NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Nelson*, 2021 NSCA 11

Date: 20210121
Docket: CAC 486471
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Harley Raymond Nelson

Respondent

Restriction on Publication: Section 486.4 of the Criminal Code

Judge: The Honourable Justice Duncan R. Beveridge

Appeal Heard: October 14, 2020, in Halifax, Nova Scotia

Subject: Criminal law: Crown right to re-examine; proof of a prior inconsistent statement

Summary: The trial judge accepted that there were numerous inconsistencies in the complainant's narrative. This caused him to have a reasonable doubt, and he accordingly acquitted the respondent of sexual assault. The appellant complains that the trial judge erred in his ruling on the Crown's attempt to re-examine the complainant about a previous statement consistent with her trial testimony and by making findings not supported by the evidence.

Issues:

(1) Did the trial judge err by stopping the Crown's re-examination about a prior consistent statement?

(2) Did the trial judge commit legal error by finding inconsistencies had been established?

Result: The appeal is dismissed. The prior consistent statement was two months removed from the inconsistent statement put to the complainant. In any event, the Crown did establish the fact of the prior consistent statement and elicited from the complainant her explanation for the inconsistent statement. There was no error in the trial judge's approach, nor did the Crown suffer any prejudice.

As for the numerous inconsistencies between the complainant's previous statements and in-court testimony, more could have been done by trial counsel to clearly establish those inconsistencies, but the trial judge's conclusions about the existence of the inconsistencies were factual determinations. There was some evidence to support those conclusions and hence no legal error.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 16 pages.

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Judges:	Wood, C.J.N.S.; Beveridge and Derrick, JJ.A.
Appeal Heard:	October 14, 2020, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beveridge, J.A.; Wood, C.J.N.S. and Derrick, J.A. concurring
Counsel:	Erica Koresawa, for the appellant Roger A. Burrill, for the respondent

Order restricting publication — sexual offences

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

(a) any of the following offences:

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

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

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

Reasons for judgment:

INTRODUCTION

[1] A trial judge acquitted the respondent because he found inconsistencies in the complainant's evidence. The lack of a reliable narrative caused him to have a reasonable doubt. The Crown appeals.

[2] It claims two legal errors: the judge relied on inconsistencies which had not been established in the evidence; and, the judge improperly restricted the Crown's re-direct examination.

[3] I am not convinced the trial judge committed legal error. Even if I were so convinced, the Crown has not met its burden to establish that but for the putative errors, the outcome may well have been affected.

[4] I will set out sufficient background facts to provide necessary context. Additional detail will be added later to illuminate the Crown's complaints.

THE BACKGROUND

[5] The Crown alleged sexual assault. The respondent admitted sexual activity occurred. The only live issue at the trial before the Honourable Justice Jamie Campbell was whether the Crown had proven beyond a reasonable doubt that the sexual activity was non-consensual. The eighteen-year-old complainant testified she did not consent.

[6] Terrisha Downey invited the complainant to visit her apartment a few days before September 17, 2014. The complainant did not have a boyfriend. Ms. Downey wanted the complainant to meet the respondent. The respondent and complainant exchanged Facebook messages.

[7] On September 17, 2014, the complainant accepted an invitation to meet the respondent at Ms. Downey's apartment. Also present were Ms. Downey's boyfriend, Santanio and her infant daughter. After they had gone to bed, the complainant and the respondent were alone in the living room.

[8] The complainant testified that the respondent forced her to engage in unprotected vaginal intercourse. She called her step-father the next morning. He took her to the hospital where she underwent a sexual assault examination.

[9] In cross-examination, differences emerged between her direct testimony, her police statements of September 29 and December 2, 2014, and her Preliminary Inquiry testimony.

[10] The only other witnesses at trial were the complainant's step-father, a friend of the complainant with whom she had exchanged text messages, and the Sexual Assault Nurse Examiner (SANE). The respondent did not testify or otherwise call evidence.

