SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Percy*, 2020 NSSC 117

Date: 20200225
Docket: Hfx No. 481119
Registry: Halifax

Between:

Her Majesty the Queen

v.

Matthew Albert Percy

Restriction on Publication: Sections 486.4 and 486.5 of the *Criminal Code*

DECISION: RE-DIRECT EXAMINATION

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	February 24, 2020, in Halifax, Nova Scotia
Oral Decision:	February 25, 2020, in Halifax, Nova Scotia
Written Decision:	May 4, 2020
Counsel:	Rick Woodburn, for the Crown Peter Planetta, for the Defence

Overview

[1] Matthew Percy is charged with sexual assault. His trial took place February 18-28, 2020. Following cross-examination of B.W., the complainant, a number of issues arose regarding the scope of the Crown's re-direct examination. B.W. was from out-of-province. I determined that the Crown could ask its questions on re-direct and I would hear argument and later determine admissibility in order to prevent a delay of the trial. I then provided counsel with an oral decision so that the trial could continue uninterrupted. This is the written version.

Re-Direct Examination Explained

[2] In *R. v. Candir*, 2009 ONCA 915, the court summarized the law as it pertains to re-direct examination:

> [148] It is fundamental that the permissible scope of re-examination is linked to its purpose and the subject-matter on which the witness has been cross-examined. The purpose of re-examination is largely rehabilitative and explanatory. The witness is afforded the opportunity, under questioning by the examiner who called the witness in the first place, to explain, clarify or qualify answers given in cross-examination that are considered damaging to the examiner's case. The examiner has no right to introduce new subjects in re-examination, topics that should have been covered, if at all, in examination in-chief of the witness. A trial judge has a discretion, however, to grant leave to the party calling a witness to introduce new subjects in re-examination, but must afford the opposing party the right of further cross-examination on the new facts: *R. v. Moore* (1984), 15 C.C.C. (3d) 541 (Ont. C.A.), at p. 568.

[3] These sentiments were reiterated in *R. v. Stiers*, 2010 ONCA 382:

> [37] In the end, something else did transpire, namely the defence cross-examination of Banwell. In my view, it was open to the trial judge to find that the tenor of the cross-examination and, in particular, the passage I have quoted, evidenced that Banwell had never told the police that he had seen blood from Ivancic until the very end when he rolled Ivancic over. Defence counsel had taken Banwell through a detailed review of the various statements he had made in an attempt to make that point. The detailed review did not, however, include the passage from the September 27 statement where Banwell told the police that he had seen blood earlier. This could have left the jury with an incorrect impression as to the tenor of Banwell's statements to the police. Crown counsel had initially refrained from leading the September 27 statement because he felt that it would

> not be proper to do so during Banwell's examination-in-chief, but the situation changed as a result of the cross-examination.
>
> [38] In the words of Martin J.A.'s oft-cited judgment in *R. v. Moore* (1984), 5 O.A.C. 51 (C.A.) (leave to appeal to S.C.C. refused, [1985] S.C.C.A. No. 248) at p. 70, re-examination ordinarily "must be confined to matters arising in cross-examination" although the trial judge does have the discretion to allow the facts to be introduced and afford the opposite party the right to cross-examine on any new facts. The law on this issue was recently explained by Watt J.A. in *R. v. Candir…*
>
> [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.

[4] One of Mr. Percy's objections relates to the Crown referring the complainant to her prior statements on re-direct examination. In *R. v. D.D.S.*, 2006 NSCA 34, the court discussed the general prohibition against the use of prior consistent statements in any form, oral or written, to support a witness' credibility. Such evidence is regarded as oath-helping, and is generally superfluous and of no probative value:

> [83] … There can be no doubt that in the particular circumstances of this case he erred in law in using J.S.'s prior consistent statement to bolster his overall assessment of her credibility. See generally *R. v. Hunter* (2004), 182 C.C.C. (3d) 121(Ont. C.A.). Generally speaking, in a criminal trial, absent a proper and limited exception, both the Crown and the defence are prohibited from leading prior consistent statements of a witness in any form, oral or written, to support the witness's credibility. Such evidence of prior consistent statements is seen to be superfluous and of no probative value. *McWilliams' Canadian Criminal Evidence* (Aurora, Ontario, Canada Law Book, 2005, looseleaf update) at p. 11-2; and *R. v. J.S.K.*, [2005] O.J. No. 3809 (C.A.) at & 8. This was not a case - for

example to rebut an allegation of recent fabrication - where a prior consistent statement would be admissible for such a legitimate but limited purpose. Rather, in this case the trial judge said:

> The testimony is consistent with the statement she provided to Lori Corbett and Constable Williams. (Underlining mine)

[84] At the hearing on appeal Mr. Fiske, for the Crown, candidly and quite properly acknowledged that the trial judge had erred by putting J.S.'s prior consistent statement to an improper use so as to bolster his own assessment of her credibility. That is pure oath-helping. Such is a prohibited use and amounts to serious error in law.

