

CANADA / JUDGMENT

R. v. Comin

2022 BCSC 548

COURT

Supreme Court of British Columbia

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2022 BCSC 548 R. v. Comin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Comin,

2022 BCSC 548

Date: 20220316

Docket: 91496-3

Registry: Kelowna

Regina

v.

Kole Louis Comin

Christian Blake Dupas

David George Dupas

Trevor Allan Pereverzoff

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Before: The Honourable Madam Justice Ker

Oral Ruling on Voir Dire No. 2

re admissibility of prior consistent statement

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Place and Date of Hearing:

Kelowna, B.C.

March 14-15, 2022

Place and Date of Judgment:

Kelowna, B.C.

March 16, 2022

- [1] These Reasons for Judgment were delivered as oral reasons. They have since been edited for distribution.

Introduction

- [2] This is a ruling on the Crown's application to adduce a prior consistent statement made by the complainant, K.S., to her mother, S.S., shortly after the alleged offences in this case are said to have occurred.

Background

- [3] The four accused before the Court are charged with one count of sexual assault and one count of unlawful confinement of K.S. The events are alleged to have occurred at the home of two of the accused, brothers Christian and David Dupas, after the four accused, the complainant, and others, had been partying together. The events started in the evening of June 16, 2018. The offence is alleged to have occurred sometime after 2:00 a.m. on June 17, 2018, after the four accused, the complainant, and at least two or three other party attendees returned to the Dupas residence from a midnight excursion to the BNA bar in downtown Kelowna.

- [4] The Crown seeks to have a statement that the complainant made to her mother in a telephone call admitted into evidence in the trial of this matter. The complainant is said to have made the call after the alleged offences occurred, but before she reported them to the police. The mother's evidence on this voir dire can be summarized briefly as follows: S.S. was awoken at approximately 4:30 a.m. Calgary time on June 17, 2018, when her daughter K.S. called her. K.S. was having difficulty with a cab driver and needed money to pay him but could not find her wallet or credit cards.
- [5] K.S. eventually began crying hysterically, almost hyperventilating, and was very upset. K.S. told S.S. what had happened and, according to S.S., outlined what appeared to be a very violent rape of K.S. by four or five men. In her evidence, S.S. intimated that K.S. even told her that her rectum hurt and that she was bleeding, inferring that K.S. may have had forced anal intercourse. S.S. counselled K.S. not to shower and to call the RCMP immediately. S.S. and K.S. ended their conversation, and then K.S. called S.S. back anywhere between approximately five to 30 minutes later to advise her mother that she had called the police and that they were on the way to her home.

Parties' Positions

- [6] The Crown contends that the complainant's prior consistent statement to her mother is admissible under the narrative as circumstantial evidence exception, as post-event demeanour evidence, and as statements of contemporaneous bodily sensation. The Crown argues that the evidence will assist the jury in assessing the complainant's credibility on the critical issue of whether she consented to sexual activity with the four accused. The Crown contends that the statement and the circumstances surrounding its making have probative value that goes beyond mere consistency with the complainant's anticipated trial evidence.
- [7] Counsel for the four accused oppose the admission of the prior consistent statement. They contend that, in light of the significant inconsistencies as between S.S.'s version of the call with her daughter at 4:30 a.m. Calgary time, and K.S.'s statements to the police about what happened in the cab—including who she called, when she called her mother, and her demeanour—all militate in favour of not admitting the presumptively inadmissible prior consistent statement the Crown seeks to tender from S.S.
- [8] In addition to the evidence of S.S. on this voir dire, the Court received a number of documents from Crown disclosure that were filed to provide objective facts about the relevant timeline as well as summaries of the cab driver's observations about K.S. and her emotional state while riding in his vehicle after the alleged incident.

Legal Principles

- [9] Before addressing the evidence any further, I will first outline the governing legal principles for determining the admissibility of prior consistent statements. They are helpfully outlined both in the cases referred to by Crown counsel in her comprehensive written argument and

oral submissions. I did not understand defence counsel to disagree with these legal principles. Rather, they contend that, in applying these principles to the circumstances in evidence in this voir dire, the Court ought to dismiss the Crown's application and not admit the prior consistent statement.

[10] In the text *Modern Criminal Evidence* by Gourlay, Jones, Makepeace, Crisp, and Pomerance, (Toronto: Emond Press, 2022), the authors address the rule on prior consistent statements at 227-232.[1] The authors note the following:

2. Prior Consistent Statements

(a) The Presumptive Exclusionary Rule

There is a general exclusionary rule that applies to a prior statement given by a testifying witness that mirrors their in-court testimony. The rationale for this rule is that the trier of fact may be tempted to conclude that the witness is more credible and/or reliable because they have maintained a consistent account. However, consistency in a witness's account does not render their version more likely to be true. A dishonest witness can just as easily perpetuate a lie. It would be self-serving to allow a witness to rely on prior consistency to support the veracity of their account. As a result, there is no probative value to the issue of credibility in admitting a prior consistent statement. . .

