NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. P.C.H.*, 2019 NSCA 63

Date: 20190726
Docket: CAC 476984
Registry: Halifax

Between:

(C.) P.C.H.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: pursuant to s. 486.4 of the Criminal Code

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	May 21 and 22, 2019, in Halifax, Nova Scotia
Subject:	Criminal Law. Ineffective Assistance of Counsel. Fresh Evidence.
Summary:	The appellant appealed his conviction for sexual offences against his daughter. He alleged that ineffective representation by his trial counsel had resulted in a miscarriage of justice. He made a fresh evidence motion in support of his allegations that his convictions were unreliable, and his trial was unfair. He claimed that he had evidence to present on the merits of his defence that, as a result of the incompetence of his lawyer, was not put before the trial judge. He further claimed that his trial counsel's preparation, strategy, and conduct fell below a reasonable standard of professional judgment.
Issue:	Whether a miscarriage of justice occurred due to the ineffective representation of trial counsel.

Result: Motion to admit fresh evidence dismissed; appeal dismissed. The appellant failed to discharge the burden of demonstrating that his trial counsel's representation of him was incompetent and that the reliability of the verdicts or trial fairness was compromised. He did not show any reasonable probability that there was ineffective representation that could have affected the verdicts or prevented him from making full answer and defence such that he was actually or constructively deprived of the assistance of counsel.

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Corrected Decision:	The text of the original judgment has been corrected according to the attached erratum dated **August 12, 2019**
Judges:	Derrick, Hamilton and Scanlan, JJ.A.
Appeal Heard:	May 21 and 22, 2019, in Halifax, Nova Scotia
Held:	Motion to introduce fresh evidence dismissed; appeal dismissed per reasons for judgment of Derrick, J.A.; Hamilton and Scanlan, JJ.A. concurring.
Counsel:	Jim O'Neil, for the appellant Mark Scott, Q.C., for the respondent William L. Mahody, Q.C. for Jeffrey Lattie

Order restricting publication — sexual offences

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

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

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

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

Reasons for judgment:

Introduction

[1] The appellant appeals his convictions for sexual offences against his daughter, the complainant. He was convicted in Provincial Court on September 26, 2017 by the Honourable Judge Laurel Halfpenny-MacQuarrie of two charges:

- Between the 1st day of October, 1999 and the 31st day of July, 2000 [he] did for a sexual purpose touch AJ a person under the age of sixteen years directly with a part of his body, to wit: his penis, contrary to section 151 of the *Criminal Code*, R.S.C. 1985, c. C-46.

- And further, at or near [*], between the 1st day of October, 1999 and the 31st day of July, 2000 [he] did have sexual intercourse with AJ while knowing that AJ was his daughter, contrary to section 155(2) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] The appellant alleges no error on the part of the trial judge. His appeal is based solely on allegations that his trial counsel, Jeffrey Lattie, provided him with ineffective assistance which resulted in a miscarriage of justice. He has made a fresh evidence motion in support of his allegations.

[3] The trial judge decided this case on credibility. The complainant and the appellant both testified. The trial judge applied *R. v. W.(D.)*, [1991] 1 S.C.R. 742 which required her to consider, even if she disbelieved the appellant, whether she still had a reasonable doubt as to his guilt after assessing his evidence in the context of the evidence as a whole (page 757). She rejected the appellant's evidence and found, on the whole of the evidence, that the complainant's allegations had been proven beyond a reasonable doubt.

[4] In oral submissions on appeal, the appellant's complaints about his representation by Mr. Lattie were focused on Mr. Lattie's inexperience, and a variety of alleged failures: prior to trial he failed to provide the appellant with the videos of witness statements and the transcript of the complainant's KGB statement; he did not effectively employ records from the Children's Aid Society of [*] (CAS) in the cross-examination of the complainant; he did not get those records admitted into evidence; he did not obtain the appellant's phone records which the appellant says would have contradicted the complainant's testimony that

there was no ongoing contact after the alleged sexual abuse; his cross-examination of the complainant was ineffective overall; he ill-advisedly called the complainant's mother, R.J., as a witness, with the intention of exposing her as untruthful, an objective he failed to achieve; and he did not prepare the appellant or his wife, S.H., to give evidence.

[5] The appellant has argued that, but for Mr. Lattie's ineffectiveness as his trial counsel, there is a reasonable *possibility* he would have been acquitted.

[6] After reviewing the trial judge's decision and the facts, these reasons will address the law relating to the admissibility of fresh evidence, the fresh evidence offered, and, in the context of that evidence, the appellant's claim that a miscarriage of justice has occurred. The test to be applied in an appeal based on ineffective assistance of counsel is to be determined on a reasonable *probability*, not reasonable *possibility*, standard (*R. v. G.K.N.*, 2016 NSCA 29, para. 44).

[7] For the reasons that follow, I would dismiss the appellant's appeal on the basis that no miscarriage of justice has been made out.

The Trial

[8] The appellant knew from the preliminary inquiry (and the Crown disclosure) that the complainant would be testifying at trial that he had sexually abused her on two occasions that she could recall, when she and her slightly older brother had been living with him in about 1999 to 2000. His defence was denial.

[9] The Crown called three witnesses at trial: the complainant's maternal grandmother, a former girlfriend, M.L., and the complainant.

[10] M.L. was the appellant's girlfriend during the time his children lived with him. She had her own home in a nearby community. A downstairs bedroom had a waterbed. She recalled that the complainant was close to the appellant and spent a lot of time with him. She remembered an instance of waking up in bed with the appellant at her home and observing the complainant glaring at them from the doorway. She testified that the complainant had a chip on her shoulder and was "just a little nasty towards me".

[11] Mr. Lattie's cross-examination of M.L. brought out that the appellant worked locally at a night security job. He explored the complainant's attitude towards her and the "glaring" incident. M.L. recalled that the complainant would emphasize what the appellant had told her, that M.L. was not his girlfriend and that

she made “comments” when M.L. and the appellant showed signs of intimacy. Mr. Lattie established that both children could be a challenge, and that the appellant disciplined the brother more harshly than the complainant. M.L. agreed that during the year they spent in Nova Scotia, the appellant imposed rules and a routine on the children.

[12] The complainant’s grandmother, testified to having limited contact with the complainant and her brother while they were living with the appellant. She recalled the complainant visiting her and looking sad but, when asked, saying nothing beyond asking to stay with her. She told the complainant she had to go home to her father.

[13] The complainant was the Crown’s third and final witness. She was born in Nova Scotia in the fall of 1989. She and her brother, older by two years, had been with their mother, R.J. in [*]. In 1999, they moved back to Nova Scotia to live with their father, the appellant. By the summer of 2000 they had returned to [*] and R.J.

[14] The appellant lived in a two bedroom apartment. The complainant testified that the appellant insisted she sleep with him. She said she would sleep with her father and her brother slept in the other bedroom.

[15] At trial, the complainant described two instances of the appellant having sexual intercourse with her. One incident occurred in his apartment and the other at M.L.’s home in the downstairs bedroom with the waterbed.

[16] The complainant’s memory of these two incidents was quite detailed. She testified that she had been on the appellant’s bed with him, both of them naked, and she had been moving around “because I did not want to do anything”. She “ended up half way off the bed with [her] head on the floor”. The appellant laughed at her and said, “where you going to go now”. He pulled her back up on the bed and tried to force her to perform fellatio. She clamped her mouth shut and the appellant had sexual intercourse with her during which he ejaculated.

[17] The complainant testified that the sexual assault at M.L.’s home occurred when the complainant was there for the night with the appellant. She was in the downstairs bedroom which she remembered had a waterbed. The appellant was pressing her for sex which she resisted. He told her if she did not permit him to have sex with her he would go upstairs to M.L.’s bedroom. The complainant didn’t want to be left alone in the dark so she acquiesced. The appellant had sexual intercourse with her and then went upstairs.

[18] The complainant testified there were other occasions when the appellant wanted to have sex with her but she did not recall whether that happened. She described: refusing to have sex with him and being made to go and sleep on the living room couch with the dog; being with the appellant in bed when her brother walked into the room; an occasion when her earring got ripped out as the appellant moved his arm from underneath her head; and M.L. knocking on the door and then on the window while she was in bed with the appellant, and the appellant getting up to see who was there. She testified that she can now only recall two instances when intercourse occurred.

[19] The complainant said that the appellant's attempts to have sex with her would always begin by him trying to take her clothes off.