[85] The situation is not unlike the circumstances recently considered by the Ontario Court of Appeal in *R. v. J.S.K.* [2005] O.J. No. 3809. In an endorsement *per Curiam* the court allowed the appeal, set aside the conviction and ordered a new trial saying:

> [2] We accept the appellant's submission that the trial judge erred by relying on a prior consistent statement made by the complainant to bolster her credibility.
>
> [3] Near the outset of his reasons, the trial judge said:
>
>> The incident described by [the complainant] in these accounts was consistent with the evidence that she gave at trial and she emerged from her cross-examination with the essential elements of the story intact.
>
> [4] The "accounts" to which the trial judge was referring were a handwritten letter prepared by the complainant on the day of the alleged assault and a videotaped statement made by the complainant to the police two days after the alleged assault, which was introduced as evidence at trial pursuant to s. 715.1 of the *Criminal Code*.
>
> [5] Read fairly, the trial judge's comment as set out above was more than simply a narrative statement explaining the evidence that was adduced at trial; rather, it reflects the trial judge's conclusion that the consistency between the complainant's evidence at trial and the accounts in issue enhanced the complainant's credibility.
>
> [6] The complainant's letter was introduced at trial to assist in explaining how the complainant's allegations came to be reported. At the time of tendering the letter as an exhibit, the trial Crown confirmed that he was not asking that it be accepted for the truth of its contents and, on that basis, defence counsel indicated that he was content that the letter be entered as an exhibit. Neither counsel referred to the contents of the letter during the course of the trial.
>
> [7] Viewed in this context, unless he was treating it as a factor enhancing the complainant's credibility, there was no other reason for the

> trial judge to refer to the contents of the complainant's letter and to its consistency with the complainant's evidence at trial.
>
> [8] It is well established that, subject to certain limited exceptions, evidence of prior consistent statements is superfluous and of no probative value: see, for example, *R. v. Wood* (1989), 51 C.C.C. (3d) 201 (Ont. C.A.). Here, apart from assisting in explaining how disclosure occurred, none of the exceptions apply. Accordingly, the trial judge's use of the complainant's letter as a prior consistent statement to bolster the complainant's credibility was an error.
>
> [9] We are not persuaded that this is a case in which it would be appropriate to apply the curative proviso. While it is true that, subsequently in his reasons, when he listed various factors supporting the complainant's credibility the trial judge did not refer to the consistency of the complainant's accounts, we cannot be satisfied that the consistency between the complainant's letter and her trial evidence was an inconsequential consideration in the trial judge's credibility assessment. [emphasis added]

[5] In *R. v. Royer*, [1996] 2 S.C.R. 169, the court affirmed the decision of the Ontario Court of Appeal (77 O.A.C. 309), in which the court reiterated and expanded upon the law respecting re-examination on statements other than the precise statement that was put to a witness on cross-examination. The court cited *R. v. Evans*, [1993] 2 S.C.R. 629, in concluding that "Re-examination, to this extent, was appropriate to ensure 'that the jury received a balanced picture of the whole of the witness's conduct throughout the police investigation'" (Ont. C.A. decision at para. 11). Similarly, in *R. v. Hunter* (2004), 182 C.C.C. (3d) 121, [2004] O.J. No. 328 (Ont. C.A.), the court reviewed the law regarding prior consistent statements and stated:

> [3] The appellant had challenged the credibility of the complainant during cross-examination. Certain prior inconsistent statements were put to the complainant and it was also established on cross-examination that she had denied being assaulted by the appellant when first asked by her mother.
>
> [4] The Crown argued that the cross-examination opened the evidentiary door to evidence of all prior consistent statements made by the complainant. The trial judge appears to have accepted this submission. She did, however, add this caveat:
>
>> The real crux of the issue is the use I put to the evidence that I hear of prior consistent statements, if that is what comes out in this witness' evidence. The Crown tells me it will. So since it is the use that I will be putting to those statements, that can also be dealt with again in submissions. I am capable of hearing something and then instructing

> myself at a later time that I cannot use it for a purpose or I can it for a purpose.
>
> [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.
>
> [6] In the present case, the cross-examination on alleged inconsistencies in prior statements by the complainant did not justify adducing evidence of the content of all of the prior consistent statements made by the complainant. For example, we think the admission in reply of a prior consistent statement was wrong. It was also wrong in the circumstances of this case to permit evidence of prior consistent statements where no part of those statements had been the subject of cross-examination.

[6] There was some discussion during argument about re-direct examination and recent fabrication. No allegation of recent fabrication has been made by Mr. Percy. He says simply that the complainant should not be believed, not that she has recently fabricated. Nonetheless, the law regarding the scope of re-direct examination when there has been an allegation of recent fabrication is useful in some limited aspects to this analysis. In *R. v. Evans*, [1993] 2 S.C.R. 629, [1993] S.C.J. No. 30, Cory J., for the majority, explained the scope of re-direct examination when an issue of recent fabrication has arisen or been alleged:

> 34. Ordinarily, other persons may not be called to testify as to a witness's out of court statements. Nor may a witness repeat, in court, her own earlier statements. Generally, the narration by a witness of her previous declarations made to others outside of the court should be excluded because of its general lack of probative value and because such a repetition is, as a rule, self-serving. However, they may be admitted in support of the credibility of a witness in situations where that witness's evidence is challenged as being a recent fabrication or contrivance...

