

CANADA / JUDGMENT

R. v. Davies

2022 BCCA 172

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 172 R. v. Davies

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Davies,

2022 BCCA 172

Date: 20220524

Docket: CA47324

Between:

Regina

Respondent

And

Jacob Thomson Davies

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment as the "complainant" or by the initials B.B., L.B. or K.B. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Marchand

On appeal from: An order of the Provincial Court of British Columbia, dated December 11, 2020 (R. v. Davies, Surrey Docket 233831-2).

Counsel for the Appellant:

N.J. Preovolos

Counsel for the Respondent:

L. Chu

Place and Date of Hearing:

Vancouver, British Columbia

March 31, 2022

Place and Date of Judgment:

Vancouver, British Columbia

May 24, 2022

Written Reasons by:

The Honourable Mr. Justice Marchand

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

Summary:

The appellant challenges his conviction for sexual assault. The appellant argues the trial judge erred in finding a critical witness was unbiased and seeks to adduce fresh evidence in support of this ground of appeal. The Crown seeks to adduce fresh evidence in response. The appellant also argues the judge misapprehended evidence in concluding Crown witnesses had no motive to lie or fabricate evidence, improperly relied on the complainant's emotional state to bolster her credibility, erroneously narrowed the complainant's cross-examination, mischaracterized the severity of inconsistencies in the complainant's evidence, erroneously applied more rigorous scrutiny to the appellant's evidence than to that of Crown witnesses, and improperly considered post-offence conduct as evidence of a guilty conscience.

Held: Appeal dismissed, applications dismissed. Fresh evidence is admitted on appeal in exceptional circumstances only. Here, the evidence was available at trial and the appellant made a tactical decision not to adduce it. The appellant failed to demonstrate due diligence and the fresh evidence lacks the required level of heightened cogency for admission. The Crown's responsive application to adduce fresh evidence is dismissed. On the merits of the appeal, the

appellant failed to demonstrate any legal error or palpable and overriding error of fact. The judge's credibility assessments were balanced, thorough and rooted in evidence, not based on stereotypes.

Reasons for Judgment of the Honourable Mr. Justice Marchand:

Introduction

- [1] On December 11, 2020, Jacob Thomson Davies was convicted of sexually assaulting the complainant. At the time of the offence, the complainant was 16 and Mr. Davies 18 years old.
- [2] The only issue at trial was consent. The complainant testified that she had not consented to the sexual contact at issue. Mr. Davies testified that, not only had the complainant consented, but that she was the aggressor.
- [3] There were no eyewitnesses. The forensic evidence was neutral. The outcome turned on the trial judge's credibility and reliability findings.
- [4] Mr. Davies appeals his conviction. He submits the judge erred:
- in finding that a critical Crown witness, L.B., "[came] before the court without any bias" resulting in a misapplication of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93;
 - by reversing the burden of proof and misapprehending the evidence by speculating that three Crown witnesses had no motive to lie or fabricate evidence;
 - in relying on the complainant's emotional state to bolster her credibility;
 - in prohibiting or narrowing cross-examination of the complainant regarding her mental health;
 - in mischaracterizing major inconsistencies in the evidence of Crown witnesses as minor;
 - by considering Mr. Davies' post-offence conduct as evidence of consciousness of guilt; and
 - in applying uneven scrutiny to the evidence of the Crown and defence.
- [5] In support of his submission regarding the judge's finding that L.B. came before the court without bias, Mr. Davies seeks to introduce fresh evidence that, at the time of trial, the complainant and L.B. were in an intimate relationship.
- [6] The Crown maintains that the judge made supportable findings and committed no errors. The Crown submits that Mr. Davies was aware of the relationship between the complainant and L.B. at the time of trial but, for tactical reasons, did not raise bias as an issue. The Crown submits that Mr. Davies' fresh evidence motion must fail on the due diligence requirement of the Palmer test. If Mr. Davies' fresh evidence is admitted, the Crown seeks to adduce relevant passages from a statement L.B. gave to the police five days after the events at issue that is consistent with his trial testimony.

- [7] For the reasons that follow, I would not admit any of the fresh evidence and I would dismiss the appeal.

Background

- [8] While the general outline of events is not in dispute, the details are.
- [9] On the evening of April 19, 2019, the complainant and her good friend B.B. made plans to go to Crescent Beach in Surrey and spend the night at B.B.'s friend's house. They took B.B.'s vehicle and arrived at Crescent Beach between 8:30 and 9:00 p.m. They drank and became somewhat intoxicated.
- [10] They learned that B.B.'s friend had made other plans so they would not be able to stay at her place. B.B. then invited her "best friend," Mr. Davies, to join them and drive them home. Mr. Davies arrived soon after. Mr. Davies was sober. A little later, Mr. Davies drove to his home to get more alcohol for the complainant and B.B. The three of them hung out chatting, listening to music and dancing.
- [11] Around midnight, Mr. Davies drove B.B. home. He and the complainant continued driving and chatting and ended up parking at a secluded lookout point. At this point, the accounts of events provided by the complainant and Mr. Davies diverge.
- [12] The complainant testified that Mr. Davies asked her how her boyfriend would like it if he kissed her. She told him he would not like that. Mr. Davies kissed the complainant twice. She pulled away on both occasions. Mr. Davies then pulled his pants down, pushed the complainant's head down and forced his penis into her mouth. After a few minutes, Mr. Davies released the complainant's head. She got out of the car and tried unsuccessfully to contact a friend to pick her up.
- [13] The complainant had no other way home and was drunk. She got into the backseat of Mr. Davies car to distance herself from him, but instead he joined her. He told her it was "her turn." He grabbed her legs, pulled down her pants, removed her tampon and threw it out the window. He digitally penetrated her for a short time and then performed oral sex on her. Her legs were tense and she squeezed his head with her thighs. He told her to relax. She told him no and to stop.
- [14] After four or five minutes, the complainant pushed Mr. Davies away with her legs. He unzipped his pants, got on top of her and had vaginal intercourse with her. She remained very tense so the intercourse "didn't really work." Mr. Davies eventually got off the complainant, sat back and masturbated himself until he ejaculated.

