NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Ord*, 2012 NSCA 115

Date: 20121122
Docket: CAC 375541
Registry: Halifax

Between:

Jason John Ord

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Saunders, Oland and Fichaud, JJ.A.
Appeal Heard:	September 25, 2012, in Halifax, Nova Scotia
Held:	Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Saunders, J.A.; Oland and Fichaud, JJ.A. concurring.
Counsel:	Lee Seshagiri, for the appellant Jennifer A. MacLellan, for the respondent

Reasons for Judgment:

[1] The appellant, Jason John Ord, was found guilty of domestic assault contrary to s. 266 and breach of Recognizance contrary to s. 145(3) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. At trial, the victim, his former girlfriend, claimed memory loss during her testimony. The Crown sought to introduce the statement she had given to the police during the course of their investigation. Following a *voir dire*, the trial judge found that the requirements of necessity and reliability had been met, and allowed the Crown to introduce the statement into evidence for the truth of its contents.

[2] Mr. Ord appealed his convictions to the Summary Conviction Appeal Court, which dismissed his appeal.

[3] He now applies to this Court for leave to appeal the decision of the SCAC.

[4] For the reasons that follow, I would grant leave but dismiss the appeal.

[5] Before addressing the appellant's submissions, I will give a brief summary of the facts in order to provide context.

Background

[6] The appellant was convicted of assaulting his then girlfriend, Nicole Cameron, on April 8, 2010. He was on a Recognizance dated February 22, 2010, which required him to keep the peace and be of good behaviour. A conviction followed for breach of this Recognizance as well.

[7] At trial Ms. Cameron claimed memory loss regarding the details of the assault. The Crown sought the admission of her prior statement to the police for the truth of its contents. A *voir dire* was held and Nova Scotia Provincial Court Judge Anne Derrick admitted the statement after finding that the requirements of necessity and reliability had been met under the principled approach to hearsay. By consent, the parties agreed that the *voir dire* evidence would be admitted as evidence in the trial proper.

[8] In Ms. Cameron's statement given to Halifax Police Constable Rogers on April 22, 2010, she detailed an assault initiated by the appellant in which he punched her at least two times in the face:

> ... and he came up from the couch and shoved me into the wall. I pushed him back. This kept going on but then he started to punch me in the face. I can't remember how many times he punched me but he hit me at least two times in the face.
>
> I told him we had to calm down. He had punched me in my left eye. We went to bed – I had a big goose-[egg] beside my eye. In the morning, the lump had gone down but it was bruised and my eye was black.

[9] Ms. Cameron and Mr. Ord were no longer living together when she gave her statement to the police. Constable Rogers, a 38-year veteran of the police force, testified that when Ms. Cameron gave him her statement two weeks after the assault, she had a small area of discoloration still visible under her left eye. He thought this was consistent with her having been struck in the eye.

[10] At trial Ms. Cameron claimed she could not remember being repeatedly punched in the face by the appellant. She could recall mutual pushing and shoving, but she could not remember who initiated the incident.

[11] When asked what prompted her call to the police, Ms. Cameron said she called them from her apartment using a friend's cell phone because of growing concern over Mr. Ord's persistent, unwanted telephone calls. She and the appellant had broken up after the April 8 altercation. She said she understood that Constable Rogers attended at her residence for the purpose of obtaining a statement about the assault. She was not drinking or using drugs when she met with him.

[12] On cross-examination Ms. Cameron recalled being pushed into the wall by Mr. Ord. She also testified that she had a mark under her eye which lasted a few weeks, although she could not say conclusively how she had sustained that injury.

[13] In his testimony the appellant also suffered from memory lapses. As Judge Derrick observed:

> Mr. Ord repeatedly said in his testimony that he did not remember much of what happened. Through this fog of little recall, he testified in direct examination that Ms. Cameron would have pushed him first for sure. However, in cross-examination Mr. Ord agreed that he doesn't actually remember who started the fight.

[14] Mr. Ord did not recall any injury suffered by Ms. Cameron such as the mark under her eye seen by Constable Rogers some two weeks later.

