NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Laing*, 2017 NSCA 69

Date: 20170720
Docket: CAC 461979
Registry: Halifax

Between:

Andrew Michael Laing

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 *Criminal Code*

Judges:	Beveridge, Farrar and Van den Eynden, JJ.A.
Appeal Heard:	June 14, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Beveridge, J.A.; Farrar and Van den Eynden, JJ.A. concurring
Counsel:	Roger Burrill, for the appellant James Gumpert, Q.C., for the respondent

Order restricting publication – sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

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

Reasons for judgment:

[1] At the conclusion of the appeal hearing, we announced that the appeal was allowed, the convictions quashed and a new trial ordered. Written reasons would follow. These are our reasons.

[2] There was a short trial—only the complainant and the appellant gave evidence.

[3] The complainant testified that she had said "no" many times to unprotected sexual intercourse, but the appellant persisted. The appellant said that he was aware of the complainant's feelings about unprotected sex, but she had initiated the intercourse. He described how they had changed positions multiple times to make it more comfortable. The word "no" was never uttered. The sex was consensual.

[4] Shortly afterwards, the complainant drove the appellant to his parents' home, then picked him up later at a different location and took him to Halifax. The record reveals not a hint of recriminatory conduct or words for what she would subsequently claim was non-consensual intercourse.

[5] The complainant went to the hospital that night—not in relation to the claimed sexual assault, but to have her hand examined.

[6] On the complainant's return trip to the Annapolis Valley on February 15, 2016 she said she "realized what had happened". She asked the appellant to call her. He did. Electronic messages were exchanged between them.

[7] The last electronic communication was on February 16, 2016:

> The sex we had, it hurt me. It felt wrong, and I don't want to be around you anymore.

[8] The trial judge relied on this message to find the charge of sexual assault had been proved beyond a reasonable doubt.

[9] It is hard to imagine two more diametrically opposed versions of the events. The trial judge, the Honourable Judge Jean Whalen reserved. Two weeks later, she delivered oral reasons.

[10] Her decision, when transcribed, comes to 14 paragraphs. Nine of those are the trial judge's self-instruction on fundamental criminal law principles. Three paragraphs set out the charges, a cursory introduction to the issue to be decided, and the fact there were just two witnesses.

[11] The total reasoning path to conviction is set out in two paragraphs:

> [13] Up until the 14th of February, Ms. M testified she was quite impressed with Mr. Laing. They had common interests, spent time together in public or at each other's apartment. They became more intimate, that is they slept in bed together, they were nude around each other. The complainant stated this was all consensual, but there was no sexual intercourse. Upon examination of the evidence there is nothing to suggest that Ms. M is motivated to lie. There is no evidence Ms. M was under the influence of alcohol or drugs that would affect her ability to recall and perceive the events on the date in question. The question that I had considered as well is why would Ms. M send a text to the defendant saying, "It hurt, it didn't feel right, and I don't want to be around you anymore," and then follow through with that statement by having no further contact or communication with Mr. Laing.
>
> [14] Based on the evidence I find that Ms. M, as she testified, realised what had occurred, that she did not consent, that she told the defendant no, but he tightened his grip on her wrist and continued with the sexual intercourse. This text is how she let him know one final time that she had not consented and that she did not want to have sex under those circumstances. And therefore, based on all of the evidence before me, I am satisfied beyond a reason [*sic*] doubt, and I find Mr. Laing guilty of the sexual assault and guilty of Count Number 2, breaching his Probation Order.

[12] The appellant was sentenced to two years' incarceration in a federal penitentiary.

[13] The appellant appeals from conviction only. He says the trial judge's reasons were insufficient, and from the reasons she did give, erred by an improper reliance on a prior consistent statement to bolster the complainant's credibility, and shifted the onus of proof to the appellant. We find merit in these complaints, but we will deal with only the first two.

[14] We would re-state the issues as follows:

1. Are the reasons insufficient?
2. Did the trial judge improperly use the prior consistent statement?

Sufficiency of Reasons

[15] For decades, Canadian Courts espoused the general common law maxim that a judge need not give reasons that explain the outcome. Yet appellate courts, including the Supreme Court, repeatedly found that trial judges' verdicts in criminal cases could not stand because, given the circumstances, reasons were indeed required to explain the result and permit meaningful appellate review (see *MacDonald v. The Queen*, [1977] 2 S.C.R. 665; *Harper v. The Queen*, [1982] 1 S.C.R. 2; *R. v. R. (D.)*, [1996] 2 S.C.R. 291; *R. v. McMaster*, [1996] 1 S.C.R. 740; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Hache*, 1999 NSCA 78.

