words report statements by someone other than the witness used to prove their truth) or opinion, as the trial judge thought it did, the prior statement should not be admitted.

I do not think, with respect, that the prior statement is inadmissible on the basis of the opinion rule. As the Supreme Court of Canada explained in **R. v. Gratt**, [1982] 2 S.C.R. 526, opinion evidence (i.e. testimony as to the inferences the witness has drawn from the observed facts) is admissible if such admission is helpful in allowing the witness to more meaningfully communicate his or her evidence to the

trier of fact. Describing an observed gesture as “forceful” is an example of such a situation. Without resorting to such descriptions, how else is a witness to communicate meaningfully what was observed?

The fact the statement refers to the words of a third party poses a bigger problem to the admission of the Derouin statement. In deciding whether this evidence is second-hand hearsay, it is essential to consider its purpose. In relation to the third party’s statement, it is only hearsay if the purpose of introducing the evidence is to prove the truth of the contents of the statement by that person.

The purpose of putting this evidence before the jury was to invite the jury to draw an inference that someone other than the accused was intimidating the deceased shortly before she was killed. The Crown acknowledges that the jury could have inferred from this evidence, had they been allowed to hear it, that what Ms Derouin witnessed was an “attempt at intimidation of a prostitute by a pimp.” I agree with the Crown that the defence suggestion that the “short stocky black guy” was, in fact, Borden is speculation. However, intimidation (if

such it was) taking place so close in time to the killing, even absent some connection to Borden, was at least marginally relevant to the extent that it could support an inference that someone other than the accused had exhibited hostility to the deceased shortly before she was killed.

The relevance of the evidence derives from the nature of the interaction between the "short stocky black guy" and the deceased. The value of the evidence, which is very limited, does not depend on the truth of the words uttered by the unidentified speaker, but on the nature of the conversation. It was the fact that there had been an intimidating conversation, not the truth of words uttered, that was relevant. Derouin, in my opinion, was entitled to testify as to what she had seen and heard, not for the purpose of proving that an unidentified short stocky black guy wanted the deceased to work the streets, but as some evidence that someone, other than the accused, was intimidating the deceased shortly before she was killed. The demeanour of the speaker and the nature of the conversation provide some, although not very compelling evidence, of enmity between the deceased and the speaker. It seems

to me, with respect, to be an excessively rigid application of the hearsay rule to exclude this evidence. It is hard to imagine that much would have been gained by calling the person who was alleged to have done the intimidation.

Having concluded that this evidence would have been admissible had it been given as part of Derouin's evidence at trial, it is therefore necessary to consider whether her prior statement to this effect should have been admitted when she was unable to testify to these matters on the basis of present memory.

Unlike the other statements considered above, this is not a prior inconsistent statement. Derouin testified that she could not recall these matters at the time of trial, but vouched for the accuracy of what she had told the police shortly after the events she described.

In my view, it is not necessary to consider the **B.(K.G.)** hearsay exception in relation to this statement. Past recollection recorded is another exception to the hearsay rule which applies here: see e.g. Alan

W. Mewett, **Witnesses** (1991) at 13-14.3. The conditions of admissibility were summarized in **R. v. Meddoui** (1990), 61 C.C.C. (3d) 345 at 352 relying on **Wigmore**:

> .....The basic rule in *Wigmore on Evidence* (Chadbourn rev. 1970), vol. 3, c. 28, ss.744 *et seq.* provided:
>
> 1. The past recollection, must have been recorded in some reliable way.
>
> 2. At the time, it must have been sufficiently fresh and vivid to be probably accurate.
>
> 3. The witness must be able now to assert that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he "knew it to be true at the time".
>
> 4. The original record itself must be used, if it is procurable.
>
> Properly understood, the rule is an unremarkable exception to the hearsay rule because it says hearsay is admissible in proof of the truth of the contents if uttered in circumstances that offer a guarantee of trustworthiness.

These conditions are satified by Derouin's statement of September 14, 1993. It was made 6 days after the events which had prompted her to approach the police. She reviewed and signed the statement at the time it was made and testified at trial that she believed it to be truthful when she made it.