[15] Mr. Ord was convicted on both counts. The offences were his seventh and eighth **Criminal Code** convictions. Judge Derrick sentenced him to 18 months' probation with conditions.

[16] The appellant appealed his convictions to the SCAC focusing on Judge Derrick's decision to admit the statement Ms. Cameron made to the police. Nova Scotia Supreme Court Justice Glen G. McDougall found that Judge Derrick had not erred in deciding to admit the prior inconsistent statement. He dismissed the appeal and upheld the convictions.

Issues

[17] I will address the issues on appeal by posing the following questions:

a) Should leave to appeal be granted?

b) Should the appellant's fresh evidence be admitted?

c) What is the proper standard of review in addressing the merits?

d) Did the SCAC err in affirming the trial verdict by misapplying the principled approach to the rule against hearsay?

Analysis

i. Should leave to appeal be granted?

[18] I would grant leave to appeal. The appellant has raised arguable issues that concern a question of law and which at least merit our consideration.

ii. Should the appellant's fresh evidence be admitted?

[19] The appellant attempted to place two documents before us which were not part of the trial record. They were simply attached to his factum as Appendix "C" and Appendix "D". Appendix "C" is headed "Halifax Regional Police KGB Oath and Caution" and consists of seven pages. Appendix "D" is entitled "Royal Canadian Mounted Police Sworn Statement" and comprises four pages.

[20] Under questioning at the hearing Mr. Ord's counsel said they were printed forms used by Halifax police officers and by RCMP officers when sworn statements are obtained from individuals during the course of an investigation. Counsel conceded that these documents were not introduced at trial and did not form part of the evidence considered in the courts below.

[21] I would refuse to admit these documents as fresh evidence. They do not meet the requirements for admission. **Palmer v. The Queen**, [1980] 1 S.C.R. 759; **R. v. West**, 2010 NSCA 16; and **R. v. Jamieson**, 2011 NSCA 122. There is no evidence purporting to describe the circumstances of their use or their relevance in this case. One assumes they existed at the time of trial. We have not heard any explanation why – if they were thought to be important – defence counsel did not call evidence to support their admission at trial. Accordingly, neither document will be considered here.

iii. What is the proper standard of review in addressing the merits?

[22] The appellant first appealed Judge Derrick's decision to the SCAC. The SCAC dismissed the appeal. Mr. Ord now seeks leave to appeal to this Court from the decision of the SCAC. Such an appeal is brought pursuant to s. 839 of the **Criminal Code**. It requires our leave and is limited to questions of law. It is not a second appeal against the judgment at trial, but rather an appeal against the decision of the SCAC. The error of law required to ground jurisdiction in this Court, is that of the SCAC judge, not the trial judge. See for example, **R. v. Fitzpatrick**, 2006 NSCA 65.

[23] The question for us is whether Justice McDougall erred in law by affirming Mr. Ord's conviction based on his conclusion that Judge Derrick was right to admit Ms. Cameron's statement to the police for the truth of its contents under the principled approach to hearsay.

[24] Through that lens, we will focus on the manner in which the SCAC assessed the trial judge's analysis, and that inquiry will necessarily refract to a tangential consideration of the trial judge's interpretation and application of the law.

iv. Did the SCAC err in affirming the trial verdict by misapplying the principled approach to the rule against hearsay?

[25] To support his argument that the SCAC erred in applying the principled approach to hearsay, the appellant makes four principal submissions. First, he says Justice McDougall (and the trial judge) took a piecemeal approach to the evidence, effectively reversing the burden of proof. Second, he says the SCAC erred in endorsing the factors relied upon by the trial judge as being sufficient to establish threshold reliability. Third, the appellant says the SCAC erred in its treatment of certain arguments made by Mr. Ord's counsel at trial on motive to fabricate. Finally, the appellant says the SCAC erred in assessing the effectiveness of his counsel's cross-examination at trial.

