
CANADA / JUDGMENT

R. v. Felker

2012 BCCA 346

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 346 R. v. Felker

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Felker,

2012 BCCA 346

Date: 20120817

Docket: CA037347

Between:

Regina

Respondent

And

Paul Russell Deleno Felker

Appellant

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Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice K. Smith

The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, April 1, 2009,

(R. v. Felker, Prince George Docket No. 27534-3)

Counsel for the Appellant:

J.P. Gustafson

Counsel for the Respondent:

M.K. Levitz, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

June 14, 2012

Place and Date of Judgment:

Vancouver, British Columbia

August 17, 2012

Written Reasons by:

The Honourable Madam Justice Garson

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Smith

Reasons for Judgment of the Honourable Madam Justice Garson:

1. Introduction

- [1] Paul Russell Deleno Felker appeals his conviction for second degree murder. Mr. Felker had confessed to killing the victim in several statements he made to undercover police officers in the course of a "Mr. Big" type police operation in which police posed as criminals and invited Mr. Felker to join them in their criminal endeavours. Mr. Felker argues on appeal that the trial judge erred in instructing the jury that the law presumes incriminating statements to be true. The Crown acknowledges the error but says when examined in the context of the entire charge, it was a harmless error that may be cured by s. 686(1)(b)(iii) of the Criminal Code, R.S.C. 1985, c. C-46. The Crown also argues that the result was inevitable due to the overwhelming evidence implicating the accused.

2. Background

- [2] On July 24, 1990, the body of Cynthia Marie Burk was found on a rural property about 300 yards from a side road off the Old Alaska Highway between Fort St. John and Dawson Creek. The forensic pathologist determined the cause of death to be blood loss resulting from a wound to the throat. Police questioned Mr. Felker about the murder, in 2004, but did not arrest him.
- [3] In 2006, police launched an undercover operation in which officers posing as members of a criminal organization recruited Mr. Felker to assist them in their criminal endeavours in return for financial compensation. Eventually, the police informed Mr. Felker he might be allowed to participate in an upcoming activity with the organization described as the "Big Score", for which he would receive \$40,000. However, he was told that first the "boss" of the organization had to be certain that he had "no skeletons in his closet" that might compromise the security of the organization. The boss informed Mr. Felker that he had learned Mr. Felker was a suspect in Ms. Burk's murder; the police had DNA evidence against him; and this potential charge would have to be cleaned up before he could participate in the Big Score.
- [4] In a recorded conversation with the boss and other undercover officers, Mr. Felker admitted to having committed the murder.
- [5] Several days later, he directed two undercover operators to the general vicinity where Ms. Burk's body was found, on the pretext that this would assist the organization in cleaning up any traces of the crime. The initial statement given to the boss and the re-enactment were audio and video recorded.
- [6] Some of Mr. Felker's statements were inconsistent with other evidence at trial. He had difficulty identifying the exact location that he had disposed of the body, eventually leading the police during the re-enactment to a location about 1.6 km from where the body had been found in 1990. He also insisted that he had not been able to perform sexually with Ms. Burk and that he had worn a condom; however his semen was found in her vagina. Also, he claimed to have strangled Ms. Burk to death and then slashed her throat but there was no evidence of strangulation and the cause of death was blood loss due to the throat wound.
- [7] At trial, the Crown addressed these inconsistencies by arguing that they were a result of the significant lapse of time between when the murder was committed and when Mr. Felker was confronted about it through the Mr. Big operation and, during this time, the relevant area had changed significantly. It also argued that the season during which the re-enactment took place was entirely different from that at the time of the murder.

- [8] The defence argued that Mr. Felker had falsely confessed, pointing out a number of significant points, and some secondary details, on which he had been incorrect. The defence argued that he had a motive to lie as he would have lost out on the potential payment for participation in the Big Score had he not been able to satisfy the boss and he needed the boss's help to fix his problem with the police.
- [9] The relevant portions of the trial judge's charge to the jury are reviewed in more detail below. For now, it is sufficient to note that the judge warned the jury that they should be "extremely cautious" in accepting the Mr. Felker's statements to the undercover operators in the absence of supporting evidence and stated that an incriminating statement could only assist the Crown if the jury was convinced that it was true beyond a reasonable doubt, because "the law presumes any incriminating part of an accused's statement is likely to be true, otherwise why would an accused say so." It is this underlined portion with which Mr. Felder takes issue on appeal.

3. The Issues

- [10] As the Crown concedes the instruction that the law presumes an incriminating statement to be true was an error, the main issue on appeal is whether the charge can be remedied through application of the curative proviso of the Criminal Code.

4. Positions of the Parties

A. Position of Mr. Felker

- [11] Mr. Felker submits that special care must be taken when instructing a jury on the use of incriminating statements made to "unconventional" persons in authority, especially where there is fear of violence or promise of reward. He argues that, even if it could be said that the general warning was sufficient, its effect was completely undermined by the statement that "the law presumes any incriminating statement to be true."
- [12] At the hearing of the appeal Mr. Felker took no objection specifically to any inadequacy in the charge concerning the use of the evidence obtained through the Mr. Big operation, rather, the focus of his submissions was directed to the impugned instruction regarding the presumption of truth - noting, however, that the erroneous instruction was even more dangerous in the context of a Mr. Big confession.
- [13] Mr. Felker concedes that the jurisprudence permits a trial judge to tell the jury that, in considering a statement by an accused that is both incriminating and exculpatory (a "mixed" statement), incriminating statements are likely highly probative and exculpatory statements may not necessarily carry the same weight. This is commonly referred to as a "Duncan instruction" (see *R. v. Duncan* (1981), 73 Cr. App. R. 359 (Eng. C.A.)). However, Mr. Felker argues that the law does not permit such an instruction to be presented as a legal presumption. In other words, he submits that, where an accused provides a mixed statement, it is an error of law to state that the law presumes that any incriminatory part of

the statement is presumed to be true. He adds that this principle also clearly applies in the context at hand, where there was a general instruction that incriminating statements are presumed to be true.

- [14] Mr. Felker submits that the impugned instruction is fatal to the jury charge. He argues that it established a clear starting point for the jury; they were to presume the accused's statement was true once they were certain that he had made it. He submits that such a presumption is contrary to both the Crown's burden of proof and the presumption of innocence. He argues the error is not trivial or inconsequential and was not offset by the balance of the charge. He seeks to have the verdict set aside and a new trial ordered.