[16] Some uncertainty about a trial judge's duty to give reasons was removed by *R. v. Sheppard*, 2002 SCC 26. But not all. The duty exists, yet perhaps not for every case, nor will breach of the duty accord automatic appellate relief (para. 46). It also begs the question: what detail is sufficient?

[17] The paradigm that guides an appellate court's assessment of a complaint of insufficient reasons was further explained by the Supreme Court in a series of cases in 2008, including *R. v. Dinardo*, 2008 SCC 24 and *R. v. R.E.M.*, 2008 SCC 51 (and more recently, *R. v. Vuradin*, 2013 SCC 38).

[18] It requires a court to take a functional approach to assessing the trial judge's reasons. The reviewing court must determine if, in the circumstances, the reasons fulfill their role: to explain to an accused why he or she has been convicted; to ensure public accountability; and, to permit meaningful appellate review.

[19] With respect, the trial judge's reasons here are manifestly inadequate. There is not even a mention of the appellant's evidence. A member of the public who reads the reasons would be completely in the dark as to his evidence. The appellant and this Court are left to wonder why his evidence, if not accepted, did not raise a reasonable doubt.

[20] That is not to say that the verdict is unreasonable or without evidentiary support. A conviction is a possible outcome on this record. But what did the judge decide and why?

[21] This case has strong parallels to *R. v. Dinardo*, *supra*. In that case, the appellant had been convicted of sexual assault and sexual exploitation of a person with a disability. The majority judgment of the Quebec Court of Appeal dismissed his appeal. Chamberland J.A. dissented on the basis that the trial judge did not

sufficiently explain why he had rejected the appellant's evidence and why the complainant's troublesome evidence was sufficient to reach a verdict beyond a reasonable doubt.

[22] Charron J., for the unanimous Court, allowed the appeal due to the insufficiency of reasons and because of the trial judge's improper reliance on the complainant's prior consistent statements. With respect to assessing sufficiency of reasons, she canvassed the guiding principles:

> [25] *Sheppard* instructs appeal courts to adopt a functional approach to reviewing the sufficiency of reasons (para. 55). The inquiry should not be conducted in the abstract, but should be directed at whether the reasons respond to the case's live issues, having regard to the evidence as a whole and the submissions of counsel (*R. v. D. (J.J.R.)* (2006), 215 C.C.C. (3d) 252 (Ont. C.A.), at para. 32). An appeal based on insufficient reasons will only be allowed where the trial judge's reasons are so deficient that they foreclose meaningful appellate review: *Sheppard*, at para. 25.
>
> [26] At the trial level, reasons "justify and explain the result" (*Sheppard*, at para. 24). Where a case turns largely on determinations of credibility, the sufficiency of the reasons should be considered in light of the deference afforded to trial judges on credibility findings. Rarely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal. Nevertheless, a failure to sufficiently articulate how credibility concerns were resolved may constitute reversible error (see *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, at para. 23). As this Court noted in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, the accused is entitled to know "why the trial judge is left with no reasonable doubt":
>
> > Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.
> >
> > This does not mean that a court of appeal can abdicate its responsibility for reviewing the record to see whether the findings of fact are reasonably available. Moreover, where the charge is a serious one and where, as here, the evidence of a child contradicts the denial of an adult, an accused is entitled to know why the trial judge is left with no reasonable doubt. [paras. 20-21]
>
> [27] Reasons "acquire particular importance" where the trial judge must "resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record" (*Sheppard*, at para. 55). Here, the

> complainant's evidence was not only confused, but contradicted as well by the accused. As I will now explain, it is my view that the trial judge fell into error by failing to explain how he reconciled the inconsistencies in the complainant's testimony on the issue of whether she invented the allegations. I also conclude that the trial judge's failure to provide such an explanation prejudiced the accused's legal right to an appeal.

[23] In *Dinardo*, the trial judge summarized the evidence of the witnesses for the Crown and the defence. He referred to the test in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 and the Crown's burden of proof beyond a reasonable doubt. The trial judge then made findings of credibility.

[24] The judge reasoned that although the accused had "testified well", he did not accept it was impossible for him to touch the complainant because of the car's physical layout.

[25] The trial judge then considered the complainant's credibility. He did not mention the complainant's admission that she had a tendency to lie. The judge viewed the inconsistencies in her cross-examination to be on unimportant details. He emphasized that the complainant's version of the events was consistent with her spontaneous reporting of the assault and subsequent statements.

[26] Justice Charron found an error in law as "there is simply no way to know how the trial judge satisfied himself that the complainant was a credible witness". We will return to *Dinardo* later on the issue of reliance on a prior consistent statement.

