

CANADA / JUDGMENT

R. v. B.H.H.**2024 BCSC 2508**

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2024 BCSC 2508 R. v. B.H.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

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Before: The Honourable Justice Brundrett

Oral Ruling on the Admissibility

of the Complainant's Hearsay Statement

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R. Larmer

Place and Date of Hearing:

Fort St. John, B.C.

February 26-29, 2024

October 21-23, 2024

Place and Date of Judgment:

Fort St. John, B.C.

December 16, 2024

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I. Introduction

- [1] The Crown applies for a ruling on the threshold admissibility of hearsay evidence under the principled exception to the hearsay rule. In particular, the Crown seeks to adduce three of the complainant's statements into evidence at trial.
- [2] The accused is charged with sexual touching of a person under 16 years of age and sexual assault under ss. 151 and 271 of the Criminal Code, R.S.C., 1985, c. C-46. These offences are alleged to have occurred on October 6, 2021 in Fort St. John at the home of the complainant, A.L., where she resided with her grandmother, M.H. A.L. was 15 at the time. The accused is a brother of M.H. and a great uncle to A.L.
- [3] The morning following the alleged incident, A.L. gave statements to her grandmother and her family friend. On the afternoon of the next day, she gave a video recorded statement to the police. The statements are presumptively inadmissible for their truth. However, the Crown seeks to tender the statements at trial pursuant to the principled exception to the hearsay rule.
- [4] The ultimate reliability of the statements will be decided later if the statements are admitted. The accused opposes the admission of the statements at trial. He submits that the statements do not pass the test for threshold reliability.
- [5] A.L. took her own life weeks after the incident, and the necessity criterion of the test is not in issue. The issue for my determination is whether A.L.'s statements have sufficient threshold reliability that they ought to be admitted at trial.

II. Circumstances

A. Background

- [6] On Wednesday, October 6, 2021, M.H., a resident of Fort St. John, called the RCMP to report an allegation that the accused, B.H.H., had sexually assaulted her granddaughter, A.L.

- [7] M.H., who was 75 at the time of trial, is the accused's sister from a large family of 14 children. She had seven sisters and six brothers. M.H. has six children of her own. She grew up in Fort Nelson but has lived in Fort St. John for the last 20 years. Her home is a duplex with two floors. The bottom floor had a laundry or playroom with an extra mattress in it, a bedroom for A.L., and a bathroom. The living room, kitchen and two more bedrooms were on the second floor.
- [8] M.H. raised A.L., along with two of her sisters, from a young age due to alcohol and drug issues with their parents.
- [9] A.L. was born on January 16, 2006, and would have been 15 years old in October 2021. A.L. took her own life on December 23, 2021.
- [10] M.H. stated that the accused would sometimes come to town for 1-2 days at a time and stay with her. He would stay on the couch in the living room when he slept over. This occurred perhaps once a month or every couple of months. M.H. was close with her entire family. As to her attitude toward the accused, M.H. stated that she did not hate him, but she could not forgive him for what she thought he had done. She stated that her parents taught her not to hate anyone.
- [11] M.H. stated that the accused never babysat children for her or looked after A.L. As far as she knew, he and A.L. were not particularly close. M.H. noticed that A.L. did not want to be around the accused alone and appeared quite a few times to be uncomfortable with him when he was around.
- [12] The accused was visiting M.H.'s home on October 6, 2021. According to M.H., he arrived on or around October 4 or 5 and was on his way back to work at the time. In cross-examination, M.H. stated that she thought he arrived on October 4.

B. Events on the Morning of October 6, 2021

- [13] On the morning of October 6, 2021, A.L. texted M.H. at 7:13 a.m. reporting that the accused had touched her.
- [14] M.H. jumped out of bed and went downstairs. When she got to the hallway, M.H. could see the accused leaving. M.H. saw A.L. sitting on the mattress in the laundry room. A.L. told her to get B.P., a family friend. A.L. was dishevelled and "didn't seem right." A.L. told M.H. to "get out" and that she didn't want to see her. This, according to M.H., was common practice for A.L. who never wanted anyone to see her unless she looked made up.
- [15] M.H. called the police.
- [16] M.H. also called B.P. B.P. was a friend of the family who lived 5-6 houses away and a counsellor at A.L.'s school. B.P. was 38 years old at trial. M.H. was trying to deal with her other granddaughter, L.L., who had wanted to go downstairs. B.P. came quickly and took over handling A.L.

- [17] The accused returned in his truck to M.H.'s house when the police were there. He was arrested.
- [18] The police suggested that A.L. be taken to the hospital.
- [19] B.P. is a teacher specializing in Indigenous education, though she was off work at the time of trial due to disability.
- [20] B.P. testified that she would see A.L. around the neighbourhood but did not formally meet her until she was in grade 7 when A.L. came to the school B.P. worked at. This was about six years prior to trial. B.P. supported A.L. on a one-on-one basis at school but had come to know A.L. and M.H. as neighbours too. According to B.P., they had become like family to her, and she felt a sense of responsibility toward them.
- [21] B.P. described A.L. as generally distrusting any form of authority, including the police. B.P. described that A.L. knew that, as a teacher, B.P. had a duty to report situations if A.L. was harmed or in danger and that, therefore, A.L. would often not disclose things that happened to her for fear of the police, social services, or M.H. becoming involved. Typically, A.L. was quite guarded about what she would say.
- [22] B.P. saw A.L. often but irregularly. She noted that A.L. and M.H. would sometimes "butt heads" because A.L. was a teenage girl and "they didn't always see eye to eye." B.P. had the type of relationship with A.L. where she could keep an eye on her and say things to A.L. that she would listen to. It was a relationship of trust in which A.L. confided in B.P. B.P. saw her role as supporting A.L. and taking some of the load off M.H.
- [23] On the morning of October 6, 2021, B.P. received a call from M.H. M.H. was distraught and screaming, and it was hard to determine what she was saying. B.P. could make out "my brother" and that M.H. needed her. B.P. got her teenage son to look after her baby and headed over to M.H.'s house.
- [24] When B.P. arrived at M.H.'s home, she saw police were there. She went into the house. A.L. was sitting on the stairs. She was sobbing. M.H. was standing at the top of the stairs. She was sobbing too.
- [25] B.P. stated that A.L. looked "really rough," as if she had been crying for a long time. She had mascara all over her face. B.P. had never seen her like that. A.L. would cry to the point where she would almost pass out, she would go limp, her eyes would close and she would come to. She was coming in and out of consciousness. A.L. looked as if she was having a nightmare. She was moaning and kicking her legs. She had a detached affect and looked very nauseous.
- [26] B.P. asked A.L., "Did he rape you? Did he put his penis in your vagina?" A.L. did not give her an answer.