The Crown argues that the statement is not admissible on this basis because the witness had some memory of it. The submission is that the past memory recorded hearsay exception applies only when the witness has total memory loss. Kerans, J.A. in **Meddoui, supra**, takes this view: at 352. Professor Schiff appears to agree on the basis that a contrary rule might "foster the practice of witnesses submitting written statements which have been carefully drafted ... for that purpose": see Stanley A. Schiff, **Evidence in the Litigation Process** (Master Edition, 1993) at 285.

As Kerans, J.A. notes in **Meddoui, supra**, the rationale for insisting on total memory loss derives from the rule barring admission of a witness's prior consistent statements. Such statements are generally excluded because they are of marginal relevance; they tend to unduly distract the trial from the important issues and unnecessarily consume precious trial time. These rationalia for the rule do not seem to me to be substantial enough to justify the exclusion of relevant testimony sought to be adduced on behalf of the accused in a criminal case. This is particularly so where, as here, there is absolutely no

suggestion of an improper purpose on the part of the witness or counsel calling her behind the preparation of the statement or the memory loss and where the statement is not offered as self-corroboration.

Moreover, I am far from convinced that Canadian authority compels exclusion of this statement on this basis. Justice Kerans' brief review of the common law rule was set out only as background for his detailed consideration of the **Criminal Code** provisions relating to video-taped evidence in sexual assault cases. As authority for the "total memory loss" rule, he relies on **Wigmore's Treatise** and two cases, **McInroy and Rouse v. The Queen**, [1979] 1 S.C.R. 588 and **C(J.) v. College of Physicians and Surgeons of British Columbia**, [1990] 2 W.W.R. 673.

These authorities do not support the "total memory loss" rule for which the Crown is arguing in this case. Wigmore, in fact, harshly criticized the rule, calling it "inflexible dogma." The majority in **McInroy** did not address the point, but Estey, J., in his dissent, described the rule as follows:

> The rule is of long standing in the law of evidence that documentary evidence will be admitted through a witness in the witness box who, although the witness cannot recall the substance of the document or perhaps the precise event described or recorded therein, is able to swear to its truth at the time of the trial. (emphasis added)

This description of the rule is consistent with its application to a situation, such as the one in this case, in which the witness has no recollection of a portion of the statement but remembers other parts of it.

The same is true of the **C(J.) v. College of Physicians and Surgeons, supra**. In that case, a witness had testified relying on a diary. The witness had memory of some parts of it and none of others. The Court held that the tribunal, in assessing the evidence, had to separate those parts of the diary of which the witness had present memory and those parts of which the witness had no memory. The former could not be used as evidence of the truth of the statements found in the diary. But, in the latter situation, the diary statements were admissible as past recollection recorded.

I conclude, therefore, that the police statement of Derouin was admissible as past memory recorded and that its exclusion was an error of law.

VI SUBSTANTIAL WRONG OR MISCARRIAGE OF JUSTICE

I have found that the following errors of law were made at trial:

1. The failure to allow the defence to prove that Chisholm had made oral statements to the police on Nov 3, 1993 that were inconsistent with her trial testimony;
2. The failure to allow Chisholm's statements about the stripping incident and the accused being asleep on the couch at the party to be considered as evidence of the truth of their contents;
3. Failure to permit the defence to put in evidence the police statement of Derouin.

The Crown relies on section 686(1)(b)(iii) which provides:

> **686. (1)** On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal ...

> (b) may dismiss the appeal where
>
> .....
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, ...

Everyone is entitled to a fair trial according to law. It follows that once an error or, as in this case, errors of law at trial are identified, appellate courts are appropriately cautious in using the power given by **s. 686(1)(b)(iii)** to affirm the conviction on the basis that no substantial wrong or miscarriage of justice resulted. In these circumstances, the Crown must satisfy the court that even had the errors not been committed, there is no reasonable possibility that the verdict at trial would have been different. Where there is more than one error, the cumulative effect of the errors must be considered. These principles are summarized by Major, J. for a majority of the Supreme Court of Canada in **R. v. Bevan**, [1993] 2 S.C.R. 599 at p. 616:

> The question to be asked in determining whether there has been no substantial wrong or miscarriage of justice as a result of a trial judge's error is whether "the verdict would necessarily have been the same if such error had not occurred": see *Colpitts v. The Queen*, [1965] S.C.R. 739; *per*