> 35. Further, it has been held that there need not be, in cross-examination, any express allegation of recent fabrication for the prior statements to be admissible. It is sufficient 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. In those situations, fairness and ordinary common sense require that the jury receive a balanced picture of the whole of the witness's conduct throughout the police investigation. To demonstrate that the evidence of the witness is not a recent fabrication it may be essential to introduce on re-examination a prior statement which shows the consistency of the witness' testimony...
>
> 36. In this case, it was apparent that it was the position of the defence that Linda Sample had killed her husband and was attempting to blame the appellant for the murder. The nature of the cross-examination involved an attack on the truth of her testimony and of her statements given to the police. In those circumstances, the prior consistent statement made by Linda Sample to the police was admissible.
>
> Should the Question Have Been Permitted on Re-examination
>
> 37. Even though it has been determined that the evidence was admissible, it remains to be seen whether the question should have been permitted on re-examination.
>
> 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 as of right 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. [Emphasis added.]
>
> 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...

[7] In *R. v. Laing*, 2017 NSCA 69, the court explained the use that can be made of prior consistent statements, and in particular, stated:

> [72] There should be little dispute about the legal principles surrounding admissibility and possible uses of prior consistent statements. Justice Pepall, for the Court, in *R. v. D. B.*, 2013 ONCA 578 set out the basic tenets:
>
> > [30] Prior consistent statements are declarations made by witnesses before they take the stand that are consistent with the testimony they give while on the stand: David M. Paciocco, "*The Perils and Potential of Prior Consistent Statements: Let's Get It Right*" (2013) 17 Can. Crim. L.R. 181, at p. 181.

> [31] Prior consistent statements are generally inadmissible. Traditionally, they have been treated as inadmissible because they are out-of-court statements made in the absence of trial safeguards such as cross-examination and the taking of an oath or affirmation to tell the truth. The hearsay rule precludes the admission of prior consistent statements for the truth of their contents. Additionally, prior consistent statements lack probative value: see *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 10, at para. 5; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 36. Put differently, repetition of a statement by the same person does not render it more likely to be true or corroborative. The repetition is self-serving and the source lacks independence. Lastly, given that the evidence will have already been adduced at trial through oral testimony, exclusion of prior consistent statements serves the desirable objective of trial efficiency.

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

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

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

> [99] *McWilliams' Canandian Criminal Evidence* says, of the "recent fabrication" exception:
>
>> 11:40:10 Recent Fabrication
>>
>> A prior out-of-court consistent statement may be admitted into evidence if it has been suggested that a witness has "recently" fabricated portions of his or her evidence. In order to be admissible, the statements must have been made prior to when the motive to fabricate arose. In such circumstances, the statement is not admitted for the truth of its contents but rather to rebut an allegation that the witness's testimony may have been fabricated or affected by an improper motive.
>>
>> The application of this exception is dependent upon identifying *a discrete factual event* that the Crown or defence alleges is the source of the witness's fabrication. ...

> Courts must be vigilant not to confuse an allegation of a discrete factual event that is alleged to be the source of a witness's fabrication with a general theory proposed by one party that a particular witness is fabricating their evidence. While the former will trigger the recent fabrication exception, the latter does not. ...
>
> (emphasis in original)

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

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

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

> [7] **However, a prior consistent statement that is admitted to rebut the suggestion of recent fabrication continues to lack any probative value beyond showing that the witness's story did not change as a result of a new motive to fabricate. Importantly, it is impermissible to assume that because a witness has made the same statement in the past, he or she is more likely to be telling the truth, and any admitted prior consistent statements should not be assessed for the truth of their contents**. As was noted in *R. v. Divitaris* (2004), 188 C.C.C. (3d) 390 (Ont. C.A.), at para. 28, "a concocted statement, repeated on more than one occasion, remains concocted"; see also J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 313. This case illustrates the importance of this point….
>
> [11] Courts and scholars in this country have used a variety of language to describe the way prior consistent statements may impact on a witness's credibility where they refute suggestion of an improper motive. Both the Nova Scotia Court of Appeal and the Alberta Court of Appeal refer to the "bolstering" of the witness's credibility (*R. v. Schofield* (1996), 148 N.S.R. (2d) 175, at para. 23; *R. v. R. (J.)* (2000), 84 Alta. L.R. (3d) 92, 2000 ABCA 196, at para. 8), a term which is also used in the leading text of Sopinka, Lederman and Bryant, at p. 314. The Ontario Court of Appeal recently found that these statements are capable of "strengthening" credibility (*R. v. Zebedee* (2006), 211 C.C.C. (3d) 199, at para. 117), while the British Columbia Court of Appeal has referred to their ability to "rehabilitate" credibility *(R. v. Aksidan* (2006), 209 C.C.C. (3d) 423, 2006 BCCA 258, at para. 21). This Court has found that the statements can be admitted "in support of" the witness's credibility (*Evans*, at p. 643). **What is clear from all of these sources is that credibility is necessarily**