C. The Ambulance Ride

- [27] It was decided that A.L. needed to go to the hospital. An ambulance was called. On the way to the ambulance, B.P. thought A.L. smelled like alcohol. She noticed that A.L. was unsteady on her feet and couldn't walk properly. B.P. couldn't tell if she was intoxicated or having a panic attack over what had apparently happened. B.P. got into the ambulance with A.L.
- [28] B.P. stated that it was not until they were in the back of the ambulance that A.L. started to become more coherent and could converse with her. At that point, A.L. was able to maintain eye contact with B.P. and answer questions. She thought this would have been between 8:00 a.m. and 9:00 a.m.
- [29] In the ambulance, A.L. told B.P. that she had been drinking the previous evening and that she had been drunk.
- [30] During the ambulance ride, A.L. started talking, became more lucid and could answer more of B.P.'s questions. At this point, B.P. asked if the accused had raped her, to which A.L. responded affirmatively. I do not understand the Crown to be tendering this statement at trial. In any event, I would not be inclined to admit the statement as necessary and reliable under the principled exception.

D. Statements to B.P. at the Hospital

- [31] B.P. went into a hospital room with A.L. at the hospital. A.L. would not talk about specifics when the investigating officer, Cst. Plankenhorn, was initially present at the hospital. A.L. was also reluctant to talk about specifics in the presence of a nurse or doctor.
- [32] B.P. thought that A.L. was not feeling well. She was throwing up and had a headache. The staff gave her GRAVOL to assist. After the officer and nurse left, they had time to talk more, and A.L. provided more detail over the course of their time at the hospital.
- [33] B.P. reported that A.L. told her that the accused had purchased alcohol and that she drank it. She got very drunk. He came downstairs. A.L. said to her that the accused had licked all of her stomach, her chest and her neck. He forced her to perform oral sex on him. She stated that he did try to penetrate her vaginally, but he was not able to have intercourse with her because he had already ejaculated. A.L. said that "he was too old to get it up again so fast." In cross-examination, B.P. stated that A.L. reported that the accused "went down on me" and forced her to "go down on him."
- [34] A.L. said that she could feel wetness on him and "down there" after he tried to force penile-vaginal penetration on her. She said that there was so much wetness that she later had to go to the bathroom to wipe it off with toilet paper. B.P. asked what she did with the toilet paper. A.L. said she flushed it.

- [35] B.P. stated that there were two time periods when A.L. was conversant about what happened. The first was when they got to the hospital within the first hour after her IV was started. Then A.L. slept for three or four hours or so. She kept sleeping even though Dr. Hopkins had tried to wake her up. When she woke up, she threw up.
- [36] B.P. stated that other than having a migraine headache, A.L. was later completely back to normal when she was talking to Dr. Hopkins.
- [37] During the sexual assault examination that afternoon, B.P. stayed in the room. She observed that A.L. was opening up to the doctor as much as she felt comfortable. A.L. was terrified at having the examination completed and went along with it as much as she could handle. Then, after the examination was finished, A.L. and B.P. talked again.
- [38] B.P. reported that A.L. was initially reluctant to talk, and B.P. asked more specific questions. A.L. stated that she did not want to talk about it at first but then stated that if she did not tell anyone, she was going to kill herself. After they spoke further, A.L. took the initiative to share information and provided information unprompted.
- [39] In terms of what was said in which conversation, B.P. reported that the parts about the accused trying to force unwanted sexual penetration but not being able to, and his licking her and her having to wipe herself were reported before Dr. Hopkins conducted the sexual assault examination.
- [40] B.P. described A.L. as becoming more coherent at the hospital. She was like a different person than the person that she was on the stairs. She became like the A.L. that B.P. knew. B.P. said that at the hospital, A.L. seemed like she had been hung over. She did not appear intoxicated at that point.
- [41] B.P. stated that the details of what A.L. disclosed never changed. She may have disclosed more after the sexual assault examination, but what she disclosed previously never changed.
- [42] More generally, B.P. stated that she observed some avoidant behaviour on A.L.'s part prior to the alleged incident. She started to become aware that A.L. was not always comfortable when the accused stayed over. A.L. would want to come to B.P.'s house, especially if M.H. was not home during the visit. She would not tell B.P. why or go into specifics.
- [43] B.P. stated that A.L. had previously been given a prescription for Ativan. B.P. kept her pills locked away in her room. After A.L. passed, she checked and noted that the two pills A.L. had were still in the bottle. B.P. conceded that it was possible that A.L. was given Ativan, Tylenol, Advil, Zofran, GRAVOL and vitamin B at the hospital.

E. Statements to Dr. Hopkins at the Hospital

- [44] Dr. Terri Hopkins is the medical doctor who was called to the emergency room of the Fort St. John Hospital on October 6, 2021 in her role as a sexual assault examiner.

- [45] Dr. Hopkins got to the hospital between 10:00 a.m. and 11:00 a.m. She saw A.L. after arriving, but A.L. was sleeping. Dr. Hopkins understood that A.L. had been given GRAVOL at 9:30 a.m. and Ativan at 9:55 a.m.
- [46] Dr. Hopkins was qualified to opine on the effects of these drugs. She stated that Ativan is a benzodiazepine that works to reduce the excitability of the central nervous system. It can calm someone who is having a panic attack. Drowsiness is the primary side effect. People can have amnesia while taking it, but loss of memory about events before ingestion is not a typical side effect. Its effects last about 4-6 hours, and she understood that A.L. was given 1 mg, which is within the 0.5 to 2 mg range for a typical dose.
- [47] Dr. Hopkins stated that GRAVOL is an antiemetic drug that is used to suppress nausea and vomiting. The typical duration is 4-6 hours. One of the side effects is drowsiness. It does not affect memory other than the fact if one is sleeping, one is not comprehending.
- [48] Dr. Hopkins also stated that A.L. was given thiamine, an over-the-counter B1 vitamin. It is typically given to people with nutritional deficiency and does not affect memory. It may improve cognition.
- [49] Dr. Hopkins checked on A.L. throughout the day and found her still sleeping. Later, at approximately 4:00 p.m., Dr. Hopkins was able to rouse her. At that point, Dr. Hopkins asked A.L. if she was ready to go through the consent process to conduct a sexual assault examination. A.L. indicated that she was and provided her consent.
- [50] Dr. Hopkins took a history from A.L. She reported that the accused had sexually assaulted her in her grandmother's basement. She reported contact from the assailant on her neck, chest and abdomen. A.L. reported that there was digital penetration of her vagina and penile penetration of the surface of her vagina. A.L. was not sure if there was actual penetration of the vaginal canal. A.L. also reported that there was penile penetration of her mouth. A.L. denied any rectal involvement and said that no objects were involved.
- [51] Dr. Hopkins asked if ejaculation had occurred. A.L. said she was not sure if that happened. She asked if a condom was used, and A.L. said no. B.P. was present for the exam and the interview but did not guide the interview or answer questions.
- [52] During the physical examination, Dr. Hopkins swabbed A.L.'s right lower neck area, breast area, and stomach area with different swabs. These swabs were turned over to police who later forwarded them for biological analysis.

F. Statement to Police the Next Day

- [53] B.P. and A.L. went to the RCMP detachment in the afternoon of the next day, October 7, 2021. A.L. would only provide a statement with B.P. present, and accordingly, B.P. was present when A.L. gave her police statement that afternoon. The statement was video recorded.