[26] I will address each of these submissions in turn.

a) **Reversing burden of proof**

[27] The appellant took the position before the SCAC (and repeated in this Court) that the trial judge had reversed the onus at trial. The SCAC rejected that submission. In my view, Justice McDougall was right to do so. A reading of Judge Derrick's very thorough and thoughtful analysis makes it clear that she was, in Justice McDougall's words, "well versed" in the law and its proper application to the issues before her. Judge Derrick began her analysis by correctly observing that a hearsay statement is presumptively inadmissible:

> … The Crown indicated that in light of Ms. Cameron's poor recall of the event, she would be seeking to have that statement admitted into evidence for the truth of its contents on the basis of a principled exception to the Hearsay rule. Ms.

> Cameron's statement to the police is hearsay and, therefore, inadmissible unless it can be received under the principled exception analysis.

[28] Judge Derrick then properly recognized that the burden to prove the statement's admissibility rested with the Crown.

[29] The appellant cites certain portions of the trial judge's reasons to advance the argument that she subconsciously reversed the burden and that the SCAC erred by failing to pick up on this slip and overturn the verdict on that basis. For example, the appellant quotes this portion from Judge Derrick's decision following the *voir dire* to admit the statement into evidence (2011 NSPC 34) at para. 28:

> … I do not find it undermines the reliability of Ms. Cameron's statement that it was not video-taped. Nor do I find the reliability of the statement to be undermined by Cst. Rogers not having warned Ms. Cameron about the consequences of giving a false statement. I do not find there is any basis for a suggestion that Ms. Cameron fabricated her statement of April 22, 2010. With such a simple and straight-forward statement I do not find that video-taping was required for the purposes of reliability.

[30] These words do not suggest any reversing of the burden by the trial judge. It is important to note that in this portion of her reasons Judge Derrick is referring to threshold "reliability" and not "admissibility". She makes it very clear throughout her ruling that the issue she is deciding is one of threshold reliability. She instructs herself that hearsay is presumptively inadmissible, and that the Crown bears the burden of proof. After quoting from the decision of the Supreme Court of Canada in **R. v. Khelawon**, 2006 SCC 57, as well as other binding precedent Judge Derrick canvasses the factors she relies upon in finding that the statement is reliable. She then goes on to assess the arguments advanced by both defence and Crown when deciding threshold reliability as opposed to ultimate reliability. It is obvious to me that the trial judge never conflated the two. She concludes her ruling on the *voir dire* with this statement:

> [29] I do not find there is any evidence that detracts from the threshold reliability of Ms. Cameron's statement and, as I am satisfied the Crown has met its burden for admissibility, I admit the statement into evidence <u>to be further assessed and weighed on the central issue of whether the assault allegation against Mr. Ord has been proven beyond a reasonable doubt</u>. (Underlining mine)

[31] The appellant also takes issue with certain words lifted from these same paragraphs [28] and [29] of Judge Derrick's *voir dire* decision to admit Ms. Cameron's statement for the truth of its contents which he says are "problematic" and reflect error on the judge's part in conducting the necessary analysis. This is a collateral argument to support his first point that the judge reversed the burden of proof. For convenience I will reproduce the impugned sentences but this time incorporating the underlining and italics from his factum at paragraph [41].

> 28 … I do not find it *undermines* the reliability of Ms. Cameron's statement that it was not video-taped. Nor do I find the reliability of the statement to be *undermined* by Cst. Rogers not having warned Ms. Cameron about the consequences of giving a false statement. I do not find there is any basis for a suggestion that Ms. Cameron fabricated her statement of April 22, 2010. With such a simple and straight-forward statement I do not find that video-taping was required for the purposes of reliability.
>
> 29 I do not find there is any evidence that *detracts* from the threshold reliability of Ms. Cameron's statement and, as I am satisfied the Crown has met its burden for admissibility, I admit the statement into evidence to be further assessed and weighed on the central issue of whether the assault allegation against Mr. Ord has been proven beyond a reasonable doubt.

