

CANADA / JUDGMENT

R. v. Narwal

2023 BCCA 328

COURT

British Columbia Court of Appeal

DECIDED

16 August 2023

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2023 BCCA 328 R. v. Narwal

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Narwal,

2023 BCCA 328

Date: 20230816

Dockets: CA47201; CA47750

Docket: CA47201

Between:

Rex

Respondent

And

Sikander Narwal

Appellant

- and -

Docket: CA47750

Between:

Rex

Respondent

And

Amarjit Dhanda

Appellant

Before:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Fitch

The Honourable Justice Skolrood

On appeal from: An order of the Provincial Court of British Columbia, dated November 28, 2019 (conviction) (R. v. Dhanda, 2019 BCPC 328, Port Coquitlam Docket 100401).

Counsel for the Appellant, Sikander Narwal:

M.K. Brown

Counsel for the Appellant, Amarjit Dhanda:

E. Purtzki

Counsel for the Respondent:

M. Mereigh

J. Jarvis, Articled Student

Place and Date of Hearing:

Vancouver, British Columbia

March 28, 2023

Place and Date of Judgment:

Vancouver, British Columbia

August 16, 2023

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Justice Skolrood

Summary:

The appellants appeal their convictions for obstructing justice contrary to s. 139(3)(a) of the Criminal Code primarily on the basis that the trial judge erred by failing to consider the appellant Narwal's exculpatory statement to the police, tendered in evidence by the Crown. Narwal also appeals on grounds that the trial judge erred by providing insufficient reasons, drawing impermissible inferences through speculation, and giving unbalanced consideration to his statement as compared to the evidence of the complainants in performing the required W. (D.) analysis. Held: Appeals dismissed. Narwal's statement is properly characterized as a mixed statement with inculpatory and exculpatory components. The judge considered the exculpatory features of Narwal's statement, found them to have been concocted and concluded that the statement did not raise a reasonable doubt. The judge did not provide insufficient reasons for finding that the statement was concocted, nor did she draw inferences grounded in impermissible speculation. Finally, nothing in the reasons suggests that the judge unfairly treated evidence potentially favourable to the defence.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] The appellants, Sikander Narwal and Amarjit Dhanda, were convicted of obstructing justice contrary to s. 139(3)(a) of the Criminal Code, R.S.C. 1985, c. C-46. The guilty verdicts followed a six-day joint trial in the Provincial Court of British Columbia.
- [2] The Crown alleged that the appellants dissuaded or attempted to dissuade witnesses by threats or other corrupt means from giving evidence in a criminal proceeding involving Sarabjit Dhanda ("Sarabjit"), Amarjit Dhanda's brother. On appeal from conviction, they argue that the judge erred in law in her treatment of the evidence, although Mr. Narwal's grounds are broader than those advanced by Ms. Dhanda. Both seek orders allowing the appeals, setting aside the convictions, and granting a new trial.
- [3] There was ample evidence upon which the judge could conclude that the Crown had established the guilt of both appellants beyond a reasonable doubt. The central issue on appeal is whether she reached this conclusion without considering the exculpatory portions of an out-of-court statement given by Mr. Narwal to the police. The Crown adduced Mr. Narwal's statement as part of its case after his counsel conceded it was voluntarily made and taken in compliance with the Charter. It is a well-established principle that where the Crown tenders an accused's out-of-court statement which is "mixed"--in the sense that it contains both inculpatory and exculpatory portions--it must tender the entire statement, and the exculpatory portions are substantively admissible in favour of the accused: *R. v. Rojas*, 2008 SCC 56 at para. 37.

- [4] Mr. Narwal submits the judge committed reversible error by failing to give consideration to the exculpatory portions of his statement in accordance with the analytical framework set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93. He submits that even if the exculpatory portions of his statement were not believed, they had the potential to raise a reasonable doubt about his guilt.
- [5] Ms. Dhanda submits that, in the unusual circumstances of this case, the judge's failure to consider Mr. Narwal's statement had a prejudicial impact on her too. Specifically, she says that if the exculpatory portions of Mr. Narwal's statement had been considered, the judge might have made different factual findings concerning her conduct--findings sufficient to seed a reasonable doubt about her guilt. In the result, both appellants submit that the verdicts are tainted by this fundamental error in law and cannot be cured by resort to the curative proviso.
- [6] The Crown submits that Mr. Narwal's statement is inculpatory, but even if it can properly be regarded as a mixed statement, the judge considered and rejected its exculpatory features. Further, the Crown submits that the judge did not err in her treatment of the evidence in the additional ways Mr. Narwal suggests.
- [7] For the reasons that follow, I would dismiss both appeals.