B. Position of the Crown

- [15] The Crown argues that the trial judge did draw the jury's attention to the specific concerns of confessions obtained from undercover investigations, including several factors which may have caused him to lie, and warned the jury to be extremely cautious in accepting Mr. Felker's statements in the absence of supporting evidence.
- [16] The Crown concedes that the statement that there is a presumption ought not to have been included in the charge and also concedes that appellate courts have frowned upon the use of Duncan instructions. It submits that the curative proviso ought to be applied because no substantial wrong or miscarriage of justice occurred. It argues that the error was harmless when considering the charge as a whole as the jury would have understood that its role was to assess the reliability of the Mr. Felker's statements.
- [17] The Crown also argues that the case against Mr. Felker was so overwhelming that a conviction was inevitable even without the error.

5. Analysis

- [18] I begin by reviewing the authorities that discuss the law relevant to the impugned instruction that incriminating statements are presumed to be true and the proper use of the curative proviso.
- [19] I will then review relevant excerpts from the jury charge before addressing the application of the curative proviso. As discussed in the authorities, there are two branches to the curative proviso. The first concerns errors of a minor nature that could not impact the verdict - the so-called harmless error branch of the curative proviso. The second branch of the curative proviso applies in the face of serious errors which would justify a new trial but for the overwhelming nature of the evidence. I conclude that the erroneous instruction made in this case cannot be characterized as a harmless error even when examined in the context of the whole charge. The balance of my analysis therefore focuses on the question of whether the evidence against Mr. Felker was overwhelming, thus making a conviction inevitable.

A. The jurisprudence regarding Duncan instructions and the curative proviso

[20] The curative proviso is found at s. 686(1)(b)(iii) of the Criminal Code. It provides in part that:

(1) On the hearing of an appeal against a conviction ... the court of appeal

...

(b) may dismiss the appeal where

...

§ (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or ...

[21] In support of his argument that the judge erred in his instruction to the jury, the appellant relies on *R. v. Illes*, 2008 SCC 57, [2008] 3 S.C.R. 134; *R. v. David and Seitcher*, 2006 BCCA 412, 213 C.C.C. (3d) 64; and *R. v. Rojas*, 2008 SCC 56, [2008] 3 S.C.R. 111. These cases discuss Duncan instructions.

[22] In *Illes*, the main evidence at the murder trial was the testimony of three witnesses and six letters written by the accused to associates while he was in custody. Some letters laid blame on a Crown witness and others contained instructions to his then wife and her uncle to assist him in attempting to mislead the police into believing that the letters accusing the other party had been written months earlier. The Crown argued that the letters were post-offence conduct indicative of guilt.

[23] The judge gave a Duncan instruction and, as cited at para. 15, stated that:

On the other hand, any portion of the statements that tend to incriminate Mr. Illes in the commission of the offence only assist the Crown's case if you are convinced that portion is true beyond a reasonable doubt. This is because the law presumes any incriminating part of the accused's statement is likely to be true, otherwise why would an accused say so. [Emphasis added.]

[24] Therefore, like this case, the trial judge took the Duncan warning one step further and elevated common sense reasoning to a presumption of law.

[25] Justice LeBel and Justice Fish, speaking for the majority, concluded that the statements made by the judge could have confused the trier of fact to conclude that the incriminating interpretations of the evidence were presumptively preferable to exculpatory interpretations. They held that, given that the incriminatory and exculpatory evidence derived from the letters was dependent upon the interpretation of the same statements in the letters, it was entirely possible that the jury would interpret the direction as one to prefer an incriminating inference over the exculpatory plain meaning of the statements as a matter of law.

- [26] In *Illes*, the majority described the application of the curative test:
- [21] The question, then, is whether this potential for jury confusion warrants a new trial. It is well established that an improper jury instruction constitutes an error of law within the meaning of s. 686(1)(a)(ii) of the Criminal Code, R.S.C. 1985, c. C-46, and that a new trial may be granted as a remedy under s. 686(2)(b) unless the harmless error proviso of s. 686(1)(b)(iii) applies. The Court has repeatedly held that the proviso can only be invoked with respect to "errors of a minor nature having no impact on the verdict" or "serious errors which would justify a new trial, but for the fact that the evidence adduced was seen as so overwhelming that the reviewing court concludes that there was no substantial wrong or miscarriage of justice" (*R. v. Trochym*, [2007] 1 S.C.R. 239, 2007 SCC 6, at para. 81 (Deschamps J., for the majority), quoting *R. v. Khan*, [2001] 3 S.C.R. 823, 2001 SCC 86, at para. 26 (Arbour J., for the majority)). More succinctly, "the proviso should only be applied where 'the evidence is so overwhelming that a trier of fact would inevitably convict'" (*R. v. Charlebois*, [2000] 2 S.C.R. 674, 2000 SCC 53, at para. 11 (Bastarache J., for the majority), quoting *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, at p. 916 (Sopinka J., for the majority)). [Emphasis added.]
- [27] The majority held that, as the letters were a principal element of the Crown's case, the error was not harmless. It also held that it could not conclude that the evidence was so overwhelming that the jury would inevitably have reached the same result if properly directed on the law, noting that: the jury had deliberated for over four days; the erroneous portion of the charge was repeated on the day that the verdict was rendered; the Crown's three main witnesses were subject to strong *Vetrovec* warnings; and the accused did not testify himself.
- [28] In *David*, both accused gave statements to the police, initially denying their guilt and subsequently admitting some level of involvement. Both retreated from their previous statements in their testimony at trial. Some of the victim's blood was found on the shoes of one of the accused and the victim had been found lying on the jacket of the other accused.
- [29] The trial judge gave a *Duncan* instruction and also stated that the law presumes any incriminating part of the statement to be true. In discussing whether there was an unfair trial, Justice Ryan, for the Court, held:
- [42] ... While an appeal court will look at each case to determine whether a like charge has led to an unfair trial, it is dangerous for a trial judge to instruct a jury that inculpatory and exculpatory statements ought to be weighed differently. Trial judges should leave such "common sense" arguments to the lawyers in their closing addresses.
- ...
- [44] Returning to the case at bar, the question is whether the instruction by the trial judge resulted in an unfair trial. The appellants made statements to the police that were alleged by the Crown to be incriminating. At trial both appellants resiled from their statements to the police and explained, under oath, why they made false statements to the police. The trial

judge told the jury that the law presumes incriminating statements to be true. This transformed what otherwise might have been a suggestion as to how the jury could approach the weighing of the evidence to a rule of law that they were obliged to apply. In my view, thusly put, the charge effectively took away the defence of both appellants. The admonition that the jury not use the statements unless they were satisfied beyond a reasonable doubt that the statements were true cannot save the charge because the truth, or partial truth, of the statements was the very matter the instructions were meant to address.