[32] The appellant says the judge's words show that her decision to admit the statement is flawed. As he puts it in his factum:

> 42. Respectfully, the question is not whether reliability is undermined or detracted by a lack of oath, warning, videotaping or any other factor; the question is whether the Crown can demonstrate that a prior inconsistent statement is reliable enough to be considered alongside and potentially preferred to testimony provided in Court under oath.
>
> 43. …this error in reasoning permeates the bulk of the Trial Judge's analysis. … (Emphasis in original)

[33] In support of his complaint that Judge Derrick used "problematic language" the appellant relies upon the decisions of the Supreme Court in **R. v. Couture**, 2007 SCC 28, and **R. v. Blackman**, 2008 SCC 37. Respectfully, I do not think either case helps the appellant and each may be easily distinguished.

[34] In **Couture**, the Court split 5:4 on the question of the admissibility of two out-of-court statements made by a spouse. In that case the accused was convicted of two counts of second degree murder. His convictions were based, in part, on two out-of-court statements made by his spouse. She had disclosed to the police that some time before their marriage she had been the accused's counsellor in prison where he was serving time on unrelated offences and that during the course of their counselling sessions he had confided in her that he had murdered two women. The first statement was audiotaped and the second videotaped, but neither statement was made under oath. At the time C gave the two statements to the police, she was estranged from and not living with the accused. The couple reconciled shortly afterwards and, at the time of trial, their marriage was valid and subsisting. As C was not a competent or compellable witness for the Crown, the trial judge admitted C's hearsay statements under the principled exception to the hearsay rule having found that both necessity and threshold reliability had been met.

[35] The British Columbia Court of Appeal allowed the appeal, ruled the statements inadmissible, set aside the convictions, and ordered a new trial. On further appeal to the Supreme Court of Canada, Justice Charron, writing for the majority (McLachlin, C.J. and Binnie, LeBel and Fish, JJ.) dismissed the appeal, on the basis that the trial judge had made several errors in the analysis she conducted before deciding to admit the out-of-court statements under the principled exception to the hearsay rule. Among the errors, the trial judge had not applied the proper legal test. In the words of Charron, J.:

> 85 Second, the trial judge did not apply the correct test. As discussed earlier, the trial judge must start from the premise that the statements are presumptively *inadmissible* and then search for indicia of trustworthiness that can overcome the general exclusionary rule. The trial judge reversed the onus. She started her analysis with the statement that "[t]he circumstances surrounding the first and second statement, do not lead to a conclusion that would <u>defeat threshold reliability</u> " (para. 11 (emphasis added)) and ended it by concluding that "[t]he circumstances with regard to the statements <u>did not raise the spectre of untruthfulness</u>" (para.14 (emphasis added)). Had the trial judge pointed to circumstances that did indeed make Darlene Couture's statements stand out as particularly cogent, I would conclude that the two book ends to her analysis only amounted to an unfortunate choice of language. But in reading her reasons as a whole, I can only conclude that she effectively reversed the onus.

[36] In my respectful view, a careful reading of Justice Charron's reasons demonstrates that the problem in that case (and which distinguishes it from this one) was that there was nothing in that trial judge's reasons to suggest that she recognized the presumption *against* admissibility or her obligation to carefully scrutinize the evidence to see if the Crown had satisfied its burden by overcoming that exclusionary rule. Similar concerns led to Justice Charron's reiteration of those same cautionary directions in **Blackburn** at paras. 37-38.

[37] Nothing of the sort happened here. A fair and careful reading of the whole of Judge Derrick's decision makes it clear that she understood and properly applied the law throughout her analysis. In my view her reasoning reflects the directions in **Khelowan, Couture**, and **Blackburn** and in no way suggests a mangling of the burden of proof. In fact, it appears to me that the language adopted by the trial judge in this case is precisely the same as that employed in a host of other cases. For example, **R. v. S.S.**, 2008 ONCA 140 at paras. 28-29; **R. v. Poulette**, 2008 NSCA 95 at para. 31; and **R. v. Youvarajah**, 2011 ONCA 654 at paras. 127 and 137, leave to appeal granted June 7, 2012 [2012] SCCA No. 139 (Deschamps, Fish and Karakatsanis, JJ.).