II. Background

1. Overview and Events Giving Rise to Animus on the Part of the Appellants

- [8] The Crown called 10 witnesses, including the complainants, five police witnesses, and an expert witness who translated telephone calls involving the two appellants and Sarabjit. The parties also filed an agreed statement of facts. Neither of the appellants testified nor did they adduce any evidence in their own defence.
- [9] The appellants are married with children. As noted above, Sarabjit and Amarjit Dhanda are brother and sister.
- [10] The primary complainants are Gurjit Gill and her husband, Parminder Dutt. They, too, have children, and a niece and nephew with whom they are close.
- [11] Ms. Dhanda and Ms. Gill were once good friends. According to Ms. Gill, the friendship ended when she refused to provide false information to ICBC in support of Ms. Dhanda's claim for personal injuries arising from a car accident. Ms. Gill testified that Ms. Dhanda was angry with her for refusing to assist in this way, and it is evident that the animosity affected the relationships between and behaviour of their children.

2. The Complainants' Home is Vandalized: May 26, 2017

- [12] Ms. Gill and Mr. Dutt's niece testified that on the morning of May 26, 2017, she received a call from someone she believed to be Ms. Dhanda's daughter. The caller said, "You did not testify for my mom. Watch your back."

- [13] Later that evening, the home of the complainants was vandalized. Feces was smeared over the garage door and the house was pelted with eggs. The complainants discovered the next morning that the exterior valve for the gas line into their home had been turned off and wires to an old telephone power box that once serviced the property had been cut. The appellants' children were observed driving by the complainants' home on multiple occasions that day.
3. Sarabjit Dhanda Attends at the Complainants' Home with a Knife: May 29, 2017
- [14] In the early morning hours of May 29, 2017, the complainants, their nephew and niece, watched Sarabjit approach their residence carrying a knife. Ms. Gill recognized Sarabjit and knew from Ms. Dhanda that he had a criminal record, which compounded her fears. When Ms. Gill alerted her husband, Sarabjit left the property and was driven away by an unknown male. Ms. Gill, who was understandably frightened, called the police. Mr. Dutt pursued Sarabjit in his own vehicle. On two occasions, the vehicle in which Sarabjit was travelling stopped, and Sarabjit got out to confront Mr. Dutt with a knife and hammer. Mr. Dutt wisely discontinued the pursuit. Ms. Gill saw the vehicle in which Sarabjit was travelling return to her residence while she was still on the phone with the police. She saw Sarabjit pointing a finger at her from inside the vehicle. The same vehicle was stopped by the police a short time later. At the time of the stop, Sarabjit was driving. Two hammers were found in the vehicle. Sarabjit was arrested and housed in the North Fraser Pre-trial Centre ("NFPC").
- [15] The primary complainants, along with their nephew and niece, gave the police statements implicating Sarabjit in the commission of this offence.
- [16] Sarabjit was charged with assault with a weapon. He was in custody at NFPC from May 29, 2017, until September 7, 2017.
4. Ms. Gill is Pressured by an Unknown Male to Recant: May 29, 2017
- [17] The next morning, an unknown man showed up at the complainants' home. He kept one of his hands in his pocket. He told Ms. Gill not to talk to the police and to "take back the statements". He mentioned something about bullets, the complainants' three children, and the school they attended. Ms. Gill was very frightened. She called Mr. Dutt to tell him what happened. Mr. Dutt called Mr. Narwal. He knew that Sarabjit was Mr. Narwal's brother-in-law. He thought Mr. Narwal might be able to help.
5. Meeting Between the Complainants and Mr. Narwal: May 29, 2017
- [18] Later that day Mr. Dutt and Ms. Gill met with Mr. Narwal to discuss the situation (the "May 29 meeting"). The meeting took place in the complainants' home.
- [19] According to Ms. Gill, Mr. Narwal asked her why she did not help out his wife with her ICBC case. He said that "if you take back your statement, I will make this all stop". He said things would only get worse if the complainants did not do so. When she asked about Sarabjit coming to their property again, Mr. Narwal said to them, " oh, Sarabjit wouldn't come with a

knife, he'd come with a gun". Mr. Narwal advised them that Sarabjit had been in and out of jail on multiple occasions and asked, "how long are the police gonna protect you?" He said, "you just need to cooperate and work with me". He counselled them to tell the police they were mistaken in their identification of Sarabjit as the perpetrator of the assault.