- [15] The complainant grabbed her phone and contacted an acquaintance, L.B. She asked him to pick her up. She told him that she had been raped. When L.B. arrived to pick up the complainant, Mr. Davies swore at her and called her a whore. The complainant was shaking, "kind of hyperventilating" and had tears in her eyes in Mr. Davies' car. She broke down in tears once she got out of his car.
- [16] Mr. Davies testified that when they arrived at the lookout point, he asked the complainant if she wanted to hook up. She began aggressively making out with him and even choked him at one point. They moved to the backseat of the vehicle. He pulled down her pants and performed oral sex. She was not wearing a tampon and he did not see any blood. When the complainant climaxed, he asked her if she wanted to give him a blow job and she agreed.
- [17] The complainant began performing oral sex on Mr. Davies but he was unable to achieve an erection. The complainant then climbed on top of Mr. Davies and aggressively tried to put his flaccid penis into her vagina. She was kissing him and scratched his back with her nails. Mr. Davies asked the complainant to get off of him. During these sexual acts, the complainant was constantly on her phone texting.
- [18] The complainant told him she had to go to the bathroom and left. When she returned, he asked her to masturbate him. She did and he ejaculated on his shirt. They got back into the front seat. The complainant was calm and not upset. She told him she was going with L.B. so he drove her to meet him. He believed the complainant was going to hook up with L.B. but was not upset. He told the complainant to "[h]ave a nice night."
- [19] After the complainant and Mr. Davies parted ways, the complainant remained with L.B. in his car until the next morning. He dropped the complainant off at her home at about 9:30 a.m. Later in the day the complainant told her parents what had happened and she went to the hospital for a sexual assault nurse examiner ("SANE") examination. The nurse examiner did not observe any blood on the vaginal swab and made no physical findings of concern.
- [20] In the meantime, Mr. Davies' mother noticed that he had scratches on his back and Mr. Davies exchanged text messages with B.B., L.B. and the complainant's boyfriend, K.B. In his text exchanges with L.B. and especially K.B., Mr. Davies provided detailed accounts of what happened. Copies of these text messages were entered into evidence. In his text exchange with B.B., Mr. Davies told B.B. about the complainant going to hook up with L.B. He denied sending B.B. a message stating "Bitch didn't even swallow." The text messages between Mr. Davies and B.B. were not introduced into evidence.

Reasons for Judgment

- [21] The trial judge began her judgment by identifying that Mr. Davies was charged with sexual assault and the only issue was consent. The judge then set out the basic legal principles that Mr. Davies was presumed innocent and the burden was on the Crown to prove his guilt beyond a reason doubt.

- [22] The judge instructed herself with respect to the analytical framework established by the Supreme Court of Canada in W.(D.). She noted that the case was not to be decided on the basis of a credibility contest and referenced a number of leading authorities on the assessment of credibility. She noted her obligation to disregard myths and stereotypes that could inappropriately undermine a complainant's testimony or operate against an accused.
- [23] The judge then reviewed the evidence in some detail. She summarized the evidence adduced by the Crown, including the testimony of the complainant, B.B., L.B., K.B. and the SANE examination nurse as well as the content of the text messages exchanged by Mr. Davies with L.B. and K.B. She also summarized the evidence adduced by Mr. Davies, namely his testimony and the testimony of his mother.
- [24] During her review of the evidence, she commented on the credibility of some of the evidence and made some findings of fact. For example, she:
- found that B.B. had loyalties to both Mr. Davies and the complainant and was a credible and reliable witness;
 - concluded that some of the inconsistencies between the evidence given by B.B. and the complainant "simply has to do with the passage of time and their consumption of alcohol";
 - accepted B.B.'s evidence regarding the text messages she exchanged with Mr. Davies after the events at issue on the basis that "[t]here is no motive for her to lie";
 - found that the results of the SANE examination were "consistent with both consensual and non-consensual sexual activity" and "neutral on the issue of consent"; and
 - accepted Ms. Davies' evidence that she saw scratches on her son's back but considered that evidence to be consistent with both consensual and non-consensual sexual activity.
- [25] The judge then undertook a W.(D.) analysis, starting with an assessment of Mr. Davies' testimony.
- [26] The judge noted that some of Mr. Davies' testimony was consistent with the testimony of other witnesses. She also identified a number of internal and external inconsistencies that were "cause for concern."
- [27] The judge noted significant discrepancies between Mr. Davies' testimony and the description of events he texted to K.B. She rejected Mr. Davies' explanation for why he sent detailed descriptions to both L.B. and K.B. and concluded that he did so "to get ahead of the situation and to set up his own version of events, one which was favourable to him."
- [28] The judge also noted that Mr. Davies' description of the complainant being perfectly fine after the incident was at odds with L.B.'s observation that she was visibly upset. She commented favourably on L.B.'s testimony saying "I found L.B. to be a very credible and reliable witness who comes before the court without any bias. He is the reliable yardstick against which the evidence of both the accused and [the complainant] can be measured."

- [29] The judge identified internal and external inconsistencies regarding Mr. Davies' description of the complainant texting L.B. and did not accept his testimony that the complainant had got on top of him while he was in the driver's seat and aggressively kissed him.
- [30] The judge rejected Mr. Davies' testimony and concluded that it did not satisfy either of the first two branches of the W.(D.) framework. In other words, she did not believe his testimony and it did not leave her with a reasonable doubt.
- [31] Finally, the judge moved on to the third branch of the W.(D.) framework. She asked herself "whether, on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt of the accused's guilt." In order to answer this question, the judge understood that she had to "carefully scrutinize the evidence of the complainant."
- [32] Overall, the judge found the complainant to be credible and reliable. In her view, inconsistencies between the complainant's testimony and her previous statements and other witnesses "were not of such a significant nature that [they] undermine[d] her overall credibility or reliability."
- [33] In the judge's view, some shortcomings in the complainant's evidence could be explained by the passage of time and her consumption of alcohol while others amounted to "primarily inconsistencies in degree as opposed to substance." The judge accepted that the complainant's more conservative trial testimony was due to the complainant being traumatized, emotional and upset at the time she gave her statement to the police.
- [34] The judge considered the complainant's testimony about being on her menstrual cycle and wearing a tampon to be "a personal, yet completely unnecessary detail" that she "had no reason to fabricate." The judge was not troubled by the absence of any observation of blood on the vaginal swab taken during the SANE examination. The complainant had told the police that her period was light at the time and the SANE examination occurred "almost a full day after the incident."
- [35] The judge found the complainant to have testified "in a forthright manner and did not exaggerate." She noted that the complainant "had no motive to fabricate these events." When the judge tested the complainant's testimony in light of all the evidence in the case, she found that "it does harmonize with the evidence of other witnesses, including in areas of particular significance and those related directly to the offence."
- [36] After taking all of the evidence into account, the judge accepted the complainant's evidence that she did not consent to the forced oral sex in the front seat and the forced digital penetration, oral sex and sexual intercourse in the back seat. The judge found that the Crown had met its burden and proven the offence beyond a reasonable doubt. She found Mr. Davies guilty.

Standard of Review

- [37] Errors of law are reviewable on a standard of correctness while errors of fact or of mixed fact and law are reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33.