[38] For all of these reasons I would affirm Justice McDougall's declaration that the trial judge's approach was correct:

> [22] In regard to the threshold reliability requirement, she not only dealt with the factors that caused her to be satisfied but she also dealt with the various issues or concerns raised by defence counsel in his submissions as reasons why she should not allow the statement to be entered. Based on my read of her oral ruling, it is clear that the Learned Trial Judge knew the law and applied it correctly to the facts that she found based on the evidence presented. Furthermore, she made it perfectly clear that the burden to satisfy the requirements of the principled approach to admission of otherwise hearsay evidence rested on the crown. She did not, as was suggested by defence counsel, reverse the onus.

b) **<u>Factors to establish threshold reliability</u>**

[39] The appellant's next principal complaint is that the SCAC erred by approving the factors relied upon by the trial judge as being sufficient to establish threshold reliability. For convenience I will repeat para. 28 of Judge Derrick's

ruling on the *voir dire* where she lists the facts she relied upon in deciding that the Crown had met its burden of establishing threshold reliability:

> [28] In assessing whether Ms. Cameron's statement to police can be assessed for its credibility and reliability even though it cannot be subject to cross-examination on its content, I rely on the following:
>
> * Ms. Cameron was upset when she gave the statement but, according to Cst. Rogers, whose evidence I accept, not hysterical as she has claimed, and capable of describing the events from two weeks earlier. I accept she was upset but not impaired in her ability to give her statement.
>
> * There is no suggestion that Ms. Cameron had, or was experiencing, any difficulties with cognition, understanding, or perception.
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> * Ms. Cameron was not drinking or using drugs, nor had she been, when she gave her statement to Cst. Rogers.
>
> * Ms. Cameron, by her own evidence, indicates she called police to give a statement because she wanted Mr. Ord to stop contacting her. She did not say that the statement she gave was untrue or that she was trying to retaliate against Mr. Ord by making up an accusation. She had plenty of opportunity in her testimony to say she had fabricated her statement and she did not say this anywhere in her evidence. I am satisfied of this by having listened to the recording of Ms. Cameron's testimony from February 28, 2011 this afternoon during a recess.
>
> * Ms. Cameron testified to having been in a physical altercation with Mr. Ord a couple of weeks before she met with Cst. Rogers. She now says she cannot remember what happened and made it quite clear in her testimony that she has moved on and does not want to be involved in a prosecution against Mr. Ord. She testified that when she called police she was "rather more going for" an order for Mr. Ord to have no contact with her. That fact does not indicate Ms. Cameron was untruthful in her statement to Cst. Rogers about the incident on April 8.
>
> * Cst. Rogers testified that Ms. Cameron called police because she was scared; Mr. Ord was contacting her and she did not know what else he might do.

* Ms. Cameron testified that Cst. Rogers was "great" and did not apply any pressure or offer any inducements to get her to give a statement.

* Ms. Cameron's statement was largely a narrative statement, Ms. Cameron's own words describing an incident. There were no leading questions from Cst. Rogers.

* Ms. Cameron had a mark under her eye which was visible to Cst. Rogers and which she acknowledges she may have sustained in the altercation with Mr. Ord. This is consistent with what Ms. Cameron told Cst. Rogers, that she was punched in the face by Mr. Ord.

* Ms. Cameron's police statement provides clear and specific details of an encounter with Mr. Ord that included him pushing and punching her.

* In the course of cross-examining her, the Crown asked Ms. Cameron if she understood that domestic violence was a serious allegation to make. Ms. Cameron's response to this was telling. She said: "Yes, that's why we are not together anymore." This is consistent with the evidence Ms. Cameron gave that she and Mr. Ord broke up after the incident that she subsequently reported to the police.

* I do not find it undermines the reliability of Ms. Cameron's statement that it was not video-taped. Nor do I find the reliability of the statement to be undermined by Cst. Rogers not having warned Ms. Cameron about the consequences of giving a false statement. I do not find there is any basis for a suggestion that Ms. Cameron fabricated her statement of April 22, 2010. With such a simple and straight-forward statement I do not find that video-taping was required for the purposes of reliability.