[Emphasis in original.]

[30] In the result, the appeal was allowed and a new trial ordered.

[31] The above passages from David are cited with approval by the Supreme Court of Canada in Rojas at para. 40.

[32] In R. v. Reynolds, 2007 BCCA 348, 244 B.C.A.C. 135, the victim died a day after he fell and hit his head on the sidewalk. The issue was whether he lost his balance or whether the accused assaulted him and caused the fall. When speaking with the police, the accused denied assaulting the victim. The accused also gave two mixed statements to civilians who stopped at the scene immediately after the incident. In one of the statements, he did not deny that he had punched the victim before he fell but stated that the victim attempted to hit him first. In the other, given 10 or 15 minutes later, he stated that the victim had slipped and fallen.

[33] More than once, the victim told police or ambulance workers that he had lost his balance and fallen but he also said once that he may have been punched. The victim's blood was found on the accused's shirt and the ambulance driver saw some blood on the victim's nose. Expert evidence stated that the victim had sustained injuries to his face probably within a couple days of death. The accused did not testify but a witness with memory deficits and other problems relevant to reliability firmly stated that the accused had struck the deceased unexpectedly.

[34] The trial judge's instruction concerning the statements provided that the jury should consider all of the evidence to determine if the statements are true and a Duncan instruction was given. The trial judge then stated (quoted at para. 21):

Part of the statement allegedly made by Jody Reynolds is exculpatory in the sense that it denies that he committed the offence, or provides an innocent explanation. If you find it reasonable to believe the part of Jody Reynold's statement where he denied committing the offence by offering an innocent explanation, then the statement may raise a reasonable doubt in your mind as to his guilt. Even if you do not believe that part of Jody Reynold's statement denying he committed the offence by offering an innocent explanation, it may still raise a reasonable doubt in your mind as to his guilt. On the other hand, any portion of his statement that tends to incriminate Jody Reynolds in the commission of the offence only assists the Crown's case if you are convinced that portion is true beyond a reasonable doubt. This is because the law presumes any incriminating part of an accused's statement is likely to be true. Otherwise, why would the accused say so?

[Emphasis added by Smith J.A.]

[35] Because in Reynolds the Crown conceded the Duncan instruction was an error, the issue was whether the curative proviso should be applied. This Court cited the test from Justice Deschamps' majority decision in *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239:

81 In *R. v. Khan*, [2001] 3 S.C.R. 823, 2001 SCC 86, at para. 26, Arbour J., writing for the majority, stated that "[t]here are essentially two classes of errors which have been identified by reviewing courts and which have led to a proper application of the proviso. The first category is that of so-called 'harmless errors', or errors of a minor nature having no impact on the verdict. The second category encompasses serious errors which would justify a new trial, but for the fact that the evidence adduced was seen as so overwhelming that the reviewing court concludes that there was no substantial wrong or miscarriage of justice." With respect to serious errors, Arbour J. (at para. 31) cited Sopinka J. in *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, at p. 916, in support of the proposition that the proviso is applicable only if "the evidence is so overwhelming that a trier of fact would inevitably convict. In such circumstances, depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction."

82 The instant case is one that falls squarely within the second category of serious errors that will justify a new trial unless the properly adduced evidence is so overwhelming that a conviction is inevitable, or would invariably result. This standard should not be equated with the ordinary standard in a criminal trial of proof beyond a reasonable doubt. The application of the proviso to serious errors reflects a higher standard appropriate to appellate review. The standard applied by an appellate court, namely that the evidence against an accused is so overwhelming that conviction is inevitable or would invariably result, is a substantially higher one than the requirement that the Crown prove its case "beyond a reasonable doubt" at trial. This higher standard reflects the fact that it is difficult for an appellate court, in particular when considering a jury trial, since no detailed findings of fact will have been made, to consider retroactively the effect that, for example, excluding certain evidence could reasonably have had on the outcome.

[36] The curative proviso was not applied in Reynolds. The Court held that the error was a serious one because the defence of self-defence rested entirely on the accused's statement and, in telling the jury that the exculpatory part should be assessed on a different standard, the trial judge effectively took away the accused's defence. The Court added that the instruction may also have unjustly bolstered other evidence favourable to the Crown's case. It concluded that the outcome at trial might have been different were it not for the error and declined to apply the curative proviso.

[37] In *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, Lebel J. for the majority described the limited nature of the first branch of the curative proviso, from which I conclude in the discussion below that the harmless error branch of the curative proviso is not applicable here despite the balance of the judge's charge which emphasized the need to question the truthfulness of the confessions:

[35] In *Khan*, this Court reviewed these two categories of error and explained the basis for upholding convictions in the face of these errors. An error falling into the first category is an error that is harmless on its face or in its effect. The proviso ensures that an appellate court does not need to overturn a conviction solely on the basis of an error so trivial that it could not have caused any prejudice to the accused, and thus could not have affected the verdict. Indeed, it would detract from society's perception of trial fairness and the proper administration of justice if errors such as these could too readily lead to an acquittal or a new trial (e.g. *Chibok v. The Queen* (1956), 24 C.R. 354 (S.C.C.), at p. 359). This is consistent with Lamer C.J.'s pronouncement in *R. v. Jacquard*, [1997] 1 S.C.R. 314, that, in respect of errors in a trial judge's charge to the jury, "accused individuals are entitled to properly instructed juries. There is, however, no requirement for perfectly instructed juries" (para. 2 (emphasis in original)). Thus, a slight deviation from the standard of a perfect jury charge is likely to constitute a harmless error that could justify upholding a conviction. Errors might also be characterized as having a minor effect if they relate to an issue that was not central to the overall determination of guilt or innocence, or if they benefit the defence, such as by imposing a more onerous burden on the Crown (*Khan*, at para. 30). The question of whether an error or its effect is minor should be answered without reference to the strength of the other evidence presented at trial. The overriding question is whether the error on its face or in its effect was so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial, that any reasonable judge or jury could not possibly have rendered a different verdict if the error had not been made.