[27] Because a sufficiency of reasons assessment is context driven, it is important to refer to the trial evidence and then revisit the judge's reasons.

[28] The complainant and the appellant met via "Tinder" in early January 2016. At that time, the appellant was in rehab for alcohol abuse. When he finished rehab, they met for coffee.

[29] They enjoyed each other's company. They met daily. They became sexually intimate, sleeping at each other's homes, but did not engage in sexual intercourse prior to Valentine's Day, February 14, 2016.

[30] The complainant went to a concert in Berwick on February 13. She stayed overnight at the appellant's home in Lakeville. They woke up together. After breakfast, they drove to Kentville to attend to different obligations.

[31] They met at a local café before returning to his home. The appellant planned to cook supper for his parents that night. For the afternoon, snowshoeing back at his place. The latter did not happen. Shortly after returning to his apartment, he received disturbing news that someone he had been very close to had attempted suicide in Halifax.

[32] The complainant gave him "space" to deal with the situation. She retired to the bedroom to read. She said he joined her on the bed an hour later. She testified they engaged in consensual hugging, spooning, and kissing. The appellant lifted her skirt and pulled down her tights and underwear. This was, in her words, "consensual". But when he tried to put his penis in her, she pulled back and said "sweetly" "if you are trying to have sex with me you need a condom. We are not going to have sex without a condom". He stopped. They continued kissing. But when he did it again, she said "like I see what you are doing but no…as much as I want to and like, how…like it would be really great but can't do it without a condom. And he put it in me anyway."

[33] In direct examination, she said she told him no at least a dozen times. She described what happened as follows:

> A. And at that point it felt like I can't get away. So... and like I also want to say like I've ... I know what consensual sex is. I've had only consensual sex in my life, so part of me is still trying to process whether or not I somehow, like how did I give him this confusion, how did I...how is this possible. So at that point I look at him and I say is this okay, because I just really wanted him to ask me that because in most consensual relationships I've ever had, you know, you're doing something new, you say okay, this person says okay, you continue on to the next thing. Or as ...so I say it, like, and he just kind of, like, looks at me and maybe nodded, and then kept going. And then his phone rings and I said you should answer it and he didn't. And then I think I just panicked, and I, like, I'll admit, like, I at some point I just, like, eased into it and just like let it happen to me, just let it...and I really don't remember the sex that happened, like, with me. I...I know like I ended up on my abdomen. I know that he, like, pulled my hair. My hair was in a braid just like this one, and I know, like, where he came, and I just don't know ...
>
> Q. So he climaxed?
>
> A. Yeah.
>
> Q. And where did he climax?
>
> A. On my butt.

[34] The complainant then said the appellant immediately stood up, threw a pair of dirty grey underwear at her and told her to clean herself up.

[35] Despite this claimed act of non-consensual intercourse and objectively crass and demeaning behaviour, the complainant drove the appellant to his parents' home. She had plans to drive to Halifax in the evening for a date with her three-year partner, A.. She agreed to pick the appellant up and take him to Halifax.

[36] The complainant had an emergency at her Valley home. The oil tank was empty. She bought a jerry can to fill with diesel. When emptying the can into her tank, she spilt oil on her cold hand. She said the pain was intense.

[37] The complainant picked up the appellant as arranged at a gas station in Greenwich and drove him to Halifax. She said she talked about her hand, probably the whole way to Halifax, and listened to music while the appellant was on his phone. She dropped him off and went on her date with A..

[38] After meeting A., she went to the Victoria General Hospital. The Crown asked her about her actions:

> Q. So which hospital did you go to?
>
> A. I went to the VG, but only to get my hand checked out. I was so concerned about my...my hand pain that...
>
> Q . So did you do anything at the VG about the sexual situation?
>
> A. No. No, honestly I was talking to [A.]. [A.], my partner, he travels so he had been gone for two months, and so I was telling him about my other partner, I was telling him about Andrew who's wonderful and he's great and I trusted him so much, and I...he respects me. I remember saying he respects me so much, he's so great.

[39] The complainant describes her date with A. as "lovely". There was no mention of the non-consensual intercourse with Andrew. By way of explanation to the Crown, she offered, "Didn't realise it….it even happened".

[40] The precise details and timeline that led to her subsequent attendances at different hospital facilities and contact with the police were not fully fleshed out in direct examination. She described that on returning to the Annapolis Valley Monday night she had a realisation that what had happened was terribly wrong. She called the Sexual Assault Nurse Examiner program (S.A.N.E.). She drove to Sackville for an examination. A sexual assault kit was not done. On Wednesday,

she went to the hospital in Kentville, intending a full S.A.N.E. exam, but left when told that she would be examined by the next available doctor and the RCMP would attend.