Exceptions to the general exclusionary rule for prior consistent statements can be classified as either hearsay exceptions or non-hearsay exceptions. When assessing the appropriate route to admissibility, it is helpful to consider prior consistent statements as involving two elements: a hearsay element and a declaration element. The hearsay element refers to the contents of the statement. Where a party seeks to prove the truth of the contents of a prior consistent statement, the rules relating to the admissibility of hearsay evidence apply.

[11] I pause here to note that the Crown does not seek to adduce the statement for a hearsay purpose. The quote continues as follows at 227:

The declaration element refers to the fact that the statement was made. Where a party seeks to simply prove that the statement was made and invite inferences from the fact and context in which the statement was made," the hearsay rule is not engaged. There are a number of exceptions that apply to admit a prior consistent statement for limited and clearly defined purposes rather than for its truth.

[12] The authors go on to note at 228 that:

(c) Prior Consistent Statements Admissible for Limited Purposes

The common law provides for a number of exceptions to the exclusionary rule relating to prior consistent statements. The purpose for which the statement is received is limited and depends on the applicable exception.

[13] One such exception is the narrative exception. The authors address the narrative exception as follows at 228-229:

i. Narrative

Two categories of narrative have developed in the common law: "pure narrative" and "narrative as circumstantial evidence." When admitted as pure narrative, a prior consistent statement serves only to assist the trier of fact in understanding the case as a whole or the unfolding of relevant events. There is no weight assigned to the statement itself - its value lies in the fact that it was made.

[14] Pure narrative was explained in *R. v. F.(J.E.)* (1993), 85 C.C.C. (3d) 457 (O.N.C.A.) at 476. As the Crown does not seek to have K.S.'s statement to S.S. admitted as pure narrative, it is unnecessary to address this further.

[15] In *Modern Criminal Evidence*, the authors go on to explain "narrative as circumstantial evidence" at 229 of the text, writing:

A more expansive category of "narrative as circumstantial evidence" has also been recognized. This allows the trier of fact to consider the circumstances surrounding the prior consistent statement to assess the witness's credibility and reliability. For example, in a sexual assault case, the fact and timing of the first disclosure and the overall context or circumstances of that initial complaint can be considered by the trier of fact in assessing the complainant's credibility. Where it emerges spontaneously and/or without delay, that would tend to enhance credibility. Similarly, where the complaint is accompanied by emotion, that may further enrich the witness's credibility. The prior consistent statement may suggest that the complainant's conduct was consistent with someone who had been sexually assaulted in circumstances where the defence attempted to show otherwise. In contrast, there may be circumstances where the prior consistent statement detracts from the credibility of the complainant. For example, a judge may be troubled where the first complaint arises years later in the context of family litigation at a point where the accused is gaining advantage. In each example, it is the declaration aspect of the prior consistent statement that is relevant, not the hearsay aspect. Consequently, the statements are not admissible for their truth and cannot be used to infer that their consistency renders the testimony more credible or offers any corroboration.

[16] The authors go on to note the following at 229-230:

The admission of prior consistent statements engages a risk of misuse by the trier of fact, particularly where it assumes a narrative purpose. In *Dinardo*, the Supreme Court noted the delicate distinction between using narrative as circumstantial evidence that can assist in credibility and reliability assessments, and using it for the impermissible purpose of corroborating testimony that the offence occurred. The Manitoba Court of Appeal offered the following caution with respect to the admission of prior consistent statements as narrative:

Trial judges should exercise great caution with the narrative exception to the prior consistent statement exclusionary rule because it can be easily abused. It is not, and cannot become, a Trojan horse for the Crown to introduce anything said out of court by a witness. Such caution is particularly important where, as is the case is here, the prior consistent statement is admissible for multiple purposes thereby increasing the risk it may be used improperly as affirmative proof of the credibility of a witness or of the allegations.

As a result of this risk, applications for the admission of this type of evidence will be scrutinized for necessity. Whether the prior consistent statement is necessary will depend on the circumstances of each case. As stated by Rosenberg J.A., "it will not always be necessary to know why or how the case came to the attention of the police, and it will not always be necessary to fill in every gap in the chronology to understand the story and properly assess the witness's credibility." Furthermore, it is often not necessary to adduce the details of the prior statement in order that the intended purpose be achieved. Considerable care should be exercised to ensure that only the necessary details are elicited, because the more detail that is revealed about the contents of the prior statement, the greater the danger of its misuse. The Court of Appeal for Ontario recently denounced the prevalence of the narrative exception serving "as a vehicle for the admission of evidence that is otherwise inadmissible and prejudicial." In *Borel*, the Court was explicit in its message that this recurring misuse of the rule "must stop" because it will often necessitate a new trial.

- [17] To add to this summary of the governing legal principles, I draw from the Crown's very helpful written submission which contains a comprehensive review of the law on prior consistent statements being admitted under the three different categories of the declaration/non-hearsay exception.
- [18] Insofar as the "narrative as circumstantial evidence" exception is concerned, the courts have recognized that the circumstances in which a prior consistent statement was made, including how it was made, when it was made, to whom it was made, and the witness's physical or emotional condition when it was made, can have probative value beyond mere repetition in assessing their in-court evidence.
- [19] In *R. v. Khan*, 2017 ONCA 114, a police officer was charged with sexually assaulting a female in his custody. The sexual assaults were committed under the pretext of pat-down searches. When the complainant arrived at the police station, a female officer told her that she would be searched again. The complainant became very emotional and confused. She advised that she had already been searched three times and wanted to know why it was necessary for her to be searched again. The trial judge admitted the complainant's statement to the female officer and convicted the accused.