- [54] In the video-recorded statement, A.L. said the accused had arrived at the house the previous evening around dinner time. He asked her to go to the store with him. Her grandma wanted something from Tim Hortons, and they went and picked up Advil from Shoppers. He then got her the alcoholic beverage, Twisted Tea.
- [55] A.L. stated that after they got back to the house, the accused was lying on the couch. He told her to come over. She went to the fridge - probably looking for a snack. He smacked her butt before she went downstairs. She then went to the basement and started drinking. She did not remember how much she had to drink. She remembered lying on the bed in the basement in the laundry room for a while. She was really tired.
- [56] A.L. then stated that she woke up and the accused was on the bed. She was not sober. She was tired, had been drinking, and felt like she could not move. She did not know the sexual assault was happening until after it commenced. He tried taking off her pants at first, and she stopped him. She said "no," but he kept getting on top of her. He was slobbering all over her neck. He repeatedly tried to remove her shirt. He licked her with his mouth, and she could not push him off.
- [57] At the point where A.L. is asked where the accused licked her with his mouth, A.L. started crying. She could not get words out. Cst. Plankenhorn left the room. A.L. then told B.P. on video, "he used his hand too." She stated that she knew she did push him and that she believed the accused knew that she was too drunk to stop his conduct.
- [58] Cst. Plankenhorn returned to the interview room with diagrams of a male and female body. Cst. Plankenhorn and A.L. then went through labelling body parts. Cst. Plankenhorn asked her to point on the female diagram where the accused put his mouth. A.L. pointed to the vagina. B.P. asked her to point to what other part he used. A.L. stated, "I don't know," but then pointed to the hand on the male diagram. Cst. Plankenhorn asked her to point to where the accused used his hand, and she points on the female diagram to the vagina. Cst. Plankenhorn then asks A.L. if he used his mouth anywhere else on her besides her vagina. A.L. points to the chest, stomach and neck on the female diagram. When asked if he used his hand anywhere else, A.L. stated she could not remember. Cst. Plankenhorn then asked A.L. if there was any other part of the accused that touched her anywhere else. A.L. stated she didn't know. B.P. told A.L. that it is important to finish telling Cst. Plankenhorn what happened.
- [59] Cst. Plankenhorn then left the room. B.P. asked A.L. why she did not finish telling Cst. Plankenhorn what he did. A.L. asked what she meant, and B.P. then responded that A.L. told Dr. Hopkins that he forced his penis into her mouth and about him trying to penetrate her vaginally with his penis. A.L. responded, "she didn't ask about that." Cst. Plankenhorn returned to the room shortly after. B.P. stated that A.L. had a couple of more things that she wanted to talk about. A.L. then pointed to the mouth of the female diagram and the penis of the male diagram, and then the penis of the male diagram and the vagina of the female diagram.

G. Subsequent Events

- [60] A.L. stayed with B.P. after being seen by Dr. Hopkins. She would not go home to the place where the offence occurred. She stayed with B.P. for the next two weeks and, after that, for approximately half the time until A.L.'s death.

H. DNA Evidence

- [61] Zorahim Hassam, a reporting scientist with the National Forensic Services Lab in Surrey, BC, was called as an expert in the areas of interpretation of bodily fluid testing results, the interpretation of DNA typing results, and the application of statistical significance to DNA typing results. She adopted and spoke to three reports prepared by Michelle LeBlanc, another reporting scientist with the same lab. Ms. Hassam was the technical reviewer for the reports which were the subject of admissions on the voir dire.
- [62] The filed reports and evidence of Ms. Hassam indicate that sperm cells were found on two areas of A.L.'s underwear, which were noted to be the upper back left and centre back in the DNA report. These areas yielded two DNA profiles. The male component matched that of the accused. The second component was weak and not suitable for comparison.
- [63] In addition, two DNA profiles were detected on the interior crotch area of A.L.'s underwear: one matching the DNA profile of the accused and one matching A.L. For the profiles that matched the accused, the chances of it matching by chance (i.e., that it was not the accused's DNA but someone else that had a matching profile) were 1 in 370 quintillion based on matching frequency in a database of Canadian Caucasian people. A random match probability was also extremely rare using three other ethnic databases. I find that the accused's DNA was on A.L.'s underwear in the identified areas.
- [64] Ms. Hassam testified that based on the serology testing and the yields of DNA found on two areas of A.L.'s underwear, it was highly likely that the male DNA came from the sperm cells on the underwear - more likely than any other body fluid. It was also highly unlikely that the underwear had been laundered prior to the sperm being deposited there. I find that the sperm cells on these areas of A.L.'s underwear came from the accused.
- [65] A partial DNA profile was obtained from the swab of A.L.'s neck. This DNA profile matched that of the accused. The probability of this DNA profile matching another DNA profile by chance was 1 in 6.5 quintillion based on matching frequency in a database of Canadian Caucasian people. I find that this was the accused's DNA.
- [66] The swabs taken from A.L.'s chest and neck had two DNA profiles. The major component matched the DNA profile of the accused. No meaningful comparison could be made in relation to the minor component. For the major component, the probability of an unrelated individual's profile randomly matching a DNA sample from the accused was 1 in 370 quintillion. I find that the DNA profiles on A.L.'s chest and neck came from the accused.

- [67] Ms. Hassam opined that the DNA that was found on A.L.'s neck, chest and stomach could be saliva or skin/epithelial cells but not sperm. She could not say how this DNA could have gotten on A.L. Various factors affect the transfer of DNA, including the fact that there will be more DNA transfer with a wet stain. Other factors include the friction and amount of force, type of touching, the smoothness or roughness of the target surface, and how prone to shedding skin cells a person is.

III. LEGAL PRINCIPLES - Hearsay Issue

- [68] Generally, hearsay evidence, such as the statements A.L. made to others, is presumptively inadmissible due to the difficulties in assessing the truth of such statements made outside the courtroom in the absence of an opportunity to cross-examine the declarant at the time the statement is made: *R. v. Bradshaw*, 2017 SCC 35 at para. 1; *R. v. Khelawon*, 2006 SCC 57 at paras. 48, 59; *R. v. Charles*, 2024 SCC 29 at para. 43.
- [69] As summarized in *Charles*, the rationale for the rule is as follows:
- [43] In *Bradshaw*, Karakatsanis J. explained that, generally, "hearsay is not taken under oath, the trier of fact cannot observe the declarant's demeanor as she makes the statement, and hearsay is not tested through cross-examination" (para. 20). However, "[t]he truth-seeking process of a trial is predicated on the presentation of evidence in court" (*Bradshaw*, at para. 19), and "our adversary system is based on the assumption that sources of untrustworthiness or inaccuracy can best be brought to light under the test of cross-examination" (*Khelawon*, at para. 48). It is "mainly because of the inability to put hearsay evidence to that test" that such evidence is presumptively inadmissible (*Khelawon*, at para. 48; see also *Bradshaw*, at para. 1).
- [44] The admission of hearsay may therefore "compromise trial fairness and the trial's truth-seeking process" (*Bradshaw*, at para. 20). It is possible that the statement has been "inaccurately recorded, and the trier of fact cannot easily investigate the declarant's perception, memory, narration, or sincerity" (*Bradshaw*, at para. 20, citing *Khelawon*, at para. 2). There is thus a risk that such evidence "may be afforded more weight than it deserves" (*Bradshaw*, at para. 21, quoting *Khelawon*, at para. 35).
- [70] However, hearsay statements may be admitted under two exceptions to the exclusionary rule. First, if the statements fall under a "traditional exception," which is a common law exception derived over time in circumstances where the hearsay evidence is thought to present minimal hearsay dangers: *Bradshaw* at para. 22. Statements can be admitted into evidence under the second, more flexible exception (the principled exception) when the party tendering the statement demonstrates that the twin criteria of necessity and threshold reliability are met on a balance of probabilities: *Bradshaw* at para. 23; *Charles* at para. 45.