[20] The complainant testified that she "can't go a single day" without thinking about what the appellant did to her. She said she "became extremely angry and I acted out a lot". She explained why she decided to come forward in 2014:

> A. I don't want to feel the way I feel anymore. I don't want to hold something that isn't mine to hold. This isn't anything I did wrong. It's something that was done to me and I was a child.

[21] In his cross-examination of the complainant, Mr. Lattie endeavoured to establish that:

- the complainant's home life in [*] was chaotic and unstable;
- she had problems in school when she and her brother lived with the appellant – Mr. Lattie was obviously anticipating what the appellant would say about the experience of having the children in his care;
- she didn't like living with either of her parents;
- she recalled only one time that her mother was at the apartment with them and that she did not recall her being there while the appellant was working;
- she could not remember the sequence of her allegations against the appellant;
- her attitude toward M.L. was inconsistent with M.L.'s testimony;

- when the sexual intercourse the complainant alleged happened at M.L.'s house, her brother was also there;
- the alleged incident of sexual intercourse at the appellant's apartment occurred at night while the complainant's brother was at home too;
- the appellant's job was security;
- the complainant had little or no recall about any details surrounding four incidents with the appellant that she described where no intercourse occurred; and,
- the appellant's bedroom and the bedroom where her brother slept shared a wall.

[22] Mr. Lattie asked the complainant about her testimony that she ran away to her grandmother's house asking not to be sent back to live with the appellant. The complainant was unable to remember anything about the circumstances surrounding this event. She said that the appellant came to get her and she went back home with him.

[23] Mr. Lattie questioned the complainant about making a disclosure about the appellant to a teacher after her return to live with her mother in [*]. The complainant recalled telling her teacher that "something happened to me" but could not remember specifically what she said or whether she mentioned the appellant. Mr. Lattie then told the court, "…there is a Children's Aid Society of [*] report on file" that he wanted to have admitted into evidence. He did not pursue the issue further once the Crown objected to the report's admissibility.

[24] Mr. Lattie instead continued with his cross-examination of the complainant, asking her:

> Q. Okay. Do you recall ever telling anyone that you were sexually assaulted every night while you were in Nova Scotia?
>
> A. I know I said I feel like it was more than what it was but I don't have a memory of it so I can't be certain.
>
> Q. Sorry, you feel like it was more than it was?
>
> A. More than the memories that I have.

[25] Mr. Lattie went on to explore a theme that the appellant had flagged as significant: an allegation that, after the complainant and her brother returned to [*] from Nova Scotia, their mother, R.J., had hit the complainant with an electrical cord. The complainant remembered telling Children's Aid about abuse by R.J. but had no recollection of any dealings with the agency in 2002. She said she did not recall telling the appellant about her mother hitting her with an electrical cord. (This was sometimes referred to in the evidence as an extension cord).

[26] Mr. Lattie required some guidance from the trial judge with this line of questioning. The trial judge ensured that Mr. Lattie understood that if he intended to ask the appellant about the complainant contacting him to complain that her mother had hit her with an electrical cord, he needed to ask the complainant directly about it, following the rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K.H.L.). With this direction, he did so.

[27] Mr. Lattie questioned the complainant about contact with the appellant after she returned to live with her mother. The complainant remembered one call and testified that as soon as she heard the appellant's voice, she "froze" and hung up. She did not remember "having any other contact with him at all". Mr. Lattie asked her whether she recalled a discussion about ten thousand dollars, plainly anticipating that the appellant would be testifying about having offered the complainant and her brother money if they finished high school and went to college or university. The complainant responded that she did not remember any conversation with the appellant about money, except either two hundred or four hundred dollars the appellant sent her for a mattress.

[28] Another area Mr. Lattie explored related to whether the complainant had "ever spoken" to the appellant's wife, S.H. The complainant recalled sending S.H. a Facebook message "some years back" in which she thought she said that the appellant had raped her. She got no response.

[29] Mr. Lattie asked the complainant directly whether she had ever tried to extort money from anyone by offering to forego criminal charges or civil proceedings. She said no.

[30] Mr. Lattie was hampered in his cross-examination by the complainant having little recall. She testified she had "not very many memories…of being down here". Her evidence under cross-examination about the core allegations remained consistent with what she had said in direct.

[31] For the defence case, Mr. Lattie called three witnesses – the complainant's mother, R.J., the appellant, and his wife, S.H. I will summarize the appellant's evidence now and discuss the evidence of R.J. and S.H. in more detail later in these reasons.

[32] Mr. Lattie asked the appellant about all the allegations made against him by the complainant. He denied the sexual abuse allegations and provided a benign explanation for the various incidents the complainant recalled, such as M.L. knocking on the window, and why he had been in M.L.'s downstairs bedroom with the complainant. He explained that the children were out of control and very aggressive when they came to live with him and that he provided them with a routine and structure. He worked nights and had his mother stay with the children. He said the complainant ran away to her cousin's home, not her grandmother's (The appellant's affidavit evidence before this Court states that the complainant ran away because he caught her smoking and "my son and I went to get her at her grandmother's". At trial, the appellant did not recall the complainant running away to her grandmother's. He now says his affidavit is inaccurate). He talked about the incentive money he had offered the children, ten thousand dollars if they finished high school. Within a month of the complainant returning to [*] she was calling him to ask for the money. He maintained contact with the children after they left, almost every week. Either they called him or he called them. He testified that the complainant called him about her mother hitting her with an extension cord, and said he reported this to "Social Services". He did not follow up or make further contact with "Social Services" about this.

[33] Mr. Lattie urged the trial judge to disbelieve the complainant's allegations. He noted her difficulties recalling the details of many events. He said her answers were "intentionally vague and quite frankly unconvincing". He pointed to the appellant's evidence about providing the children with a safe, stable home. He emphasized the appellant's "adamant" denial. He argued it was implausible that the appellant would have sexually assaulted the complainant at his apartment with the complainant's brother present, or at M.L.'s when she was in the house. He referred to the appellant's evidence that the complainant had trusted him enough to tell him about her mother hitting her with an extension cord. He suggested the complainant had a motive to fabricate – the ten thousand dollar incentive money the appellant had refused to give her.

The Trial Judge's Decision

[34] The trial judge explicitly recognized that the Crown bore the burden of establishing the presumptively-innocent appellant's guilt beyond a reasonable doubt. She correctly noted that: "Credibility is the key issue in this case". She discussed what courts can consider in determining credibility, the requirements of *W.(D.)*, and the principle that judges can accept all, some, or none of a witness' evidence. She then reviewed the evidence of each Crown witness, the allegations by the complainant, and Mr. Lattie's cross-examination. She observed that the complainant "really had very little memory of that time in Nova Scotia".

[35] The trial judge carefully examined the defence evidence and went through the appellant's testimony in detail. She summarized Mr. Lattie's and the Crown's closing arguments. She found the complainant to be a credible witness, remarking on her consistency in the details she gave under direct and cross-examination about the sexual abuse, the fact that she did not embellish her answer or guess in response to questions:

> [The complainant] did not recall and she didn't seek to make a serious situation even more so by adding details that she did not know. This witness refused to guess. Mr. Lattie calls this being [vague] on details. I disagree.

[36] The trial judge found the complainant to have a very good recall when it came to the allegations of sexual intercourse. She said that the appellant confirming there were occasions when he was in bed alone with the complainant was corroborative of the complainant's allegations.

[37] The trial judge rejected the appellant's denial. She found his evidence "was not given in a straightforward fashion" and that it "did not have an air of reality…when considered in its entirety". The appellant was "polite" and "answered all questions of [his] counsel" but was "evasive" on cross-examination and "flippant and argumentative" with the Crown. She went on to say:

> …You set yourself out as a caring parent willing to take these two children from [*] who were misbehaved back to live with you who you felt had a tragic life and an abusive life in [*]. Yet after barely a year you had had enough. They were a handful and you packed them up and you sent them back to someone that you described to this court as being abusive. And that you clearly portrayed as being a criminal or attempted to portray as being a criminal and from a greedy and dysfunctional family with no more than her word, no investigation as to the fact that she had changed because that in fact helped you get rid of these children. You

> never followed up with the Children's Aid Society to confirm that she was appropriate and upon getting word that she had abused [the complainant] with an electrical cord you did no more than report it.

[38] Although the trial judge viewed the evidence of M.L., the complainant's mother, R.J., and his wife, as "neutral", saying, "nothing turns on it", in rejecting the appellant's denial she did reference R.J.'s testimony that she spoke to the appellant about him wearing only a bathrobe to bed with the complainant and that being inappropriate. She found it unbelievable that the complainant, aged 11, would have attempted to extort money from the appellant in exchange for remaining silent about the sexual abuse allegations.