- [20] The accused appealed and the summary conviction appeal judge overturned the conviction on the basis that the prior consistent statement had been wrongfully admitted. The Ontario Court of Appeal allowed the Crown's appeal and restored the conviction. Justice Hourigan, writing for four of the five justices hearing the appeal, explained the two different narrative exceptions to the rule against prior consistent statements:
- [30] As pure narrative, prior consistent statements carry no weight because they are tendered simply to give the background to explain how the complaint came to be before the court. This court described the pure narrative exception in *R. v. F. (J.E.)* (1993), 1993 CanLII 3384 (ON CA), 16 O.R. (3d) 1, [1993] O.J. No. 2589 (C.A.), as allowing the decision maker to understand the "chronological cohesion" of the case. The statement is not used to prove the truth of its contents, nor are there any inferences arising that would make the case of one person more compelling than that of another. It is merely an aid in understanding the case as a whole.
- [31] But sometimes the circumstances surrounding the making of the prior consistent statement are such that the statement assists in assessing the reliability and credibility of a witness' in-court testimony, giving prior consistent statements admitted as "narrative" a more substantive use: *R. v. Dinardo*, [2008] 1 S.C.R. 788, [2008] S.C.J. No. 24, 2008 SCC 24, at para. 39; *R. v. Evans*, 1993 CanLII 102 (SCC), [1993] 2 S.C.R. 629, [1993] S.C.J. No. 30, at para. 32. This is referred to as narrative as circumstantial evidence.
- [21] Justice Doherty wrote a separate but concurring opinion providing an outline of the approach he suggested should be taken in determining the admissibility of prior consistent statements.
- [22] In *R. v. Steele*, 2021 ONCA 186, the Ontario Court of Appeal again addressed the admissibility of prior consistent statements, both the narrative as circumstantial evidence exception and the post-event demeanour evidence as circumstantial evidence, to corroborate the complainant's testimony. Justice van Rensburg addressed the issue in the following manner:
- [93] The narrative as circumstantial evidence exception was explained by Hourigan J.A. in *Khan*, at paras. 31-34. It applies when there is something in the circumstances of the making of the statement that can assist in the assessment of the credibility or reliability of the witness's in-court claims: see *Khan*, at para. 31; David M. Paciocco, "The Perils and Potential of Prior Consistent Statements: Let's Get It Right" (2013), 17 Can. Crim. L. Rev. 181, at p. 199. If admitted, the evidence can be used to assess a complainant's credibility, but not for the prohibited inference that consistency enhances credibility or the incorrect conclusion that the simple making of a prior consistent statement corroborates in-court testimony. "The probative value of the statement [page744] lies in the inferences that can be drawn from the timing and circumstances of the statement, rather than the simple fact that the complainant has said the same thing before": *R. v. E. (M.)*, [2015] B.C.J. No. 254, 2015 BCCA 54, 319 C.C.C. (3d) 352, at para. 46. In the circumstances of this case, the trial judge ought to have considered whether the evidence as to the timing of A.V.'s call to C.D. and A.V.'s emotional

state during the call were admissible under the narrative as circumstantial evidence exception, and then, if admitted, evaluated the weight of such evidence and its effect on his assessment of A.V.'s credibility.

- [94] Post-event demeanour evidence of a sexual assault complainant can serve as circumstantial evidence to corroborate the complainant's testimony: see *R. v. Mugabo*, [2017] O.J. No. 1979, 2017 ONCA 323, 348 C.C.C. (3d) 265, at para. 25; *R. v. Murphy*, 1976 CanLII 198 (SCC), [1977] 2 S.C.R. 603, [1976] S.C.J. No. 87, at pp. 612, 616 S.C.R. C.D.'s evidence about how A.V. sounded during the call, if accepted, may have served to corroborate the complainant's evidence that she had not consented to the sexual contact in the trailer. Contrary to the respondent's submissions, I see nothing in the trial judge's reasons to suggest that he considered and rejected or discounted such evidence. Indeed, he concluded at para. 77 that there was "an absence of available corroborating evidence to support the testimony of either [the complainant or the respondent]".
- [95] In my view, the trial judge erred when he applied too narrow a test in determining the admissibility of C.D.'s evidence and A.V.'s prior consistent statement to C.D. If he had considered the relevant permissible uses of C.D.'s evidence, he may have concluded that C.D.'s evidence was admissible, not for the truth of the contents of the prior consistent statement made by A.V., but as relevant circumstantial evidence to assist in his assessment of A.V.'s credibility.
- [23] In this jurisdiction, our Court of Appeal in *R. v. Greif*, 2021 BCCA 187, leave to appeal ref'd [2021] S.C.C.A. No. 39689, recently addressed the admissibility of prior consistent statements by the complainant to her mother. The statement was about the complainant's alleged sexual assault by the accused, and the mother noted that her daughter was upset and crying. The trial judge admitted this evidence under the narrative as circumstantial evidence exception and as post-event demeanour evidence. In dismissing the conviction appeal, Justice MacKenzie, writing for the Court, addressed the admissibility of the prior consistent statement by the complainant to her mother and the trial judge's proper use of the statement and demeanour evidence accompanying the statement:
- [69] In the paragraphs leading to para. 67 (the paragraph most impugned by the appellant), the judge was careful to set out the permissible uses of the complainant's prior consistent statement. He noted in particular that prior consistent statements can be used to provide context about how the matter came to the attention of the police, and as circumstantial evidence relevant to assessing the credibility and reliability of the complainant's testimony. He stated several times that the statement could not be used for the truth of its contents or to corroborate the complainant's testimony. In my opinion, his statement of the law and his use of the statement in this context accorded with the law as set out by Chief Justice Bauman in his dissenting reasons in *R. v. Langan*, 2019 BCCA 467, later adopted by the Supreme Court of Canada in reasons indexed as 2020 SCC 33:

[99] It is well-established that prior consistent statements may be used to assess credibility. Proper use turns on whether the statements are used to find a witness credible because of specific, permissible inferences of credibility, such as: "evaluating the context in which the initial complaint arose, in particular the fact and timing of the complaint" ([R. v. Khan, 2017 ONCA 114] at para. 43[, leave to appeal ref'd [2017] S.C.C.A. No. 139]); understanding "the sequence of events from the alleged offence to the prosecution so that [the trier of fact] can understand the conduct of the complainant and assess her truthfulness" (R. v. F. (J.E.), 1993 CanLII 3384 (Ont. C.A.) at 476, cited in [R. v. Dinardo, 2008 SCC 24] at para. 38); or assessing if there is "evidence that an individual has a motive to lie" (R. v. Stirling, 2008 SCC 10 at para. 12).

(See also Singh at paras. 32-34, and R. v. Steele, 2021 ONCA 186 at paras. 89-95 (per van Rensburg J.A., concurring), finding the trial judge had erred by failing to consider the admissibility of the complainant's prior consistent statements under the narrative as circumstantial evidence exception and as post-event demeanour evidence. The majority agreed with Justice van Rensburg on this point: Steele at para. 44.)

[70] Similarly, it is well established that a complainant's post-event emotional condition may be considered in evaluating their credibility: R. v. Varcoe, 2007 ONCA 194 at para. 33; R. v. Daley, 2008 BCCA 257 at para. 10; R. v. Munt, 2012 BCCA 180 at para. 22; R. v. Lopez, 2015 BCCA 294 at para. 29; R. v. J.S.S., 2016 BCCA 411 at para. 47.

[24] In R. v. Langan, 2019 BCCA 467, Chief Justice Bauman's dissenting opinion on the issue of the admissibility of a prior consistent statement was upheld by the Supreme Court of Canada in a decision indexed as 2020 SCC 33. In Langan, the accused was convicted of the sexual assault of his sometime girlfriend. He had unprotected sex with her after she had fallen asleep. He had made an earlier attempt at sexual activity when the complainant was awake, which the complainant had rebuffed and the appellant stopped. However, when he later had the unprotected intercourse with her, the complainant was unconscious and unable to consent. The complainant only became aware of what happened after she discovered she was pregnant. The two exchanged text messages, both before and after the events that comprised the offence.

[25] At trial, the accused's text messages were admitted as admissions against interest. The complainant's text message responses were admitted under the narrative as circumstantial evidence exception. On appeal, the Court was divided on whether the complainant's text messages were admissible. The majority found them to be inadmissible and ordered a new trial. Chief Justice Bauman dissented on this point, writing:

[89] To explain my disagreement I would expand on the lessons we take from Gill. There the issue was rooted in the allegation that the accused's prior out-of-court statement to his niece "I was stabbed" (allegedly made in the throes of the drawn out altercation in which the accused was involved) could be admitted in the context of his same evidence at trial in aid of his claim of self defence.

[90] Justice Fitch gave the judgment of the Court. He noted (at paras. 63-64) that a prior consistent statement's presumptive inadmissibility is subject to the "narrative as circumstantial evidence" exception. Justice Fitch was satisfied that it applied in Gill in respect of the niece's evidence; that that evidence could be admitted "for the limited and permissible purpose of showing the fact and timing of the appellant's complaint that he had been stabbed, which evidence could assist the trier of fact in assessing the truthfulness of the appellant's in court testimony" (Gill at para. 64, relying on R. v. Dinardo, 2008 SCC 24 at para. 37 [Dinardo]).

[91] My colleague has already reproduced para. 76 of Justice Fitch's reasons (at para. 44 of Justice Stromberg-Stein's reasons) and I would highlight this admonition from the Court in Gill:

The prior consistent statement is not admitted for the truth of its contents or as a form of self-corroboration of the trial testimony of the witness. The trier of fact also must not rely on the statement to support the prohibited inference that repetition enhances truthfulness. Rather, "the probative value of the statement lies in the inferences that can be drawn from the timing and circumstances of the statement, rather than the simple fact that the [witness] has said the same thing before" . . .