[11] The parties made submissions to the trial judge about the significance of the complainant's demeanour and some of the inconsistencies in her account. The judge reserved for two-and-a-half hours, then delivered an oral decision (unreported).

[12] The trial judge instructed himself against over-reliance on demeanour, stereotypical thinking, and the reality that witnesses can honestly forget details:

> …Everything need not be proven beyond a reasonable doubt, just the elements of the offence. And here, the real issue was consent.
>
> But the issue of consent is based on Ms. [K]'s evidence, and that has to be considered bearing in mind the inconsistencies in her narrative. People forget details, and honest people mess up on re-telling an event several times.
>
> The inconsistencies in Ms. [K]'s evidence went beyond merely forgotten or mis-remembered details. …

[13] The judge observed that some of the inconsistencies in the complainant's evidence were significant. The reasoning that led to the acquittal is summed up in these excerpts:

> Inconsistencies can sometimes be characterized as trifling. These go to the heart of the accusations. It can seem overly technical to assess evidence for those kinds of inconsistencies. But they are the only protection that the accused really has. When the complainant gives evidence in a situation where only two people were present, the weight of that evidence has to be fairly addressed. If inconsistencies can be routinely dismissed as inconsequential, there's little more that an accused person can do. The victim is not tested on the recall of details. But when evidence central to the charge is inconsistent in a number of insignificant [*sic*] respects, that can go to the reasonable doubt about the central issue of consent.
>
> …

> All told, though, there are inconsistencies in the evidence here that are not simply about minor details. They are relevant and relate to matters central to the incident.
>
> To find someone guilty of a criminal offence, there has to be a reliable narrative. This narrative is so uncertain that it raises reasonable doubt as to the issue of consent.

THE ISSUES

[14] The Crown framed its two grounds of appeal as follows:

> 1. The trial judge erred in law by refusing to permit the Crown to examine the complainant on re-direct on a previous statement made by the complainant.
>
> 2. The trial judge erred in law by making findings of fact which were not supported by the evidence when ruling on the credibility of the complainant.

[15] I will address them in reverse order.

ANALYSIS

Findings of fact not supported by the evidence

[16] Appellate courts must defer to a trial judge's factual findings, except on conviction appeals where, in addition to legal errors, a verdict can be overturned if it is unreasonable or unsupported by the evidence.

[17] Crown appeals from acquittals are a different breed. They are limited to questions of law alone. Courts must decline Crown invitations to provide appellate relief for what amounts to a claim of an unreasonable acquittal.

[18] Nonetheless, even if a trial judge's determinations are accurately labelled as factual does not mean they are necessarily immutable. In *R. v. J.M.H.*, 2011 SCC 45, Cromwell J., for the unanimous full Court, identified at least four scenarios where a trial judge's factual determinations are vulnerable to appellate scrutiny: facts found in the absence of evidence; the trial judge erred with respect to the legal effect of the facts; the trial judge assessed evidence based on a wrong legal principle; or, they failed to consider all of the relevant evidence on guilt or innocence.

[19] However, as Cromwell J. stressed, an acquittal is not a finding of fact, but a conclusion that the standard of persuasion of beyond a reasonable doubt has not

been met. This is because a reasonable doubt can flow from the evidence or absence of evidence (paras. 25-32).

[20] The Crown claims that the trial judge found there were inconsistencies which were "not supported by the evidence". It argues respondent's trial counsel did not follow the strict sequential requirements of confrontation, confirmation, and contradiction when putting inconsistencies to the complainant pursuant to s. 10 of the *Canada Evidence Act*.

[21] Although, as the respondent puts it, trial counsel's methodology may not have been textbook or ideal, it was fair and the trial judge's reliance on the inconsistencies exposed, unremarkable. I say this for two broad reasons.

[22] First, the Crown made no objection during cross-examination that the various inconsistencies did not exist or were not established as between the complainant's direct evidence, her prior statements or Preliminary Inquiry testimony.