The Fresh Evidence Put Forward by the Appellant

[39] The appellant made a fresh evidence motion in support of his allegations against Mr. Lattie. He, and his wife, filed affidavits. The appellant filed as an exhibit to his affidavit a volume of materials entitled "Fresh Evidence Exhibit". This volume contains the following: Children's Aid Service of [*] documentation from 2002; [*] Police Service General Occurrence Documents from 2002 and 2014; Emails from the appellant's wife to Mr. Lattie with attached trial preparation notes; the transcript of the complainant's 2014 KGB statement; the transcript of the June 2015 preliminary inquiry; a letter from Mr. Lattie to the appellant dated October 3, 2017; telephone records for the appellant's home phone (the account was in his wife's name); and the CD of a 2014 police interview of the appellant's former girlfriend, M.L.

[40] Mr. Lattie filed an affidavit attaching a number of exhibits. The Crown filed an affidavit from the complainant's mother. Mr. O'Neil was permitted to directly examine the appellant and his wife as their affidavits were filed prior to Mr. Lattie's. All the affiants were cross-examined.

The Admissibility of the Fresh Evidence

[41] This Court, most recently in *R. v. Finck*, 2019 NSCA 60, has articulated the principles that govern the admission of fresh evidence on appeals involving allegations of ineffective assistance of counsel:

- There is wide discretion for the Court to admit fresh evidence "where it considers it in the interests of justice": *Criminal Code*, s. 683(1).

- Fresh evidence in such appeals will generally fall into the categories of, evidence relating to an issue adjudicated at trial, and evidence relating to the trial process. The former correlates to miscarriage of justice due to an unreliable verdict; the latter correlates to miscarriage of justice occasioned by an unfair trial (*R. v. Finck, supra*, para. 19).

- Fresh evidence directed at issues adjudicated at trial generally must satisfy the well-established test in *R. v. Palmer*, [1980] 1 S.C.R. 759 for the admission of fresh evidence on appeal. The criteria require consideration of due diligence, relevance, whether the evidence is reasonably capable of belief, and whether, if believed, the evidence, taken with other evidence admitted at trial, could reasonably be expected to have affected the result (*R. v. Finck, supra*, para. 20; *R. v. Ross*, 2012 NSCA 56, para. 23).

[42] The appellant's fresh evidence is directed at both the reliability of his convictions and trial fairness. He says he has evidence to present on the merits of his defence that was not put before the trial judge as a result of the incompetence of his trial counsel. He further says that his trial counsel's preparation, strategy, and conduct fell below a reasonable standard of professional judgment, causing a miscarriage of justice (*R. v. Ross*, *supra*, para. 25; *R. v. Finck, supra*, para. 23).

[43] The appellant bears the burden of demonstrating that Mr. Lattie's representation of him was incompetent and that his incompetence compromised the fairness of the trial or the reliability of the verdict (*R. v. Finck, supra*, para. 62; see also: *R. v. A.W.H.*, 2019 NSCA 40, para. 32, citing *R. v. Gogan*, 2011 NSCA 105, para. 29; *R. v. Fraser*, 2011 NSCA 70, para. 53; *R. v. Ross*, para. 34-35). *R. v. Finck* reiterates the standard that the appellant must satisfy: to succeed in his appeal, he must show that there is a reasonable *probability* that Mr. Lattie's representation could have affected the verdict or prevented him from making full answer and defence such that he was actually or constructively deprived of the assistance of counsel (*R. v. Finck, supra*, para. 53; see also: *R. v. A.W.H.*, *supra*, para. 33; *R. v. Ross, supra*, para. 59).

[44] The fresh evidence offered by the appellant is accepted provisionally for the purpose of assessing whether the appellant has established that Mr. Lattie's representation of him led to the verdicts being unreliable or deprived him of a fair trial (*R. v. Gogan, supra*, para. 31). As noted in *R. v. Finck, supra*:

> [24] …without evidence to support an allegation that counsel's incompetence compromised trial fairness, an appellate court could not determine the merits of such an argument: see *Ross* at ¶26.

[45] In his affidavit, the appellant set out the broad contours of his appeal:

> 21. That I believe that had my case been fully and properly presented to the trial judge, that there would have been a different verdict and my full and proper testimony would then have had "an air of reality".

[46] I will now examine the appellant's specific complaints about Mr. Lattie's representation, as enumerated earlier, in para. 4.

Mr. Lattie's Inexperience

[47] The appellant was represented by Alain Bégin for his preliminary inquiry in June 2015. He and S.H. had been active participants in assisting Mr. Bégin on the case. In September 2016, Mr. Bégin was appointed to the Provincial Court. He wrote the appellant and recommended Malcolm Jeffcock, Q.C., an experienced criminal defence lawyer. The appellant decided instead to ask Mr. Lattie to represent him. They had retained the firm in an unrelated matter and, in that context, knew Mr. Lattie, as he had been assisting on the file, as an articled clerk.

[48] Mr. Lattie says he met with the appellant and S.H. on October 31, 2016 and expressed reservations about representing the appellant due to the seriousness of the charges. As a clerk articled to Mr. Bégin, Mr. Lattie had only done summary sexual assault trials and no historical sexual assault cases.

[49] The appellant and his wife have testified on the fresh evidence motion that Mr. Lattie indicated no such concerns. However, Mr. Lattie's affidavit attached a memo to the file dated October 31, 2016 entitled "[the appellant] – Retainer" which says the following:

> I met with [the appellant and his wife] today. They advised that they did not want to change Firms for representation. I advised that the charges alleged carry a significant penalty and that I have reservations in representing [the appellant] based on same.
>
> [The appellant and his wife] acknowledged this fact, but agreed that they wanted me to represent [the appellant]
>
> They are to review the witness' statements, preliminary inquiry and give notes on inconsistencies…

[50] The appellant's wife, S.H., testified that they retained Mr. Lattie when they met him on October 31. His file memorandum satisfies me he told the appellant and S.H. at the meeting that he had reservations about assuming carriage of the appellant's case.

[51] When the appellant and his wife retained Mr. Lattie, he was a very newly-minted lawyer having been admitted to the Bar a couple of weeks earlier. Contrary to the evidence of the appellant and S.H., Mr. Lattie says they were aware he had recently been articling. I accept that to have been the case. The appellant's wife, in particular, was familiar with the workings of a law firm having been previously employed as a legal assistant. I find it would have either been explicitly mentioned that Mr. Lattie was an articling clerk or obvious from his role in assisting on the two files.

[52] Mr. Lattie testified that he felt he was qualified to handle the appellant's case. Having assisted Mr. Bégin, he was familiar with it. The appellant impressed him as intelligent. The appellant and his wife were actively engaged.

[53] Once retained, Mr. Lattie said he had numerous meetings with the appellant and his wife. They were fully involved throughout, looking for evidence to assist the defence. They reviewed Crown disclosure and prepared extensive trial preparation notes. Mr. Lattie was provided with typed notes that included commentary under headings, "discrepancies". These notes were included in the Fresh Evidence Exhibit.

Failure to Provide Videos of the Witnesses' Police Statements or the Complainant's KGB Statement and Transcript

[54] There is no dispute that the appellant and his wife were actively involved in preparing for the appellant's trial. The appellant and his wife say they were working with the preliminary inquiry transcript and police statement synopses (also known as "can-says") contained in a disclosure document, "Report to Crown Counsel". This document was tendered by the Crown, and admitted into evidence as Exhibit 1, on the fresh evidence motion. I will be explaining its significance in due course.

[55] The appellant and his wife say that prior to trial, they did not have the actual statements provided to police by the complainant's mother, and M.L. or, as I have noted, the 2014 KGB statement of the complainant. Mr. Lattie disputes this. The appellant alleges an inability to view the statements of the complainant and M.L. in

advance of the trial and says this compromised trial preparation. He says the statements, which he has now viewed, provided ammunition for attacking the complainant's credibility. What he indicates is nothing more than a reiteration of points made in the trial preparation notes provided to Mr. Lattie. Indeed, the complainant's KGB statement adds nothing of substance to what she said in her preliminary inquiry evidence.

[56] The appellant and his wife testified that they were unable to view the complainant's KGB video when Mr. Bégin was representing the appellant because at first he did not have the software program to play the video; and later, was unable to make his computer available to them on the day they went by his office. The appellant's wife agreed this could have been in 2014 or 2015. They acknowledge that they did not follow up with Mr. Bégin for another opportunity to see the video.