[38] At para. 36, the majority further held that:

Thus, an appellate court is justified in refusing to allow an appeal against a conviction in the event of minor errors that could not possibly have affected the verdict and more serious errors that were committed in the face of an overwhelming case against the accused, since the underlying question is always whether the verdict would have been the same if the error had not been committed: *R. v. Bevan*, [1993] 2 S.C.R. 599.

B. Relevant excerpts from the charge to the jury

[39] In the course of instructing the jury on how to approach the credibility or truthfulness of witnesses, the trial judge cautioned the jury for the first time about how they should approach Mr. Felker's confession. The trial judge stated:

In this case you heard evidence arising from an RCMP undercover operation in which police officers pose as members of a criminal organization. I will have more to say about this evidence later in these instructions but I want to say to you at this stage that you should approach this evidence with the utmost caution. [Emphasis added.]

[40] The trial judge gave a specific direction that the jury must decide if the statements made to the undercover police officers were true. To assist the jury in determining if the statements were true, he instructed them to look for confirmatory evidence, and also inconsistent or conflicting evidence:

On the other hand, if you are satisfied beyond a reasonable doubt on the whole of the evidence that the accused did make those statements, then you must go on to the second step and decide whether they are true.

To determine whether or not the alleged statements are true, you should consider all the evidence. Only as examples, you should look for evidence that appears to confirm or support the statements. In this case, you will have to look to and consider primarily the physical evidence gathered at the scene where the body was recovered and that obtained during the course of the autopsy and the subsequent scientific examinations of samples taken during the course of the autopsy. In considering this issue, look to all that body of surrounding evidence.

Secondly, you should examine the evidence as a whole and ask yourself whether there is evidence that appears to contradict the statements. And in this respect you will have regard to Mr. Gustafson's submissions to you in his jury address that internally within the statements made by the accused to the undercover operators, there are inconsistent statements and contradictions in some cases within the body of those statements. That constitutes evidence, as does the body of evidence recovered at the scene where the body was located and what he urges on you is your comparing some of that evidence to what is said during the course of the statements. That is very generally the body of evidence to which you must look.

[Emphasis added.]

[41] He noted that defence counsel emphasized contradictions and inconsistencies in the statements and provided an example. He then instructed that: "[i]t is for you to look at the whole of these statements, including inconsistencies and try and determine what evidentiary value they have and what they mean." The trial judge warned the jury that the circumstances of the undercover operation could have influenced what the appellant chose to say to the undercover officers and may have caused the appellant to not tell the truth. The trial judge also set out the factors which could have influenced the appellant to not tell the truth, stating:

In this trial, the circumstances behind the undercover operation have been described and the activities and simulated criminal activity have been outlined to you. These activities give rise to a number of concerns which you should consider. These considerations include the apparent desire of the accused to remain associated with the members of this organization, the potential big payoff he stands to make from the big score if he's allowed to participate and the benefit he stands to gain in terms of the police investigation if he can have the organization and particularly the boss assist him with the investigation and the evidence the police apparently have. Each of these factors could have influenced what the accused chose to say to the undercover operator and they may not have caused him to tell the truth. You will have to consider carefully what factors

were affecting the accused at the time these conversations took place and how they might have affected what he told them. [Emphasis added.]

[42] The trial judge immediately followed this instruction by giving the jury a strong warning to be extremely cautious before accepting the truth of the appellant's statements in the absence of confirmatory evidence. He stated:

In addition, however, I warn you that you should be extremely cautious in accepting the accused's statements to the undercover police officers in the absence of supporting evidence. As judges of the facts, you are entitled to accept that evidence if, in the end, you consider it reliable. But do so and approach it with the utmost caution and consider it carefully. You should examine all the other evidence in this case and look for evidence that supports or confirms the accused's statements to the officers or parts of them. The supporting evidence would be evidence that makes you more confident the contents of his statements or parts of them are true. [Emphasis added.]

[43] The judge then pointed out some consistencies between the appellant's statement and the other evidence, and concluded this passage by warning the jury that this was not an entirely one-sided case, stating:

In the examination of the whole of the evidence it is sometimes the little things which provide such evidence. As but single examples only, you will recall that the accused described breaking off some saplings or twigs both to cover the body and to use as a kind of brush to wipe out his tracks. The police officers who attended the scene where the body was found described the broken saplings and twigs in the area and there are a series of photographs of them in Exhibit 12.

Secondly, there are some facts that the accused got exactly right, such as the fact that he said he left the deceased's body in the bush face up, which was how she was found. This is not entirely one sided is all I am saying to you, members of the jury. This is very much a puzzle. There are some things that are consistent, there are some things that are not. I suspect that that will be the most difficult part of your task to approach.

[44] The trial judge then instructed the jury that any portion of a statement that tended to incriminate the appellant could only assist the Crown if the jury was convinced that the portion was true beyond a reasonable doubt. He followed this with the impugned instruction.

In this trial, the statement of the accused as recounted by the undercover police officers and recorded in the various recordings contain a variety of what you may find to be admissions. In the ordinary course of human behaviour, it often occurs that statements of an incriminating nature such as admissions or confessions are likely to be true. Otherwise, why say them? You will recall I told you earlier that you do not have to accept or reject everything a witness says. The same thing applies to these statements by the accused. You may believe all of them, part of them or none of them. Please keep in mind that the accused is entitled to the benefit of any reasonable doubt you may have including a reasonable doubt about the truth of these statements or any part

of them. Parts of the statements allegedly made by the accused are contradictory, either within the context of the statements as a whole or when considered in light of other physical and scientific evidence. Any portion of the statement that tends to incriminate the accused in the commission of the offence only assists the Crown's case if you are convinced that portion is true beyond a reasonable doubt. That is because the law presumes any incriminating part of an accused's statement is likely to be true, otherwise why would an accused say so. [Emphasis added.]

[45] The trial judge concluded his instruction regarding the appellant's confession by emphasizing to the jury that it was up to them to decide how much weight to give to the statements, stating:

Finally, I want to emphasize that it is up to you to decide how much weight or importance, if any, you should give to the statements or any parts of them

[46] Defence counsel did not object to any portion of the charge.