Appellate Review of Trial Reasons

- [38] This Court recently summarized how appeal courts are to review trial reasons in *R. v. Kruk*, 2022 BCCA 18 at paras. 34-40, leave to appeal to SCC requested. The following is based on that summary.
- [39] Trial reasons are the means by which judges are held accountable, ensure transparency in the adjudicative process and satisfy the public and the parties that justice has been done. Reasons are intended to explain what the judge decided and why. On appeal, the issue is whether the reasons disclose a reversible error: *R. v. G.F.*, 2021 SCC 20 at paras. 68-69.
- [40] Trial reasons are to be read functionally and contextually. They must be read as a whole and in the context of the live issues at trial, informed by the positions of the parties. Trial reasons are not to be finely parsed in search for error: *G.F.* at para. 69; *R. v. Pastro*, 2021 BCCA 149 at para. 53.
- [41] In reviewing trial reasons, it is critical to review the record. Even if the trial reasons do not explain the "what" and the "why," if those answers are clear from the record, there will be no reversible error: *G.F.* at para. 70.
- [42] Trial judges are presumed to know the law and are not required to "expound on features of the criminal law that are not controversial in the case before them": *G.F.* at para. 74. Where trial reasons are ambiguous, interpretations that are consistent with a correct application of the law are to be preferred: *G.F.* at paras. 78-79.
- [43] Credibility findings are central in most sexual assault cases. The task of articulating reasons supporting credibility findings is particularly challenging because the crime is typically committed in private and there is often no objective, independent corroborative evidence to aid in assessing credibility: *G.F.* at para. 81. See also *R. v. Gagnon*, 2006 SCC 17 at para. 20.
- [44] In recognition of the privileged position of the trial judge to see and hear the witnesses in the courtroom, credibility findings deserve particular deference: *G.F.* at para. 81. They are also to be assessed in light of the presumption of the correct application of the law: *G.F.* at para. 82. Appeal courts must nevertheless consider whether the trial judge turned their mind to the relevant factors affecting the believability of the evidence in the factual context of the case, including truthfulness (credibility) and accuracy (reliability) concerns. It is noteworthy that "[a] trial judge's determination to accept or believe inculpatory witness evidence includes an implicit assessment of truthfulness or sincerity and accuracy or reliability": *G.F.* at para. 82.

- [45] All of this said, appellate review of trial reasons must be based on the reasons actually given by the trial judge and not those that might have been given. In *Pastro*, Justice Fitch explained:
- [54] At the same time, appellate review must be based on the reasoning path reflected in the reasons for judgment. The need for a contextualized assessment of reasons on appellate review does not authorize an appellate court to sustain a result because reasons in support of that result might have been, but were not, given. Put differently, appellate review of a trial judge's reasons for judgment, while informed by context, is necessarily circumscribed by the reasons actually provided in support of a particular result. As noted by Justice Deschamps and Justice Fish, dissenting in the result in *Gagnon* at para. 53, reasons for judgment serve as guarantors of the propriety of the verdict. Where they are shown to reflect error in principle or palpable and overriding error in fact, appellate intervention may be necessary.

Analysis

Did the judge err in finding that L.B. "[came] before the court without any bias," resulting in a misapplication of W.(D.)?

- [46] Mr. Davies' argument that the judge erred in finding that L.B. came before the court without any bias depends on the admission of his proposed fresh evidence to establish that the complainant and L.B. were in an intimate relationship at the time of trial.
- [47] Because of the nature of Mr. Davies' proposed fresh evidence, the Crown brought a motion seeking to have the procedural safeguards of ss. 276 and 278.93 of the Criminal Code [Code] apply to Mr. Davies' application. Those sections aim to ensure that irrelevant evidence of a complainant's sexual history is not admitted into evidence.
- [48] The Crown's motion came before a different division of the Court. That division established the procedure to follow when determining whether to admit sexual history evidence as fresh evidence on appeal. The Court's ruling is indexed as *R. v. Davies*, 2022 BCCA 103.
- [49] During the hearing of the appeal, this division heard submissions on Mr. Davies' application to adduce fresh evidence in camera in accordance with the procedure established by the Court's earlier ruling. Following submissions, the division ruled that it would receive certain of Mr. Davies' proposed fresh evidence (but not all of it), reserving judgment on admissibility. The evidence the division determined not to receive was clearly irrelevant. It did no more than invite twin myths reasoning and represented a significant breach of the complainant's privacy interests. In short, the division determined not to receive a portion of the appellant's proposed fresh evidence because it was not capable of being admissible under s. 278.93.
- [50] The division also made orders to preserve the integrity of the record and protect the privacy interests of the complainant.

- [51] I turn now to the merits of Mr. Davies' application.
- [52] Under s. 683(1) of the Code, an appeal court may accept certain types of "fresh evidence" where the court considers it to be in the interests of justice.
- [53] The leading case on fresh evidence is *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 1979 CanLII 8. Proposed fresh evidence must be admissible and meet the following criteria:
1. in spite of due diligence, the evidence could not be adduced at trial;
 2. the evidence is relevant;
 3. the evidence is credible; and
 4. the evidence could be expected to have affected the result.
- [54] The due diligence criterion exists to ensure finality and order in the criminal process. These values are essential to the integrity of the process: *R. v. G.D.B.*, 2000 SCC 22 at para. 19. The routine admission of fresh evidence would invite parties to retry cases on appeal and undermine the finality of the trial process.
- [55] While the admission of fresh evidence is considered to be exceptional, "due diligence is not an essential requirement of the fresh evidence test, particularly in criminal cases": *G.D.B.* at para. 19. In criminal cases, the due diligence criterion is often relaxed to avoid a miscarriage of justice: *R. v. Aulakh*, 2012 BCCA 340 at para. 57.
- [56] A tactical decision against tendering evidence at trial usually militates against the admission of fresh evidence on appeal: *R. v. Falkner*, 2008 BCCA 277 at para. 17. In such circumstances, an added degree of cogency is required: *R. v. Wu*, 2020 BCCA 128 at para. 62, leave to appeal to SCC ref'd, 39313 (14 January 2021), citing *R. v. Maciel*, 2007 ONCA 196 at para. 50. Otherwise, for example, an accused who chose not to testify at trial could secure a new trial by offering an explanation on appeal that was "reasonably capable of belief." The resulting harm to the integrity of the criminal justice system of routinely admitting fresh evidence that for tactical reasons was not led at trial "can only be justified if the proffered evidence gives strong reason to doubt the factual accuracy of the verdict": *Maciel* at para. 51.
- [57] In this case, Mr. Davies concedes he was aware that the complainant and L.B. were in an intimate relationship at the time of trial. He submits that he did not adduce evidence of their relationship because he was concerned it would be inadmissible as evidence of the complainant's sexual history and because he did not anticipate that L.B.'s evidence would be central to the judge's credibility analysis.
- [58] In trials involving specified sexual offences, including sexual assault, s. 276(1) of the Code, prohibits the admission of evidence of the sexual history of the complainant that supports "twin myths" reasoning. Twin myths reasoning suggests that by reason of the sexual nature of the prior activity "the complainant (a) is more likely to have consented to the sexual activity that forms the subject matter of the charge; or (b) is less worthy of belief."