- [71] In this case, the defence takes no issue, and I agree, that necessity is clearly established by the death of A.L. Hence, the issue of whether the impugned statements can be admitted under the principled exception turns on whether the Crown has established the threshold reliability of the impugned statements.
- [72] To establish the threshold reliability of a statement, a party may demonstrate its procedural or substantive reliability. The Court in *Charles* explained procedural reliability as follows:
- [46] Procedural reliability is established when there are adequate substitutes for testing the truth and accuracy of the statement "given that the declarant has not 'state[d] the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination'" (*Bradshaw*, at para. 28, quoting *Khelawon*, at para. 63). Triers of fact must have "a satisfactory basis . . . to rationally evaluate the truth and accuracy of the hearsay statement" (*Bradshaw*, at para. 28). Substitutes for the traditional safeguards "include a video recording of the statement, the presence of an oath, and a warning about the consequences of lying" (*Bradshaw*, at para. 28, citing *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at pp. 795-96). Some form of cross-examination of the declarant, such as preliminary inquiry testimony, is usually required (*Bradshaw*, at para. 28).

[Emphasis added.]

- [73] The Court explained substantive reliability as follows:
- [47] Substantive reliability is established when the statement is inherently trustworthy. To determine whether this is the case, trial judges may consider the circumstances in which the statement was made as well as the evidence that corroborates or conflicts with it. The standard is a high one (*Bradshaw*, at para. 31). That being said, it is not necessary for reliability to be established with absolute certainty. Rather, judges must be satisfied that the statement is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process" (*Khelawon*, at para. 49, quoted in *Bradshaw*, at para. 31). In other words, the evidence must be "sufficiently reliable to overcome the dangers arising from the difficulty of testing it" (*Bradshaw*, at para. 26, quoting *Khelawon*, at para. 49). As *Karakatsanis J.* explained in *Bradshaw*, at para. 31:

Substantive reliability is established when the statement "is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken" (*[R. v. Smith]*, [1992] 2 S.C.R. 915, at p. 933); "under such circumstances that even a sceptical caution would look upon it as trustworthy" (*Khelawon*, at para. 62, citing [*J. H. Wigmore, Evidence in Trials at Common Law* (2nd ed. 1923), vol. III], at p. 154); when the statement is so reliable that it is "unlikely to change under cross-examination" (*Khelawon*, at para. 107; *Smith*, at p. 937); when "there is no real concern about whether the statement is true or not because of the circumstances in which it came about" (*Khelawon*, at para. 62); when the only likely explanation is that the statement is true (*[R. v. U. (F.J.)]*, [1995] 3 S.C.R. 764, at para. 40).

[Emphasis added.]

[74] As noted in Bradshaw at para. 32, the two approaches to establishing threshold reliability may work in tandem. Procedural reliability and substantive reliability are not mutually exclusive (Khelawon at para. 65), and "factors relevant to one can complement the other" (R. v. Couture, 2007 SCC 28 at para. 80). That said, the threshold reliability standard always remains high -- the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents: Khelawon at para. 49. Great care must be taken to ensure that combining the two approaches does not lead to the admission of statements despite insufficient procedural safeguards and guarantees of inherent trustworthiness that overcome the hearsay dangers: Bradshaw at paras. 27, 32, 40; R. v. Newsham, 2019 BCCA 126 at para. 13.

[75] The Court in Charles recently affirmed the approach taken in Bradshaw and Klehawon respecting threshold reliability. As to the impact of corroborative evidence on threshold reliability, the Court held as follows:

[54] At the threshold reliability stage, "not all evidence that corroborates the declarant's credibility, the accused's guilt, or one party's theory of the case, is of assistance" (Bradshaw, at para. 44). Accordingly, one can "only rely on corroborative evidence . . . if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement" (para. 44). The function of corroborative evidence is thus to "mitigate the need for cross-examination, not generally, but on the point that the hearsay is tendered to prove" (para. 45 (emphasis in original)).

[Emphasis added.]

[76] The Court reaffirmed the approach to corroborative evidence as follows:

[49] Recall that, to determine whether "corroborative evidence is of assistance in the substantive reliability inquiry", a trial judge should

1. identify the material aspects of the hearsay statement that are tendered for their truth;
2. identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;
3. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and
4. determine whether, given the circumstances of the case, the corroborative evidence led at the voir dire rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

(Bradshaw, at para. 57)

- [77] The threshold reliability inquiry differs from the ultimate reliability inquiry in that ultimate reliability concerns whether and to what degree the statement should be believed and relied upon to decide the issues in the case: Bradshaw at para. 39; Newsham at para. 14.

IV. Discussion of Threshold Reliability

A. Credibility

- [78] I begin my discussion of the evidence tendered on the voir dire by noting that A.L.'s statements sought to be admitted were made to three individuals: B.P., Dr. Hopkins and Cst. Plankenhorn. The credibility of these narrators of A.L.'s statements was not strongly challenged.
- [79] B.P. had an excellent recall of events. Her credibility and reliability as a reporter of A.L.'s statements were not impugned in cross-examination, and I found her highly credible.
- [80] Dr. Hopkins had an excellent recall, a professional approach to her task of examining A.L., and her recollection was aided by detailed notes. Cst. Plankenhorn's evidence is captured by video, and there is no concern with respect to her account of A.L.'s statement.
- [81] All three witnesses were prepared to concede points or make corrections in cross-examination where appropriate. I find all three individuals to be highly credible, and I accept their evidence for the purposes of the voir dire.

B. Procedural Reliability

- [82] Dealing first with the procedural safeguards under the first aspect of threshold reliability, courts engaged in this analysis have traditionally looked to factors such as whether the statements of the declarant were recorded or videotaped, whether they were made under oath, and importantly, whether they were subject to cross-examination at the time they were made.
- [83] A.L. was not subject to cross-examination in relation to any of the statements. The statements A.L. made to B.P. and Dr. Hopkins at the hospital were not recorded and were not taken under oath.
- [84] The statement A.L. gave to Cst. Plankenhorn was recorded. The recording is of good quality, but the camera angle is not ideal because the point-of-view is from overhead. One cannot observe A.L.'s facial expressions in response to questions. However, the observer can assess A.L.'s verbal reactions, the timing of her answers and her intonation in responding to questions, her apparent emotional state at the time she gave the statement, and some of her body language, such as her fidgeting, hand gestures and head nods. The officer used open-ended questions during the interview and language appropriate to A.L.'s age.