[57] Mr. Lattie says in his affidavit that he and Mr. Bégin made all the Crown disclosure available to the appellant, however, "On more than one occasion, [the appellant] indicated that he did not wish to view the video statements provided by the complainant". Mr. Lattie testified that by "statements provided by the complainant" he meant the complainant's KGB statement and the statement M.L. gave to the police in 2014. He testified that the appellant chose not to watch the complainant's videotaped KGB statement. According to Mr. Lattie, the appellant did not want to be viewing his daughter making sexual abuse allegations against him, in the presence of his wife, an assertion that the appellant strongly rejects.

[58] Who was responsible for ensuring that the appellant watched the video of the complainant's KGB statement – the appellant himself or Mr. Lattie – is inconsequential. The important question on the subject of the KGB statement is whether the appellant had the transcript while preparing for trial and, if not, what significance that may have had.

[59] The appellant and his wife testified that they never saw the KGB transcript until Mr. O'Neil took over the case for the appeal. They say Mr. O'Neil provided them with the transcript and that any notations on the transcript were made by them for the appeal. I find the evidence does not support that recollection.

[60] The appellant knew that the complainant had given a statement to police in [*] in 2014. Mr. Bégin confirmed that in his cross-examination of the complainant at the preliminary inquiry. The appellant says he never asked if there was a transcript of her statement.

[61] A copy of the transcript of the complainant's KGB statement was filed by the appellant as an exhibit to his affidavit on the fresh evidence motion for this appeal. There are handwritten notations on it throughout. The appellant and his wife acknowledged in testimony that they made many of the notations but say they did so once they first saw the transcript after Mr. O'Neil provided it to them. This acknowledged authorship directly contradicts the appellant's affidavit where he says at para. 7:

> That **Item 5** – the Transcript KGB Video Statement of [the complainant] (FE 107 – 162) was provided to my current lawyer, Jim O'Neil, and then to me, and the hand markings were present. *I do not know for sure who made the hand notes.* I was never made aware of the existence of the KGB transcript by [Mr. Lattie].

[Emphasis added]

[62] The discrepancy between the appellant's affidavit and his testimony at the appeal raises serious concerns about the credibility and reliability of his evidence on the issue of when he received the KGB transcript.

[63] I find there is evidence that seriously undercuts the appellant's claim about not having the KGB transcript until after his trial. However, the best evidence – Mr. Lattie's file copy of the KGB transcript – is not available.

[64] No KGB transcript filed for this appeal has original markings on it. All the copies filed with the court, including the court copy, are photocopies. Mr. Lattie testified that he did not retain his file copy of the transcript, sending it to Mr. O'Neil when he transferred the file. Obviously, if Mr. Lattie had produced a KGB transcript with the appellant's and his wife's original notations on it, that would clearly establish they had the transcript prior to trial. We don't have that and therefore must look to other evidence.

[65] Sifting through the question of when the appellant and his wife had the transcript of the complainant's KGB statement requires an examination of the preliminary inquiry transcript and Exhibit 1 in this appeal – Report to Crown Counsel. Appellate Crown counsel deftly brought this evidence out in his cross-examination of the appellant.

[66] In the transcript of the preliminary inquiry there are handwritten notes next to a response by the complainant during her cross-examination. Those notes read: "She said she went to her grandmother and told her and said she never wanted to

go back with me". The appellant testified that this notation was made by him after he received the preliminary inquiry transcript from Mr. O'Neil. He claims to have gleaned the information about what the complainant said from the disclosure that did not include the KGB transcript. Appellate Crown counsel pointed out to him that the "not wanting to go back" reference does not appear in Exhibit 1 nor does it appear in the 2014 General Occurrence Hardcopy of the [*] police, both documents before us. In Exhibit 1, the reference to the complainant running away, reads: "[the complainant] stated that she ran away to her grandmother's house once ([*]), but [the appellant] found her there and brought her back home". There is no mention of not wanting to go back. However, as the appellant acknowledged in cross-examination by appellate Crown counsel, the complainant's statement about running away appears in the KGB transcript: "I ran away to her house one time [referring to her grandmother] and I begged her not to send me back and he found me and she sent me back". There is a handwritten notation in the margin next to this statement: "She ran because I caught her smoking".

[67] Mr. Lattie says that he gave the appellant and his wife the KGB statement transcript. He says that they made notes on the transcript either in his presence or beforehand, for his review. He also went through the transcript when preparing for the complainant's cross-examination and made notes.

[68] Mr. Lattie attached several pages of the complainant's KGB statement to his affidavit as Exhibit "O". He testified that he received these from Mr. O'Neil on request. They were from the KGB transcript he had forwarded to Mr. O'Neil when he transferred the appellant's file. He had used the transcript in his trial preparation. Mr. Lattie identified the handwriting of the appellant and his wife on the transcript. For example, the notation, "She ran because I caught her smoking" was written by the appellant.

[69] Although Mr. Lattie, unfortunately, does not have any record of the KGB-noting process by the appellant and his wife, I am satisfied that, contrary to his claim, the appellant did have the KGB transcript before his trial.

[70] Similarly, the appellant's claim at para. 76 of his affidavit that Mr. Lattie did not inform him about M.L.'s 2014 videotaped police statement does not withstand scrutiny.

[71] Appellate Crown counsel pointed out to the appellant that Exhibit 1, where M.L.'s can-say is found, contains the only reference to the M.L. police statement other than the reference Mr. Bégin made to it at the preliminary inquiry. A

reference in the appellant's trial preparation notes – "[M.L.] states that 'one night I arrived in her bed…" – does not appear in M.L.'s can-say in Exhibit 1. Neither does the statement in the trial preparation notes, "[M.L.] told the police she would never forget the look [the complainant] gave her on the stairs...". The trial preparation notes conclude this passage with: "Check [M.L.'s] testimony to police in 2014".

[72] Where these statements do appear is in M.L.'s 2014 videotaped police interview. The appellant's trial preparation notes satisfy me that, contrary to his assertion, the appellant did receive a copy of M.L.'s 2014 police statement prior to trial. I find he was not relying merely on can-say's in Exhibit 1, the Report to Crown Counsel, as he and his wife have claimed.

[73] In his affidavit, the appellant advances arguments for why M.L.'s police interview would have assisted Mr. Lattie in his cross-examination of her on "an alternative explanation" for the complainant's "glare" that M.L. observed. It is to be remembered that the trial judge merely referred to this evidence. It played no role in her reasoning. As Mr. Lattie said in his cross-examination, he explored alternative explanations for the "glare". He did not think the M.L. police interview was helpful.

[74] The appellant's wife testified that she and the appellant never saw any of the videotaped statements, including those of the complainant's mother and M.L. She and the appellant claim not to have known they existed. I do not accept that as accurate. In Exhibit 1, the disclosure document the appellant's wife says they relied on to prepare for trial, there is an explicit reference that "[the complainant's mother] provided a sworn statement to the investigators".

[75] The appellant's wife testified that she and the appellant extracted information from Exhibit 1 to prepare the trial preparation notes. That cannot have been their sole source of information. Included in the trial preparation notes are references that can only be found in documentation they allege Mr. Lattie never provided to them.

Failure to Effectively Employ Records from [*] CAS

[76] The appellant says in his affidavit that the trial preparation notes he and his wife provided to Mr. Lattie "included specific references to the Child Welfare Documents and we pointed out to him the significance of the material". He

"assumed [Mr. Lattie] would use the material in cross-examination of [the complainant]".

[77] The CAS records are contained in the appellant's fresh evidence material. It is apparent from his cross-examination of the complainant that Mr. Lattie was familiar with the CAS records. He tried to use them but there wasn't much the complainant could recall about involvement with CAS in [*] fifteen years earlier. Mr. Lattie got the answers she provided. Nothing more could be achieved without the records being admitted into evidence. There was no easy route to admissibility, which was also fraught with tactical issues, something Mr. Lattie indicated he had discussed with the appellant.

Failure to Have the CAS Records Admitted into Evidence

[78] The appellant says the CAS records should have been admitted into evidence at his trial. He says these records contained contradictory statements by the complainant that were very important to his defence. He refers in his affidavit to wanting the evidence to be "ruled admissible at trial".

[79] The CAS records dated from 2002 contain notes prepared by a CAS worker. Included is a note of a telephone call from a teacher. The note says the following:

- caller was teacher
- [the complainant] approached her today – she told her that about 2 years ago she said her father had abused her in Nova Scotia –
- it went on for one year – from age 11 to age 12.
- child said it happened every night for a year – child started crying.
- teacher asked who knows –
- child said no one knows – not even her mother.
- [redacted]
- caller feels there is no immediate risk as she doesn't live with her father.