> **impacted -- in a positive way -- where admission of prior consistent statements removes a motive for fabrication. Although it would clearly be flawed reasoning to conclude that removal of this motive leads to a conclusion that the witness is telling the truth, it is permissible for this factor to be taken into account as part of the larger assessment of credibility**.
>
> [Emphasis added in *Laing*]

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

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

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

> [37] In some circumstances, prior consistent statements may be admissible as part of the narrative. Once admitted, the statements may be used for the limited purpose of helping the trier of fact to understand how the complainant's story was initially disclosed. The challenge is to distinguish between "using narrative evidence for the impermissible purpose of 'confirm[ing] the truthfulness of the sworn allegation'" and "using narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then assist the trier of fact in the assessment of truthfulness or credibility" *McWilliams' Canadian Criminal Evidence* (4th ed. (loose-leaf)), at pp. 11-44 and 11-45 (emphasis in original); see also *R. v. F. (J.E.)* (1993), 1993 CanLII 3384 (ON CA), 85 C.C.C. (3d) 457 (Ont. C.A.), at p. 476).

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

> [40] The Court of Appeal correctly concluded that the trial judge erred when he considered the contents of the complainant's prior consistent statements to corroborate her testimony at trial, noting in his judgment that [TRANSLATION] "there is a form of corroboration in the facts and statements of the victim, who never contradicted herself" (para. 68). I am unable to agree with the majority, however, that the accused suffered no prejudice from the trial judge's improper use of the statements. The trial

> judge relied heavily on the corroborative value of the complainant's prior statements in convicting Mr. Dinardo. He was clearly of the view that the complainant's consistency in recounting the allegations made her story more credible. Accordingly, I would also allow the appeal on this basis.

Analysis

Re-Direct Question One

[8] During cross-examination, Mr. Planetta, counsel for Mr. Percy, asked for the first time about B.W.'s use of the word "probably" in her police statement when describing where she was during the anal sex. He suggested that this might impact on whether or not she consented. The cross-examination in this regard was as follows:

> Q: Can I get you to turn your statement to page 20, and just read that page to yourself and let me know when you're done.
>
> A: Okay.
>
> Q: Okay. So in that passage that I had you read, you would agree that is a passage in your statement where you are talking about the anal sex, right?
>
> A: Right
>
> Q: Okay, and Detective Constable Cross is talking to you about a, suggesting to you, that there is a degree of consent in the whole thing, right?
>
> A: She was, she was asking, yeah.
>
> Q: Okay.
>
> A: Or she had…
>
> Q: She's asking you and she says because we have a degree of consent.
>
> A: Well…
>
> Q: Right?
>
> A: It seems like more an assumption on her part…
>
> Q: Okay, well here's...
>
> Court: Mr. Planetta, Mr. Planetta, the witness was still speaking.
>
> Q: Sorry, I thought she was done.
>
> Court: Nope, so we'll let her finish her answer before you jump to the next question.
>
> Q: Sorry, I didn't mean to cut you off, I thought you were done.

> A: Sorry. Yeah, I just had never told her that I did consent and then she said that I had consented, so, on my end it seemed like she was making an assumption.
>
> Q: Okay. In that passage you don't come out and say to her, other than the anal sex, and we're getting to that, but she is saying there is a degree of consent to the whole thing, and you don't come out and say no I didn't consent to anything, right? You could've disa… it was open for you to disagree with her.
>
> A: Right.
>
> Q: And you didn't.
>
> A: Right.
>
> Q: Right. Okay now can you read the passage from line 16-19 out loud?
>
> A: Yeah. I never - I never for once said yes. But when I said no was probably in the washroom when he had me bent over the sink and he was going to, like, um, anal - he was going to perform anal sex.
>
> Q: Okay, so in that passage, Ms. W., you use the word, the phrase, you say but when I said no was probably in the washroom when he had me bent over the sink, right?
>
> A: Right.
>
> Q: That choice of words, was probably in the bathroom, would suggest that you weren't sure when you made that statement, is that true?
>
> A: Not true, it was, the first time I said no. I mean it says here, but when I said no, but when I know that I said no was in the washroom. It just didn't come across that way when I was saying it.
>
> Q: I never for once said yes, but when I said no was probably in the washroom, those are your words, right?
>
> A: Yes.
>
> Q: Okay, and you, when someone says that something probably happened a certain way, that usually suggests that they're not certain. Right, that choice of words?
>
> A: Right.
>
> Q. Okay.

[9] The Crown then re-directed B.W. on this aspect of her cross-examination, and referred her to another area of her police statement:

> Q: My friend directed you to page 20, lines 16-19 in the statement, I see you picking up the statement right now. Do you recall that cross-examination? And specifically about, over the, I said no probably in the washroom when he had me bent over the sink?

> A: Yep.
>
> Q: Okay. Now, earlier in that statement, page 14, lines 15 and 16.
>
> A: Right.
>
> Q: This is you, it says, Ms. W., um, and then he penetrated me anally, and I was… I said no repeatedly, I just…
>
> A: Yeah.
>
> Q: Are those words that you used?
>
> A: Yep.
>
> Q: And are those words that you used to describe the anal sexual assault?
>
> A: Yep.