[41] She returned to Sackville to get a rape kit performed. No information is in the record about the results of any of the examinations.

[42] In cross-examination, the complainant at first denied having told the appellant that she wanted to have intercourse with him on February 14. Eventually she agreed she had said just that. The following exchanges illustrate:

> Q. Okay. Now, if you thought back to what the plan was, would you agree that you had made it quite clear to him before that afternoon that what you wanted to do on that day with him was to have sexual intercourse with him?
>
> A. Can you repeat that question?
>
> Q. I'm asking you that you were there on...this was a Sunday, February 14th?
>
> A. Yes.
>
> Q. And you were there in his apartment that Sunday, and you had talked
>
> about seeing him on that day.
>
> A. Yes.
>
> Q. And wasn't it true that what you told him you wanted to do with him that day was to have sexual intercourse with him?
>
> A. No.

[43] Defence counsel persisted:

> Q. Did you not tell him that I can't wait to fuck you on Sunday?
>
> A. **I don't think so**. I did intend to have sex with him.
>
> [Emphasis added]

[44] The complainant explained that she was on her period, but it would potentially be over by that Sunday [the 14th]. Despite being clearly questioned about her stated intention to have sexual intercourse with the appellant on February 14, the complainant tried to explain that it was not something she had said that day or had not said to him "verbally":

> A. So that's not something I said that day, that's...
>
> Q. No, not that day...before that day.

> A. Certainly not something I said that day.
>
> Q. I'm suggesting you said that either on Friday or Saturday, that you said to him I can't wait to fuck you on Sunday.
>
> A. **I did not verbally say that to him**.
>
> [Emphasis added]

[45] The complainant then appeared to agree that she had said that very thing to the appellant:

> Q. Right. And I'm suggesting that that's indeed exactly what you said to him a day or two before that, that I can't wait to fuck you on Sunday.
>
> A. Okay.

[46] The complainant then gave the equivocal qualifier that she did not "believe" and had no "recollection" of having said that, but did intend to have sex with the appellant at "some point".

[47] It is of course axiomatic that just because someone has indicated a willingness or has even given actual consent to a certain sexual activity does not mean he or she cannot change their mind. To be valid, consent must be a voluntary agreement to engage in the activity at the time.

[48] But the variation of the complainant's evidence from a denial, to she did not think she had said she wanted to have intercourse, to not having said it "verbally", to an acceptance that she had said to him she could not wait to have sexual intercourse with him on Sunday, back to no recollection was relevant.

[49] It was germane to her credibility as she gave evasive and contradictory sworn evidence and a reluctant admission of having said things that meshed with the appellant's version of events. It is to his evidence we turn.

[50] The appellant, at the time of trial, was a university graduate with prior convictions for drinking and driving (s. 253(b)) and a breach of the probation order arising out of the former offence. When he first met the complainant, he had just completed a 28-day rehab programme for alcohol abuse.

[51] He testified that the complainant had told him she would be finished her period on Sunday, February 14th and "I can't wait to fuck you on Sunday". On the 14th, the complainant mentioned to him that her period was almost done, and she

had switched from a large DivaCup to a diaphragm, which allowed to her to have sex.

[52] As described above, plans for the day changed when the appellant received distressing news about a friend. He was upset. Sex was not on his agenda. He made arrangements for a place to stay in Halifax. It was time to leave to go to his parents when she hugged him and started kissing him. They ended up on the bed.

[53] She took off his pants and performed oral sex on him. He intended climax with oral sex, but she stopped and they resumed kissing. He knew she did not want sex without a condom. Her clothes were off. According to the appellant, it was the complainant who initiated sexual intercourse. The following illustrates:

> A. She said are you trying to have sex with me without a condom, and I pulled my head back and looked her dead in the eye and just said no.
>
> Q. Okay. Carry on, please.
>
> A. She then took my penis and tried to insert it into her vagina.
>
> Q. Okay. Now, she'd asked you whether or not you were trying to have sex without a condom, and you'd said no.
>
> A. Hm..mm.
>
> Q. And why was that?
>
> A. I had talked to her before and she told me she wasn't on any birth control and had multiple partners so she always had sex with condoms.
>
> Q. Okay. So you knew she didn't want to without one?
>
> A. Yes.
>
> Q. That's what she told you before?
>
> A. Yes.
>
> Q. And then you say she took your penis and actually put it in her vagina?
>
> A. She attempted to.
>
> Q. Yes.
>
> A. Yeah.
>
> Q. Okay. And did it enter?
>
> A. I'd say yes, like half.
>
> Q. Okay.
>
> A. Yeah.