[80] The disclosure materials indicate that the complainant was subsequently interviewed on video by [*] police (I will note here that the 2002 police interview was not in the Crown disclosure. Neither Crown nor Defence ever had this interview).

[81] Mr. Lattie's evidence is that he advised the appellant and his wife against the use of the CAS records. His affidavit says:

> …I reviewed these records in detail. In pretrial discussions with [the appellant], I indicated that the Children's Services of [*] and [*] Police Service documents confirmed the complainant's allegations of abuse by [the appellant] and that the beneficial effects (if any) of admitting these documents would be outweighed by the detrimental effect of having the information contained in the records examined by the Court. [the appellant] understood that the defence would not be seeking to admit these records.

[82] Mr. Lattie testified that it was well-understood by the appellant and his wife that this would be a "he said/she said" case and that anything corroborating her would be detrimental to his defence.

[83] In his testimony, Mr. Lattie said he knew the appellant thought the CAS records were important although he viewed them as problematic. They contained corroboration of the complainant's accusations of sexual abuse by the appellant – what she had said to a teacher that then led to her being interviewed by the police. Mr. Lattie says he conducted a balancing consideration: what was the benefit in those records? He decided he could use the records in cross-examination without the court seeing the notes about the complainant disclosing abuse by the appellant.

[84] The appellant and his wife dispute that Mr. Lattie advised against using the CAS records. They wanted to highlight discrepancies they claimed existed between what was contained in the CAS records and the complainant's preliminary inquiry evidence. They say they thought the records would be before the trial judge as part of the evidence in the trial and that Mr. Lattie assured them the trial judge would "see everything".

[85] Mr. Lattie did not move to introduce any of the CAS records until part way through his cross-examination of the complainant. He was asked at the appeal about this mid-trial change of strategy. He said it occurred because the complainant was being vague, so he asked her if she recalled speaking to the teacher. He went on to describe the complainant as "hostile" and "avoidant". He says he only wanted to introduce the "letter" from the teacher, and nothing else from the records.

[86] Mr. Lattie had in mind bringing out an inconsistency between the complainant's trial testimony that she only recalled two instances of sexual intercourse and an earlier disclosure that "It had happened every night". Mr. Lattie

testified that he wanted the trial judge to know the complainant had made this disclosure to the teacher.

[87] An objection by the Crown for unspecified grounds led to Mr. Lattie abandoning his attempt to introduce the CAS "letter" into evidence. He says he did not pursue the issue because he did not want to have his line of questioning disrupted by an evidentiary argument.

[88] As I have indicated, there is no "letter" from the teacher. The note was from a CAS worker who spoke to the teacher who had spoken to the complainant. Mr. Lattie was not in a position to have the note admitted into evidence. He would have had to call the teacher to establish that the complainant had made the statement. Even evidence from the CAS worker would only have established that the teacher had relayed an allegation made to her; it would not have been proof that the complainant actually made the statement the teacher claimed to be relaying.

[89] A prior inconsistent statement by a complainant may well be relevant to the issue of credibility. "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". (*R. v. Eisenhauer*, [1998] N.S.J. No. 28, at para. 68) Here, no such proof was adduced.

[90] However, although Mr. Lattie does not appear to have anticipated or appreciated the admissibility problems associated with the CAS note about the teacher's call, it is very difficult to see how the admission of the note would have assisted the appellant's defence. The CAS note does not elaborate on what the complainant meant by "it happened every night for a year". With nothing but the record itself, there is no context for what "it" may have meant. There is no indication in the record that what "it" meant was explored at the time with the complainant. Had it been proven that the statement was made by the complainant, it is very likely that an attempt to highlight an inconsistency would have foundered. In response to Mr. Lattie asking her if she recalled telling anyone that she had been sexually assaulted every night while she was in Nova Scotia, the complainant said she felt the abuse had happened "more than the memories that I have".

[91] The "it happened every night" note is followed immediately by an entry that reads:

- child started crying
- teacher asked who knows –

- child said no one knows – not even her mother.

[92] As Mr. Lattie says he feared, an earlier record of the complainant disclosing abuse by the appellant could very well have been prejudicial to his defence.

[93] In addition to the note about the call with the teacher, the CAS records contain another notation of interest to the appellant and his wife. It says:

> On May 15, 2002 Penny Gill phoned the Society to report the following information:
>
> Caller is CAS worker in Nova Scotia. [redacted] called CAS in Nova Scotia and reports that he recently had a conversation with [the complainant]. In that conversation [the complainant] told [redacted] that her mother was abusive to her ie: mother hit her with a cord. Caller thinks it was an electrical cord.

[94] The appellant and his wife saw the CAS note as confirming the appellant's claim that the complainant had called him about her mother hitting her with an electrical or extension cord. He wanted the trial judge to see the note as it corroborated evidence he would be giving that the complainant had called him about being abused by her mother. He wanted to contradict the complainant who had no recall at the preliminary inquiry of telling the appellant in 2002 that her mother had beaten her. It was the complainant's testimony at the preliminary inquiry that her mother had hit her with a cord when she was almost 14. The appellant also wanted the CAS note entered as evidence at the trial to support his argument that the complainant trusted him enough to reach out to him.

[95] For completeness, it should be noted that there is a subsequent note dated June 14, 2002 in the CAS records that states:

> In car -> child denied having said her mother had hit her – "my mom never beats me", my dad just says things like that because he wants me to go & live with him, and I don't want to because of what happened…

[96] This record, subject to admissibility, could indicate that the complainant lied to CAS when she denied that her mother had hit her. However, it does not establish that she lied at trial.

[97] Mr. Lattie says he used the trial preparation notes, prepared by the appellant and his wife and referencing information contained in the CAS records, to the best of his ability. Quite apart from the thorny issue of admissibility of the CAS records, it is significant to the concerns raised by the appellant and his wife about

the electrical cord disclosure that the trial judge appears to have accepted the appellant's evidence on this point. She said in her decision:

> …upon getting word that she [the complainant's mother] had abused [the complainant] with an electrical cord you did no more than report it.

[98] Finally, there is the collateral fact rule. The electrical cord "evidence" would have run up against the rule allowing the trial judge to exercise her discretion to exclude it as inadmissible. Through the application of the collateral fact rule, "the cross-examiner may be stuck with the answer he or she gets – as contradictory evidence may be precluded" by the rule (*R. v. Borden*, 2017 NSCA 45, para. 117).

[99] I will conclude this section of these reasons by noting that, although it has no bearing on the issues in this appeal, Mr. Lattie's answers to questions from this Court indicated he does not understand that the admissibility into evidence of a record created by a third party is governed by a different process and set of principles than production of such a record in the possession of a third party record holder. Mr. Lattie understood that production was not an issue in this case: he had the CAS records. When asked about the admissibility of the records at trial, Mr. Lattie said he thought the court would have followed the production of third party records provisions of section 278.1 of the *Criminal Code*. This is incorrect and reveals the need for him to thoroughly familiarize himself with the legal principles and statutory provisions that apply where the issue is the admissibility of evidence.

Failure to Obtain Phone Records

[100] The appellant points to Mr. Lattie's failure to obtain telephone records as another example of his ineffective assistance. He says in his affidavit that he and the complainant "spoke a lot on the phone" in 2006. He blames Mr. Lattie for failing to contradict with phone records the complainant's evidence of no contact. The appellant says: "So all this lying about never having contact with me after she left in 2000, could have been disproved".

[101] The phone records or phone contact play a role in several contexts described by the appellant for this appeal: phone records as proof he had calls with the complainant; a phone call between the appellant and the complainant that the appellant's wife says she remembers; and contact the appellant says his wife had with the complainant.

The Phone Records from 2006

[102] Both the appellant and his wife say that Mr. Lattie never discussed getting phone records with them. It was Mr. O'Neil who raised the issue of phone records which prompted the appellant's wife to obtain them – the account is in her name – for the appeal.

[103] Attached to the appellant's affidavit in Exhibit "A" are phone records for May through October 2006. Despite the appellant listing 28 calls in his affidavit that he says were between him and the complainant, there is nothing in his affidavit or in the phone records themselves to confirm who these calls were with.

[104] The appellant's cross-examination in this Court weakened the claim he made in his affidavit that the 28 calls were with the complainant. He agreed he was not telling the Court that he remembered each of the calls nor that they all involved the complainant. He admitted he cannot say which ones did.