- [59] Under s. 276(2), sexual history evidence may be admitted into evidence only if the trial judge determines, in accordance with the procedures in ss. 278.93 and 278.94, that the evidence:
- a) is not being adduced to support twin myths reasoning; and
 - b) is relevant to an issue at trial; and
 - c) is of specific instances of sexual activity; and
 - d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
- [60] Section 276(3) lists a number of factors that the trial judge must take into account in considering whether to admit sexual history evidence of the complainant.
- [61] In this case, Mr. Davies is not seeking to adduce fresh evidence in support of twin myths reasoning. Rather, he is seeking to adduce sexual history evidence to establish that, contrary to the judge's finding, L.B. came before the court with a bias in favour of the complainant.
- [62] The importance of establishing L.B.'s possible bias must have been apparent to Mr. Davies at the time of trial. The complainant and Mr. Davies' evidence regarding the complainant's emotional state when she was picked up by L.B. was diametrically opposed. Credibility was the central issue at trial and any evidence corroborating the complainant's version of events had obvious importance. It is hard to think of a better way to undermine the value of L.B.'s corroborative evidence than by establishing his bias: *R. v. Batte* (2000), 145 C.C.C. (3d) 449 at para. 120, 2000 CanLII 5751 (Ont. C.A.).
- [63] In light of L.B.'s prior consistent statement, it is also apparent that Mr. Davies made a tactical decision not to raise L.B.'s then current relationship with the complainant during the trial. If Mr. Davies had, he must have foreseen that the Crown would seek to adduce his prior consistent statement to dispel any notion that his trial evidence was the product of a recent fabrication, concocted after the events in question, to support the complainant. Rather than attempt to undermine L.B.'s credibility, Mr. Davies' position at trial was simply that the complainant could have been crying "for any number of reasons."
- [64] In *Maciel*, Justice Doherty discussed the role that cogency plays in the decision to admit or not admit fresh evidence:
- [46] There are at least three discernible markers on the cogency continuum. At one extreme is evidence that satisfies the court of appeal that the appellant is innocent. Next on the continuum is evidence that, when considered with the evidence adduced at trial, satisfies the court of appeal that no reasonable jury could convict. If the new evidence reaches this degree of cogency, an appellant is entitled to an acquittal. Finally, there is evidence that is sufficiently cogent to meet the criteria for the admission of fresh evidence on appeal in that it could reasonably have affected the verdict at trial, but is not sufficiently cogent to exclude the reasonable possibility of a conviction. Evidence at this level of cogency requires a new trial: see *R. v. Stolar* (1988), 40 C.C.C. (3d) 1 at 10 (S.C.C.).

- [65] Given the availability of L.B.'s prior consistent statement and the use that would likely be made of it, to have any probative value, the proposed fresh evidence would have to establish that L.B. was biased in favour of the complainant when he gave his statement to the police.
- [66] On the date of the sexual assault, L.B. was a co-worker and acquaintance of the complainant. His prior consistent statement was given five days later at a time when the complainant was still in a relationship with K.B. There is no evidence to suggest that L.B. and the complainant were in any type of relationship that would raise concerns of bias at the time he gave his statement to the police.
- [67] Having said that, I acknowledge that Mr. Davies could have cross-examined L.B. on when he started developing feelings for the complainant and whether their relationship was beginning to form within days of the sexual assault. It is telling that he did not even try. He must have concluded that doing so would likely not affect the result. I share that view. Mr. Davies' proposed fresh evidence lacks the required heightened degree of cogency for admission. There is no basis to conclude that it "gives strong reason to doubt the factual accuracy of the verdict": Maciel at para. 51.
- [68] In my view, it would not be in the interests of justice to admit any of the fresh evidence on appeal. Mr. Davies fails the due diligence test and his proposed fresh evidence lacks the required level of heightened cogency. The Crown's proposed fresh evidence is purely responsive.
- [69] I would dismiss both applications to adduce fresh evidence. There being no basis to conclude that L.B.'s dating relationship with the complainant at the time of trial affected his evidence, I would dismiss this ground of appeal.

Did the judge err by reversing the burden of proof and misapprehending the evidence by speculating that Crown witnesses had no motive to lie or fabricate evidence?

[70] Mr. Davies submits the trial judge reversed the burden of proof and misapprehended the evidence by speculating that the complainant, B.B. and L.B. had no motive to lie or fabricate evidence. He specifically takes issue with the findings of the trial judge that:

- the complainant's testimony concerning being on her menstrual cycle "was a personal, yet completely unnecessary detail" that she "had no reason to fabricate";
- the complainant "had no reason to fabricate" the events at issue;
- B.B. had no motive to lie about the two text messages she received from Mr. Davies; and
- L.B. came before the court without any bias.

Legal Principles

[71] In the recent case of *R. v. Swain*, 2021 BCCA 207, Justice Voith comprehensively addressed the relevance of a complainant's apparent absence of motive to fabricate. The decision recognizes the compelling nature of a finding of either a motive to lie by a complainant (making a finding of credibility less likely) or the absence of any motive to lie (making a finding of credibility more likely). Mr. Davies' case involves the typical scenario where no evidence is adduced on the issue.

[72] Subject to a number of cautions, a trier of fact is entitled to consider an absence of evidence of a motive to fabricate as one of many factors in assessing the complainant's credibility: *Swain* at paras. 30 and 32. In *Swain*, Voith J.A. summarized these cautions at paras. 31-33:

- First, the trier of fact must not equate the mere absence of evidence that the complainant has a motive to fabricate with a proven absence of motive. The Crown must meet a high standard to prove the absence of motive to fabricate.
- Second, the trier of fact must not consider the absence of evidence of motive to fabricate, or even a proven absence of motive, as conclusively establishing that the complainant is telling the truth. In other words, the fact finder may consider the absence of evidence as one factor in assessing the complainant's credibility, but must not place excessive weight on it.
- Third, the trier of fact must not reverse the burden of proof, which remains on the Crown to prove its case beyond a reasonable doubt. Specifically, the accused does not have an onus to demonstrate that the complainant has a motive to fabricate evidence in order to achieve an acquittal.

See also *R. v. Gerrard*, 2022 SCC 13.

[73] The high standard to prove the absence of motive to fabricate recognizes that people "may accuse others of committing a crime for reasons that may never be known, or for no reason at all": *Swain* at para. 31, citing *R. v. Bartholomew*, 2019 ONCA 377 at para. 22.

[74] Whether the trier of fact has made any of the errors identified by Voith J.A. depends on the circumstances of the case, the submissions and positions of counsel, and the manner in which the judge addresses the issue: *Swain* at para. 34.

[75] Although *Swain* was written in the context of a complainant's testimony, in my view, the principles apply to all material witnesses.