[23] A more forceful or direct cross-examination could have driven home the palpability of the inconsistencies. The cross-examination was low-key and polite. Counsel chose to permit the complainant to read her prior statements and testimony. In all, a polite and reserved approach. As the trial judge observed:

> Ms. [K] was subjected to cross-examination based on her previous statements. It was not aggressive. It was done in a way that was both respectful and polite. Ms. [K] was not asked questions that were intended to confuse her. The questions were to the point. She was given a break at one point to collect her thoughts.

[24] Furthermore, during closing submissions, the Crown did not dispute the existence of the many inconsistencies. Counsel focussed on the traumatic effect of the sexual assault on the complainant and argued the core of her allegations were unshaken:

> And I will state that even though there was grave frustration in cross-examination by Ms. [K], her testimony and the core of her allegations was unshaken. She was admittedly unsure about the minutes between two events: her rape and when her friends came out of the room. She testified that it was about one minute and also acknowledged that she had said five minutes in the Preliminary Inquiry.

[25] The trial judge questioned Crown counsel about a number of the now disputed inconsistences. Counsel acknowledged the complainant was not sure

about certain details, and in other instances, argued the inconsistencies were not important:

> And I'll also just note that ... well, really, I think those were the main inconsistencies that were brought out through that cross-examination. The Crown submits that they were not major inconsistencies. They're inconsistencies on timing, …

[26] Second, whether there were inconsistencies is quintessentially a factual determination. So long as there was *some* evidence demonstrating the existence of the inconsistencies, there is no error of law. Nonetheless, the Crown cites *R. v. Mauger*, 2018 NSCA 41, for the proposition that it is incumbent on the cross-examiner to establish the putative inconsistency. With respect, *Mauger* does not assist the Crown.

[27] In that case, a transcript of a video-statement appeared to sharply contradict the Crown witness's in-court testimony. Appellate counsel complained that the trial judge had failed to deal with the material inconsistency. The problem was the witness denied he had said the words found in the transcript and challenged defence counsel to play the video-statement. Counsel had the right to prove the prior inconsistent statement pursuant to s. 11 of the *Canada Evidence Act*. He did not.

[28] This case is far different. The complainant did not deny the existence, the content or the accuracy of the prior statements. It is not a situation where there was *no* evidence the complainant testified to details that differed from her previous statements. A few examples illustrate.

[29] The trial judge identified confusion in the complainant's narrative about how the non-consensual intercourse ended and the events that followed. The complainant testified that after the assault, she grabbed her clothes, ran into the bathroom and cried. She got dressed—she said she did not know if she told Terrisha "about it". The complainant immediately corrected her evidence to say that Terrisha and Santanio had "heard it" and came out of their bedroom. Terrisha got mad. Santanio punched the respondent in the mouth and made him leave, but the respondent ended up coming back in to stay the night.

[30] In cross-examination, more confusion ensued. Counsel invited the complainant to read her police statement of September 29, 2014 and suggested to her that she had left out of her testimony any suggestion the assault had ended

because she had screamed, Terrisha and Santanio came running out and told the respondent to get off of her. She implicitly acknowledged that these details were in her police statement. She offered she had not mentioned them because "I forgot". This seemed to change in almost the same breath to this:

> MR. COADY: And where were you at that time, Ms. [K]?
>
> A. In the bathroom.
>
> Q. In the bathroom.
>
> A. They were coming out as I was going into the bathroom.
>
> Q. Certainly. And so you had told police, though, "Then I started screaming, and then Santanio and (Laurel?) came running out and told him to get off me." **So was he on you when they came out of the room?**
>
> A. **No.**
>
> Q. No? But you had told the police that, "I started screaming and then Santanio and Terrisha came running out and told them [*sic*] to get off me."
>
> A. **Okay, then I guess I said that**.
>
> [Emphasis added]

[31] Defence counsel had the complainant confirm her direct evidence it was Santanio that had allegedly told the respondent to leave. He then asked her to read her Preliminary Inquiry evidence:

> Q. My question is, Ms. [K], is who allegedly told my client to leave?
>
> A. Santanio.
>
> Q. Santanio said to leave?
>
> A. Yeah.
>
> Q. Same page, Ms. Woodburn. Can you read ...
>
> MS. WOODBURN: Sorry, can you repeat the page number again?
>
> MR. COADY: Oh, certainly. Prelim, page 55 ...
>
> MS. WOODBURN: Thank you.
>
> MR. COADY: ... line 7. Can you read that for me quickly?
>
> A. Okay.
>
> Q. So it wasn't Santanio who told him to leave, is that correct?
>
> A. I guess not. It was Terrisha.
>
> Q. It was Terrisha. So it wasn't Santanio.

A. No.

Q. So that was a mistake or ...

A. Yes.

[32] The Crown also argues the trial judge's reliance on the inconsistency about the length of the complainant's prior visit to the apartment was misplaced because she had "denied that the prior statement was accurate". With respect, I disagree.

[33] The complainant testified that a few days before the assault, she met and talked with Terrisha for an hour or two. In cross-examination, defence counsel suggested she had originally told the police she was only there for ten minutes. When she appeared to demur, counsel presented her September 29, 2014 statement and asked her to read it. He then continued with this exchange:

Q. So I'm going to just suggest to you that you had originally told police that you were only there for ten minutes the first time you went there. Is that correct?

A. No, because it was longer than ten minutes, I think. I don't remember.

Q. But I'm going to suggest to you that you did tell the police that the first time you'd ever gone to Terrisha's house was for ten minutes. Is that correct? Is that what you just read on your statement?

A. That's what I just read, yes.

[34] The complainant did not deny the accuracy of her statement. Counsel could have asked further questions, but the contradiction had been, in these circumstances, sufficiently established. If there were any doubt about the accuracy of the statement or the existence of the inconsistency, Crown counsel could have explored these issues in re-direct examination. She did not.

[35] The trial judge was plainly entitled to conclude the complainant had acknowledged the prior inconsistency. The appellant does not address this issue, but, I would observe that a contradiction about the length of a prior encounter with another third party would not ordinarily be of much import. However, it was not just the length of that encounter, but the details the complainant gave about it, including the strange nature of the topics discussed. As the trial judge observed: "It seems as though the details have emerged further from the event".

[36] Furthermore, there were a host of other inconsistencies. Many were discussed by the trial judge. As the respondent points out, there were, in fact, many more. I need not review them.

[37] The trial judge found he had a reasonable doubt with respect to the issue of consent. He correctly observed that reasonable doubt can come from one or more witnesses or from a lack of evidence (*R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 39; *R. v. J.M.H.*, *supra*, at para. 25). He noted in his analysis, neither Terrisha nor Santanio were called as witnesses.

[38] I would not accede to this ground of appeal.

Restriction on Crown re-examination

[39] The Crown complains that the trial judge erred in law by restricting its right to re-examine the complainant on the contents of her prior consistent statement. Context is needed to understand the complaint and why I cannot agree the trial judge committed reversible error.

[40] In direct examination, the complainant testified when she arrived at Ms. Downey's apartment on September 17, 2014, she and her daughter were the only ones present, and they talked for an hour-and-a-half before Santanio and the respondent arrived.

[41] Defence counsel referred the complainant to her December 2, 2014 statement. It is evident the complainant had told the police in that statement the respondent and Santanio were already present when she arrived. She offered she "had messed up on that" :

> Q. Okay. So you were there for an hour and a half before Santanio and Mr. Nelson arrived. You said that you had conversations. You talked about things, correct?
>
> A. Yes.
>
> Q. Okay. Can I bring your attention to page 18 on the same statement, 16 and 17, please?
>
> A. Okay, I messed up on that because he was not there when I got there.
>
> Q. Okay. But what I respectfully submit, Ms. [K] is that ...
>
> A. **So I messed up on that. That's my bad**.