[105] The complainant's mother, R.J., was called by the Crown as a witness on the appellant's fresh evidence motion. She testified that in 2006, the complainant was in the care of Children's Aid (CAS) in [*]. R.J. did not know where the complainant was living and did not have any contact with her. R.J. and the complainant were estranged throughout 2006. They finally spoke in December.

[106] The complainant's baby had been placed with R.J. and the complainant had to follow strict conditions if she was to get her baby back. Those conditions included not going to her mother's home in [*]. R.J. never had occasion to report that the complainant had breached this no-contact condition.

[107] R.J. confirmed in her affidavit that her phone number appears in the phone records and that this was her phone number between 2004 and 2007. For the duration of 2006, the complainant's brother, who was 15 or 16 , lived with R.J. He maintained contact with his father. The brother was permitted to use the phone and R.J. did not monitor his calls. It was R.J.'s evidence that any calls between the phone number of S.H., the appellant's wife, and her number would have been calls involving the complainant's brother and the appellant.

[108] The 2006 phone records establish nothing. They are an undifferentiated listing of calls from S.H.'s number to R.J.'s and vice versa. They provide no evidence of the appellant and the complainant talking. Further, given her estrangement from her mother and the no-contact condition during 2006, I am not satisfied the complainant would have been at R.J.'s residence to use the telephone.

The Appellant's Wife's Recollection of a Call Between the Appellant and the Complainant

[109] The affidavit of S.H., the appellant's wife, sought to bolster the appellant's claim that Mr. Lattie should have obtained phone records. She described a vivid recollection of arriving home from work in May or June of 2006 to overhear the appellant on the phone with the complainant. He was doing yard work and had the call on speaker phone. S.H. stated she remembered this phone call in part because "it was lovely outside". S.H. knew it wasn't fall:

> 7. That I knew it wasn't Fall because [the complainant] stopped talking to [the appellant] in the Fall. I distinctly recall this because I am a huge proponent of family and I was so pleased when [the appellant] told me that he was speaking to his daughter.
>
> […]
>
> 10. That I know for a fact that it was his daughter [the complainant] and his son [C.] because he had them on speaker phone and I said "hello" to them.
>
> 11. That I was "happy they were talking to their father." [The appellant] told me afterwards that [the complainant] said "I sounded nice," and this pleased me.

[110] S.H. was directed to the May 2006 phone bill. It shows a one minute call at 11:52 a.m. on May 24 from the appellant's number to R.J.'s number. S.H. agreed that could not have been the call she says she remembers. On June 21 there was an 18 minute call from the appellant's number to R.J.'s number at 23:38 hours. It would not have been sunny then, the appellant would not have been doing yard work, and S.H. would not have been arriving home from work.

[111] There are no other May or June 2006 calls that involved R.J.'s phone number.

[112] I find S.H.'s recollection of a call between the appellant and the complainant to be unreliable.

The Allegation of Contact between the Complainant and S.H.

[113] In his affidavit, the appellant claimed that the complainant and his wife had spoken after the complainant went back to live with her mother:

> 23. That both myself and my spouse, [S.H.], pressed upon [Mr. Lattie] that [the complainant] had continuous contact with me and that [the complainant] also spoke to [S.H.] after the complainant had returned to [*].

[114] This claim is very much at odds with trial preparation notes provided by the appellant and his wife to Mr. Lattie.

[115] Mr. Lattie attached two pages of handwritten trial preparation notes made by the appellant and his wife to his affidavit as Exhibit "F". On the first page, in S.H.'s handwriting, is the following: "[The complainant] and I have NEVER EVER spoken".

[116] The typed trial preparation notes also indicate there was no contact between the complainant and S.H.: "but [S.H.] has never received a message from [the complainant] or ever spoken with her, not once in her life". The appellant also acknowledged notations on the preliminary inquiry transcript in his handwriting that say: "Never talked to her, not once", "never talked to [S.H.] in her life".

[117] These categorical denials of any communication between the complainant and the appellant's wife would seem to relate to the complainant's testimony at the preliminary inquiry and trial that she messaged S.H. on Facebook to say the appellant had raped her. S.H. testified in cross-examination that the denials in the typed trial preparation notes referred to Facebook messaging but acknowledged that her notes do not make this distinction.

[118] None of the trial preparation notes are qualified in any way. They stand as emphatic denials of any communication between the complainant and S.H.

[119] S.H. was asked in cross-examination before this Court about the notations on the preliminary inquiry transcript. She agreed she had seen them prior to trial, having reviewed the preliminary inquiry transcript with the appellant in the course of trial preparation.

[120] In her affidavit for this Court, S.H. referred to being asked by Mr. Lattie at trial about communication with the complainant, and saying there had been none. She says she assumed Mr. Lattie meant the Facebook messaging the complainant had spoken about which, according to S.H., never happened. In her affidavit, S.H. says:

> 26 That I never once had any communication with [the complainant] directly through Facebook or any other means about [the appellant] abusing her, so I said "No."

[121] Mr. Lattie's question to S.H. was not about communication from the complainant concerning abuse, but whether the complainant had contacted her "in any way".

[122] As for the handwritten notation "[the complainant] and I have NEVER EVER spoken", S.H. agreed under cross-examination before us that she did not qualify this statement by indicating it referred to Facebook. She agreed that the only place where she has made a reference to Facebook is in her affidavit.

[123] The contrast between what Mr. Lattie was provided and what S.H. put in her affidavit for this Court seriously undermines the credibility and reliability of what is now being alleged about contact with the complainant.

[124] Mr. Lattie says S.H. did say to him that she had overheard the complainant on the phone with the appellant. However, he had information from the appellant and his wife that they had no contact; that there had been no communication with the complainant. He had no reason to think there would be anything relevant in phone records. He had been led to believe the appellant's wife never spoke to the complainant.

Ineffective Cross-Examination of the Complainant

[125] A cross-examination is not ineffective merely because it does not succeed in demolishing a witness' testimony. The trial judge carefully reviewed the evidence before her and concluded that the complainant's testimony was consistent and credible. The appellant says that Mr. Lattie should have prevented that conclusion.

[126] The appellant says that Mr. Lattie's cross-examination of the complainant fell short of what competent counsel would have done, rendering the result unreliable. In the appellant's submission, had Mr. Lattie conducted a proper cross-examination, there is a reasonable probability the trial judge would have come to a different conclusion (*R. v. Joanisse*, (1995), 102 C.C.C. (3d) 35 (Ont. C.A.) at pp. 63-64).

[127] However, beyond what I have already addressed, the appellant has failed to identify what Mr. Lattie should have done differently in his cross-examination of the complainant. This is not a case where appellate counsel has been able to

assemble “an impressive catalogue of inconsistencies” upon which the complainant could have been cross-examined (*R. v. R.S.*, 2016 ONCA 655, para. 26).

[128] Cross-examination has rightly been called “no easy task” (*R. v. White* (1997), 114 C.C.C. (3d) 225 (Ont. C.A.) at p. 260). It is not a measure of incompetence that a lawyer is simply unable to undermine or destroy a witness’ credibility (*R. v. R.(P.)* (1998), 132 C.C.C. (3d) 72 (Que. C.A.) at p. 86).

[129] Mr. Lattie worked with what he had, which included the extensive trial preparation notes provided by the appellant and his wife. His affidavit also attaches copies of notes he prepared for his cross-examination of the complainant. What Mr. Lattie did not have were material inconsistencies with which to cross-examine the complainant. Her core allegations, the surrounding circumstances, and her memories of her time in Nova Scotia living with the appellant, as she had recounted them in her 2014 KGB statement, at the preliminary inquiry, and at trial, remained consistent.

[130] A failure to explore material inconsistencies has been a potent indicator of ineffective representation. (See, for example: *R. v. Cubillan*, 2018 ONCA 811, paras 24 and 25; *R. v. R.S.*, *supra*, paras. 26 and 30.) Material inconsistencies were not present in this case.

[131] There is also nothing in this case like *R. v. Fraser*, 2011 NSCA 70, where trial counsel failed to uncover “important evidence which could have seriously discredited the complainant” (para. 97). Mr. Lattie did not fail to interview a witness who had evidence that would have contradicted the complainant, nor did he neglect to obtain prior inconsistent statements (see: *R. v. R.S.*, *supra*, paras. 18-22) .

[132] It is clear that the appellant was fully engaged in his defence throughout Mr. Lattie’s representation of him. The trial record indicates that the appellant sat at counsel table. Mr. Lattie deposed in his affidavit that he and the appellant reviewed the complainant’s evidence “as it was provided (via the exchange of notes) and during Court breaks”. I do not accept the appellant’s evidence that he sat passively with Mr. Lattie and did not try to assist him by writing notes as the complainant’s evidence was elicited.