The complainant's motive to lie

- [76] Mr. Davies submits that the complainant's testimony about her tampon and being on her menstrual cycle was not "a personal, yet completely unnecessary detail." He submits the evidence "was probative of a number of things, including her purported lack of interest in sexual activity and whether she was actually sexually assaulted." He further submits that there was evidence of the complainant's motive to lie, namely to bolster her credibility and her desire to hide her infidelity from her boyfriend, K.B.
- [77] There are a number of problems with Mr. Davies' position.
- [78] First, the complainant did not testify that she was not interested in sexual activity because she was on her menstrual cycle. It is therefore apparent that she did not disclose being on her menstrual cycle to bolster the credibility of her testimony that she did not consent.
- [79] Second, the judge did not misapprehend the evidence or the parties' positions at trial. She understood that Mr. Davies viewed the absence of blood detected during the SANE examination as exculpatory but rejected that view--as she was entitled to do.
- [80] Third, Mr. Davies' submission that the fact the complainant had a boyfriend gave her a reason to lie is not well supported by the evidence. While the complainant was initially reluctant to tell K.B. that L.B. had picked her up, Mr. Davies did not cross-examine the complainant on his theory that she lied to hide her alleged infidelity from K.B. He also did not advance this theory in closing submissions. Mr. Davies' theory cannot successfully be advanced at this late stage and on such a thin evidentiary basis to overturn the judge's verdict.
- [81] Fourth, the judge's finding that the complainant "had no motive to fabricate these events" must be read functionally and contextually. Neither party suggested that the evidence proved the complainant either had or did not have a motive to lie. Rather, the Crown's submissions correctly identified that there was no evidence of a motive to lie. Moreover, nothing in the reasons for judgment demonstrates the judge placed an onus on Mr. Davies to explain why the complainant fabricated her allegations. In my view, the judge correctly relied on the absence of evidence of a motive to lie as one of many factors in her credibility analysis.
- [82] Finally, in the absence of any evidence that she fabricated her testimony about her tampon and being on her menstrual cycle, it was open to the judge to find that the complainant would not raise these topics unless they were true. The judge carefully analyzed the evidence before reaching her supported conclusion that this testimony concerned "a personal, yet completely unnecessary detail."

[83] The judge could have expressed herself better regarding the absence of evidence of the complainant's motive to fabricate, but I am not prepared to engage in a process of parsing the reasons for judgment in search of error. After reviewing the whole of the record and reading the reasons for judgment functionally and contextually, I would resolve any ambiguity created by the judge's imperfect expression in favour of an interpretation of her reasons consistent with a correct application of the law.

[84] I would dismiss this ground of appeal.

B.B.'s motive to lie

[85] The trial judge found that B.B. had no motive to lie about receiving two text messages from Mr. Davies. The first message disparaged the complainant for leaving him to hook up with L.B. and the second referred to her as a "bitch" who "didn't even swallow." Mr. Davies submits there was no evidentiary foundation for the judge's conclusion on motive. I disagree.

[86] While the judge could have found, as Mr. Davies suggests, that B.B. "took a side" without hearing Mr. Davies' side of the story, the judge based her conclusion that "[t]here is no motive for [B.B.] to lie" on the uncontroversial evidence that at the time of the sexual assault B.B. had divided loyalties. Mr. Davies was her "best friend" and the complainant was a good friend.

[87] Again, the judge could have expressed herself better and stated that there was no evidence that B.B. had a motive to lie, but a functional and contextual reading of the reasons leads me to conclude the judge did not err in her assessment of B.B.'s credibility.

[88] I would dismiss this ground of appeal.

L.B.'s motive to lie

[89] I have already addressed Mr. Davies' arguments regarding L.B.'s motive to lie. They depend on his fresh evidence application, an application that I would dismiss. I would therefore dismiss this ground of appeal.

Did the judge err in relying on the complainant's emotional state to bolster her credibility?

[90] Mr. Davies submits that the judge improperly discounted inconsistencies between the complainant's statement to the police and her testimony based on "stereotypical notions about the behaviour of sexual assault victims." Mr. Davies contends that the judge assumed the complainant had been a victim of sexual assault "to rationalize the emotions she was experiencing." In doing so, Mr. Davies maintains the judge "engaged in circular reasoning and reversed the burden of proof."

[91] The passages at issue provide:

- [178] Her evidence in the witness box was generally more conservative than the version she provided to the police just a few days after the incident. I accept her evidence that she was traumatized when she gave her statement to the police. It is not difficult to believe that she, a young 16-year-old girl, may have been more emotional and upset at the time she gave her statement as the incident was still fresh, having occurred so recently.
- [181] Much has also been made about the scratches on the accused's back. The complainant testified that she did not recall ever having scratched the accused's back. It is not implausible that [the complainant] did not recall doing that given that she was in the midst of being sexually assaulted.
- [92] Stereotypic reasoning has no role to play in credibility assessments. Such reasoning cannot be used to discount or bolster the credibility of an accused or a complainant: *R. v. Pastro*, 2021 BCCA 149 at paras. 49-52. Judges are, however, permitted to rely on their human experience to assess the plausibility of a witness' testimony provided the assessment is grounded in the evidence: *R. v. Roth*, 2020 BCCA 240 at para. 65. As triers of fact, judges are also entitled to accept a witness' explanation of frailties in their evidence, such as an inconsistency in their testimony or motive to concoct: *R. v. W.H.*, 2013 SCC 22 at para. 32, citing *R. v. Francois*, [1994] 2 S.C.R. 827 at 837, 1994 CanLII 52.
- [93] Mr. Davies argues that the judge's reasoning is circular because he says the judge accepted the complainant's explanation of certain inconsistencies on the basis that she was traumatized. He contends, in essence, that she found the complainant to be credible because she was sexually assaulted and that she was sexually assaulted because she was credible.
- [94] To have force, Mr. Davies' argument requires that the passages at issue be read in isolation. Passages in judge's reasons are not, however, to be read in isolation. Reasons are to be read as a whole, functionally and contextually.
- [95] In this case, the reasons for judgment as a whole make clear that the judge did not rely on the trauma that would flow from a sexual assault to obviate the need to closely examine issues relating to the complainant's credibility. Rather, as I set out below, the judge took many factors into account in her assessment of the complainant's evidence.
- [96] After finding that Mr. Davies' testimony did not leave her with a reasonable doubt, the judge turned to the third step of the W.(D.) framework. To determine whether, on the basis of the evidence she accepted, she was convinced beyond a reasonable doubt of Mr. Davies' guilt, she explicitly stated "I must carefully scrutinize the evidence of the complainant."

[97] Before accepting the complainant's explanations for inconsistencies in her testimony and inability to remember scratching Mr. Davies' back, the judge held that the inconsistencies "were not of such a significant nature that [they] undermine[d] her credibility or reliability" and were "primarily inconsistencies in degree as opposed to substance." The judge then provided a number of examples of the inconsistencies between her statement to the police and her testimony:

[177] [W]as she crying with tears pouring down her cheeks in the car with the accused, or was she visibly upset and on the verge of tears? Did she say no and to stop once or many times? Did she kick the accused when he performed oral sex on her or did she push him away with her legs and feet? Did the accused digitally penetrate her for a short period of time or a longer length of time?