Q. What happened next?

A. It was very uncomfortable due to the appartus inside of her and due to the fact there was no lubrication on the head of my penis.

Q. What did you do?

A. I applied saliva to my hand then I applied it to the head of my penis. After pulling out my penis.

Q. Okay, and then what?

A. Then I put it inside of her and due to that apparatus I told her, I said you...I said go slow, you control how this penetration is going to go, type thing. And so I...my leg was up and so she put her hand under my knee and slowly sort of pulled me inside of her, and she arched her back and pulled herself down towards me until my penis was fully inside of her.

[54] The appellant described how the intercourse was uncomfortable due to the apparatus. The complainant then got on top of the appellant and came down on top of his penis. It was still uncomfortable. He began to lose his erection. He withdrew and asked for oral sex so he could climax. His evidence about what happened next is:

A. She said...she laughed, and she said no, I want you to fuck me this way,

and she got on all fours.

Q. Okay. And what did you do?

A. I manually masturbated until I achieved a full erection again, and then she took her right hand from behind her and grabbed my right hand...her right hand behind her and grabbed my right hand, and wrapped it around her pony...or braid, and she said, once we began having sex she said pull on my hair harder and fuck me harder.

Q. Okay. Did you continue to have sexual intercourse from that position?

A. Yes, we did. No, at no point was she on her abdomen.

[55] The appellant was adamant that she never said no. He insisted she was the one who wrapped her hair round his hand:

Q. On all fours. What do you say to her suggestion that she was saying no.

A. That was never said.

Q. Are you sure of that?

A. One hundred percent the word 'no' was never said in that bedroom.

Q. Okay. And how sure are you that she wrapped the hair around your hand?

A. Very sure. I'm not into that type of sexual activity.

Q. Okay. Had she told you that this was something that she liked to do?

A. She said she liked things different, keep it different all the time, I guess.

Q. Did she specify that she'd like to have her hair pulled?

A. Yes.

[56] Once in Halifax, the appellant kissed her goodbye. He texted the complainant the next day. She responded that she was great. He missed some calls from her on the 15th. He could not reach her by phone. This led to the electronic message exchange that was brought out in cross-examination of the complainant. The following reveals the full context:

Q. Okay. The following day he texted you around five o'clock?

A. Yes.

Q. Asked you how you were?

A. Yes.

Q. You told him you were great?

A. Yes.

Q. You were with your friend having dinner?

A. Yes.

Q. You texted him back that evening?

A. Yes.

Q. You said, hey, I want to talk?

A. Yes.

Q. Called him back again at 7:20...

A. Hm..mm.

Q. ...asked him to call you?

A. Hm..mm.

Q. He tried to call you back at 8:13...8:15?

A. That sounds right. At that point I had left my friend after dinner. I was driving back to the Valley and it occurred to me what had happened, so I asked him to call me.

Q. Hm..mm.

A. And then I called him.

> Q. The next day after that, February 16th …
>
> A. Yes.
>
> Q. ...he sent you a Facebook message.
>
> A. Yes.
>
> Q. And you replied to that. He said, "Did I do something or was it the result of your visit to Halifax with your ex?" And you replied something along the lines of, "The sex we had, it hurt me. It felt wrong, and I don't want to be around you anymore."

[57] Many of the details of the appellant's evidence had been put to the complainant. She denied some of them. She had no recollection or acknowledged others. For example: she denied any oral sex; she admitted wearing a generic version of a DivaCup; she did not deny the appellant lubricated his penis with saliva, but said she did not remember that; she said she did not remember pulling on his leg to make the penile penetration deeper.

[58] She admitted they changed positions for intercourse, but said she did not know what they did, except she ended up on her abdomen. She did not know if she was on top of him. She did not remember him saying the diaphragm made the intercourse uncomfortable.

[59] She denied taking his hand to wrap her hair around and requesting him to pull on it, although she had told him before that she liked that.

[60] The point of this review of the evidence is not to re-try the case, but to provide meaningful context to the very substantial credibility issues presented by the trial evidence. How did the trial judge address and resolve these issues?

[61] She did not. Her reasons reveal not one mention of the appellant's evidence. She did not even say that she rejected it. The Crown says by inference the trial judge must have done so. But this begs the question, why?