[133] With the appellant’s active involvement, Mr. Lattie had developed a theory of the case and advanced that theory in his cross-examination of the complainant. The appellant has failed to discharge the burden of establishing that Mr. Lattie’s

cross-examination of the complainant led to a miscarriage of justice or an unfair trial.

Calling the Complainant's Mother, R.J., as a Witness

[134] The appellant has complained that Mr. Lattie's decision to call R.J. as a witness was more than merely ineffective, it actively undermined his efforts to challenge the complainant's credibility. He has not shown this to be the case.

[135] Mr. Lattie pursued several lines of inquiry with R.J. He asked about the circumstances of the complainant and her brother going to live with the appellant. He says he wanted to show that the children had had a troubled upbringing in R.J.'s care and that the appellant was able to provide a loving home. He asked R.J. about whether she was aware of the appellant offering money to the complainant and her brother if they finished high school. R.J. said no. He questioned her about the complainant being struck with an electrical cord. R.J. admitted to hitting the children with her hands but not with cords.

[136] Mr. Lattie saw significance in R.J.'s testimony that she never beat the complainant with an electrical cord. He thought it worked to show that, given the appellant's report to CAS, R.J. was not being truthful. He says he was trying to establish that she was, as the appellant had told him, a compulsive liar. He says other family members had histories of extortionate conduct and making allegations they later recanted, which was "all relevant". It appears he thought this supported the appellant's claim that the complainant had turned on him when he refused to give her the money he had promised. Mr. Lattie acknowledges there was no evidence to contradict R.J. about there being no offer of money, and so nothing to show she was lying.

[137] Evidence about family members attempting to extort money would have been completely irrelevant. It would not have been admissible even if Mr. Lattie had got anywhere close to eliciting it.

[138] Mr. Lattie obtained nothing of value from R.J.'s testimony. Perhaps he would have realized this had he interviewed her in advance of calling her, which he admits he did not do. However, there is no basis for the appellant's argument that R.J.'s answers were "devastating" to his defence. Furthermore, as I noted earlier, the trial judge appears to have accepted the appellant's evidence that he reported the complainant's allegations against her mother to CAS.

Failure to Prepare S.H. to Testify at Trial

[139] There was very little of relevance that the appellant's wife, S.H., could offer in evidence at the appellant's trial. She had been married to the appellant for eleven years and had not known him when the complainant and her brother lived with him in 1999 to 2000. Mr. Lattie directly examined her about one issue, contact with the complainant:

> Q. Have you ever had any communication with [the appellant]'s other daughter, [the complainant]?
>
> A. No, I have not.
>
> Q. Has [the complainant] to your knowledge ever attempted to contact you or communicate with you in any way?
>
> A. Not to my knowledge.

[140] As I previously noted, S.H. says she understood she was being asked about any Facebook communications with the complainant and that her evidence was intended to contradict the complainant's claim of having Facebook messaged her about sexual abuse by the appellant. If that is what Mr. Lattie intended, he brought the contradiction out.

[141] S.H. was not cross-examined. There is no merit in the appellant's complaint that Mr. Lattie failed to prepare S.H. to give evidence.

Failure to Prepare the Appellant to Testify at Trial

[142] The appellant alleges Mr. Lattie was ineffective by failing to prepare him to testify. In his affidavit, the appellant says Mr. Lattie "never prepared me or [S.H.] to testify, not once" and undertook no preparation for cross-examination. The appellant alleges that Mr. Lattie's preparation did not involve presenting him with any questions. It involved the appellant going over the trial preparation notes and what had transpired. The appellant said in his affidavit that:

> 46. That the questions asked of me in direct examination by [Mr. Lattie] did not provide me with the opportunity to testify fully in my defense.
>
> 47. That I was not prepared for any of the questions asked of me in cross examination and had I been prepared, my answers would have been more full and complete.

> 48. That I believe my confusion and frustration caused me to be impolite at times to the Crown Attorney and this I believe may have cast me in a negative light in the eyes of the Trial Judge.

[143] In his affidavit the appellant says that he and his wife, S.H., met with Mr. Lattie to discuss the trial preparation notes S.H. had emailed him on January 17, 2017. He says:

> 36. …[S.H.] and I went over again and again everything we wanted him to know about the case.
>
> 37. That we were diligent in trying to prepare him for trial. We talked a lot to him about everything we wanted him to know.
>
> 38. That it was at this second meeting that I mentioned I wanted to testify and [Mr. Lattie] agreed I could, but nothing more was said about it until the morning of the trial.
>
> 39. That I met with [Mr. Lattie] two nights before the trial on Tuesday, July 18th. This would have been the third time I met with him. I met with him for approx. 45 mins to an hour. He asked me at this meeting if there was anything else he should know. I just went over what we had already talked to him about the two previous meetings (sic),with me doing most of the talking again.
>
> 40. [Mr. Lattie] did not prepare me to take the stand, nor was it mentioned at this meeting that I would take the stand.

[144] The appellant says he expected to testify on the second day of the trial, July 21. He says he was "completely surprised" to be called to testify on July 20. He points to a comment he made to the trial judge in the midst of an exchange about hearsay: "I didn't even know I was coming on the stand to be honest".

[145] Mr. Lattie says that the appellant's reaction at trial that he was "not expecting to be here" surprised him. Mr. Lattie testified that he and the appellant had worked together throughout using the trial preparation notes. The appellant's evidence was always consistent. Mr. Lattie testified there was preparation ahead of time, focused on "what [the appellant's] evidence would be".

[146] Mr. Lattie says that the appellant knew he would be asking open-ended questions on direct and that this was his opportunity "to get his side of the story out". He told the appellant to be prepared that anything he said would be fodder for cross-examination. He described his role as permitting the appellant to get his version of events before the trial judge.

[147] As I described earlier, the appellant did get his version of events out in his direct examination. Mr. Lattie elicited much of what the appellant wanted the court to hear. It was a case where: "The appellant knew the case and what he wanted to address in his testimony" (*R. v. Domoslai*, 2018 NSCA 45, para. 57).

[148] The appellant's direct testimony explained the ten thousand dollars of incentive money which related to the defence theory that the complainant had fabricated her allegations against him out of spite for not receiving the money.

[149] In his affidavit the appellant cites the incident where the complainant's earring was ripped out as an example of not being prepared adequately to testify. He says he didn't recall the incident at trial and has since "recollected the incident but I was not prepared for the question and had not canvassed my memory prior to that day". He acknowledged before this Court that he heard the complainant testify at the preliminary inquiry about the incident. It was not new to him when he heard this evidence at trial. He says his recollection of the incident since the trial is a result of having his memory refreshed by his son. He admits he did not state this in his affidavit. He acknowledged he is not blaming Mr. Lattie for his lack of recollection.

[150] The appellant also cannot fault Mr. Lattie for the fact that his evidence included admitting that he was alone in bed on occasion with the complainant. He is not now saying his evidence was untrue.

[151] In his affidavit, the appellant says he "would have testified" at trial that "every night he worked as a security guard", that his mother "watched the kids every night", and that he "came home in the mornings to sleep". This was in fact the evidence he gave.

[152] The appellant's defence was one of denial. Although the appellant says in his affidavit that he was "greatly stressed" and somewhat angered and confused while testifying because he had "no idea what to expect or what I was supposed to be doing", the transcript of his testimony does not indicate confusion. The trial judge described him as "calm and polite" during his direct examination. He acknowledges that changed when he was being cross-examined, a change in demeanour that he attributes to "confusion, anger and anxiety". Cross-examination was undoubtedly uncomfortable for him, as it often is for witnesses, as intended.

[153] This is not a case like *R. v. Simpson*, 2018 NSCA 25, where a conviction was overturned on the basis that the appellant had not been prepared for testifying

within a reasonably proximate time of the trial (para. 46). Mr. Lattie deposed in his affidavit that there were "many consultations with [the appellant] and review of material provided by him…" He says that:

> 36. I undertook extensive preparation in the weeks immediately before the commencement of the trial. My preparation included the following tasks:
>
> (a) Detailed review of the transcript from the preliminary inquiry, and identification of any areas for potential cross examination of the complainant;
>
> (b) Detailed review of the complainant's KGB statement. I marked-up this statement based on my review of other disclosure and the comments provided by [the appellant];
>
> (c) Detailed review of [M.L.]'s statement to the police;
>
> (d) Detailed review of the documents from Children's Services of [*] and the [*] Police Service;
>
> (e) Detailed review of written comments on the Crown disclosure prepared by [the appellant] and [S.H.] and provided to Alain Bégin and myself;
>
> (f) I prepared a comprehensive outline of my intended cross examination of the complainant;
>
> (g) I encouraged [the appellant] to search and locate any information with respect to the alleged $10,000 in funds; Facebook or text messages regarding the complainant, travel receipts, or any other evidence that would support his defence.