[98] In her credibility assessment, the judge also took into account:

- the complainant's age;
- the complainant's consumption of alcohol;
- the passage of time;
- the level of detail offered by the complainant in her testimony;
- the neutrality of the results of the SANE examination;
- the complainant's forthright presentation;
- the absence of evidence of a motive to fabricate;
- the harmony between the complainant's testimony and the evidence of other witnesses, "including in areas of particular significance and those related directly to the offence"; and
- the fact that her testimony was supported by the text messages that Mr. Davies sent to B.B. and exchanged with L.B. and K.B. after the incident.

[99] Summarizing, the judge held:

[185] In conclusion, I find that the inconsistencies in the evidence of [the complainant] are not so significant that they are serious enough to undermine her overall credibility and reliability. When I assess her evidence in the context of other witnesses and the evidence as a whole, I find she was a credible and reliable witness.

[100] In light of the judge's thorough credibility assessment, I do not agree that she engaged in stereotypic reasoning or assumed the complainant had been a victim of sexual assault. Rather, the judge accepted, as she was entitled to, the complainant's explanation for minor inconsistencies on peripheral rather than central details. She did so in light of all the evidence and not on the basis of stereotypes and assumptions. Her conclusion that the complainant was credible and reliable was firmly grounded in the evidence.

[101] I would dismiss this ground of appeal.

Did the judge err in prohibiting or narrowing cross-examination of the complainant regarding her mental health?

[102] Evidence was adduced at trial that the complainant was on anti-depressant medication at the time of the assault. When Mr. Davies attempted to cross-examine the complainant about scars that, according to the SANE examination report, evidenced self-harm from cutting, the Crown objected. Given the judge's reliance on the complainant's emotional state in her credibility assessment, Mr. Davies submits "it was an error of law [for the judge] to forbid cross-examination on any aspect of the Complainant's mental health that might have offered an alternative explanation for her emotional state."

[103] Respectfully, the transcript reveals that the judge did no such thing.

[104] Following the Crown's objection, the judge asked counsel for Mr. Davies to explain the relevance of her questions about the complainant's scars. The following exchange then occurred:

[DEFENCE COUNSEL]: Because she was on antidepressant medication, it goes to whether - her state of mind at the time, whether or not she was emotionally fragile, whether or not she may have had other emotional turmoil going on in her life.

THE COURT: No. So what's the point of the scars? Are you trying to seek out what other medical treatment she may have had?

[DEFENCE COUNSEL]: I'm trying to determine what the nature of her emotional state and her mental well-being was at the time of the incident.

THE COURT: Then I think you can ask her that question, instead of referring to things that aren't relevant with respect to this matter.

[105] Despite that invitation from the judge, counsel for Mr. Davies moved on to ask questions confirming that the complainant was on antidepressant medication and that mixing her antidepressant medication with alcohol was not recommended. As can be seen, the judge did not "forbid" Mr. Davies from exploring the complainant's mental health or improperly narrow the scope of what Mr. Davies was permitted to ask in cross-examination. Rather, she made a ruling in response to an objection to ensure the cross-examination of the complainant focussed on the matter of relevance, namely the complainant's emotional state at the time of the assault.

[106] I would dismiss this ground of appeal.

Did the judge err in mischaracterizing major inconsistencies in the evidence of Crown witnesses as minor?

[107] Mr. Davies objects to the judge characterizing various inconsistencies in the complainant's evidence as "primarily inconsistencies in degree as opposed to substance." Specifically, he submits:

- Whether the complainant was on her period was not a "personal, yet completely unnecessary detail";
- Whether the complainant's failure to admit she kissed Mr. Davies in front of B.B. was not an insignificant matter that is explained "by the passage of time and her consumption of alcohol";
- Whether she "kicked" Mr. Davies while he was performing oral sex or squeezed him with her legs was not a minor detail; and
- Whether she was crying and hyperventilating as she was exiting Mr. Davies' car or after she entered L.B.'s car was not a trivial matter.

[108] I have already addressed Mr. Davies' arguments regarding the complainant being on her period. To repeat, it was open to the judge to conclude on the evidence that the complainant's testimony about being on her period was a "personal, yet completely unnecessary detail."

[109] The evidence regarding Mr. Davies and the complainant kissing relatively early in the evening was not consistent between various witnesses. Mr. Davies testified that the complainant climbed on top of him in the driver's seat of his car and began making out with him while B.B. was in the back seat. B.B. testified that she saw Mr. Davies and the complainant kiss while they were sitting beside each other in Mr. Davies' car. The complainant testified that she did not kiss Mr. Davies at that point in the evening.

[110] The judge found as a fact that the complainant and Mr. Davies kissed early in evening (though not as described by Mr. Davies). Respectfully, it was open to the judge to conclude, given the passage of time and the complainant's level of intoxication, that not much turned on the complainant's inability to remember kissing that occurred well before Mr. Davies' assaultive behaviour.

[111] Likewise, it was open to the judge to conclude that nothing much turned on the complainant's evidence regarding whether she kicked Mr. Davies. In direct, she testified that she "pushed him away" with her legs. When cross-examined on her statement to the police that she was "kicking" during the sexual assault, she replied "I wouldn't call it kicking. I would call it more like pushing away."

[112] Similarly, there was nothing drastic about exactly how upset the complainant was when L.B. picked her up. In direct, she testified that she was "visibly upset" while she was with Mr. Davies. She was cross-examined on her police statement that she was bawling her eyes out when Mr. Davies was having sexual intercourse with her. She testified:

[M]y eyes were teary. I didn't ball my eyes out. I didn't like noticeably like - like tears running down my face cry. But I was shaking and I was like kind of hyperventilating, but not to the point where it's like crazy. But it - I was on the verge of tears the whole time. But I did not bawl my eyes out in front of him. I started crying when I got into [L.B.]'s car.

[113] I will address the nature of the inconsistencies between Mr. Davies' text messages and his trial testimony below. At this stage, I will simply say that, unlike Mr. Davies' various descriptions of events, the inconsistencies in the complainant's testimony did not relate to her core allegations that she did not consent to performing oral sex on Mr. Davies, or Mr. Davies digitally penetrating, performing oral sex on or having sexual intercourse with her.

[114] In my view, it was open to the trial judge to characterize the frailties in the complainant's testimony as relatively insignificant and to accept her various explanations. The judge did so in the context of the evidence as a whole and from her privileged position as the trier of fact.

Did the judge err by considering Mr. Davies' post-offence conduct as evidence of consciousness of guilt?

[115] Mr. Davies submits that the judge erred in relying on his post-offence text message exchanges with L.B. and K.B. as evidence of consciousness of his guilt. He relies on *R. v. Friesen*, 2016 BCSC 2120, for the proposition that, before doing so, the judge was obliged as a matter of law to conduct a voir dire to determine the admissibility of the text messages for that purpose.