[62] The Crown suggests the trial judge's reasons are sufficient, relying on *R. v. R.D.*, 2016 ONCA 574 for the principle that the bare rejection of an accused's evidence will meet the two important purposes of giving sufficient reasons: why the accused was convicted and permitting effective appellant review. The appellant does not disagree, but stresses the caveat in *R. v. R.D.*—reasons will only be sufficient if the trial judge engaged in a considered and reasoned acceptance of the complainant's evidence. Justice Laskin, for the court in *R. v. R.D.*, describes what is required:

> [18] The sufficiency point: the bare rejection of an accused's evidence will meet the two important purposes for giving sufficient reasons -- explaining why the accused was convicted, and permitting effective appellate review -- **provided that the bare rejection is based on a "considered and reasoned acceptance" of a complainant's evidence.** Implicitly, the bare acceptance of a complainant's evidence and the bare denial of an accused's evidence ("I accept the complainant's evidence; therefore I reject the accused's evidence") are unlikely to amount to sufficient reasons. A trial judge who relies on the formulation in *J.J.R.D.* should at least give grounds for accepting a complainant's evidence.
>
> [19] In *J.J.R.D.*, Doherty J.A. placed his point about the sufficiency of reasons in the context of the evidence as a whole and the reasonable doubt standard. The accused's denial in that case, when "stacked beside" the complainant's evidence and her diary entries, "did not leave the trial judge with a reasonable doubt." And so Doherty J.A. explained that "an outright rejection of an accused's evidence" may be "based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence..." (emphasis added). In doing so, he addressed the need for the trial judge to be convinced that the conflicting credible evidence established the accused's guilt beyond a reasonable doubt.
>
> [20] The burden of proof point: a trial judge who says only "I reject the accused's evidence because I accept the complainant's evidence" risks being held by an appellate court to have chosen which of the two parties to believe and failed to determine whether, on all the evidence, the accused's guilt had been proved beyond a reasonable doubt. That risk is what Cronk J.A. cautioned about in *O.M.* But, as *O.M.* also shows, a trial judge can still reject an accused's evidence because either the complainant's evidence or other evidence establishes the accused's guilt beyond a reasonable doubt. Thus, *J.J.R.D.* and *O.M.* are entirely consistent.
>
> [21] In the case before us, the trial judge's reasons were sufficient. He did summarily reject the appellant's evidence though it had no obvious flaw in it. **But he did so based on a "considered and reasoned acceptance" of K.Y.'s evidence. He discussed her evidence at length, including the discrepancies in it, and gave several grounds for why he found her evidence to be both credible and reliable.**
>
> [Emphasis added]

[63] With respect, the trial judge's reasons here do not reveal even a cursory consideration of the complainant's evidence, let alone that of the appellant.

[64] This is also a far cry from the situation in *R. v. Vuradin, supra* where the trial judge recognized the live issues about the complainant's credibility. Though not discussing all of the evidence, he referred to the problems in her evidence and

addressed them, and considered the accused's denial of the allegations. None of these features exist here.

[65] The total of the trial judge's analysis is set out above (¶ 11). In sum, the trial judge reasoned the complainant had no motivation to lie, she was not impaired, and the electronic communication confirmed her evidence she had not consented.

[66] There is no mention of the appellant's version of events nor of the complainant's evidence where she either did not contradict, professed no recall, or grudgingly admitted details favourable to the appellant.

[67] It is convenient to repeat what led to the verdict:

> . . . Upon examination of the evidence there is nothing to suggest that Ms. M is motivated to lie. There is no evidence Ms. M was under the influence of alcohol or drugs that would affect her ability to recall and perceive the events on the date in question. The question that I had considered as well is why would Ms. M send a text to the defendant saying, "It hurt, it didn't feel right, and I don't want to be around you anymore," and then follow through with that statement by having no further contact or communication with Mr. Laing.

[68] The Crown reasonably concedes that the first two factors, no evidence of a motive to lie and lack of impairment, are, in fact, neutral. The absence of possible troublesome credibility detractors cannot be the basis to make a positive finding of credibility and reliability.

[69] The reasons fall far short of being sufficient. On this ground of appeal alone, the appeal is allowed and a new trial is ordered.

[70] In the event there is a new trial undertaken by the Crown, it is appropriate to address the use that can be made by what the trial judge thought was a prior consistent statement.

Improper use of the prior consistent statement

[71] The trial judge interpreted the complainant's electronic message that "It hurt, it didn't feel right, and I don't want to be around you anymore" as being consistent with her trial evidence that she did not consent.