[92] In Gill, Justice Fitch placed some reliance on Justice Paciocco's influential article "The Perils and Potential of Prior Consistent Statements: Let's Get it Right", (2013) 17 Can. Crim. L. Rev. 181. In particular this portion of that article was quoted (at para. 77 of Gill):

It is not the "hearsay part" of the prior consistent statement block that is available. As this adapted passage from F. (J.E.) illustrates, it is the "declaration part" that is used to support relevant and permissible circumstantial inferences. It alone adds weight to the case for a party by supporting affirmatively the testimony offered by a witness. The circumstantial inferences cannot amount to the prohibited inference that consistency enhances credibility, or the incorrect conclusion that the simple making of a prior consistent statement corroborates in-court testimony. Those inferences must arise from the content and context of the prior consistent statement. Where logic yields inferences based on the fact statements are made and the circumstances in which they were made there is nothing improper in drawing them.

[93] Inferences arising from the content and context of the prior consistent statement are permissible--"[w]here logic yields inferences based on the fact statements are made and the circumstances in which they were made there is nothing improper in drawing them."

[. . .]

[99] It is well-established that prior consistent statements may be used to assess credibility. Proper use turns on whether the statements are used to find a witness credible because of specific, permissible inferences of credibility, such as: "evaluating the context in which the initial complaint arose, in particular the fact and timing of the complaint" (Khan at para. 43); understanding "the sequence of events from the alleged offence to the prosecution so that [the trier of fact] can understand the conduct of the complainant and assess her

truthfulness" (R. v. F. (J.E.), 1993 CanLII 3384 (Ont. C.A.) at 476, cited in Dinardo at para. 38); or assessing if there is "evidence that an individual has a motive to lie" (R. v. Stirling, 2008 SCC 10 at para. 12).

[100] These uses are all distinct from the impermissible use of finding credibility through repetition.

[Emphasis in original.]

[26] The majority of the Court of Appeal in Langan ordered a new trial. The Crown appealed the decision to the Supreme Court of Canada and a majority of the Supreme Court allowed the appeal substantially for the reasons of Bauman C.J.B.C.

[27] Regarding the admissibility of prior consistent statements under the contemporaneous bodily sensations exception, our Court of Appeal in R. v. J.S.S., 2016 BCCA 411 upheld the accused's conviction for assault and sexual assault of his spouse. The trial judge admitted as prior consistent statements the observations of the complainant's sister as to the complainant's physical state after one of the assaults. Her sister testified that the complainant looked miserable, her face was swollen, she seemed to have been crying, and she was complaining about pain. The complainant then telephoned her sister after a subsequent assault involving forced anal intercourse. Her sister testified that, during that telephone call, the complainant was crying and said that she was not feeling well and was bleeding from her anus.

[28] The accused appealed his conviction in part based on the trial judge's instruction to the jury on their permissible use of the complainant's statements to her sister. In upholding the conviction, Justice Fenlon, writing for the Court, held that the statements to the sister were admissible to rebut the defence theory that the complainant's post-event conduct was inconsistent with having been assaulted, and that they were also admissible under the contemporaneous bodily sensation exception:

[47] A complainant's statements to others about her emotional state and sensations may be admitted as circumstantial evidence, particularly in sexual assault cases in which the complainant's consent is in issue. Whether the evidence is admissible will depend on the circumstances of the case, including the temporal nexus to the alleged offence and the existence of alternative explanations for the emotional state: R. v. J.A., 2010 ONCA 491, appeal allowed on other grounds. In R. v. Clark, 87 O.A.C. 178, the Ontario Court of Appeal concluded that no limiting instruction was required concerning evidence of the complainant's emotional phone calls after a sexual assault. The complainant called a friend immediately after the incident and she called another witness the next morning. Both calls were admitted as evidence of the complainant's emotional state.

- [29] This review of the jurisprudence establishes that prior consistent statements may be admitted for limited purposes--not for their truth, but rather as inferences arising from the content and context of the prior consistent statements: Langan at para. 93; Greif at para. 69. They may also be admissible under the contemporaneous bodily sensation exception, as occurred in J.S.S.