C. Whether the harmless error branch of the curative proviso should be applied

[47] As noted already, Mr. Felker argues in his factum that even if the instruction drew sufficient attention to the need to treat statements made in a Mr. Big operation with caution, the charge was totally undermined by the instruction that the law presumes an incriminating statement to be true.

[48] It is not contentious that the statement that there is a presumption was an error. Viewing the entirety of the charge, I would not go so far as the appellant does in saying that the erroneous instruction undermined the rest of the charge. The jury was sufficiently warned regarding the dangers of Mr. Big statements. As instructed, the jury would have understood that their main task was to determine if Mr. Felker's confessions were true. That is what the case was about.

[49] Although it is my view that the erroneous instruction when examined in the context of the whole charge was unlikely to have confused the jury, I cannot conclude with confidence that it could not have misled the jury. The instruction was a fundamental contradiction concerning the standard of proof. It was not a minor, technical, or trivial error. It would be wrong to characterize the error as harmless.

D. Whether the inevitable conviction branch of the curative proviso should be applied

[50] As I explain below, here, the independent evidence, much of which corroborates very specific comments made to the police during the Mr. Big investigation, leads me to conclude that conviction was inevitable.

[51] I now turn to a more detailed review of the evidence. In brief, the facts that are not in dispute include the following:

- Ms. Burk was murdered early in July 1990;
- Her naked body was found on July 24, 1990, in a bush off the old Alaska Highway by the Kiskatinaw River, between Fort St. John and Dawson Creek;
- Her throat had been cut and the resulting blood loss was the cause of her death;
- During an undercover operation in 2006, Mr. Felker confessed to murdering Ms. Burk;
- Mr. Felker's semen was found in Ms. Burk's vagina; and
- Ronald Bray testified that jewelry in his possession, belonging to and later identified by his then wife, had been stolen from his apartment after Ms. Burk spent time there and the jewelry was found scattered near the scene.

[52] The first statement took place in a hotel room in Vancouver on October 27, 2006. Three undercover police officers were present at first. Mr. Felker was introduced to the alleged crime boss, "D". After his two assistants left, D had a lengthy conversation with Mr. Felker, discussing in detail Mr. Felker's involvement in the killing of Ms. Burk. Their conversation was video and audio recorded.

[53] The second confession was more in the nature of a re-enactment. It took place on October 31, 2006. Two undercover officers, N and RD, met with Mr. Felker in Fort St. John and the three travelled in a rented vehicle to the location that Mr. Felker identified as the place where he had disposed of Ms. Burk's body. He also pointed out landmarks along the way, such as where he first encountered Ms. Burk and where he disposed of her clothes and the knife.

[54] Below I examine Mr. Felker's statements regarding specific factual matters pertaining to the death of Ms. Burk.

I. Description of killing Ms. Burk

[55] As recorded in the transcript of the October 27, 2006, undercover operation hotel meeting, Mr. Felker's discussion of the offence began with the undercover police advising him that they had been informed by their sources that police were looking into the murder of Ms. Burk and that an arrest was pending. D said, "and they got some DNA too and you know how that is?" Mr. Felker did not deny his involvement, rather his response was "Fuck". A few minutes later Mr. Felker gave a brief narrative of how the murder occurred. In that explanation, he denied having "sex with her or anything". He said:

I was coming into town about 6 o'clock and I, and I met this woman, I was on parole and she was drinking and she wanted me to take her to Dawson. And, uh, she was drinking rum, straight, mixed with, with, uh, moonshine. And we, she started slapping me because she wanted me to

take her to Dawson, I said, no, I'm gonna turn around, I'll drop you off here. And she went to hit me with the bottle and I went like that. She hit her head on the door and I pulled off and I felt her, soon she was dead. So I drug her in the bush. Never, previous, I never had sex with her or anything. I drug her in the bush, left her and I went back to the ranch. I had, I just never said nothing to nobody. But here, 2004, the police did come and talk to me. I said, I don't know anything about it, other than what I heard on the news. And, you know, like I've, I've lived with this.

[56] After D expressed some skepticism about the truth of Mr. Felker's statement and pressed him again for full disclosure, Mr. Felker stated "It's hard for me" and then gave a different description of the murder. He described how he had had difficulty getting an erection and that Ms. Burk was performing oral sex on him. He stated that he had gotten mad and "went nuts" and then "choked her to death". He reported that the following then occurred:

F: And then I, I realized what I did. I drug her out of the truck and I took her in the bush and she had a knife in her purse and I, I don't know what side I cut but I cut her. I tried to cover her up in the bush. I took everything and I drove and drove and finally, she had some jewelry and I got rid of it.

[57] He reported that he took Ms. Burk's clothes, put them in a bag, put a rock in the bag and threw it in the Peace River. Later, Mr. Felker and D again discussed the way that the murder was committed:

D: ...Um, so, correct me if I'm wrong, if I'm hearing this wrong. You're in the truck, uh, you start having some sex, she's giving you a blow job, whatever, you end up trying to fuck her but you can't and then you choke her in the truck. But haven't, that's not where you stabbed her, right? Am I right about that?

Mr. Felker: No, I, later.

D: Ok. So you basically choke her. That's it and it's done and then you think. "Holy fuck." Now you want to get rid of her. That's when you take her up in the bush?

Mr. Felker: Yeah.

D: And that's when you find that knife and you stab her? What's you do to her?

Mr. Felker: I cut her throat.

...

D: And , um, and I'm just gonna assume that that was to make sure that the job was done, right? So she's not gonna come back cause sometimes people do, my experience is sometimes when you choke people, they're not necessarily dead. You think they are but they're not. Fair enough?

Mr. Felker: Right.

[58] And later still:

D: ...really. If you just choked her. Um. And then what happens? That, that happens. Choked her. Then what do you do?

Mr. Felker: I got out and I drug her over in the bush quite a ways. And I think I did limbs and grass, dead leaves on her before I done that though I cut her throat. I don't know how deep it was.

[59] During that same meeting, D asked Mr. Felker why there was no blood in the body where it was found and no blood on the ground around the body either. The following was said:

Mr. Felker: I can't remember where I cut her at that time. But well I know it wasn't, it was quite a ways from the truck.

D: Okay, well I'm confused. Cause I thought you told me that, you know, when you took her over there and then you, then you cut her. So where'd you cut, fucking cut her because um this says there's no...