- [20] Ms. Gill testified that, after consulting with Mr. Dutt, they agreed to retract their statements. She said she had no choice. She could either cooperate with the police and hurt her family, or listen to Mr. Narwal and save her family. Mr. Narwal told them they were making the "right choice".
- [21] Ms. Gill also testified that she raised the vandalism incident with Mr. Narwal and told him that she suspected his daughters were involved. Mr. Narwal responded that windows had been broken at his house. He conveyed his suspicions that the complainants' family was responsible for this mischief.
- [22] In cross-examination, Ms. Gill rejected suggestions put to her that Mr. Narwal was attempting to pacify her or make her feel better and that she thought he was just trying to help out. She responded, "I don't believe that at all I felt threatened and left with no choice but to tell the police I'm not gonna get involved". When it was put to her that Mr. Narwal "was being a peacemaker in this little problem", Ms. Gill said Mr. Narwal told her, "I will stop all of this if you guys take back whatever you guys said to the police. Sarabjit can't stay in jail". She said Mr. Narwal was not willing to help them unless they took back their statements.
- [23] Ms. Gill acknowledged in cross-examination that the involvement of their children in the dispute was raised, but she had no recollection of the specifics of that part of the conversation.
- [24] Mr. Dutt's evidence was largely consistent with Ms. Gill's on the matters discussed at the meeting. He testified that Mr. Narwal acknowledged the unknown male who had attended at their house and told them that "these guys are very bad". Mr. Narwal said he knew about everything and could make it all stop if the complainants took back their statements. If they refused to do so, he said that matters "would be out of his hands". When asked how the meeting with Mr. Narwal came to an end, Mr. Dutt testified that, "[b]asically, [Mr. Narwal] came to the conclusion that I should take back my statement from the police. And I said I would. Make it all just stop. Make the cars go away. And I don't want your daughters driving around here anymore".
- [25] Mr. Dutt testified that, after discussing the matter further with Ms. Gill, they determined that it was in their best interests, and in the best interests of their family, to retract their statements.
- [26] Mr. Dutt was asked in cross-examination whether he contacted and met with Mr. Narwal on May 29 to resolve all of the disputes between their families. The "disputes" referred to consisted of the vandalism said to have been committed in relation to the properties of both the appellants and complainants. Mr. Dutt denied this and testified that he wanted Mr.

Narwal to stop what was happening. In context, it is clear that Mr. Dutt was referring not only to the vandalism, but the drive-by harassment, the attendance of Sarabjit at his home in possession of a knife, and the subsequent attendance of the unknown man who made veiled threats to his wife. The following exchanges are illustrative of the point:

Q. Mr. Dutt, I suggest that you called Sikander Narwal, you picked him up to resolve all escalating disputes between families. Is it right?

A. What kind of dispute are you talking?

Q. All allegations against each other, vandalism at your house and vandalism at his house.

A. Well, I didn't know anything about a vandalism at his house 'til he told me. I didn't want no random male coming to my house. I didn't want his brother-in-law with a knife in my yard. And I didn't want his daughters driving up and down the street. That's what I wanted to talk to him about.

Q. Mr. Dutt, I suggest you offered Sikander Narwal that you will recant your statements in order to resolve all escalating disputes between families.

A. No, he told me. He said I can make everything stop. Just take your statements back.

6. Initial Attempts to Retract the Statements Implicating Sarabjit

[271] Just after midnight on May 30, 2017, Ms. Gill and Mr. Dutt contacted the police to advise that they no longer wanted to proceed with the assault charge against Sarabjit. They were advised to speak with the investigating officer who was away until June 4. Ms. Gill spoke to Mr. Narwal "a bunch of times" after that, telling him that she needed to speak to the investigating officer. Mr. Narwal told Ms. Gill (and Mr. Dutt) that this was not so, and that they could call anyone at the police station to let them know she wanted to retract her statement. Mr. Narwal accused her of lying about contacting the police to recant. He told her that "people are getting upset", and that "[i]f we're not gonna listen to him he's not responsible for our safety, then it's out of his hands". Mr. Narwal said to her, "remember what's gonna happen when Sarabjit is out. The longer you keep him in there the more he's going to be upset...".

[281] Mr. Dutt also spoke with Mr. Narwal by phone around this time. Mr. Narwal did not believe that the complainants had retracted their statements and "hounded" Mr. Dutt "every day" to take his statement back. During one of these calls, Mr. Narwal told Mr. Dutt the date upon which Sarabjit was scheduled to appear in court. Mr. Dutt told Mr. Narwal, "I'll go the extra mile. I'll go to the court when the guy's date is."

[291] Ms. Gill and Mr. Dutt testified that vehicles they associated with Ms. Dhanda and Mr. Narwal continued to drive-by her property. Additionally, they saw a truck being driven by Mr. Narwal go past their property.