[10] This was proper re-direct examination. While the issue of consent and the location of each sexual activity was canvassed by the Crown in direct examination, the use of the word "probably" in describing where the anal sex took place, and when B.W. said she answered "no" in her police statement, both arose for the first time during cross-examination. Through re-direct examination the Crown asked the witness to clarify a confusing series of answers on cross-examination.

Re-Direct Question Two

[11] On direct examination B.W. said that she said no repeatedly, shrilly and loudly. Mr. Planetta then cross-examined her on this point:

> Q: You're done reviewing your statement?
>
> A: Yes.
>
> Q: Okay, so what I was asking you about was when the anal sex was occurring, you testified yesterday that you said no repeatedly, loudly and shrilly, and that you were crying at that time.
>
> A: Right.
>
> Q: Okay. And so, my question to you is there's nowhere in your statement where you say that, right?
>
> A: Right, not, yeah right.
>
> Q: There is, you pointed out a reference to crying, but that is at a different time, right?
>
> A: Right. It was shortly after is when I had mentioned here.

> Q: Okay. So, you know, all of those things that you said it loudly and shrilly and that you were crying while you said it, you had every opportunity to tell that to Detective Constable Cross when giving that statement.
>
> A: Yep.
>
> Q: Right. Okay.

[12] Re-direct examination about that series of questions overlapped with the previous re-direct examination discussed above:

> Q: My friend directed you to page 20 lines 16-19 in the statement, I see you picking up the statement right now. Recall that cross-examination? And specifically about over the I said no probably in the washroom when he had me bent over the sink?
>
> A: Yep.
>
> Q: Okay. Now, earlier in that statement, page 14, lines 15 and 16.
>
> A: Right.
>
> Q: This is you, it says, Ms. W., um, and then he penetrated me anally, and I was… I said no repeatedly, I just…
>
> A: Yeah.
>
> Q: Are those words that you used?
>
> A: Yep.
>
> Q: And are those words that you used to describe the anal sexual assault?
>
> A: Yep.

[13] Mr. Planetta asked a compound question during that cross-examination, "When anal sex was going on you said no repeatedly, loudly and shrilly. No where in your statement do you say that?". There are multiple parts to that question: 1) When anal sex was going on you said "No"; 2) You did so repeatedly; 3) You did so loudly; and 4) You did so shrilly.

[14] Had Mr. Planetta asked, "You told the police that you said no?", waited for an answer and then asked, "Did you tell the police you said no repeatedly?", waited for an answer and then asked , "Did you tell the police you said no loudly?", waited for an answer and then asked, "Did you tell the police you said no shrilly?", then there would have been no ability for the Crown to re-direct on those questions. However, that is not the way the cross-examination unfolded. The question was asked in a manner that resulted in lack of clarity.

[15] In an effort to clarify B.W.'s evidence the Crown was permitted to try to clear up exactly what B.W. meant by her answer and, if she had said something else to the police on that point, what that may have been.

[16] On re-direct examination B.W. explained that she told the police that she said no, and that she did so repeatedly, during the anal sex. She did not say anything to the police about repeatedly being loud or shrill.

Re-Direct Question Three

[17] In direct examination B.W. said that she was initially confused when Mr. Percy put a pillow on the floor in her bedroom during the first incident of oral sex.

[18] Mr. Planetta cross-examined her on what she told the police in her statement about this, but he had her read the statement to herself. Her exact words to the police were not said aloud in court. That process did not allow the court to know which incident of oral sex she was referring to, the first or the second. In argument, Mr. Planetta said that the excerpt of her police statement to which she was referred on this point related to the first incident of oral sex, but this was not clear from the cross-examination:

> Q: Okay, can you flip your statement over to page 13, and just read to yourself lines 6 to the bottom of the page.
>
> A: Okay.
>
> Q: You're done. Okay, so in that passage of your statement you are asked a couple questions and you're talking about the, when Mr. Percy put a pillow on the ground, right, which you described yesterday?
>
> A: Um hm.
>
> Q: Okay. You'd agree with me that, in that passage, you didn't say anything like you did yesterday about you didn't say that you were confused in the passage that you just read?
>
> A: Right.
>
> Q: You didn't say that you found it threatening or anything like that?
>
> A: Right.

[19] On re-direct, the Crown had B.W. read an excerpt of her statement that appears to refer to the second incident of oral sex, not the first:

> Q: I think my friend cleared up this with regards to the Toothy Moose, he read in that paragraph, that was one of the other ones. My friend directed you to a portion of your statement saying that you were never in, paraphrasing, scared or threatened during this. Now, I'll direct you to page 16, lines 22, part of which he read, through to page 17, line 3. Just the previous page. So my friend read in parts of that page 17, line 22, back to line 3 on 17. Now line 22, is that words that, did you have a chance to review this, those areas?
>
> A: Sorry?

Q: Did you have a chance to review those areas that I just talked about? Page 16, line 22 through to page 17, line 3?

A: Yep.