Q. That's your bad. So all of a sudden, they were already there when you got there.

A. No, they weren't.

Q. No? And do you think ...

A. They were in the Bean at someone's house.

Q. They were at the Bean. So why would you tell police that they were there when they weren't?

A. Because I had so much running through my head at that time when I was giving statements, like ...

[Emphasis added]

[42] The examination continued with the following:

MR. COADY: Ms. [K], I know this ...

A. Because you aren't listening to what I'm telling you.

Q. Ms. [K], I'm certainly listening but I'm just suggesting that there are some things that you said to police that are contradicting the evidence you're giving today. Would you agree with that?

A. I don't remember. I just told you. I need to go, man, like ... (makes heavy breathing noise).

Q. Okay. And you had told police that when you got to the apartment that Santanio and my client were drinking and smoking dope, is that correct?

A. (No response.)

Q. I know this is difficult, Ms. [K], but did you ...

A. Like, how do you ... (sighing).

Q. Did you tell police that Santanio and my client were drinking and smoking dope?

A. Yeah.

Q. Okay. Is that correct?

A. Yeah, they were.

[43] Counsel then directed the complainant to her sworn direct testimony at the Preliminary Inquiry that no one was consuming any drugs such as marijuana.

[44] Crown counsel rose to re-examine on two issues about the complainant's prior statements. Counsel started with the inconsistency between the complainant's direct testimony and her December 2, 2014 statement about the

presence of the respondent and Santanio when she first arrived at the Downey apartment. Counsel referred the complainant to her September 29, 2014 statement. While the complainant read her September statement, the trial judge asked if it was being put forward as a prior consistent statement.

[45] Counsel responded that she was clearing up the inconsistency. The trial judge accepted it would be a permissible clarification if the complainant had corrected her inconsistency in the same December statement. However, merely because she said something in September that is consistent with her in-court testimony did not change the fact of the inconsistency.

[46] Counsel argued the complainant's December statement flowed from her September statement—it was one fluid story. Crown counsel in fact continued her re-examination which elicited the content of the complainant's prior consistent statement and her repeated explanation that she had "messed up" in the December statement:

> Q. So you agree that in this statement that you just read, you told the police that ... and I'm just going to read this in. The police say: "Uh-huh. So you were having this conversation with her at her apartment, is that right?"
>
> And "her" meant Terrisha.
>
> A. Yes.
>
> Q. Okay. "Yeah."
>
> A. We were talking ...
>
> Q. And then: "Okay. And who else is there when you guys got there, when you guys were talking?"
>
> "**It was just us and the baby."**
>
> And then they ask: "Okay. **You said that some other people came later on."**
>
> **And then you say: "Yeah, Santanio and that guy**."
>
> A. Meaning Harley.
>
> Q. Okay. And so that's the correct ...
>
> A. Yes.
>
> Q. ... statement.
>
> A. So I ...
>
> Q. Okay.

A. **... messed up on the second one, sorry.**

Q. Okay. Now on that same statement ...

[Emphasis added]

[47] Defence trial counsel objected there was no flow from the prior statement, but two statements, months apart. The trial judge ruled he was not satisfied it was a proper question.

[48] Crown counsel continued her re-examination on the inconsistency from the complainant's Preliminary Inquiry testimony about drug consumption. The complainant explained her Preliminary Inquiry answer was a "mishap"—she had thought the question referred to her drug consumption, not consumption by the others.

[49] There are two competing principles: the right of a party to re-examine on new matters brought out in cross-examination; and, the rule that prior consistent statements are presumptively inadmissible.

[50] These principles were reviewed in *R. v. Evans*, [1993] 2 S.C.R. 629. A jury acquitted the appellant of first degree murder. His gun had been used to kill the victim. The appellant testified he had given the gun to the victim's wife. The defence theory at trial was that the wife had killed her husband and was attempting to blame the appellant for the murder. In her police statement, she had told the police that the appellant fit the profile of the killer. The Crown theorized it was improbable she would have named the appellant as a suspect as that would lead the police back to her. The trial judge refused to permit re-examination about the contents of her police statement.