[116] The passage in the reasons for judgment at issue provides:

[161] I agree with the Crown that the reason why the accused sent the messages to L.B. and K.B. providing details of his contact with [the complainant] was to get ahead of the situation and to set up his own version of events, one which was favourable to him.

[Emphasis added.]

[117] As noted in *Friesen* at para. 24, post-offence conduct is a type of circumstantial evidence that may be admissible to prove a fact in issue. The relevance and probative value of the post-offence conduct must be determined on a case by case basis.

[118] The ruling in *Friesen* was made in the context of a voir dire held in advance of a jury trial. It does not stand for the proposition that post-offence conduct is inadmissible in the absence of a voir dire.

[119] In any event, the record and reasons for judgment make clear that the text messages were not entered into evidence as post-offence circumstantial evidence to establish Mr. Davies' consciousness of guilt. Rather, they were entered into evidence as admissions that Mr. Davies had engaged in sexual activity with the complainant. They were then relied on to impeach Mr. Davies' credibility.

- [120] In closing submissions, the Crown identified inconsistencies between Mr. Davies' text messages and trial testimony, and submitted that his explanations for sending the text messages did not make sense. The Crown submitted the judge should reject Mr. Davies' version of events and explanations. As part of that submission, the Crown suggested that a more plausible explanation for Mr. Davies' exchange of text messages with L.B. was that "he's trying to get out in front of a negative story about himself." The Crown did not submit that the judge should rely on the text messages as post-offence circumstantial evidence on which the judge should infer guilt.
- [121] I acknowledge that the theory that Mr. Davies was trying to "get out in front of a negative story about himself" was not put to him in cross-examination. But Mr. Davies has not identified any passage in the reasons for judgment that demonstrates the judge relied on the text messages as positive evidence of Mr. Davies' guilt. Indeed, the passage at issue is found within the judge's analysis of the first two steps of the W.(D.) framework and was but one of many factors leading the judge to disbelieve Mr. Davies and conclude that his evidence did not leave her with a reasonable doubt.
- [122] The judge then moved on to the third step of the W.(D.) framework to determine whether on the whole of the evidence she was convinced beyond a reasonable doubt of Mr. Davies' guilt. In doing so, she expressly understood that she had to "carefully scrutinize the evidence of the complainant." In the following twelve paragraphs, the judge dealt with the strengths and weaknesses of the complainant's testimony before accepting her evidence that she did not consent, concluding the Crown had met its burden and finding Mr. Davies guilty. In those twelve paragraphs, the judge refers to Mr. Davies' text messages only once and only as supportive of the complainant's version of events.
- [123] In all of the circumstances, it is evident that the judge relied on Mr. Davies' post-offence text messages to reject his evidence and not as circumstantial evidence of his guilt.
- [124] I would dismiss this ground of appeal.

Did the judge err in applying uneven scrutiny to the evidence of the Crown and defence?

- [125] Mr. Davies contends that "[o]n a qualitative or quantitative analysis of the trial judge's credibility assessments, Mr. Davies' evidence was subject to more rigorous scrutiny than the Crown's." He says the judge was permissive and forgiving of numerous deficiencies and weaknesses in the evidence of Crown witnesses while "Mr. Davies was not given the benefit of the doubt about anything."
- [126] Mr. Davies relies on this Court's decision in Roth at paras. 47 and 51, for the proposition that an unbalanced approach to the assessment of credibility is a recognized error of law, usually accompanied by other identifiable errors. Mr. Davies submits this case is typical in that the judge applied uneven scrutiny to the Crown and defence evidence in the context of a host of other errors.

- [127] In Roth, the appellant's conviction for sexual assault was overturned because the judge's credibility assessment was tainted by three errors in principle. This Court found that the judge engaged in speculative reasoning, relied on the fruits of an improper cross-examination in her assessment of the appellant's testimony, and failed to appreciate and resolve significant inconsistencies in the complainant's evidence. The cumulative effect of the errors in principle resulted in an unbalanced scrutiny of the evidence and necessitated a new trial.
- [128] The Court set out the legal principles underlying "uneven scrutiny" as a ground of appeal at paras. 47-51, where the Court held:
- [47] It is an error of law for a trial judge to subject the evidence of the defence to more rigorous scrutiny than the evidence of the Crown. See, for example: R. v. Singh et al., 2020 MBCA 61 at paras. 31-33; R. v. Mehari, 2020 SKCA 37 at para. 29; R. v. Murray, 2020 BCCA 42 at para. 82; R. v. E.H., 2020 ONCA 405 at paras. 40-41; R. v. Willis, 2019 NSCA 64 at paras. 40-45; R. v. Wanihadie, 2019 ABCA 402 at paras. 34-43; R. v. Kiss, 2018 ONCA 184 at paras. 82-83; R. v. Gravesande, 2015 ONCA 774 at paras. 18-19, 43.
- [49] This is a notoriously difficult ground of appeal to make out: Mehari at para. 31; R. v. Radcliffe, 2017 ONCA 176 at paras. 23-26, leave to appeal to SCC ref'd, 37671 (7 December 2017). A trial judge has a unique advantage in hearing and seeing witnesses as they testify: E.H. at para. 44. Because of that fact, as well as other considerations, appeal courts afford substantial deference to a trial judge's assessment of credibility, interfering with their credibility findings only in the face of overriding and palpable error: R. v. Wright, 2019 BCCA 327 at paras. 23-24; R. v. Vuradin, 2013 SCC 38 at para. 11.
- [50] Consequently, to obtain a new trial on the ground that the judge applied different standards in the assessment of credibility, an appellant must persuade the appeal court of a demonstrably flawed assessment methodology or reasoning process that affected the credibility determination: see Wanihadie at para. 36 and the cases cited therein.
- [51] For this reason, successful claims of an unbalanced approach to the assessment of credibility have often involved other identifiable errors, such as a misapprehension of material evidence; speculative reasoning; an overemphasis on demeanour; or a failure to consider testimony in the context of the evidence as a whole. Again, see Wanihadie at para. 38 and the cases listed there.
- [Emphasis added.]
- [129] As can be seen, Roth does not stand for the proposition that it is an error of law for a judge to accept a complainant's explanation for problematic testimony while rejecting that given by an accused. "Standing alone, being disbelieved does not translate into uneven scrutiny": Roth at para. 143, citing R. v. Bartholomew, 2019 ONCA 377 at para. 31. More is required. An appellant must persuade the appeal court that the trial judge relied on a "demonstrably flawed assessment methodology or reasoning process that affected the credibility

determination": Roth at para. 50.

[130] In G.F. at para. 100, the majority judgment casts doubt on whether "uneven scrutiny" is a stand-alone ground of appeal. Nevertheless, Roth is binding in this jurisdiction. However, any application of Roth must be mindful of all the requirements, cautions and limitations expressed in that judgment.