Q: And do you know whether or not those are your words that you told the police officer on that day?

A: Yep.

Q: Okay, and can you read those in starting at page 17, line 22.

A: Page 16?

Q: Page 16, good, glad somebody's paying attention.

A: He did some of it and then we went back into my room after and he sat down on the bed and he, there was more oral, but this was like scary and I didn't want that.

Q: And you remember saying that to the police?

A: Yep.

Q: And page 18, lines 2 through 6, page 18, lines 2 through 6. Did you have an opportunity to review that with regards?

A: Yep.

Q: Are those words you spoke to the police on that day?

A: Yep.

Q: Okay, and can you read in that paragraph, please, in its entirety.

A: And then after he pushed my hand away he started like pushing down on my head more and then I put my hands back on his legs to push myself away and he got like kind of like an aggressive tone and he said no hands.

Q: Thank you. You can put the statement down. Thank you very much. Prior to testifying, do you know whether or not you had an opportunity to review any of the notes of the police officers?

A: Prior to testifying today?

Q: Yes.

A: I don't think so, just this.

Q: Just the…

A: Just my statement.

Q: Just that statement, but what about the police, notes that the police officers made themselves, did you have an opportunity to read those?

A: No.

> Q: Were you ever able, prior to testifying, read the statements of other witnesses?
>
> A: No.
>
> Q: I know in the middle of your testimony my friend asked you about a certain portion of your statement and you felt that you had been cut off by the police officer, do you recall that?
>
> A: Yep.
>
> Q: Can you tell us about, first of all, the taking of that statement that we've heard, and whether or not you feel you were fully heard and why? Why or why not.
>
> A: In this statement, I feel like I was not fully heard. It seemed like she from even the beginning that she didn't seem engaged and when I was speaking she would always, not always, but sometimes she would cut me off and sometimes I would be in the middle of a sentence or what I was trying to explain and she would stop me and go back to another point so then I would be confused in what I was saying before so I might not have been able to finish what I was trying to get out. So I feel like there was parts that I would have been able to get out if I didn't feel cut off or if I wasn't redirected throughout my statement with Detective Cross.
>
> Q: Did she ever ask you if you had anything else to add to the statement?
>
> A: At the end, near the end, she asked I think if there was anything else and then I said no, but then I continued to say a few other things that I had kept remembering and then after that she said okay I think I have everything I need, and it's in the statement at the end. On page 24, line 6, she asked if there was anything else I could remember and then I said no, but then I had said one, two, three, three more things.

[20] There were two occasions that B.W. described oral sex and kneeling on a pillow. In her direct testimony B.W. said that she was initially confused when Mr. Percy put the pillow on the floor during the first occasion of oral sex. Mr. Planetta's question on cross-examination was not clear which occasion he was asking her to describe.

[21] It is permissible for the Crown to clarify which occasion B.W. was describing in her police statement without reference to finding it confusing or threatening. It was also permissible for the Crown to have B.W. explain any difficulties she had when providing her police statement in an attempt to explain why the statement might be deficient.

[22] However, having B.W. explain on re-direct how she felt during the second incident of oral sex, if Mr. Planetta's questions were in relation to the first incident of oral sex, is not proper re-direct.

Re-Direct Question Four

[23] B.W. was cross-examined about her statement to the SANE nurses, and specifically her failure to tell them about sexual activity that she says occurred after the anal sex in the bathroom.

[24] She was also cross-examined about comments she made to the SANE nurses as to whether she was unsure if she choked during oral sex, not if she was choked during oral sex. The cross-examination on this point was as follows:

> Q: If that had happened, the sex in the shower, or what happened, what you say happened in the bedroom next, is that something that you would have told the SANE nurses when you met with them?
>
> A: I mean, if it had, if it had come into my mind, if they had asked about it, I was pretty traumatized, I could have missed it.
>
> Q: Okay. You would agree with me that those are two important events in this whole narrative, right?
>
> A: Right.
>
> Q: And you were, you were aware that that would be important, and you were trying to tell the SANE nurses everything that was important, right?
>
> A: Right, I mean I don't fully remember that, I just remember, photos and medication. I don't remember all the conversations that we had is what I'm saying, sorry.
>
> Q: Okay, alright. So the, I'll ask you a couple questions about that. When you went to the hospital and had the SANE kit done, you weren't intoxicated?
>
> A: No.
>
> Q: The medications that you were given had you taken them at that time?
>
> A: After they had given them to me, I was, I was told to take them in the room. I took them, they gave me the medications and the water, and I took them in the room.
>
> Q: But that would have been kind of after you sat down and told them what happened, wouldn't it?
>
> A: I think so.
>
> Q: Okay. So, did those medications have any like intoxicating effect on you?
>
> A: No.
>
> Q: No, okay. So, they wouldn't affect your ability to tell your story or in any event, right?

A: No.

Q: No, okay. And beyond, besides that you probably hadn't taken them until after you told?

A: Right.

Q: Okay. Alright. And you know, we talked a little bit about passage of time and that having some, you agree that has some effect on your memory, right?

A: Right.

Q: So, your memory back when you were at the hospital in 2014 is probably better than it is now?