Mr. Felker: Before I...

D: Blood in her body.

Mr. Felker: Before I bury, put, put those leaves on, I'm pretty sure.

D: But, okay.

Mr. Felker: But it was in the bush.

D: But not right there?

Mr. Felker: No.

D: Because there's no, they're, they're saying there's no blood there and that she was, basically that she had no blood left in her body.

...

Mr. Felker: Uh before, she, I done it, I think I done it, I did it before. Because it was kind of a slope. I think I had her by the hind feet, or by the, by the feet. And I remember dragging her. Then into a kind of like ditch.

...

D: So where was that in like? What I'm trying to figure out here is where, where's the fucking blood? If it wasn't there. Like where, where you left her. You're saying it happened between the truck and there?

Mr. Felker: Yeah. Half way. I'm pretty sure.

...

D: It doesn't make sense to me. Like I can see you doing that, like you dump her and you go fuck I better make sure it's finished. But why between the truck and there? I don't get that...

...

D: Was she still alive?

Mr. Felker: No.

D: 'Cause I was, you know, I'm just thinking like well, if I was you, if while I'm dragging her she moans or groans, I might think well hey, she's not fucking dead yet.

Mr. Felker: Yeah.

D: But, but that wasn't the case?

Mr. Felker: No.

[60] Mr. Felker's statement above provides that he had thought he had dragged the body by the feet. During the re-enactment, he told RD and N that he dragged the body by the arms about 50 feet after slashing Ms. Burk's throat.

[61] During the re-enactment, when RD and N took Mr. Felker to the scene, he gave the following account of the murder:

Mr. Felker: I parked the truck and we started fooling around there. She was trying to give me a blow job, and I put a condom on, she look her clothes off and I couldn't get it up, I tried, and fooled around, she hit, slapped me. And you know like, I seen instant red and I, started to choke her. And she kept on hollering, talk to me, talk to me, and I choke her, till she didn't move. I got out of the truck and I drug her in, in the bush. But part way to the, to the bush, I took that knife and I cut her.

[62] After answering questions about the weapon used, he stated: "And I drug her in, and there was kind of a ditch. And I drug her in there, I covered her with limbs, leaves, whatever I could dig up..."

[63] In the re-enactment scenario, Mr. Felker seemed unclear about where all the blood had been. He stated that she must have bled before he put her in the ditch, that he knew he had put "a bunch of leaves" when he came back and "seen that blood", and that he was pretty sure that when he saw the blood it took "quite a big area to cover that blood up". Later in the re-enactment, he again commented upon the murder, stating that the pool of blood was "halfway" and then dragged her further into the bush.

[64] In potential conflict with Mr. Felker's confession that he strangled Ms. Burk before he cut her, is the evidence of the forensic pathologist, Dr. Jennifer Rice. She testified that the wound to Ms. Burk's throat was "obviously caused by a knife or similar instrument" and that "it was obviously a relatively wide blade that caused the stab wound."

[65] Dr. Rice testified that Ms. Burk bled to death from the cut to her throat. She testified that the large veins on the right side of the neck were completely severed leading to a very quick death due to blood loss. There was virtually no blood left in her body. Dr. Rice opined that

Ms. Burk was not manually strangled and that strangulation sufficient to cause death would leave certain marks that would not have been obscured or obliterated by the neck wound. During cross-examination, she firmly stated that the neck wounds were made while Ms. Burk was alive. Dr. Rice also testified that there would have been a large amount of blood on the body and around the body when Ms. Burk was killed. She testified that it appeared to her that the body had been cleaned. There was no blood around the body at the site where it was found.

- [66] Mr. Felker's statement is inconsistent with the evidence of Dr. Rice that Ms. Burk was not strangled. But his admission that he cut her throat is consistent with Dr. Rice's evidence in other respects. He said he dragged her body out of the truck "quite a ways" and covered her with "limbs and grass". He also said that he cut her throat before he dragged her body to the spot where it was left. That is consistent with Ms. Burk being stabbed in another location and with the fact that there was no blood in the bush where she was found.

II. The DNA evidence

- [67] In the first confession, Mr. Felker stated that he had been wearing a condom and had been unable to get an erection. During the first confession, when D put to him that the condom must have leaked because semen was found in Ms. Burk's vagina, Mr. Felker agreed with D that it "[m]ust have". However, he did not admit that he ejaculated. In the re-enactment, he again stated that he had worn a condom and had been unable to get an erection. He stated that he did not ejaculate.
- [68] The expert evidence at trial, obtained through testing vaginal washings, was that Mr. Felker's semen was found inside the victim's body.

III. The Jewelry and the knife

- [69] In regards to the knife he had used, Mr. Felker told the police in his first statement and in the re-enactment that it had come from Ms. Burk's bag. For example, in the first meeting, he confirmed that it was not his knife:

D: ...So this, this knife, then they can't put that back to you because you said she had it.

Mr. Felker: She had it.

D: Correct? Yeah, right. Like, if you'd already, well it doesn't matter why, but why, why did you?

Mr. Felker: I don't know I just, sometimes I get very impulsive.

- [70] In the re-enactment, he also told the police that "it wasn't a cheap knife, it was a well made sharp knife" and that it was not a butterfly knife but was "just like a hunting knife".

- [71] In his first statement, he told D that he "wiped [the knife] off good" and threw it away in a bag with a rock in it into the Peace River with Ms. Burk's clothing. In the re-enactment, he identified the bridge where he stopped and disposed of Ms. Burk's bag of clothing and the knife, which he had wiped with paper towel.
- [72] In the re-enactment, he described the knife in detail, commenting on its length as being approximately 5 ½ inches and stating that the handle was "a kind of a black and silver handle, about half the guards were chromed...".
- [73] Mr. Felker said that later when he got home he burned his own clothes and Ms. Burk's shoes. He did not throw her shoes into the river because he feared they would float. In the first statement, Mr. Felker told the police that Ms. Burk had had some jewelry with her and that he "got rid of it". When pressed for more information, he responded that he "threw it all over". He said, "like I'd stopped and I threw some shit, a bunch of Indian jewelry necklaces and I threw some over here and I, I drove down to Watson River and threw some in the River" and that "I walked quite a ways down in the bush when I threw that jewelry away". In the re-enactment, he told the police that Ms. Burk had had a bunch of jewelry, including necklaces. He said, "[b]ut I took them, I went to the other side of town, then...walked down the bush, and threw them as far out into the bush as I could."
- [74] Mr. Felker's statements that Ms. Burk had a knife in her possession and a collection of jewelry are consistent with other evidence, particularly that of the witness Mr. Bray. According to his evidence, Mr. Bray had met Ms. Burk at his lodge/restaurant. She had had Indian jewelry she wanted to sell. Later, Ms. Burk appeared outside of Mr. Bray's home in the company of two other people. After a fight broke out between Ms. Burk and her companions, the other two ran off and Ms. Burk went into Mr. Bray's restaurant. She later sought to come into his house to watch television, the two had sex and Mr. Bray left Ms. Burk at his home while he went into Fort Nelson for business reasons. He testified that while he was in Fort Nelson some things were taken from his property: "a bunch of hunting knives along with a bunch of my wife's jewellery". Mr. Bray described the missing knives as follows:

They were just like sharp little knives that was a pretty good value, you know, some of them. Like, buck knives, you know. And some of them, then again, weren't as valuable either. You know, I tend to -- at that time I was collecting knives....

- [75] He testified that he had several styles of knives of varying sizes; the largest one being a hunting knife, perhaps about a foot long, and the smallest being very small buck knives.
- [76] At trial, Patsy Withrow, the former spouse of Mr. Bray, identified several pieces of jewelry found near Ms. Burk's body as her own. She had left Mr. Bray in early July and moved to Fort St. John. She and Mr. Bray had lived in a small one bedroom trailer on his property. She had left her jewelry in a jewelry box in the bedroom. When she returned from Fort St. John and went to the trailer, all the jewelry except one ring was missing. She spoke to the police around that time and identified most of the jewelry that was found in the bush near the body as her own. At trial, she identified several of the items of jewelry as hers.

[77] Ronald Horne was the owner of property near where the body was found. This property is between Fort St. John and Dawson Creek near the Kiskatinaw River. He testified that he was in the process of building a log house on the property. On July 24, 1990, he and his family visited the property to view the progress of construction and found some jewelry on the ground at the bottom of the road. They followed a path that lead to the discovery of Ms. Burk's body. He described the jewelry as two types "[s]ome quite nice stuff, silver, turquoise like they may -- would make in -- Navahos would make that kind of stuff. And then there was costume jewelry too, just neck chokers and things like that." Mr. Horne collected the jewelry that they found and turned it over to the police.

IV. Ms. Burk's travel plans

[78] Mr. Felker said in his first confession that he picked up Ms. Burk hitchhiking on the outskirts of Fort St. John on the Old Alaska Highway from where he picked her up "in town", that is Fort St. John. He said that she wanted a ride south to Dawson Creek.

[79] This evidence is consistent with the evidence of Ms. Burk's common law spouse, Stewart Blackjack. He and Ms. Burk had been staying and working on a temporary basis in Fort Nelson (north of Fort St. John). Their plan had been to save enough money to travel south to Regina. But Ms. Burk left without him, and he last saw her in Fort Nelson headed south in the passenger seat of a van. Tim Leguerrier, an employee of Mr. Bray's business, testified at trial that Ms. Burk had told him that she planned to go to Saskatchewan by bus.

V. Site where the body was found

[80] In his first statement, Mr. Felker told the police that he had tried to cover up the body in the bush. He also said that he dragged her into the bush after choking her and said, "I think I did limbs and grass, dead leaves on her" and that he "drug her into a kinda of a ditch" and "threw a bunch of sticks and limbs and dead leaves and grass on her".

[81] At one point in the re-enactment, Mr. Felker pointed to a location where he stated he recalled that he had pulled off the road with Ms. Burk. He told the police that they had "started fooling around there" before he choked her. The following was then said:

Mr. Felker: And I drug her in, and there was kind of a ditch. And I drug her in there, I covered her with limbs, leaves, whatever I could dig up. When I left I broke off some branches, and wiped my tracks out all the way going back to my truck. And her bag, I made sure everything was in it, and I went back out this way. But I'm damn sure this, this looks about far enough down. But go up that way to see.

Cst. N.: Ok, so when you got back to your truck you grab her shit and you started driving that way again?

Mr. Felker: Yeah.

- [82] He also told the police that she was naked when he was dragging her into the bush and that he left her, face up, on the ground. This was consistent with the manner in which the body was found. Mr. Horne testified that when he found the body in an excavation where a stump had been pushed over and that the body had some willows thrown over it.
- [83] The transcript of the October 31, 2006, re-enactment discloses that from the time the undercover officers joined him in the rental car, he gave directions to the location of the murder with no assistance from the undercover officers. The officers told him that the boss had said to "...take it from the beginning." He described where he first saw Ms. Burk and picked her up as she was hitchhiking. He told the officers that she said she was going to Dawson Creek. That is consistent with her wishing to travel south and eventually to Regina. As the three drove along the highway Mr. Felker pointed out the location where he stopped at the Kiskatinaw River. It was a highway rest stop with public bathrooms. Both he and Ms. Burk used the bathrooms. He and Ms. Burk then got back in his vehicle and continued on towards Dawson Creek.
- [84] During the re-enactment, although he was able to take the undercover operators close to the site where the body was found, Mr. Felker could not precisely identify the correct location. The site he thought was the location where he had left the body was 1.6 kilometres away from where Mr. Horne found the body. The area is generally a bush type area, sparsely populated and with little in the way of easily identifiable landmarks.
- [85] During his testimony, Mr. Horne identified several changes in the area since 1990, in regards to the location where the body was found, he stated:

A Okay. There had been a -- there was a -- there was a pick-up body that I had pulled in there that I had stripped or whatever, a box. I guess it was just a box, whatever. And the Cat kind of smoothed that all over, dug a hole and -- and buried this pick-up box about -- about in the same -- same place as we found the body roughly.

...

Q All right. So how much -- how much change to the scene was created by bringing in the Cat and burying the pick-up?

A A lot. Everything was -- was kind of -- was flattened out and kind of smoothed off. There's a little bit of the box sticking out. He didn't do a really good job, but --

- [86] Also, on the day of the re-enactment, there was a lot of snow on the ground and Mr. Felker said that the murder occurred on a hot day in July. Mr. Felker agreed with N and RD that things looked a little different because of the snow. He also stated about the area that "this looks all different". Although he later said that he was "damn sure" that the location was the one he ultimately identified.