Evidence and Analysis

- [30] The factual context established by the evidence on this voir dire is as follows.
- [31] S.S. testified to having a conversation with her daughter, K.S., at approximately 4:30 a.m. Calgary time. In direct examination, she spoke of a conversation that she had with her daughter when her daughter was unable to exit the cab because she did not have any money or credit cards to pay the driver. S.S. said her daughter was upset. S.S. spoke with the cab driver and, as a result, the driver let her daughter exit the cab to retrieve money from her apartment. The phone remained with the cab driver and S.S. stayed on the phone. K.S. then returned, paid the cab driver, and retrieved her phone, while still on the line with S.S.
- [32] S.S. remained on the phone with K.S. as K.S. walked back to her apartment. Once in the apartment, K.S. broke down sobbing, almost hyperventilating, and crying hysterically. She attempted to tell S.S. what had happened. Initially, S.S. was unable to follow as K.S. was too upset. S.S. told K.S. to calm down, lock her door, and splash water on her face. She then had K.S. outline what had happened. It was at this time that K.S. told S.S. she had been raped and outlined the lead-up to this attack. S.S. testified that K.S. told her that the men tore her clothes off and took turns raping her.
- [33] K.S. indicated that she wanted to shower, but S.S. told her not to and that she had to call the police. According to S.S., K.S. told her that she was raped and that the men kept pushing her down, holding her, hurting her, spitting on her, and pulling her hair. S.S. also said that K.S. told her that her bum hurt, which S.S. believed to be a reference to forced anal intercourse. After S.S. finished this conversation with K.S., K.S. called her back approximately 30 minutes later to tell her that she had called the police and that the RCMP were coming to take her to the hospital.
- [34] S.S. seemed to contradict herself in cross-examination. In cross-examination, S.S. stated that K.S. had been crying and upset, and had disclosed the rape while she was still in the cab, in the presence of the cab driver. S.S. also stated in cross-examination that K.S. told her that she had told the cab driver that she had been raped and needed to get money from her home. S.S.'s evidence then evolved to her hearing K.S. tell the cab driver that she had been raped and that she wanted to go into her home to get money to pay his fare.
- [35] S.S. then said that, while K.S. was still in the cab, K.S. told her that the cab driver asked K.S. why she was crying, and that she told him that she had been raped. S.S. then explained that, when S.S. herself was trying to talk with the cab driver, K.S. was hysterical, and she and the cab driver attempted to talk over K.S.'s crying. S.S. then seemed to backtrack a bit and

thought that K.S. had told her in a later conversation that K.S. had told the cab driver about being raped. When the first conversation ended and K.S. was going to call the police, S.S. said she was still crying and sobbing, but was calmer. S.S. estimated her daughter called her back five minutes later and reported that she had called the police.

- [36] S.S. did not provide a statement to the police about the contents of her daughter's call until sometime in June 2020, nearly two years after the offence and after she had had more than one conversation with her daughter. During her June 2020 statement to Corporal Reddekopp, S.S. had been in a medical clinic waiting for an appointment and therefore felt caught off-guard. She also felt uncomfortable discussing what her daughter had told her about being raped, and so referred to the incident as an assault.
- [37] By the end of her cross-examination, it was not entirely clear whether the details S.S. had learned from K.S. about the events had occurred in the first conversation with K.S. before the police were called, or in later conversations. S.S. was asked about an assertion in her statement to Cpl. Reddekopp that K.S. told her that she thought the men were going to kill her, and S.S. agreed that K.S. had said this in their first conversation.
- [38] I have numerous difficulties with S.S.'s evidence about her first conversation with K.S.
- [39] First, S.S. says the phone call occurred at approximately 4:30 a.m. Calgary time, which would be 3:30 a.m. B.C. time. However, there is an admission that the cab was called by someone inside the Dupas residence at 4:19 a.m. B.C. time, that the cab subsequently arrived at 4:40 a.m., and that the drive from the Dupas residence in West Kelowna to the complainant's residence in Kelowna took approximately 20-25 minutes. Thus, the complainant would have arrived at her residence sometime after 5:05 or 5:10 a.m. B.C. time, or 6:05 or 6:10 a.m. Calgary time. However, that difference on its own is not material, since S.S. had been awoken from sleep and may well have been confused about the time.
- [40] The following points, which can be inferred from the documentary evidence filed in this voir dire, are far more significant and troubling.
- [41] The first such evidence is the cab driver's observations of the complainant. On June 17, 2018 at 5:24 p.m., shortly after Constable Lyndsey Schwindt concluded her audio interview of K.S. at the Kelowna General Hospital, Cst. Schwindt contacted the cab driver, Mr. Gill. According to Cst. Schwindt's notes, Mr. Gill provided the following description of the passenger that he picked up at the Dupas residence at 4:40 a.m. that morning: "female was not distressed, was intoxicated & crying."
- [42] On June 20, 2018, Cst. Schwindt completed an occurrence report outlining the steps she took on June 17, 2018 to locate the cab driver, based on K.S.'s statement that this cab was "Car 16." In her occurrence report, Cst. Schwindt outlined that Mr. Gill knew the first name of the passenger, K. The following notation was included in the occurrence report:

Cst. SCHWINDT asked Gill if "[K.]" appeared to be at all in distress, to which he advised that she was crying and appeared to be slightly intoxicated.

[43] On July 9, 2020, Corporal Meghan Foster conducted a follow-up investigation with respect to Mr. Gill's observations and memory of the fare involving K.S. While Cpl. Foster appeared to be operating under the belief that the events occurred on June 18, 2018, that may simply be a typo in her occurrence report. Mr. Gill advised Cpl. Foster that he remembered the fare because K.S. had to go into her residence to get her credit card to pay him. However, Mr. Gill did not remember K.S.'s demeanour. Cpl. Foster's notes of the conversation with Mr. Gill are a bit more cryptic and state that Gill "remembers the fare but not the disposition of the girl he picked up."