[131] Mr. Davies submits that the judge "minimizes, rationalizes or excuses" all of the inconsistencies in the evidence of the complainant, B.B. and L.B., while finding every inconsistency in Mr. Davies' testimony to be damaging to his credibility. Worse, he says the judge found that Mr. Davies' version of events "does not make any sense" and is "implausible" for no discernable reason. I am unable to agree.

[132] I have already addressed and dismissed Mr. Davies' complaint that the judge mischaracterized major inconsistencies in the complainant's testimony as minor. In short, in my view, it was open to the judge to accept the complainant's explanations regarding the frailties in her evidence and to characterize the inconsistencies as she did. I have also determined that the judge made none of the other errors asserted by Mr. Davies. I will now focus on all that remains, namely Mr. Davies' complaints about the judge's treatment of his testimony.

[133] The judge identified a significant number of inconsistencies in, or other problematic aspects of, Mr. Davies' evidence, including:

- At trial, Mr. Davies testified that the complainant got on top of him and aggressively tried to put his flaccid penis in her vagina, but did not mention that in his post-offence text messages to K.B. and L.B.;
- In his text messages to K.B., Mr. Davies said he had digitally penetrated the complainant but, at trial, Mr. Davies did not mention digital penetration;
- At trial, Mr. Davies testified that the complainant performed fellatio and masturbated him at two separate times whereas in his text messages to K.B. he said "she started trying to jerk me off/giving me head";
- In his text message to K.B., Mr. Davies said that the complainant climaxed during digital penetration but, at trial, he testified it was during oral sex;
- In his text messages to K.B., Mr. Davies asserted that he learned of the complainant's version of events from L.B. and that her version "cast him as a villain" when L.B. shared no such information with Mr. Davies;
- At trial, Mr. Davies testified that he sent text messages to K.B. and L.B. to get B.B. to contact him, but Mr. Davies' text messages did not ask them to contact B.B. on his behalf;
- Mr. Davies testified that the complainant was perfectly fine when she was with him whereas the complainant and L.B. testified otherwise; and

· Mr. Davies testified that the complainant climbed over the front console to kiss him when the judge considered that to be a "difficult maneuver."

- [134] Mr. Davies argues that the judge failed to remind herself that Mr. Davies' text messages were not a statement to a person in authority or provided for purposes of a criminal investigation. He relies on passages in his text exchanges with L.B. that he did not know what was going on and was "sad because [he] lost [his] best friend over bullshit." With respect to his text messages with K.B., he complains that "[i]t did not occur to the trial judge that in tapping out text messages on a smart phone in response to an angry boyfriend, Mr. Davies might not have had the presence of mind or desire to include every graphic detail of the sexual encounter with the Complainant."
- [135] Respectfully, none of Mr. Davies' complaints demonstrates that the judge utilized a flawed assessment methodology or reasoning process. Rather, Mr. Davies disagrees with the weight the trial judge assigned to alleged inconsistencies. The fact that Mr. Davies takes a different view of the evidence does not amount to a palpable and overriding error: *R. v. Greif*, 2021 BCCA 187 at para. 50, leave to appeal to SCC ref'd, 39689 (4 November 2021).
- [136] The judge began her assessment of Mr. Davies' credibility by noting that aspects of his testimony were consistent with the testimony of other witnesses, including the complainant, B.B., L.B. and his mother.
- [137] Mr. Davies' text messages to K.B. and L.B. were not statements to the police, but they did not have to be for the judge to rely on them.
- [138] Within the text messages, Mr. Davies offered to provide "full detail" to K.B. He told K.B. it would "take a while." He then wrote an extremely long and very detailed message. The message was explicit about Mr. Davies' sexual interactions with the complainant and included many peripheral details. At the end of the detailed message, Mr. Davies said "Sorry that's really long, but that's legit every detail I can think of off the top of my head" and then after some further back and forth "I don't care if you believe me or not, that's what happened, every detail."
- [139] Notably, Mr. Davies did not assert in his testimony that he did not have the presence of mind to include every detail in his text messages to K.B. In fact, he admitted that he made the statements in the text messages and maintained they were comprehensive and accurate. In material respects, they were inconsistent and/or incongruous with his trial testimony. It was open to the judge to take the inconsistencies and incongruities into account in her assessment of Mr. Davies' credibility.
- [140] Objectively, the discrepancies between Mr. Davies' trial testimony and the highly descriptive text messages he sent to K.B. could fairly be characterized as "major." Unlike the inconsistencies in the complainant's testimony, the discrepancies related to the core allegations of the sexual activity at issue. It was open to the judge to accept the complainant's explanations for what were, in the judge's view, relatively minor

inconsistencies and reject Mr. Davies' asserted forgetfulness for far more significant inconsistencies.

- [141] The judge was understandably skeptical of Mr. Davies' asserted reason for exchanging text messages with L.B. and K.B. Yes, Mr. Davies had complained to L.B. about losing his best friend, but he did not ask either K.B. or L.B. for their assistance in reconnecting with her.
- [142] Moreover, the judge had reason to be concerned about Mr. Davies' assertion to K.B. that he had received certain information from L.B. about what the complainant was saying, when that was not the case.
- [143] As I found above, there is no basis to set aside the judge's finding that L.B. came before the court as an unbiased witness and it was open to the judge to reject Mr. Davies' testimony about the complainant's emotional state on the strength of the testimony given by the complainant and L.B.
- [144] On any fair reading of the reasons for judgment, the judge did not undertake a one-sided credibility assessment. She took equal care in rigorously reviewing the evidence of all the witnesses. She grappled with the strengths and weaknesses of the Crown and defence evidence before reaching her conclusions on credibility.
- [145] The judge did not accept all of the complainant's testimony but, in light of the evidence as a whole, she accepted the complainant's explanations for internal and external inconsistencies in her testimony.
- [146] On the other hand, the judge accepted some evidence favourable to Mr. Davies, including the testimony of his mother regarding the scratches on his back. She noted that aspects of Mr. Davies' testimony were consistent with other witnesses. She then expressed valid reasons for rejecting Mr. Davies' description of the sexual activity at issue and on the key issue of consent.
- [147] Respectfully, there were discernable reasons for the judge to find aspects of Mr. Davies' testimony implausible, non-sensical and lacking credibility. What is not discernable is any methodological or reasoning flaw in the judge's balanced credibility assessment.
- [148] I would dismiss this ground of appeal.

Disposition

- [149] Mr. Davies has not satisfied the test for adducing fresh evidence, and has failed to demonstrate that the trial judge committed any legal errors or made palpable and overriding errors in her findings of fact. Accordingly, I would dismiss his application to adduce fresh evidence and his appeal.
- [150] The Crown's fresh evidence application hinged on the admission of Mr. Davies' proposed fresh evidence. I would therefore dismiss the Crown's application to adduce fresh evidence.

"The Honourable Mr. Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Butler"

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