- [87] In his first confession, and in the re-enactment, Mr. Felker identified the general Kiskatinaw area near the highway as the location where he pulled off the highway. This is the area where Mr. Horne found the body.

VI. Discussion

- [88] The first main inconsistency in the evidence is the location of the body. Mr. Felker took N and RD to the general vicinity but could not readily identify the exact location where the body was left.
- [89] The fact that Mr. Felker could not take the undercover officers to the precise location is hardly surprising. The area is rural and mostly covered by bush-type vegetation. There are few readily identifiable landmarks. Although Mr. Felker was familiar with the general area, he was uncertain whether he was at the precise location. The killing took place in the summer but the re-enactment was in winter conditions and he agreed looked different. In my view, the inability of Mr. Felker to pinpoint the location 16 years after the fact, in a different season, does not detract from the conclusion that the evidence against Mr. Felker was overwhelming.
- [90] The second main inconsistency in the evidence relates to the cause of Ms. Burk's death. Dr. Rice's evidence, although consistent with his evidence he wounded her neck with a knife, is inconsistent with that part of Mr. Felker's statement in which he says he strangled Ms. Burk.
- [91] A third point of inconsistency is Mr. Felker's varying description of his sexual relations with Ms. Burk and the fact that his semen was found in her vagina, proving that he did ejaculate, even though repeatedly he said he did not.
- [92] Contrasted with these inconsistencies is the evidence that implicates Mr. Felker in a consistent manner and which, in its totality, is in my view overwhelming evidence of guilt.
- [93] Mr. Felker readily confessed to the murder the moment the topic was first raised by the undercover officer posing as the boss. He knew her name to be Cindy. Without hesitation and on numerous occasions he repeated his admission that he had murdered Ms. Burk.
- [94] He gave a detailed description of the location at which he picked up Ms. Burk and gave an internally consistent account of his route along the Alaska Highway and about various landmarks where he stopped.
- [95] Significantly, Mr. Felker's semen was found in Ms. Burk's vagina. He admitted to attempting to have sexual relations with Ms. Burk.
- [96] Mr. Felker's description of Ms. Burk's collection of jewelry; Mr. Bray and Ms. Withrow's evidence that the jewelry was stolen from them when Ms. Burk was in their home; Mr. Horne's evidence about finding the jewelry scattered around in the vicinity of the body; and Mr. Felker statement that he scattered the jewelry, are all consistent with his guilt and firmly implicate Mr. Felker.

- [97] Mr. Felker testified that he cut Ms. Burk's throat with a good quality hunting knife that she had in her possession. This description of the knife is consistent with Mr. Bray's description and with the evidence that the knife was probably stolen by Ms. Burk.
- [98] Mr. Felker's description of the timing and manner in which he cut Ms. Burk's throat is also consistent with the injury observed by the pathologist. Both say that a knife was used and Mr. Felker's evidence that he disposed of the body in a different place than where he cut her throat is consistent with the fact that no blood was found at the scene and with Dr. Rice's testimony that the victim would have quickly bled to death and had very little blood left in her body. Mr. Felker described sweeping the site of the killing with branches to hide the blood. He removed jewelry from her body.
- [99] Significantly, Mr. Felker's description of the manner in which he left the body mirrors precisely the evidence of Mr. Horne as to his discovery of the body. Ms. Burk was in a depression covered with leaves and twigs and branches.
- [100] Mr. Felker's description of disposing of Ms. Burk's belongings is very detailed. He said he stopped his truck at the curved bridge on the Old Alaska Highway and threw away her quart sealing jar containing her liquor. The river was quite low and he said he threw it so that the jar would break on the rocks. He then got back in his truck and drove to a second bridge, this one over the Peace River. Here the river was running higher. He described in a precise manner how he had retrieved a rock from the area of first bridge, put it in the bag with her clothes, kept her money (\$10), kept her shoes, and threw the weighted bag of clothes into the deepest part of the river.
- [101] Separately, he threw the remaining jewelry into the river.
- [102] Next he returned to his home where he burned all his own clothes, and her shoes in an old barrel. He explained that he worried her shoes might float if he threw them into the water. He thoroughly cleaned his truck.
- [103] This evidence is highly incriminatory in its level of detail, internal consistency, and consistency with the evidence of Ms. Burk being found naked, with no jewelry on her body, face up, covered in branches, all just as Mr. Felker described in the re-enactment. He identified landmarks to the officers who accompanied him on the re-enactment that were consistent with his narrative of the events leading to the killing of Ms. Burk and with his efforts to cover his tracks after the murder.
- [104] It is often the case in this type of police undercover operation that the police hold back certain information that only the killer could know as a means of testing the reliability of the confession. That was not the case here. There were a number of press releases and brief accounts of the murder in the press. In my view, because these accounts gave scant details, they are neutral factors in my assessment of the evidence.

[105] In *Trochym* the Supreme Court of Canada articulated the standard of proof to apply in cases involving the second branch of the curative proviso. That standard requires the appellate court to be satisfied that the evidence "is so overwhelming conviction is inevitable or would invariably result". The Court notes that the standard of proof is substantially higher than the one required at trial. There is no doubt that there are some inconsistencies in the evidence against Mr. Felker but, in my view, the evidence as a whole overwhelmingly implicates him in a manner that gives no other explanation than the one he admitted, that he murdered Ms. Burk. I refer most particularly to the existence of his DNA in Ms. Burk's vagina, his description of the stolen jewelry and knife, his admission of cutting her throat, and his description of the manner he left the body, all of which are independently corroborated. I note also his freely given narrative during the re-enactment of his journey with her and of his actions after killing her. In my view, the conflicts in the evidence do not undermine the overwhelming evidence consistent with his having killed her as he repeatedly and freely admitted he did.

6. Summary

[106] The jury was erroneously instructed that the law presumes incriminating statements to be true. The curative proviso may be applied even where the error is not harmless if the evidence is so overwhelming that a trier of fact would inevitably convict: *R v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823. The evidence I have reviewed above, implicating Mr. Felker in the murder of Ms. Burk meets that test. It was overwhelming. I would apply s. 686(1)(b)(iii) on the basis that notwithstanding the error in the judge's instruction, no substantial wrong or miscarriage of justice occurred. I would dismiss the appeal.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice K. Smith"

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