[85] No oath was formally administered to the 15-year-old A.L. in her police statement, and there was no formal warning about the consequences of lying. However, Cst. Plankenhorn told A.L. that it was important to tell the truth.

[86] At the outset of the interview, Cst. Plankenhorn told A.L.:

Like I said, we're just going to go over a couple of ground rules, ok? First things first is, this is a truth-space, ok? You're not going to get in trouble for anything you say here. You're not going to shock me with anything you say here. Nothing like that, so don't worry. This is your time to -- tell me the truth about what happened, ok? It's really important though, that you tell me the truth. And if you don't remember something, it's ok to say I don't remember. Does that make sense?

[87] At this point, the video shows that A.L. nodded indicating she understood. During the statement, Cst. Plankenhorn also stated, "we're just gonna talk about everything that's the truth here." Moreover, B.P. stated that A.L. knew what a lie was and that she had told A.L. that it was important not to lie to the police and to tell the truth. In the context of this case, I consider this evidence to be important because A.L. trusted B.P. I find that A.L. was likely to follow her advice about how to deal with the situation. While the interview lacked a formal oath, I find that the combined effect of this evidence was that A.L. understood the importance of telling the truth.

C. Substantive Reliability

[88] As noted above, substantive reliability is established when there are sufficient circumstantial or evidentiary guarantees that the statements are inherently trustworthy. To determine whether this is the case, trial judges may consider the circumstances in which the statement was made as well as the evidence that corroborates or conflicts with the statement. Judges must be satisfied that the statement is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process": Charles at para. 47 quoting Khelawon at para. 49.

[89] I will consider the circumstances under which A.L. made her three statements to assess the potential relevance of the context of the statements in assessing substantive reliability. The relevant factors have been helpfully set out by Justice MacNaughton in *R. v. Dias*, 2023 BCSC 527 as follows:

[72] The following circumstances have been considered as potentially relevant in assessing substantive reliability, including in the context of admitting a child's statement when they cannot testify:

- a) Circumstances relating to the statement:
 - a. whether the statement was casually made or formally to the police: Khelawon at para. 39;
 - b. the timing of the statement in relation to the event(s) reported: *R. v. J.M.*, 2010 ONCA 117 at para. 54; and

- c. whether there was the presence or absence of leading questions or other forms of prompting leading to the statement: J.M. at para. 54.
- b) Circumstances relating to the declarant:
 - a. whether the declarant intended that their statement be acted upon: Khelawon at para. 39;
 - b. whether the declarant had a motive to lie: J.M. at para. 54;
 - c. the declarant's condition when they made the statement: R. v. Hennie, 2019 QCCS 5170 at para. 35;
 - d. whether the declarant is of unsavoury character: Bradshaw at paras. 68-69;
 - e. the nature of the event(s) reported: J.M. at para. 54; and
 - f. is the likelihood of the declarant's knowledge of the event is, apart from its occurrence: J.M. at para. 54.

See also R. v. Clarke, 2013 MBQB 26 at para. 33, for a list of factors that go to a declarant's sincerity, perception, memory, and narration.

[Emphasis in original.]

1. Context

- [90] The context of A.L.'s three statements (the statement to B.P. at the hospital, the statement to Dr. Hopkins, and the statement to Cst. Plankenhorn) has some indications of reliability.
- [91] The statements to B.P. were made the afternoon of the day after the alleged offence. They were not made casually because A.L. would have been aware of police involvement by the time she spoke to B.P. and Dr. Hopkins at the hospital. A.L. was aware of B.P.'s duty to report abuse.
- [92] The statements to B.P. were made to a person whom A.L. inherently trusted. The hospital statements were made when A.L. was no longer under the influence of alcohol and when A.L. had calmed down. I am satisfied that the drugs prescribed at the hospital did not impact her recollection. These statements were more detailed and not made in response to leading questions.
- [93] The statements to Dr. Hopkins were made in similar circumstances at the hospital on the same afternoon as the statements made to B.P. Dr. Hopkins did not have a prior relationship with A.L. She was a professional conducting a medical examination. Although the questions Dr. Hopkins asked were pointed, they did not suggest answers to A.L.
- [94] The statement to Cst. Plankenhorn was made on the afternoon of the next day, October 7, 2021. This was a formal police statement made within two days of the alleged event. The environment was supportive but not suggestive. The officer's questions were appropriate in that they were non-leading.

- [95] In all these statements, I find that A.L. was reluctant to disclose details rather than eager to disclose facts that would incriminate the accused. She was mistrustful of authority rather than anxious to make a report. She clearly had difficulty talking about the intimate details of what happened to her.
- [96] In terms of other factors, A.L. was not of unsavoury character. While A.L.'s motive to lie is but one factor in the analysis (see *R. v. Blackman*, 2008 SCC 37 at para. 42), I cannot find the presence of a motive to lie on A.L.'s part in relation to any of the above statements. The initial narrator of A.L.'s statements, B.P., barely knew the accused and would have had no motive to implicate him. A.L.'s hospital statements were preceded by a change in A.L.'s demeanour that appears entirely consistent with her being in the process of recovering from a traumatic event. I find that the circumstances under which A.L.'s three statements were made are strongly supportive of A.L.'s sincerity and truthfulness.

2. Corroborative Evidence

- [97] As noted above in *Charles and Bradshaw*, only certain kinds of corroborative evidence are of assistance when assessing substantive reliability. The corroborative evidence must itself be trustworthy and must tend to show the "truthfulness or accuracy of the material aspects of the hearsay statement": *Bradshaw* at paras. 44-50; emphasis in original.
- [98] The corroborative evidence here is the DNA found on A.L.'s chest, neck, and stomach and the sperm cells and DNA belonging to the accused found on A.L.'s underwear.
- [99] As well, as the Court held in *R. v. J.A.A.*, 2011 SCC 17 at para. 40, evidence of the demeanour of a sexual assault victim can be used as circumstantial evidence to corroborate A.L.'s version of events. Here, the extremely distraught emotional demeanour of A.L. on the morning following the alleged assault is corroborative of something traumatic having occurred to her the previous evening. That evidence was provided by B.P. with whom A.L. had a trusted, supportive relationship.
- [100] I turn now to the factors set out in *Charles* to determine whether the corroborative evidence is of assistance in the substantive reliability inquiry.

a) The Material Aspects of A.L.'s Statements

- [101] The first step in assessing the assistance of corroborative evidence is to identify the material aspects of the hearsay statement.
- [102] In *R. v. Larue*, 2018 YKCA 9, Justice Dickson, writing for the majority, made the following comments with respect to identifying the material aspects of a hearsay statement:
- [97] The material aspects of a hearsay statement are those relied upon by the moving party for the truth of their contents. In other words, the material aspects of an out-of-court assertion are those aspects of its content that are relevant, disputed and tendered to prove their truth. As noted, if evidence of a disputed hearsay assertion is equally consistent with another plausible hypothesis, even if speculative, the evidence does not add to the statement's

inherent trustworthiness. For this reason, although such evidence may be probative of the guilt of an accused, it does not assist in an inquiry into the substantive reliability of the hearsay.