[72] There should be little dispute about the legal principles surrounding admissibility and possible uses of prior consistent statements. Justice Pepall, for the Court, in *R. v. D. B.*, 2013 ONCA 578 set out the basic tenets:

> [30] Prior consistent statements are declarations made by witnesses before they take the stand that are consistent with the testimony they give while on the stand: David M. Paciocco, "*The Perils and Potential of Prior Consistent Statements: Let's Get It Right*" (2013) 17 Can. Crim. L.R. 181, at p. 181.
>
> [31] Prior consistent statements are generally inadmissible. Traditionally, they have been treated as inadmissible because they are out-of-court statements made in the absence of trial safeguards such as cross-examination and the taking of an oath or affirmation to tell the truth. The hearsay rule precludes the admission of prior consistent statements for the truth of their contents. Additionally, prior consistent statements lack probative value: see *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 10, at para. 5; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 36. Put differently, repetition of a statement by the same person does not render it more likely to be true or corroborative. The repetition is self-serving and the source lacks independence. Lastly, given that the evidence will have already been adduced at trial through oral testimony, exclusion of prior consistent statements serves the desirable objective of trial efficiency.

[73] Prior consistent statements can gain admission to rebut an allegation of recent fabrication or as narrative. The statement in issue in this case was not adduced by the Crown, but came to light through cross-examination. The appellant voices no complaint about its presence in the record. But he argues the trial judge used it improperly as confirmatory of the complainant's evidence that she did not consent to the sexual activity. We agree.

[74] The Crown argues the statement was admissible to rebut an allegation of recent fabrication or as part of the narrative to support the complainant's credibility. Although it is the statement's use, not admissibility, that is important, we cannot agree that, in these circumstances, there was an allegation of recent fabrication.

[75] In *R. v. Greenwood*, 2014 NSCA 80, Justice Fichaud cautioned about the confusion between an argument that a witness should not be believed and an allegation of recent fabrication. He adopted the following excerpt from *McWilliams' Canadian Criminal Evidence*:

> [99] *McWilliams' Canandian Criminal Evidence* says, of the "recent fabrication" exception:
>
> > **11:40:10 Recent Fabrication**
> >
> > A prior out-of-court consistent statement may be admitted into evidence if it has been suggested that a witness has "recently" fabricated portions of

> his or her evidence. In order to be admissible, the statements must have been made prior to when the motive to fabricate arose. In such circumstances, the statement is not admitted for the truth of its contents but rather to rebut an allegation that the witness's testimony may have been fabricated or affected by an improper motive.
>
> The application of this exception is dependent upon identifying *a discrete factual event* that the Crown or defence alleges is the source of the witness's fabrication. ...
>
> Courts must be vigilant not to confuse an allegation of a discrete factual event that is alleged to be the source of a witness's fabrication with a general theory proposed by one party that a particular witness is fabricating their evidence. While the former will trigger the recent fabrication exception, the latter does not. ... (emphasis in original)

[76] The law with respect to the admission and use of prior consistent statements was thoroughly canvassed by the Supreme Court in a trilogy of cases, *R. v. Stirling*, 2008 SCC 10, *R. v. Dinardo, supra*, and *R. v. Ellard*, 2009 SCC 27.

[77] Prior consistent statements are presumptively inadmissible. The exceptions to this rule are well described by Justice David M. Paciocco in his 2013 article "The Perils and Potential of Prior Consistent Statements: Let's Get it Right", 17 Can. Crim. L. Rev. 181.

[78] Even if admissible to rebut an allegation of recent fabrication, use of the prior statement is limited. Justice Bastarache in *R. v. Stirling*, *supra*, explains:

> [7] **However, a prior consistent statement that is admitted to rebut the suggestion of recent fabrication continues to lack any probative value beyond showing that the witness's story did not change as a result of a new motive to fabricate. Importantly, it is impermissible to assume that because a witness has made the same statement in the past, he or she is more likely to be telling the truth, and any admitted prior consistent statements should not be assessed for the truth of their contents**. As was noted in *R. v. Divitaris* (2004), 188 C.C.C. (3d) 390 (Ont. C.A.), at para. 28, "a concocted statement, repeated on more than one occasion, remains concocted"; see also J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 313. This case illustrates the importance of this point….
>
> [11] Courts and scholars in this country have used a variety of language to describe the way prior consistent statements may impact on a witness's credibility where they refute suggestion of an improper motive. Both the Nova Scotia Court of Appeal and the Alberta Court of Appeal refer to the "bolstering" of the witness's credibility (*R. v. Schofield* (1996), 148 N.S.R. (2d) 175, at para. 23; *R. v.*