[51] The British Columbia Court of Appeal quashed the acquittal and ordered a new trial on the basis of the trial judge's refusal to permit re-examination about the contents of her police statement. By a majority judgment, the Supreme Court of Canada allowed the appeal and re-instated the acquittal. Cory J., for the majority, reasoned:

> [38] The issue is put very well by E. G. Ewaschuk in *Criminal Pleadings & Practice in Canada*, 2nd ed., in these words at p. 16.29, para. 16:2510:
>
> > Questions permitted <u>as of right</u> on re-examination must relate to matters arising out of the cross-examination which deal with new matters, or with matters raised in examination-in-chief which require explanation as to questions put and answers given in cross-examination.

> Generally speaking, the right to re-examine must be confined to matters arising from the cross-examination. As a general rule new facts cannot be introduced in re-examination. See *R. v. Moore* (1984), 15 C.C.C. (3d) 541 (Ont. C.A.), per Martin J.A. In this case, the cross-examination of Linda Sample referred to her statements to police about the appellant. The police interview of December 30 was specifically alluded to during the cross-examination and had not been dealt with in-chief. It was in response to this cross examination that Linda Sample stated that, from the time of that meeting, she suspected the appellant of committing the crime. It would seem that the Crown had the right to re-examine Linda Sample as to precisely what she told the police at that time with regard to the appellant. It was a subject that had not been raised in the examination in chief but arose from the cross-examination. The trial judge erred in failing to allow re-examination on this point.
>
> [Emphasis in original]

[52] Despite the error, the acquittal was re-instated because it was not a significant error in light of the fact the police officer testified it was the victim's wife who had volunteered the appellant's name to the police. The Crown failed to meet its heavy onus to establish that the verdict would not necessarily have been the same (para. 45).

[53] In this case, the Crown wanted to demonstrate the complainant had given a prior consistent statement. Subject to very limited circumstances, prior consistent statements are not admissible in direct or re-examination.

[54] Establishment of prior inconsistent statements does not automatically justify proof of a prior consistent statement. In *R. v. Ellard*, 2009 SCC 27, a Crown witness was cross-examined on prior inconsistent statements he had made. The Crown was permitted to re-examine to establish a prior consistent statement. The British Columbia Court of Appeal quashed the respondent's murder conviction and ordered a new trial. By a majority decision, the Supreme Court reversed and re-instated the conviction.

[55] Abella J., for the majority, agreed that the trial judge had erred by permitting the re-examination. She explained:

> [31] Having described the relevant context, the first issue is whether Ms. Bowles' prior statements were admissible through re-examination. It is true that prior consistent statements are presumptively inadmissible (*R. v. Béland*, [1987] 2 S.C.R. 398, at pp. 409-10, and *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, at para. 5). The rationale for excluding them is that repetition does not, and should not be seen to, enhance the value or truth of testimony. Because there is a danger

> that similar prior statements, particularly ones made under oath, could *appear* to be more credible to a jury, they must be treated with caution.
>
> [32] Certain exceptions have nevertheless developed in the jurisprudence. In particular, where a party has made an allegation of recent fabrication, the opposing party can rebut the allegation by introducing prior statements made *before* the alleged fabrication arose, that are consistent with the testimony at trial. The allegation need not be express. It is enough if "in light of the circumstances of the case and the conduct of the trial, the apparent position of the opposing party is that there has been a prior contrivance" (*Evans*, at p. 643; see also *R. v. Simpson*, [1988] 1 S.C.R. 3, at p. 24).
>
> […]
>
> [34] In this case, the statements put to Ms. Bowles on re-examination were not made prior to the atmosphere of rumour and speculation that the defence claimed had led to her changed memory. As a result, their timing prevented them from being capable of rebutting an allegation of recent fabrication. The trial judge therefore erred in ruling that the re-examination was permissible on the basis of this exception.
>
> [Emphasis in original]