[44] Mr. Gill does not mention anything in either interview about K.S. crying hysterically, nor any conversation with S.S. or overhearing K.S. tell S.S. that she had been raped. Similarly, Mr. Gill does not say anything about K.S. telling him that she had been raped, as S.S. claims that K.S. had told her while K.S. was still in the cab.

[45] It may well be that he never said anything because, as the Crown contends, he was never asked. However, respectfully, the more logical inference is that Mr. Gill had not heard about this because it was not said in his presence, and because S.S. is confused about when she first spoke to K.S. and what K.S. told her.

[46] The final piece of evidence addressing Mr. Gill's recollection of the fare comes from Cpl. Reddekopp, in an email discussing his interview of Mr. Gill in person on March 14, 2022. I infer that Cpl. Reddekopp interviewed Mr. Gill to see whether he could testify in this voir dire, occurring on March 15, 2022. Unfortunately, Mr. Gill could not attend due to prior travel commitments. When Cpl. Reddekopp spoke with Mr. Gill, he learned that Mr. Gill now has only a vague memory of the events from nearly four years ago. Cpl. Reddekopp provided the following summary of what he learned in his conversation with Mr. Gill:

He had a vague memory of dropping off a female who had problems with her credit card. The female told him her card did not work and she had to get another one. Gill remembered telling the female that he was going to call the police, but could not remember if he actually did.

[47] Given the passage of time, it would be very surprising if Mr. Gill now remembered any of the details that S.S.'s evidence suggests he would have heard if she did in fact speak with K.S. while K.S. was still in Mr. Gill's cab. However, I have significant doubts that S.S. did in fact speak with K.S. when K.S. was still in the cab, or that K.S. was hysterical at this time, or that K.S. said anything about being raped to either Mr. Gill or S.S. while in the cab.

[48] My significant doubts about S.S.'s purported conversation with K.S. in the early morning hours of June 17, 2018 are reinforced by the following uncontroverted facts.

[49] Contrary to S.S.'s assertion that K.S. called her either 5, 30 or 45 minutes after their first conversation in the cab to advise S.S. that she had called the police, as evidenced by the computer-aided dispatch ticket or call summary at Exhibit 9, K.S. did not in fact call the police until 2:47 p.m. on June 17, 2018. The initial remarks in that call summary include the following:

C reporting that she thinks she was raped at 0230 hours by 4 men at a house in West Kelowna.

[50] Additionally, another point of contention arises from K.S.'s statements to the police between June 17 and June 20, 2018. Three were audio-recorded and two were not. I will outline the conversations chronologically.

[51] The first statement was obtained sometime after K.S. made her complaint at 2:47 p.m., but before police obtained her first audio-recorded statement. Cst. Schwindt spoke with K.S. at the hospital and recorded the gist of their conversation in her notebook. At page 2 of Constable Schwindt's notes, she wrote the following:

has only told mom

went to BNA. (Bar)

[52] It is unclear whether K.S. was relating that she also told her mother what is contained in the next three lines of Constable Schwindt's notes, or whether K.S. was simply telling Cst. Schwindt of her limited memory of the events of the night before. Cst. Schwindt's notes state the following:

Woke up undressed, in a bed.

Males threw clothes

at her + told her to leave

[53] Either way, the above three lines contradict S.S.'s evidence as to what she says K.S. told her in their first conversation when K.S. was still in the cab.

[54] The second conversation between K.S. and the police occurred when Cst. Schwindt audio-recorded an interview of K.S. at 4:01 p.m. on June 17, 2018, at Kelowna General Hospital. This is the first transcribed statement, marked as Exhibit 6 on this voir dire. In this statement, K.S. advised the police that she called her roommate when she was having problems with the cab, and that she then called her mother at 1:00 p.m. and told her what had happened.

[55] Later in the statement, it is apparent that K.S. was trying to piece together when she arrived home and whom she called when she was having difficulty with the cab driver. The context of that statement suggests that K.S. was scrolling through her phone as she spoke with the officer. At p. 16 of that statement, K.S. refers to calling her friend and roommate, E., to ask E. to talk to the cab driver so that she could go in and get her credit card.