[103] The material fact asserted in both A.L.'s hospital and police statements is that the accused engaged in sexual activity with A.L. More specifically, the statements include the additional details that the accused used his finger to engage in digital penetration of A.L., engaged in oral sex, forced A.L. to perform oral sex on him, unsuccessfully attempted penile-vaginal penetration, and licked her all over her chest, neck and stomach.

b) Hearsay Dangers

[104] The second step in assessing the assistance of corroborative evidence is to identify specific hearsay dangers that are raised in the circumstances of the case. In *R. v. Baldree*, 2013 SCC 35, the Court identified four specific concerns with respect to untested hearsay evidence:

[32] First, the declarant may have misperceived the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been wrongly remembered; third, the declarant may have narrated the relevant facts in an unintentionally misleading manner; and finally, the declarant may have knowingly made a false assertion. The opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross-examination. (emphasis in original)

[105] The Crown groups the hearsay dangers into two categories: accuracy of memory and sincerity. The accused agrees with these dangers and points out the possibility that A.L. is not relaying all of what happened, such that we do not have a complete picture of the events as they transpired. In my view, this concern relates to both accuracy and sincerity.

[106] With respect to concerns over memory, I note that the significant parts of A.L.'s statements to the three narrators were unprompted and in A.L.'s own words. In her statement to Cst. Plankenhorn, A.L. appeared to be clear about what she remembered and what she did not. For instance, she clearly remembered laying down, going to bed with a shirt on, the accused forcing oral sex, and her being unable to push him off. She said she did not remember how much she had to drink. When asked if the accused used his fingers anywhere else besides her vagina, she said she does not remember. It does not appear that A.L. attempted to guess or fill in her memory where she had none. Her overall actions, including going to the hospital and to the police, are consistent with someone who has a memory of a traumatic event.

[107] Likewise, in terms of sincerity, I note A.L.'s strong, visceral reaction on the morning of October 6, 2021. She was vomiting, panicking and having difficulty breathing in the early hours of that morning, a reaction that seems to go beyond what could possibly be attributable to alcohol consumption. She did not have a close relationship with the accused and had no apparent motive to lie about him. I note that she reported that the accused was her occasional supplier of alcohol, and I question whether A.L. would want to sacrifice that

relationship which would affect her ability to continue receiving alcohol from him.

[108] I cannot find that A.L.'s statements to others were the product of suggestion. It was noted that at one point, B.P. asked A.L. to tell police what she told Dr. Hopkins at the hospital about the accused forcing his penis in her mouth. However, I view this as minimal prompting to more fully disclose what A.L. had already disclosed.

c) Alternative or Speculative Explanations

[109] The next step in the analysis is to, based on the circumstances and the dangers identified above, consider alternative or even speculative explanations for A.L.'s statements.

[110] The accused submits that there are a number of alternative explanations for why one would give a statement to police about being sexually assaulted:

- a) The complainant believes that they were sexually assaulted even though they were not, for any number of reasons (to name a few: they dream it, they think it happened when it did not, they are confusing one incident of something occurring for another unrelated incident, they have been sexually assaulted and are confused about the identity of who assaulted them and/or when, they have a false memory).
- b) The complainant feels that they need to make a complaint in order to satisfy some other person.
- c) The complainant wants to falsely accuse someone for an ulterior motive.
- d) The complainant feels pressured to make a complaint.
- e) The complainant consented to the sexual activity (and the accused believes they are 16 years of age or more due to their actions, words or gestures) and after the fact decides that they did not provide their consent.

[111] In the context of this case, the accused specifically offered the following explanations for the Crown's DNA evidence:

- 1) that the accused masturbated on the laundry in the laundry room;
- 2) that the DNA was deposited in the course of a sexual interaction very different from one described by the complainant; or
- 3) that the DNA was deposited in the context of a sexual interaction as described by A.L.

[112] The accused submits that the circumstances of the complaint do not rule out the alternative explanations (the first and second explanations listed above). In pointing to such alternative explanations, the accused submits that this is not the kind of case where the evidence on its face can be reduced to one explanation. He argues that sexual assault cases, particularly the evidence of complainants in such cases, lend themselves to many possible explanations on their face. In this highly complex analysis, the accused emphasizes the importance of cross-examination, which is ultimately crucial to a W.D. credibility analysis (as set out by Justice

Cory in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93). Without cross-examination, the accused says none of the proffered alternatives can be ruled out.

[113] On the other hand, the Crown submits that the only explanation for the accused's semen being on A.L.'s underwear she wore at the hospital was A.L.'s explanation that the accused could not fully perform intercourse with her because he had already ejaculated and was no longer erect. A.L. explained that she knew he ejaculated because she could feel that he was wet when he tried to force intercourse with her.

d) Does the Corroborative Evidence Rule Out Alternative Explanations?

[114] I will next determine whether, in the circumstances of the case, the corroborative evidence rules out these alternative explanations such that the only remaining likely explanation for the statements is the declarant's truthfulness about, or the accuracy of, the material aspects of the statements.

[115] In *Bradshaw*, the Court commented on this step as follows:

[49] While the declarant's truthfulness or accuracy must be more likely than any of the alternative explanations, this is not sufficient. Rather, the fact that the threshold reliability analysis takes place on a balance of probabilities means that, based on the circumstances and any evidence led on voir dire, the trial judge must be able to rule out any plausible alternative explanations on a balance of probabilities.

[116] In *R. v. McMorris*, 2020 ONCA 844, the Court held that any speculative explanation must be plausible on a balance of probabilities, and any speculative explanation that does not survive such scrutiny should be rejected. In other words, not just any speculative explanation suffices to abort the threshold reliability analysis - only those that are, on reflection, reasonably plausible: *McMorris* at para. 34.

[117] In approaching this task, I note the following comments of the Court in *Charles*:

[55] It is true that it is the combined effect of the corroborative evidence and the circumstances of the case, and not the evidence taken in isolation, that must rule out plausible alternative explanations for the material aspects of the statement (see *Bradshaw*, at para. 47). However, this does not mitigate the need for a connection between the evidence and the aspect sought to be proved. In the absence of such a connection, the evidence is quite simply of no assistance in determining whether that specific aspect is true or accurate; it merely corroborates the declarant's credibility, the accused's guilt or one party's theory of the case, which is not sufficient (see *Bradshaw*, at para. 44; see also paras. 45-46 and 72). Evidence that is not connected with the material aspects of the statement is therefore not capable, even in combination with the circumstances of the case, of ruling out plausible alternative explanations for those aspects.