A: Yeah.

Q: Okay. How long was the intercourse in the shower?

A: I don't know.

Q: At that point, do you recall, were you actively participating?

A: I don't remember.

Q: Were you saying anything:

A: I don't remember.

Q: Did he ejaculate in the shower?

A: I don't remember.

Q: When you go back into the bedroom and you described oral sex there and kind of being choked, did he ejaculate there?

A: I don't remember.

Q: How did it stop? How did it end?

A: I don't remember.

Q: Alright, do you recall telling the SANE nurses about being, during oral sex at some point being held by the head, unsure if choked or not, do you remember saying that?

A: I don't remember if I had told them or not.

Q: Okay. So, you wouldn't have lied or misled the SANE nurses, right?

A: No.

[25] On re-direct B.W. was asked about her statement to the SANE nurses and then was asked to clarify what she told the police a few days later in her statement:

> Q: So, my friend also asked you with regards to the SANE nurse. First I'll ask you about whether or not you reviewed, prior to testifying, any notes or statements that were taken by the SANE nurse or SANE nurses?
>
> A: No.
>
> Q: Okay. My friend took a portion of notes made and specifically took you to the area, states here, he held her by the head, unsure if he choked her or not. Unsure if he choked her or not. And that was put to you. Now if I turn take you to your police statement, page 17, line 6-15, and do you see that those sections are a portion of the statement that you made to the police officer?
>
> A: Yep.
>
> Q: Okay, and it says, Ms. W., like there was more oral sex, like he -- I was doing it to him, except he had my head like this, he was holding my head, and he was choking me with his penis.
>
> …
>
> Q: I'm sorry, Ms. W., I sometimes I read these in and sometimes the witness does. In this particular case, I'll lead you to the paragraph and I'll ask you if you can read in, first of all, whether or not that paragraph from 6-15 are your words that you told the police officer on that day?
>
> A: Yes, they are.
>
> Q: Okay, and can you read them in for me starting at line 6 going right down to 15 please.
>
> A: Out loud?
>
> Q: Read it out loud, yes, please.
>
> A: Okay. Like there was more oral sex, like he, I was doing it to him, except he had my head like this. He was holding my head and he was choking me with his penis because he was pushing my head down so far and I felt like I was going to gag or like puke on him so I put my hands on his thighs to try and push away and he like hit my hand away and he was like no hands and I like he started pushing my head down more so and like my gag reflexes are not so great so.
>
> Q: And that ends that paragraph?
>
> A: Yep.

[26] In *Royer*, the Supreme Court of Canada confirmed that re-direct examination on a statement other than the one referenced during cross-examination is permissible in certain limited circumstances. In *Royer*, the complainant was cross-examined on four statements she gave either the night she was stabbed or shortly thereafter. The Crown was allowed to re-direct her on a statement she made to police two months after the incident. The court noted that the complainant

attempted to explain her failure to refer to certain details in her earlier statement by reference to her physical and mental condition when those statements had been given:

> 11. … In our view, given the nature and extent of the attack on the credibility of Mrs. Mohamed during cross-examination, it was appropriate on re-examination to bring out the fact that Mrs. Mohamed had provided a further statement to the police after she had regained her health, and she had provided some of the details which counsel had pointed out were missing in her earlier statements to the police. In order to properly assess Mrs. Mohamed's credibility and in particular, the effect on that credibility of her failure to refer to certain details in her first four statements, the jury was entitled to know about the fifth statement and its content in so far as the content related to the details which defence counsel had pointed out were missing in the earlier statements. Re-examination, to this extent, was appropriate to ensure "that the jury received a balanced picture of the whole of the witness's conduct throughout the police investigation": *R. v. Evans* (1993), 82 C.C.C. (3d) 328 at 349 (S.C.C.).

[27] Similarly, the allegations are that B.W., having just turned 19 years old, was sexually assaulted. She is described as being embarrassed, upset, and in pain after the alleged assault. She underwent a lengthy and invasive examination by two SANE nurses who were strangers to her. She was given medication for sexually transmitted diseases. She had photos taken of her injuries. B.W. stated on cross-examination in reference to her interview by the SANE nurses:

> A: I mean, if it had, if it had come into my mind, if they had asked about it, I was pretty traumatized, I could have missed it.
>
> …
>
> A: Right, I mean I don't fully remember that, I just remember, photos and medication. I don't remember all the conversations that we had is what I'm saying, sorry.

[28] Based on the principles espoused in *Royer*, the Crown's questions on re-direct examination regarding her mentioning choking in her statement to the police several days after the incident and after speaking to the SANE nurses is admissible as proper re-direct examination.

Re-Direct Question Five

[29] The issue of consent was live throughout the Crown's case. The Crown's direct examination on what happened between B.W. and her roommates/friends,

was very brief. B.W. said she was upset and shaken and initially did not want to go to the police because she was embarrassed. She said that her friends told her that would not matter because she had said no and convinced her to go to the police.