[40] Under questioning at the appeal hearing in this Court, counsel for the appellant conceded that each of these factors listed by Judge Derrick was a legitimate circumstance for her to have considered. However, counsel said the combination of all of these factors was not sufficient to meet the Crown's burden. I respectfully disagree.

[41] One has to exercise some measure of common sense in such matters. Judge Derrick was required to express herself in sufficient and meaningful reasons. The Supreme Court of Canada's decision in **Khelowan** encourages judges to take a functional approach and consider all of the circumstances, not just those

circumstances specific and temporally related to the giving of the statement. In effect the appellant says "it would be okay for the judge to observe 'she was drunk' (if that were the case)". But "it's not okay for the judge to say 'she was sober at the time'". With respect, these are just opposite sides of the same coin. The trial judge was merely attempting to explain the path of reasoning she followed in her analysis.

[42] The law obliges judges to articulate the factors which led them to arrive at a certain conclusion. But in doing so we must not hamstring judges in a kind of formulaic straightjacket forcing them to adhere to an approved list of words to describe their conclusions and the circumstances which led them to it. As long as there is no suggestion that the judge failed to recognize the presumption against admissibility or the obligation to carefully examine the evidence to ensure the Crown has met its burden in overcoming the exclusionary rule, we should not subject the words the judge uses to express herself to a forensic audit on appeal.

[43] Every one of the bullet points listed by Judge Derrick in her reasons are factors that have arisen from the case law. She was not bound by those same factors in this case. Every case is different. It was open to her to be persuaded by other factors arising from the evidence. That is, after all, how the law evolves.

[44] The issue here was threshold reliability, only. The standard of proof is on a balance of probabilities. In my respectful opinion each of the features mentioned by Judge Derrick is valid and compelling. As noted earlier, the appellant has not pointed to any of them as being wrong. He just says there were not enough to have a cumulative effect in meeting the Crown's burden. I disagree.

[45] In their aggregate they were obviously enough to persuade Judge Derrick that the Crown had satisfied its burden on a balance of probabilities. The SCAC did not err in upholding the trial judge's ruling with these words:

> [21] ... In her determination she considered the evidence offered during the *voir dire* and based on the law she found, on the balance of probabilities, that the crown had established both necessity and reliability. She clearly stated in her reasons how the evidence satisfied her of these two essential requirements.
>
> ...

> [25] I find that the Learned Trial Judge, in deciding to admit the prior inconsistent statement of the complainant, made no error in law. ...

[46] Indeed, Judge Derrick could have gone further. She might also have said that there were no internal inconsistencies in Ms. Cameron's statement. Such a conclusion was justified on the evidence here. As well, the appellant says the solemnity of the occasion was not drawn to the declarant's attention. I disagree. The evidence demonstrated that:

- Ms. Cameron called the police to her home because she was worried the appellant was harassing her with unwanted phone calls, etc.

- Written in the statement was the question asked by the police officer: "What do you want?" Ms. Cameron's answer was that she wanted Mr. Ord charged with assault. Clearly she was aware that giving a statement to the police would have consequences.

- In her statement to the police Ms. Cameron told Constable Rogers that she and Mr. Ord were going to court the following week on other matters. Obviously she was no stranger to such proceedings.

- The terms of the Recognizance binding Mr. Ord at the time contain some very unique conditions. He was barred from these premises on South Bland Street unless the declarant consented to him being with her in the apartment. If she did not consent then Mr. Ord was required to reside in Belmont, Nova Scotia. Thus, their cohabitation was subject to terms enforced by court order. Given that experience, it would be reasonable to infer that Ms. Cameron was well aware of the potentially serious repercussions surrounding her reaching out to the police for help.

[47] At the end of the day a ruling as to whether the Crown has met its burden in establishing threshold reliability is not based on the size of the list, or the number of factors on a page. It is the quality of the evidence that counts. Each of the features considered by the trial judge was important. Taken together they were enough to satisfy the Crown's burden on a balance of probabilities.