- [56] It follows that evidence that confirms one material aspect of a statement is not necessarily admissible to establish the statement's reliability with respect to its other material aspects. When evidence merely confirms one material aspect of a statement and no more, the support it provides for other material aspects derives entirely from the fact that it boosts the declarant's credibility. This holds true regardless of the materiality of the aspect of the statement that is confirmed by the evidence. As established in *Bradshaw*, it is not sufficient for evidence to support the declarant's credibility generally, and such evidence cannot be used to assess the admissibility of other aspects of the statement.
- [57] On the other hand, there may conceivably be situations in which several aspects of a statement are connected, such that evidence that demonstrates the truth or accuracy of one aspect is also capable of ruling out the possible explanations for the others. In such a case, the evidence is sufficiently -- albeit indirectly -- connected with those other aspects. Such evidence may then be of assistance in analyzing the statement's admissibility with respect to all of those aspects.
- [118] In *Charles*, the combined effect of the corroborative evidence and the circumstances did not overcome the specific hearsay dangers raised by the out-of-court statement. There, the corroborative evidence was the pistols found in a search conducted at a witness's residence subsequent to an incident where the accused accosted the victim with a pistol in the presence of the witness and another person. The Court held that the search results did not confirm the accused's role in the event or the degree of the accused's involvement. By contrast in the present case, the location and nature of the DNA found on A.L.'s torso and underwear supports a stronger inference that it was deposited during sexual activity, which is a material aspect of the Crown's case. As well, determining the nature and degree of the accused's involvement is less of a concern here than in *Charles*, where multiple suspects being involved in the alleged assault represented a complicating factor: *Charles* at para. 70.
- [119] In terms of possible alternative explanations, the defence submits that it is possible that the accused masturbated on A.L.'s underwear. He pointed out that Ms. Hassam, the DNA reporting officer, could not testify as to how the accused's DNA got on A.L.'s underwear, when the sperm cells were deposited, or when or how the accused's DNA was transferred onto A.L. I have difficulty with this theory.
- [120] In assessing this possible explanation, I note the accused had only been staying at M.H.'s house for one or two days during this stay (A.L. reported that he had arrived around dinnertime the previous evening), leaving a relatively short timeline in which this theory could have materialized. M.H. stated that the accused slept in the living room upstairs when he stayed over. She testified that the laundry would get done every other day or so, and that there would be clean and dirty clothes in the laundry room downstairs. M.H. agreed that the accused could have been in the laundry room when she was not present. There is no evidence on the voir dire that the accused masturbated on the clothes in the laundry room. However, if the accused masturbated on dirty clothes, these would likely, though not certainly, have been washed before being worn.

- [121] If on this theory he somehow deposited his sperm onto A.L.'s underwear, one could further speculate that the stain may have come to A.L.'s attention before she put on the underwear, and this if noticed would have led to her reticence to wear soiled underwear. She would also have had to put on the same exact pair of underwear that he had deposited his DNA onto, which I find to be unlikely. No sperm cells were observed in the swabs of A.L.'s stomach, chest and neck, which means his sperm cells would have had to be deposited onto A.L.'s underwear but not the rest of her body through accidental or secondary transfer. The alternative theory does not include direct contact between A.L. and the accused, and I find it unlikely that his DNA would have indirectly transferred to the stomach, chest and neck of A.L. and her underwear in the manner found.
- [122] Moreover, if the accused's DNA had been innocently transferred in the manner theorized, this would not account for A.L.'s visceral, emotional response on the morning of October 6. The accused's explanation of secondary transfer scenarios is speculative, and inconsistent with A.L.'s demeanour, and I find this theory implausible on the evidence given what is reliably known about the context.
- [123] A second theory is that the accused's DNA was deposited in the course of a sexual interaction very different from one described by A.L. The accused argues that A.L. did not disclose the context in which the sexual activity occurred because there are no details about what was said, the actions taken by either party, or the context of the relationship. The DNA evidence therefore arguably does not rule out the possibility that there was a consensual interaction and an honest but mistaken belief in the A.L.'s age.
- [124] Underlying this theory is the idea that the lack of consent is a material fact. However, A.L. was 15 years old at the time and her consent is vitiated by operation of law: s. 150.1(1) of the Criminal Code. A.L.'s factual consent would be legally irrelevant even if established. The argument that an accused honestly but mistakenly believed the complainant was over 16 is not part of the actus reus of the offence. Rather, it is a defence based on intent or mens rea, and amounts to an issue for trial along with a reasonable steps analysis.
- [125] Hence, an alternate theory based on purportedly consensual sexual relations in this context does not amount to an alternative explanation for the accuracy of the statements. I would not exclude the possibility that corroborative evidence in some cases can tend to confirm non-consent as a material aspect of a statement. But here the material aspects of the statements are that the accused engaged in sexual relations with A.L. (specifically digital penetration, oral sex, attempted penile-vaginal penetration, and licking of her neck, chest and stomach). Given the age of A.L., I do not accept the theory of non-consent goes to a material aspect of A.L.'s statements as to what happened in this context: see Charles at paras. 54-58; Larue at para. 97; R. v. J.F.P., 2014 NWTSC 14 at para. 48.
- [126] I would also consider the possible explanation that A.L. was so intoxicated on the evening of October 5-6 that she imagined the incident or that somehow she otherwise made up the allegation due to suggestion or fabrication for an unknown reason. Again, however, the

corroborative DNA and the demeanour evidence is inconsistent with such a theory and instead is corroborative of sexual activity and physical contact between the two. The corroborative evidence rules out such an alternative explanation on the standard of proof applicable at this stage.

[127] I would classify the alternative explanations as speculative. In other words, there is no evidence to support that the accused masturbated on the laundry in the laundry room, that his DNA was deposited in the course of a different sexual interaction, or that A.L. was mistaken or fabricated the allegations. The three statements are generally consistent in the details provided, though of course, repetition does not add to the credibility of a statement. There was no evidence offered in direct support of an alternative explanation. And I find that the surrounding circumstances do not plausibly support these explanations on the evidence on the voir dire.

[128] I turn to some examples in the caselaw for further guidance on the corroborative use of DNA evidence in sexual assault cases. In *R. v. Khan*, [1990] 2 S.C.R. 531, 1990 CanLII 77, a hearsay statement from a child was found to be admissible because it was corroborated by a semen stain on the child's clothes.

[129] In *Couture*, at paras. 83-84, the Court commented that corroboration can powerfully substantiate the trustworthiness of a statement, recalling the semen stain in *Khan*. In *Couture*, a witness told the police that Mr. Couture had admitted to sexually assaulting both victims after their deaths. However, in that case, there was no forensic evidence of that nature led on the voir dire or at trial. The Court added the following comment:

However, assuming that there had been evidence that the victims had indeed been sexually assaulted, and that this evidence was not likely to have been known by anyone other than the investigators and the perpetrator at the time of the statement, this corroborative evidence would lend much cogency to the statement. [at para. 84]

[130] This passage was quoted at paras. 95 and 119 by the majority in *Larue* in its decision admitting the hearsay statements of the accused's romantic partner who refused to testify in that case. That decision rested, in part, on the presence of corroborative DNA evidence. The majority in *Larue* stated:

Like the theoretical corroborative evidence of sexual assault discussed in *Couture*, in my view Mr. Larue's DNA on the handle of the bat lent "much cogency" to Ms. Asp's claim that Mr. Larue participated in the Seybold murder (para. 119).

[131] Like the DNA evidence discussed in *Larue*, the accused's DNA on the complainant's body and underwear lends much cogency to the claim that he had sexual relations with her. The DNA is evidence capable of restoring the faith of the trier of fact in A.L.'s account.