[30] On cross-examination Mr. Planetta asked B.W. what she might have discussed with E.C. and K.L.:

> Q: Around that, you know, in the days after you had some discussions with both E.C. and K.L. about maybe pressing charges, but you weren't sure.
>
> A: Possible. I don't remember.
>
> Q: And is it possible that some of that discussion over whether you should press charges or not turned on the issue of, you know, whether it was consensual?
>
> A: Possible.

[31] On re-direct the following exchange occurred:

> Q: Okay, we don't need to know what those are, but thank, no that's fine, thank you. My friend touched on a conversation that you had after this statement with the police officer. Do you remember the content of that statement, of that conversation with the police officer at all?
>
> A: Not entirely.
>
> Q: My friend left it kind of open with regards to he said you and your, I guess, K.L. and perhaps R.?., had discussed prior to going to police with regards to, he said discussions surrounded consent. Remember that, that was his questioning?
>
> A: Okay. Right.
>
> Q: And did you understand at that point the notion of consent?
>
> …
>
> Q: Do you know if there, I'll leave that. Going to circle back to the question about the conversations that you had with K.L. and R.?. regarding consent. My friend didn't get into those, can you tell us what your side of that was? What were you talking about?
>
> A: Well I don't remember the conversation, but I know that I said no and he didn't stop when I said no and that was the main point that they had pressed me to go to the police because nothing else mattered, it was the fact that I said no, at any given time, I said no, and it wasn't respected.
>
> Q: Well, thank you very much, I appreciate that, and I know this was tough. I'm going to walk you out if that's okay.

[32] The issue of consent was live from the commencement of this trial. B.W.'s discussions with her roommates/friends were canvassed by the Crown in direct examination. Nothing new came up on cross-examination. This was not proper re-direct examination.

Re-Direct Question Six

[33] B.W. was asked a number of questions on direct examination about her injuries. She was asked if she was drinking and on a couple of occasions she said she was wobbly. On cross examination she was asked:

> Q: Okay, you mentioned yesterday that you were wearing heels and, Exhibit 1… I have Exhibit 1, and I've opened it to photograph number 5, if you don't mind me coming up, I'll just show you. Do you recognize?
>
> A: Those shoes are the ones that I was wearing.
>
> Q: Okay, so the shoes you're pointing to in the what looks like an open window kind of in the centre of the…
>
> A: They're the brown heels.
>
> Q: Okay. So those are the heels that you were wearing?
>
> A: Yeah.
>
> Q: Okay. Alright. So those were the heels that you were wearing?
>
> A: Yep.
>
> Q: When in the past when you've been intoxicated wearing heels, do you sometimes fall?
>
> A: Fall down?
>
> Q: Yes.
>
> A: Yep, possibly.
>
> Q: That's something that's happened?
>
> A: Before then, I don't know, before now, yes.
>
> Q: Okay. Would any of your friends, you know say K.L. or E.C., would they have seen you fall wearing heels and drinking?
>
> A: I don't know.
>
> Q: Did you fall at any time on December 5th?
>
> A: I don't remember.
>
> Q: You don't remember. Okay, so you can't, that's again, you can't say no, just that you don't recall it happening.

A: Right.

Q: Okay, but go back to what we also established is that there are a lot of blanks in your memory that night, right?

A: Right.

…

Q: The injuries that you talked about as far as the bruises, your evidence yesterday, I gather, was that I took be that all of that was caused by Mr. Percy, is that?

A: Yes.

Q: I guess you were, you mentioned your knees bruising easily?

A: Yeah.

Q: So that could have been from something else maybe?

A: Right, the knees could have been.

Q: Okay. Anything else that could have been caused otherwise?

A: No.

Q: Okay. We canvassed earlier that you don't remember if you had a fall or anything during the night?

A: Right.

Q: If you did that could be something that would leave a bruise, right?

A: Right.

Q: But everything, all of your injuries were caused by Mr. Percy?

A: Right, except unsure about the knees.

Q: Okay.

[34] On re-direct examination she was asked:

Q: My friend mentioned the bruising on your backside?

A: Right.

Q: And I think there was some inquiry about whether or not, I was confused about this, about whether or not you believed all of it or some of it was caused by Mr. Percy?

A: I believe it was all caused by Mr. Percy.

Q: Now, I'm going to ask, do you remember being walked out of the Liquor Dome prior to meeting up with Mr. Percy?

A: I don't remember leaving.

> Q: The rest of the time at the Liquor Dome, do you, were you with K.?
>
> A: For the most of it I'm sure, but I mean maybe we had split up a couple of times, I'm, I mean I'm sure of the entire night.
>
> Q: Do you know if you fell at the Liquor Dome?
>
> A: I don't know if I did or not.

[35] B.W. was asked on direct whether she had the injuries mentioned during direct examination and depicted in the photos prior to arriving at her apartment with Mr. Percy and she said no. The issue of whether B.W. fell prior to arriving at her apartment with Mr. Percy was first raised during cross-examination. It is certainly possible that the Crown could have pre-emptively asked B.W. specifically whether she fell but realistically the Crown cannot foresee every possible question on cross-examination. In any event, her answer to the specific question on re-direct did not clarify the issue and was of no assistance to the court.

Arnold, J.