[56] Similarly, in *R. v. Hunter* (2004), 182 C.C.C. (3d) 121 (Ont. C.A.), the sole ground of appeal was the trial judge's conclusion that the defence cross-examination on prior inconsistent statements opened the door to introduction on re-examination of prior consistent statements. The Court, in an unanimous endorsement, rejected that blanket rationale but dismissed the conviction appeal because the appellant suffered no prejudice:

> [5] We cannot agree that cross-examination on the alleged inconsistencies rendered admissible the contents of all prior consistent statements made by the complainant. **Where evidence of a prior consistent statement is offered to support credibility, the trial judge must decide whether in all of the circumstances, evidence that the witness made the prior consistent statement could assist the trier of fact in making an accurate assessment of the witness' credibility by removing potential mistaken impressions based on an incomplete picture of what the complainant had said or not said about the relevant events on other occasions. The trial judge must make this determination bearing in mind that normally the mere fact that a witness has made prior consistent statements is of no assistance in determining the credibility of that witness**. The trial judge must also consider whether the admission of the prior consistent statement would unfairly prejudice the accused or unduly prolong or complicate the proceedings. Finally, the trial judge must decide, if he or she determines that evidence of the prior statement should be admitted, whether it is appropriate to admit all or part of the contents of the prior

> statement or to only allow counsel to lead evidence that a consistent statement was made on the prior occasion.
>
> [Emphasis added]

[57] That is not to suggest that absent an allegation of recent fabrication, a prior consistent statement can never gain admission on re-examination. There may be circumstances where admission may be appropriate to ensure the trier of fact is not left with an incorrect impression.

[58] In *R. v. Stiers*, 2010 ONCA 382, the Crown convinced a trial judge to permit re-examination about a prior consistent statement on the basis of an allegation of recent fabrication. Sharpe J.A., for the Court, rejected that premise but found no error. After reference to the rehabilitative and explanatory purposes of re-examination, he reasoned it was appropriate to allow the re-examination to correct an erroneous impression left by the cross-examination:

> [39] I do not agree with the characterization of the cross-examination as suggesting "recent invention" on Banwell's part and, before us, the respondent did not seek to justify the re-examination on that basis. However, it is my opinion that the re-examination may be properly justified as having been linked to its rehabilitative and explanatory purpose and to the subject-matter on which the witness has been cross-examined. **The cross-examination canvassed Banwell's statements to the police in some considerable detail and suggested that Banwell had never told the police that he saw blood before he turned Ivancic over. This was not a full and accurate picture of the statements Banwell had made. In my view, the trial judge was entitled to conclude that the cross-examination had opened the door to the Crown's request to put the September 27 statement to Banwell on re-examination, in order to avoid a situation where the jury would be left with a partial and misleading appreciation of the tenor of Banwell's statements to the police on this crucial issue.** I agree with the respondent that the re-examination was properly permitted to correct the erroneous impression, left after the cross-examination, that Banwell had never said he saw blood before rolling Ivancic over.
>
> [40] I am not persuaded that there was any error or trial unfairness arising from the re-examination and, accordingly, I would not give effect to this ground of appeal.
>
> [Emphasis added]

See also: *R. v. Royer* (1995), 77 O.A.C. 309.

[59] I see no error in the trial judge's determination about the prior consistent statement by the complainant, nor any prejudice to the Crown. There was nothing

about the circumstances surrounding the first or second statement that could justify further re-examination to provide important context or otherwise correct a wrong impression.

[60] Furthermore, the Crown not only had a full opportunity to have the complainant explain why her trial evidence was inconsistent with her December 2, 2014 statement, it did adduce from the complainant the fact that her September 29, 2014 statement was consistent with her trial evidence. The trial judge's decision to attach no weight or disregard entirely the prior consistent statement does not amount to legal error.

[61] Not only do I see no error, the impugned ruling or approach could not, in the concrete reality of this case, be said to come close to having had a material bearing on the acquittal (*R. v. Graveline*, 2006 SCC 16).

[62] I would not accede to this ground of appeal and would dismiss the appeal.

Beveridge, J.A.

Concurred in:

Wood, C.J.N.S.

Derrick, J.A.