> Cartwright J. (as he then was), at p. 744; *Wildman v. The Queen*, [1984] 2 S.C.R. 311, at pp. 328-29. This test has also been expressed in terms of whether there is any possibility that if the error had not been committed, a judge or properly instructed jury would have acquitted the accused: see *Colpitts, per* Spence J., at p. 756; *R. v. S.(P.L.)*, [1991] 1 S.C.R. 909, *per* Sopinka J., at p. 919; *R. v. Broyles*, [1991] 3 S.C.R. 595, at p. 620; *R. v. B.(F.F.)*, [1993] 1 S.C.R. 697, *per* Iacobucci J. at pp. 736-37. I do not interpret these two approaches as being intended to convey different meanings. Under either approach, the task of an appellate court is to determine whether there is any reasonable possibility that the verdict would have been different had the error at issue not been made.

Where, as here, the errors resulted in the exclusion of evidence sought to be adduced on behalf of the accused, the test enunciated in **Bevan** must be applied in light, not only of the evidence adduced at trial, but of the wrongly excluded evidence as well. As Lamer, J., (as he then was), writing for the Court, put it in **Wildman v The Queen**, [1984] 2 S.C.R. 311:

> The determination as to whether the verdict "would necessarily have been the same if such error had not occurred" is generally made upon a reading of the evidence put to the jury.
>
> But when the error of law is the preclusion of exculpatory evidence, then the determination must be made with regard to the entirety of the evidence, that evidence having been included, and in the light of the effect the excluded evidence could, within reason, possibly have had on the evidence that did go to the jury. Any reasonable effect that excluded evidence could have had on the jury should, in applying s. 613(1)(b)(iii) [now s. 686(1)(b)(iii)], enure to the benefit of the accused. When the excluded evidence is, as in this case, of a certain importance and might reasonably have had an effect on

> the jury then, even assuming we in this Court would have nevertheless convicted, I find it difficult to be satisfied that the jury would have necessarily agreed with us. Any reasonable, possible effect of that excluded evidence on the jury should enure to the benefit of Wildman.

In my opinion, there is no reasonable possibility that the verdict would have been different had this evidence been admitted as it ought to have been. Although the statements were not properly proved to have been made, the manner in which they were dealt with at trial, which I have reviewed above, would have inevitably lead the jury to consider them. The trial judge in his charge referred to one aspect of the Nov 3, 1993, interview and defence counsel to others as if they were properly before the jury. With respect to the stripping incident and the accused falling asleep at the party, there was other evidence to support the accused's position at trial in this regard. Moreover, the credibility of Chisholm was obviously something the jury would need to consider carefully; there were many bases upon which to be sceptical about the truthfulness and reliability of her evidence. The three aspects of her Nov 3, 1993, interview relied on by the defence on appeal are insignificant in comparison to the many other such points fully placed before the jury.

With respect specifically to the stripping incident, the jury had before it the fact that Borden had admitted the incident in a statement to police although he denied it at trial. Newhook, a Crown witness, testified to the incident, substantially confirming the accused' evidence on this point.

As for the accused being asleep on the couch at the party, the trial judge specifically referred to Chisholm's statement to the police in this regard. There was also evidence from Amanda Earle that the accused appeared to be asleep on the couch and that she had told the police that the accused had been asleep on the couch.

With respect to the issue of whether Chisholm lied at her November 3, 1993, interview to protect the accused, as Chisholm maintained at trial, I am convinced that the jury was well able to discern her motivation on the evidence before them. It could not have been more obvious that Chisholm had every reason to implicate the accused in an effort to help shift suspicion from herself.

As to Derouin's statement, while it was relevant, its probative value was negligible.

Taken cumulatively, there is no reasonable possibility that the admission of this evidence would have changed the result.

VII. DISPOSITION:

For these reasons, I would dismiss the appeal.

Cromwell, J.A.

Concurred in:

Freeman, J.A.

Flinn, J.A.

C.A.C. 135715

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DORIS MAE EISENHAUER	)	
Appellant	)	
- and -	)	
	)	REASONS FOR JUDGMENT BY:
HER MAJESTY THE QUEEN	)	CROMWELL, J.A.
Responden	)	