[154] Although the evidence before this Court does not clarify the extent of Mr. Lattie's preparation of the appellant, the significance of the preparation issue "is much diminished" where the accused has had intensive engagement in preparing for trial and has a detailed knowledge of the case (*R. v. Domoslai*, *supra*, para. 52).

[155] The appellant's direct testimony was consistent with his denial of the allegations. Mr. Lattie explained the theory of the defence in his affidavit:

> As a result of my pre-trial preparation, including many consultations with [the appellant] and review of material provided by him, a defence theory of the case was established. The defence theory was that the complainant had fabricated the alleged incidences and was either motivated to harm [the appellant] as a result of him not providing certain financial support; the complainant was jealous of the life that [the appellant] and his wife and other children enjoyed; that the

> complainant was upset that [the appellant] returned the complainant to an abusive home in [*], or a combination of all of the above.

[156] This theory was pursued by Mr. Lattie at trial. Cross-examination targeted the appellant's evidence: that there were times when he was alone in bed with the complainant; that he returned the children to their mother whom he had portrayed as abusive without following up on their well-being; and that the complainant, aged ten or eleven, had been asking him for the ten thousand dollars. The Crown simply tested the appellant's defence and the trial judge, after considering all of the evidence before her, including the appellant's, found no basis for reasonable doubt.

[157] The appellant has not shown that he was inadequately prepared for the Crown's cross-examination. He "handled himself adequately…and in any event, he has not explained how he could have been better prepared or have made greater headway…" in responding to the Crown's case against him (*R. v. Davies*, 2008 ONCA 209, para. 57).

Was There a Miscarriage of Justice?

[158] Miscarriages of justice may be occasioned by "counsel's performance [resulting] in procedural unfairness" or by "the reliability of the trial's result [being] compromised" (*R. v. G.D.B.*, 2000 SCC 22, para. 28).

[159] What the appellant must establish is not that Mr. Lattie was admittedly inexperienced and that, as appellate Crown counsel has said, "there were rough patches at certain points in the trial". What the appellant must establish is that Mr. Lattie's representation resulted in a miscarriage of justice by causing the guilty verdicts to be unreliable or by depriving him of a fair trial.

[160] The appellant has the burden of showing that Mr. Lattie's representation fell short of the standard of reasonable professional judgment. "The wisdom of hindsight has no place in this assessment" (*R. v. G.D.B.*, *supra*, para. 27).

[161] As Saunders, J.A. explained in *R. v. West*, 2010 NSCA 16:

> [268] …Incompetence is measured by applying a reasonableness standard. There is a strong presumption that counsel's conduct falls within a wide range of reasonable, professional assistance. There is a heavy burden upon the appellant to show that counsel's acts or omissions did not meet a standard of reasonable, professional judgment. Claims of ineffective representation are approached with caution by appellate courts. Appeals are not intended to serve as a kind of forensic autopsy of defence counsel's performance at trial. See for example, **B.(G.D.)**,

> **supra**; **R. v. Joanisse** (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal ref'd [1996] S.C.C.A. No. 347; and **R. v. M.B.**, 2009 ONCA 524.
>
> [269] One takes a two-step approach when assessing trial counsel's competence: first, the appellant must demonstrate that the conduct or omissions amount to incompetence, and second, that the incompetence resulted in a miscarriage of justice. As Major, J., observed in **B.(G.D.), supra**, at para 26-29, in most cases it is best to begin with an inquiry into the prejudice component. If the appellant cannot demonstrate prejudice resulting from the alleged ineffective assistance of counsel, it will be unnecessary to address the issue of competence.

[162] The appellant's ineffectiveness claim can be dispensed with on the basis that he has not demonstrated any prejudice arising from what Mr. Lattie did or did not do. This is not a case where the appellant was deprived of "any reasonable prospect of successfully defending himself" (*R. v. Ross*, *supra*, para. 1). Nor is it a case where the appellant has established that Mr. Lattie's representation prevented him from making full answer and defence, "rendering the trial unfair as well as the verdict unreliable" (*A.W.H.*, *supra*, para. 64; see also; *Ross*, *supra*, para. 60).

[163] The appellant has failed to show there is a reasonable probability the guilty verdicts "cannot be taken as a reliable assessment of [the appellant]'s culpability" (*Joanisse*, *supra*, page 64); that if Mr. Lattie had conducted the case differently there is a reasonable probability he would not have been convicted. The grim fact of conviction is not evidence of incompetence. While the appellant's complaints have cast Mr. Lattie's assistance as "so deficient that it was ineffective" (*Joanisse*, *supra*, page 63), as these reasons explain, this has not been made out. The Crown's case was challenged and the appellant's defence was advanced. The central issue in the case was credibility. The trial judge ultimately found that the complainant's evidence about her father sexually assaulting her was credible. She looked at all the evidence before her and did not find it raised a reasonable doubt. Mr. Lattie may have been unsuccessful in the appellant's case, but that does not mean he was ineffective.

[164] "The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct" (*G.D.B.*, *supra*, para. 29). As held in *Joanisse* at page 58:

> It would be a rare case where, after conviction, some aspect of defence counsel's performance could not be subjected to legitimate criticism. Convictions would be rendered all too ephemeral if they could be set aside upon the discovery of some deficiency in counsel's defence of an accused. Appeals are not intended to be forensic autopsies of counsel's performance at trial.

[165] The record reveals Mr. Lattie's relative inexperience and his less than authoritative grasp of evidence law. However, the "rough patches" did not cause his representation of the appellant to fall below the "reasonable professional assistance" standard.

[166] The appellant also says that a miscarriage of justice is made out because, due to Mr. Lattie's ineffective representation, he didn't get a fair trial. As explained by Bryson, J.A. in *R. v. Ross*, *supra*, the fairness of a trial must be assessed contextually. It is determined on the specific facts of the case (para. 31). An accused is entitled to a fair trial, not a perfect one (*R. v. Khan*, 2001 SCC 86, para. 72, per Lebel, J. (concurring).

[167] For the reasons I have already given, the appellant has not established that his trial was unfair. Mr. Lattie assisted him in making a full answer and defence. The trial judge's rejection of his evidence does not constitute unfairness. This is not a case, for example, where "the appearance of a fair trial was undermined by trial counsel's failure to advocate for her client by pressing for the rejection of the complainant's evidence" (*R. v. J.B.*, 2011 ONCA 404, para. 6). Nor is it a case where Mr. Lattie "literally did nothing" in the face of the Crown's case (*R. v. Ross*, *supra*, para. 58). And this case was not plagued by delays occasioned by trial counsel, the distractions of an application that had no merit and never materialized, and a lack of timely preparation for testifying (*Simpson*, *supra*, para. 43) (I will note that, in *Simpson*, the Crown conceded the appeal. The Crown here makes no such concession).

[168] It cannot be said, in the appellant's case, that "a well-informed, reasonable person considering the whole of the circumstances would have perceived the trial as being unfair or appearing to be so" (*Khan*, *supra*, para. 73).

Disposition

[169] The appellant's fresh evidence was admitted provisionally for the sole purpose of assessing his ineffective assistance of counsel claims. These claims are without merit. I would not admit the fresh evidence and would dismiss the appeal.

Derrick, J.A.

Concurred in:

Hamilton, J.A.

Scanlan, J.A.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. P.C.H.*, 2019 NSCA 63

Date: 20190726
Docket: CAC 476984
Registry: Halifax

Between:

(C.) P.C.H.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: pursuant to s. 486.4 of the Criminal Code

Corrected Decision: The text of the original judgment has been corrected according to this erratum dated **August 12, 2019**

Judges:	Derrick, Hamilton and Scanlan, JJ.A.
Appeal Heard:	May 21 and 22, 2019, in Halifax, Nova Scotia
Held:	Motion to introduce fresh evidence dismissed; appeal dismissed per reasons for judgment of Derrick, J.A.; Hamilton and Scanlan, JJ.A. concurring.
Counsel:	Jim O'Neil, for the appellant Mark Scott, Q.C., for the respondent William L. Mahody, Q.C. for Jeffrey Lattie

Erratum:

Page 9, paragraph [41], first line, change the citation of *R. v. Finck* to 2019 NSCA 60