[48] For all of these reasons I find that the SCAC did not err in endorsing the factors relied upon by the trial judge as being sufficient to establish threshold reliability.

c) **Motive to fabricate**

[49] The appellant frames the issue this way in this factum:

> iv) **The SCAC Erred in Analyzing Arguments on Motive to Fabricate or Exaggerate**
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> 80. The SCAC made the following comments in relation to submissions that Ms. Cameron may have had a motive to exaggerate or fabricate her hearsay statement [SAB]:
>
> > 23 As to whether or not the complainant had a motive to lie, I am not convinced that, in the circumstances of this case, this is a valid ground of appeal. Defence counsel had the opportunity to cross-examine the complainant during the voir dire. Her statement given to police just two weeks after the assault was not shaken or undermined in any way. Certainly there was no indication that she had fabricated her story in order to rid herself of her then boyfriend. She had already broken up with him. What prompted her to tell her story was his persistence in attempting to contact her. The events surrounding the assault were still relatively fresh in her mind when she gave her statement to the police. The physical effects of the assault were still visible below her left eye according to the testimony of the officer.
> >
> > 24 If there was a motive to lie it was not when the complainant first reported the incident to the police. She might not have been totally forthright at trial in saying that she could not remember many of the details of the assault but that does not detract from the threshold reliability and hence admissibility of her statement.
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> 81. It is respectfully submitted that the SCAC (i) erred in treating the Appellant's arguments on motive to fabricate as a separate ground of appeal and (ii) erred in properly applying the factor in relation to threshold reliability under the principled approach.

[50] In his factum the appellant says both judges fell short in their consideration of the complainant's so-called "motive to fabricate". He states:

> 88. The Appellant agrees that Ms. Cameron never expressly indicated that she had exaggerated or fabricated her statement. Respectfully, however, that is not the end of the inquiry; the circumstances of the case necessitated a more thorough analysis in both courts below before dismissing this issue as having no impact on the question of reliability.
>
> ...
>
> 90. ...the possibility of Ms. Cameron having a motive to exaggerate or fabricate cannot be negated by the mere fact that Ms. Cameron never said she was fabricating. This is particularly so where she was never directly asked whether she had fabricated her statement. In the Appellant's view, this Honourable Court cannot discount the possibility that Mr. Cameron may have exaggerated, fabricated, or even falsely remembered events that occurred two weeks prior while under the influence of alcohol. This danger further strikes at the reliability of the statement in this case.

[51] I accept that trial judges will wish to assess the "opportunity for meaningful cross-examination" and "whether the circumstances ... provided adequate substitutes for customary court processes to meet the standard of threshold reliability. For example, **R. v. Youvarajah**, **supra**, at para. 144, leave to appeal granted June 7, 2012, [2002] SCCA No. 139. I am satisfied the trial judge did exactly that.

[52] With respect, Judge Derrick conducted the necessary review of the evidence and carefully considered defence counsel's attack on the complainant's credibility. No "more thorough analysis" was required. Neither is it our role on appeal to retry the case by finding facts anew as to "the possibility that Ms. Cameron may have exaggerated, fabricated, or even falsely remembered events".

[53] Counsel for the appellant had every opportunity to put to Ms. Cameron a direct question or series of questions suggesting that she had lied to the police in her statement. It hardly behooves the appellant to now complain:

> This is particularly so where she was never directly asked whether she had fabricated her statement.

[54] It was, after all, the appellant's counsel who put the issue of a "motive to fabricate" in play at both the trial, and on appeal to the SCAC. One can hardly fault either judge for addressing the issue, having been invited to do so by counsel in argument. At trial Mr. Ord's lawyer mounted a vigorous attack on the credibility of the complainant. The trial transcript contains this submission from the appellant's counsel:

> It's the Defence's view that the Crown's evidence in this case was highly problematic and does not reach that high threshold. The central difficulty obviously being the credibility of the complainant, Ms. Cameron, which the Defence suggests suffers from significant flaws. ... the Defence would suggest that she had a strong motive to fabricate in this case which the Defence would suggest undermines her credibility to such a degree that it raises a reasonable doubt. ... recognizing that she never admitted to fabricating her story, nonetheless we would suggest that these place a taint upon the out-of-Court statement such that that shouldn't be relied upon as proof beyond a reasonable doubt in this case. ... In the Defence's view, though, the key issue is that even if Ms. Cameron was accepted as being truthful on the stand, she appears to have provided testimony that was inconsistent with her written statement which suggests, then, that she may have misled the police. .... Quite obviously, this is testimony given under oath that is significantly different from the suggestion that Mr. Ord had punched the complainant several times. Once again, the Defence would suggest that the potential motive to fabricate becomes relevant. ...