- [132] In Bradshaw at para. 52, the Court again referenced its decision in Khan, stating that "[g]iven the semen stain and the circumstances of the case, the only likely hypothesis was that the child had not lied about or misperceived the assault. The semen stain directly responded to the hearsay dangers."
- [133] Counsel debated the helpfulness of the decision in Dias. In that case, the Court admitted the videotaped statement of a complainant who refused to testify at trial. The accused was like a grandfather to the complainant and allegedly touched the complainant while in his care. The complainant was eight years old when she gave her statement and was 11 at trial. The Court found that the complainant's statement met the test of threshold reliability on a balance of probabilities.
- [134] The accused notes that many of the cases such as Khan and Dias in which statements are admitted involve extremely young children. He points out the dicta from Khan that "young children are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken": see *R. v. S.S.*, 2022 ONCA 305 at para. 98, quoting Khan. I take this into account in light of the age of the complainant here.
- [135] However, sufficiently reliable hearsay statements of adult sexual assault complainants have also been admitted at trial where circumstances warrant. For example, in *R. v. Bernard*, 2018 ABCA 396, an adult victim's written statement was admitted on the basis of corroborating evidence found at the scene and the victim's emotional and physical condition. In *R. v. Thyagarajah*, 2017 ONCA 825, the statement of an adult victim (deceased at trial) taken five hours after an alleged sexual assault was admitted at trial. In that case, the accused's DNA was found on the victim, and this fact, in addition to the complainant being found crying and half-naked on the bathroom floor of a restaurant, was found to corroborate the reliability of the victim's statement.
- [136] I recognize the accused's submission that the Court does not know what cross-examination of A.L.'s evidence might show. The accused submits that cross-examination can cause the evidence to change and lead to the Crown failing to discharge its burden. He therefore submits that some caution is warranted before concluding that cross-examination is unlikely to change the evidence of a child complainant. Here, however, I find that there is sufficient corroborating evidence that the trier of fact should not be deprived of hearing A.L.'s words through the admission of her hearsay statements.
- [137] In my view, the DNA evidence here, and to a lesser extent the demeanour evidence, overcomes the specific hearsay dangers presented by the material aspects of the contents of A.L.'s statements that the Crown wants to rely upon. That evidence corroborates the material aspects of A.L.'s statements: that sexual activity occurred; that the accused licked her on her chest, neck and stomach during the course of a sexual interaction; and that the accused had attempted intercourse proximate to the point in time that he had ejaculated.

- [138] I do not find the alternative explanations to be reasonably plausible on the evidence on the voir dire. The combined effect of the corroborative DNA evidence, when considered in the circumstances of the case, shows that the only likely explanation for the hearsay statements is A.L.'s truthfulness about and accuracy of the material aspects of the statements she gave to B.P., Dr. Hopkins, and Cst. Plankenhorn. Put another way, the material aspects of the statement would be unlikely to change with cross-examination on the alternative theories.
- [139] The circumstances and corroborative evidence provide a rational basis to rule out any plausible explanations for A.L.'s statements to B.P. and Dr. Hopkins at the hospital, as well as her statement to Cst. Plankenhorn, other than her truthfulness. I find that the substantive reliability of the statements is established on a balance of probabilities.

D. Conclusion on Threshold Reliability

- [140] Each of A.L.'s statements is deficient in some aspects of procedural reliability, including importantly, the absence of cross-examination. The statements to B.P. and Dr. Hopkins lack a formal oath and were not videotaped. Those statements are likely incomplete because they were not recorded. However, those statements were made soon after the alleged offence. A.L. lacked a motive to lie, and both statements were made to reliable narrators of the statements. The statement to Cst. Plankenhorn was videotaped. While the point of view of A.L. in the video recording is less than ideal, it represents a full record of what was said. As well, one can discern her apparent demeanour and emotional state during the statement, and the statement includes an emphasis on the importance of truth-telling.
- [141] In terms of substantive reliability, all three statements are corroborated by the DNA evidence tendered on the voir dire, which confirms A.L.'s account. The DNA evidence tends to rule out the possibility of concoction, misreporting, or coincidence. That evidence mitigates the need for cross-examination on the point that the hearsay is tendered to prove (Charles at para. 54), which is that sexual activity occurred between A.L. and the accused. The evidence of A.L.'s demeanour and emotional state is also corroborative of her statements. In my view, when considered as a whole and in the circumstances of the case, the only likely explanation for A.L.'s hearsay statements to B.P., Dr. Hopkins and Cst. Plankenhorn is A.L.'s truthfulness about the material aspects of her statements.
- [142] I would not find that A.L.'s statements are sufficiently reliable based on procedural factors alone. However, based on a combination of procedural and substantive factors, I find that A.L.'s three statements to B.P., Dr. Hopkins, and Cst. Plankenhorn are sufficiently reliable to justify their admissibility at trial.
- [143] I find in this case that the threshold reliability of A.L.'s three statements has been established on a balance of probabilities.

V. PREJUDICIAL EFFECT AND PROBATIVE VALUE

- [144] The accused argues that even if A.L.'s statements are admitted under the principled exception to the hearsay rule, they should nevertheless be excluded on the basis that the prejudicial effect of the statements is outweighed by their probative value.
- [145] In *Bradshaw*, the Court held that even when the trial judge is satisfied that the hearsay is necessary and sufficiently reliable, the judge has discretion to exclude this evidence if its prejudicial effect outweighs its probative value: at para. 24 citing *Khelawon* at para. 49. The onus is on the Crown to satisfy the court as to the admissibility of the evidence on a balance of probabilities: *R. v. Handy*, 2002 SCC 56 at para. 55. As the evidence becomes more focussed and specific to the charge, its probative value increases: *Handy* at para. 87.
- [146] A.L.'s statements are directly connected to the offences on critical matters in issue. Her statements go to what happened between her and the accused which forms the basis for the charges. I assess that the probative value of A.L.'s statements is relatively high having regard to the nature and strength of the evidence, the materiality of the evidence or extent to which they support critical elements of the Crown's case, and the extent to which these matters are at issue in the proceedings.
- [147] On the other hand, I assess that the prejudicial effect of the evidence is low, having regard to how discreditable the evidence is, the extent to which the evidence may confuse issues or support inferences based solely on bad character, and the accused's ability to respond to it. The evidence is not inflammatory in that it does not raise matters extraneous to the charges or lead to potential distractions for the trier of fact. I cannot find that the evidence will have other prejudicial effects, including misleading the trier of fact or consuming time on peripheral issues.
- [148] In my view, the probative value of the hearsay statements clearly outweighs their prejudicial effect. I would not exclude the evidence on this basis.

VI. CONCLUSION

- [149] A.L.'s statements are admitted at trial for their truth.
- [150] This ruling deals only with the threshold admissibility of the three statements at trial. The ultimate reliability of A.L.'s statements and their probative value in light of the evidence as a whole are matters for trial to be considered after further evidence and submissions on the standard of proof applicable at a criminal trial.

"Brundrett J."

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