- [56] The third conversation between K.S. and the police occurred when K.S. was interviewed at 6:28 p.m. on June 17, 2018, this time by Cst. Georgina Josefsson, as evidenced in Exhibit 5. This conversation was not audio-recorded but is reproduced in Cst. Josefsson's occurrence report of June 18, 2018. In this conversation, Cst. Josefsson mainly endeavours to clarify the timeline of events from when K.S. met Mr. Comin and his friend Marcus, to when she was kicked out of the Dupas residence and sent home in a cab. In this interview, K.S. indicates that she had told her sister, her friend E., and her mother S.S.; however, no details were obtained as to what she told any of these three women.
- [57] The fourth conversation between K.S. and the police occurred the next day on June 18, 2018, commencing at 1:57 p.m., again with Cst. Schwindt. This is K.S.'s second audio-recorded statement to the police. In this statement, K.S. said that the cab driver called the RCMP. She then paid for the cab ride, passed out when she got home, and later called her mother and told her what had happened. In this statement, K.S. does not recall:
- i) any of the men engaging in any anal intercourse with her;
 - ii) ever falling on the floor; or
 - iii) who removed all of her clothing.
- [58] These three points contradict S.S.'s evidence as to what K.S. told her about the attack when they purportedly spoke while K.S. was in the cab and then in her apartment. Significantly, Cst. Schwindt also asked K.S. to talk about when she woke up on June 17, 2018 and how she was feeling physically. K.S. described how she was feeling and then said, "That's why I had to call my mom first to make sure like what's the next step in this kind of thing."
- [59] Finally, K.S.'s fifth and final statement to the police was obtained by Cpl. Foster on June 20, 2018 at 1:30 p.m. This statement was also audio-recorded and does not contain any information relevant to the issue to be decided on this voir dire.
- [60] The evidence contained in these various statements and conversations between K.S. and the police unequivocally establishes that K.S. never called her mother when she was in the cab. Accordingly, K.S. never told S.S. about what had happened at that particular time.
- [61] Moreover, when considered in the context of the evidence about Mr. Gill's recollection, it also becomes clear that K.S. had not been sobbing hysterically in the cab, likely had never said anything about rape in Mr. Gill's presence, and had not talked to her mother at that time. Rather, the evidence establishes that K.S. had tried to contact her roommate E. for assistance over the credit card issue.
- [62] While I have no doubt that K.S. did contact her mother at some point to tell her what had happened, and may have been emotional when she did so, that conversation did not happen when K.S. was in the cab. It would seem that, at the earliest, K.S. spoke to her mother several hours later at approximately 1:00 p.m., and then called the police at 2:47 p.m.

- [63] While I appreciate that it is up to the jury to determine the reliability and the credibility of S.S. and K.S. on this issue, in exercising my gatekeeper function regarding the admissibility of presumptively inadmissible evidence, I must nonetheless conduct a threshold assessment of the reliability and credibility of the person who purportedly received the alleged prior consistent statement.
- [64] The Crown seeks to lead evidence from S.S. of statements that she says K.S. made to her while K.S. was still in the cab and when K.S. entered her apartment. The Crown seeks to lead these statements for the reasons I outlined at the beginning of this ruling. However, on the totality of the evidence before me on this voir dire, the problem is that those statements and events did not occur at this time.
- [65] Respectfully, in my view, it would be dangerous for the Crown to lead such evidence from S.S. when it in fact could not have occurred the way that S.S. recalls. Accordingly, the prejudicial effect of this evidence far exceeds any probative value that may exist. To that end, I also do not find that there is any probative value to this purported prior consistent statement, since the totality of the evidence before me fairly conclusively establishes that the conversation S.S. testified to:
- i) did not occur at the time S.S. says it did;
 - ii) did not occur in the manner she says it did, both in respect of hysterical sobbing in front of the cab driver or in the details K.S. allegedly told S.S. in the presence of the cab driver; and
 - iii) did not contain the details that S.S. says that K.S. provided regarding the nature of the attack, the conversation with the men afterwards, or that K.S. told S.S. that she thought the men were going to kill her.
- [66] I want to clarify that I do not think S.S. is lying in the sense of deliberately or intentionally misleading the Court. S.S. was undoubtedly very concerned about her daughter's welfare and safety, and had several conversations with her about these events over an unknown period of time. S.S. never wrote down any of the details her daughter told her, and did not provide a statement to the police for approximately two years. The best I can infer in these circumstances is that S.S.'s memory of her conversations with her daughter have merged, creating a memory that does not accord with the surrounding circumstances.
- [67] The independent evidence that I have summarized contradicts the reliability, accuracy, and credibility of S.S.'s evidence about the occurrence and contents of the early morning phone call with K.S.
- [68] In short, S.S.'s evidence from this voir dire does not align with the preponderance of probabilities arising from the rest of the evidence. A practical and informed person would reasonably recognize this significant incongruity which undermines the threshold reliability and accuracy of S.S.'s evidence: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357.

Conclusion

- [69] In conclusion, when considered in the context of the rest of the evidence, I am not satisfied from S.S.'s evidence that S.S. and K.S. spoke when S.S. says they did, or that the details S.S. says she received from K.S. were actually conveyed to her by K.S. at that time. Accordingly, S.S.'s evidence about K.S.'s statement and purported condition at this time will not be admitted as a prior consistent statement at trial.
- [70] Finally, I understand that the defence, at the conclusion of the voir dire, was prepared to admit that K.S. called her mother at some point, more likely on or after 1:00 p.m. on June 17, 2018, and received advice from her mother to call the police. The fact that K.S. called her mother is admissible, as is the fact that S.S. advised her daughter to call the police. However, S.S.'s recollection of the contents of that conversation and when it occurred, along with S.S.'s recollection of K.S.'s demeanour at that time, are not admissible. I leave it to counsel to work out the agreed admissions.
- [71] That concludes my ruling.
- "Ker J."
- [1] I have omitted from these passages the numerous footnotes and related case citations that are included in this textbook.
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