[55] Counsel's submission was obviously taken seriously by the trial judge who went back to listen to a recording of the complainant's earlier testimony and then addressed the issue directly in her reasons on the *voir dire* when she said:

> [28] ... I rely on the following:
>
> ...
>
> *Ms. Cameron, by her own evidence, indicates she called police to give a statement because she wanted Mr. Ord to stop contacting her. She did not say that the statement she gave was untrue or that she was trying to retaliate against Mr. Ord by making up an accusation. She had plenty of opportunity in her testimony to say she had fabricated her statement and she did not say

> this anywhere in her evidence. I am satisfied of this by having listened to the recording of Ms. Cameron's testimony from February 28, 2011 this afternoon during a recess. ...

[56] The same argument was advanced by Mr. Ord's counsel in his submissions to Justice McDougall at the SCAC. After listing the same set of factors he said were enough to demonstrate the *unreliability* of the hearsay statement, counsel went on to say:

> ...Further, these defects, we would suggest, were not cured by an effective cross-examination. There was also no suggestion of a striking similarity or coincidence in this case that's similar to a **U. (F.J.)** type reasoning. We know Ms. Cameron was in an emotional state when giving the statement, not hysterical, but certainly emotional. This was a time when she and Mr. Ord were either breaking up or had broken up, and Mr. Ord was bothering her by calling her repeatedly. At the same time, Ms. Cameron was being urged to call police by a friend. And so we suggest that in all of these circumstances, they demonstrate the possibility that Ms. Cameron may have had a motive to exaggerate or even include certain fabrications in her statement. I'll just rely on my written submissions with respect to motive to fabricate here, because I know I have taken a significant amount of time here. But even if the idea of a motive to fabricate is rejected, the absence of a motive to fabricate does not render the statement reliable. ... (Underlining mine)

[57] Once again this was an issue raised in argument by appellant's counsel that called for a judicial determination. Whether it was considered as a stand alone ground of appeal, or treated as a particular aspect of the whole appeal, is irrelevant. A motive to lie is an obvious consideration whenever a trial judge is faced with differing factual accounts or, as was the case here, a robust attack on one's credibility. It was undoubtedly an important factor to consider when deciding the question of threshold reliability and the SCAC did not err by endorsing the trial judge's handling of the matter.

d) Effectiveness of Cross-Examination

[58] The appellant puts the submission this way in his factum:

> **The SCAC erred in assessing the nature and effectiveness of cross-examination.**

Relying upon the observations of Justice Charron in **R. v. Devine**, 2008 SCC 36, and other cases cited therein, the appellant says "Ms. Cameron's availability for cross-examination does not suffice to establish reliability in this case", and that the reviewing court will always wish to consider whether the opportunity for cross-examination was merely notional or, did in fact, present a real opportunity to test the declarant's account.

[59] Judge Derrick addressed both Crown and defence counsels' opportunities to meaningfully cross-examine the declarant on her statement at the *voir dire*. She considered the very detailed submissions made by Mr. Ord's lawyer when challenging the reliability of the statement, and she referred specifically to parts of the declarant's testimony under cross-examination by both the Crown and the defence in her ruling admitting the statement for the truth of its contents. Neither the judge at trial nor the SCAC on appeal was required to do more. I see no error on the part of the trial judge or the SCAC in the manner in which they dealt with the complainant's cross-examination during the *voir dire*.

Conclusion

[60] For all of these reasons I would grant leave to appeal but dismiss the appeal. The decision of Judge Derrick and the sentence imposed are affirmed.

Saunders, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.