> *R. (J.)* (2000), 84 Alta. L.R. (3d) 92, 2000 ABCA 196, at para. 8), a term which is also used in the leading text of Sopinka, Lederman and Bryant, at p. 314. The Ontario Court of Appeal recently found that these statements are capable of "strengthening" credibility (*R. v. Zebedee* (2006), 211 C.C.C. (3d) 199, at para. 117), while the British Columbia Court of Appeal has referred to their ability to "rehabilitate" credibility (*R. v. Aksidan* (2006), 209 C.C.C. (3d) 423, 2006 BCCA 258, at para. 21). This Court has found that the statements can be admitted "in support of" the witness's credibility (Evans, at p. 643). **What is clear from all of these sources is that credibility is necessarily impacted -- in a positive way -- where admission of prior consistent statements removes a motive for fabrication. Although it would clearly be flawed reasoning to conclude that removal of this motive leads to a conclusion that the witness is telling the truth, it is permissible for this factor to be taken into account as part of the larger assessment of credibility.**
>
> [Emphasis added]

[79] As explained above, there was no express nor implied allegation of recent fabrication. There was simply the suggestion that the complainant's evidence she did not consent should not be believed.

[80] In certain circumstances, the way a complaint came forward can amount to circumstantial evidence relevant to assessing the credibility and reliability of the complainant's in-court testimony (see: *R. v. G.C.*, [2006] O.J. No. 2245 (C.A.); *R. v. Curto*, 2008 ONCA 161; *R. v. Khan*, 2017 ONCA 114 (leave to appeal filed)). But prior consistent statements introduced as part of the narrative cannot be used as corroborative of the in-court testimony (see: *R. v. D.D.S.*, 2006 NSCA 34 at paras. 82-85; *R. v. Dinardo, supra*; *R. v. Zou*, 2017 ONCA 90).

[81] The key is to distinguish between proper and improper use. It is not always easy. In *Dinardo*, the trial judge referred to the consistency of the complainant's in-court testimony with her prior statements. Justice Charron referred to the challenge for courts:

> [37] In some circumstances, prior consistent statements may be admissible as part of the narrative. Once admitted, the statements may be used for the limited purpose of helping the trier of fact to understand how the complainant's story was initially disclosed. The challenge is to distinguish between "using narrative evidence for the impermissible purpose of 'confirm[ing] the truthfulness of the sworn allegation'" and "using narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then *assist the trier of fact in the assessment of truthfulness or credibility*" *McWilliams' Canadian Criminal*

> *Evidence* (4th ed. (loose-leaf)), at pp. 11-44 and 11-45 (emphasis in original); see also *R. v. F. (J.E.)* (1993), 85 C.C.C. (3d) 457 (Ont. C.A.), at p. 476).

[82] In *Dinardo*, the Court found the trial judge erred by relying on the consistency to be corroborative:

> [40] The Court of Appeal correctly concluded that the trial judge erred when he considered the contents of the complainant's prior consistent statements to corroborate her testimony at trial, noting in his judgment that [TRANSLATION] "there is a form of corroboration in the facts and statements of the victim, who never contradicted herself" (para. 68). I am unable to agree with the majority, however, that the accused suffered no prejudice from the trial judge's improper use of the statements. The trial judge relied heavily on the corroborative value of the complainant's prior statements in convicting Mr. Dinardo. He was clearly of the view that the complainant's consistency in recounting the allegations made her story more credible. Accordingly, I would also allow the appeal on this basis.

[83] Much depends on the language found in the decision and the live issues presented to the judge to decide. Here, the Crown argued to the judge that the electronic communication was consistent with what she said took place and the way it took place. It was also the Crown's suggestion that the judge should rely on the absence of evidence that the complainant was impaired. These were two of the very factors the judge relied on to find the allegation proved beyond a reasonable doubt.

[84] The trial judge twice referred to the prior statement as demonstrating consistency with her claim. First, she said: "The question that I had considered as well is why would Ms. M send a text to the defendant saying, "It hurt, it didn't feel right, and I don't want to be around you anymore," and then follow through with that statement by having no further contact or communication with Mr. Laing". The second time, when she reasoned: "This text is how she let him know one final time that she had not consented and that she did not want to have sex under those circumstances."

[85] In our view, the trial judge interpreted the message as being consistent with and, hence, corroborative of her testimony that she was the victim of non-consensual sex.

[86] This is an error of law. We also allow the appeal on this ground and order a new trial.

[87] As a result, the appeal is allowed and a new trial ordered, as always, a process to be undertaken at the discretion of the Crown.

Beveridge, J.A.

Concurred in:

Farrar, J.A.

Van den Eynden, J.A.