[30] Ms. Gill testified that on one occasion, Ms. Dhanda stood outside her house yelling and swearing at Ms. Gill and calling her "trailer-park trash". On another occasion, Ms. Dhanda "flipped her middle finger" at Ms. Gill. On yet another occasion, Ms. Dhanda approached Ms. Gill, while she waited in her vehicle at her son's school, and spat on her face.

7. The Intercepted Calls from NFPC: May 30 and 31, 2017

[31] Sarabjit ("S") called his sister, Amarjit Dhanda ("A"), on May 30, 2017, from NFPC. The call was intercepted and recorded. The appellant, Sikander Narwal ("N"), participated in a portion of the conversation.

[32] Ms. Dhanda confirmed with Sarabjit that Mr. Dutt was retracting his statement and that Mr. Narwal would be accompanying Mr. Dutt to the police station for this purpose. Ms. Dhandha also confirmed with Sarabjit her understanding that the investigating officer was "off shift" and that no one else could search their case file. She considered this to be "fucking bullshit". Ms. Dhanda said to Sarabjit that Mr. Dutt had to say he was mistaken about his identification of Sarabjit as the perpetrator of the assault. The following exchange then occurred between the appellants and Sarabjit:

A: Has he [Mr. Dutt] not been to the police station yet? You [Mr. Narwal] too were to go with him?

N: He, the police guy said I'll call home, he said I will give the statement again.

A: What is he [Mr. Dutt] going say to him, him?

N: This, that he would like to drop it.

A: Drop it? Told him that he was mistaken, that it was someone else not him. He was mistaken. Okay? Call him right way and tell him.

S: Yes, tell him it was not him, we did not say his name that time, otherwise they won't release me.

A: Yes.

S: Right? They want

A: Say this that it was not him.

N: Okay.

S: Yes, how are you? Tell them that we are not going to spare them if they cause any problem. I

N: What?

S: Tell that sister-fucker for once that, if there's any problem, he won't be spared.

N: Okay, okay, okay, okay.

S: Right?

N: Okay, okay, okay.

S: Yes, yes.

N: Okay then.

S: If these people [the complainants] can also come to June 8 to the court hearing, that would be even better too.

A: Okay.

S: These sister-fuckers, they laid charges.

A: Yeah, I'll talk to him.

S: What?

A: I'll talk to Sikander, yeah.

S: Tell them too, tell them too, these sister-fuckers should also be there.

A: Yeah, okay.

S: If he can come even better. Just say, hey, this is us. We are not pressing charges on this guy.

A: Yeah.

S: Right?

A: Uh, it's mistaken identity.

A: Yeah.

S: If they can even do that even better.

A: Yeah, okay.

A: And we're going to talk to [Mr. Dutt] right now and make him go to the fucking police station. And say It is a mistaken identity. That's all.

S: It is a mistaken identity. You say hey you have to go to court with me on that day.

A: Yeah.

S: Come to court with me that day and fucking say, hey man, you guys got this guy for no reason.

A: Yeah.

[Emphasis added.]

[33] Phone records adduced at trial confirm that Mr. Narwal called Mr. Dutt on May 30, 2017, after the call placed by Sarabjit from NFPC had ended.

[34] In a second recorded call placed by Sarabjit to his sister on May 31, 2017, the following exchanges occurred:

A: So, I guess you talked to somebody and, uh, Puppy bastard [Mr. Dutt] went in to say, hey, I'm withdrawing my case. Right?

S: Yes

A: He can't just say, I'm withdrawing the case. He has to give a reason, stuff like that. He doesn't want to implicate himself. He just says, he wants to withdraw the case.

S: Either way, Amar, there is this fellow Dodd or Dood, [Dutt] tell him, tell him that on June 8, even if it has to be done with the help of a lawyer, bring him along to the court.

A: Uh.... that I know, I know.

S: Bring him along that day. Say, hey, here's the guy, he's the one who put up the case, police caught, we have to hire lawyer. Hey, it's the wrong guy.

A: Yeah, exactly. Right?

S: Okay, okay. There is one thing Amar, make sure you bring these mother-fuckers to the court date on June 8. You know

A: I'm going to, I'm going to make every single effort.

S: If you can bring them on Friday

A: He said, he will. He has told Sikander he's, he will come to court.

[Emphasis added.]

8. Mr. Dutt's Recantation Letter: June 8, 2017

[35] Mr. Dutt, Mr. Narwal and Ms. Dhanda all attended at the courthouse on June 8, 2017--the date of Sarabjit's appearance. Mr. Narwal's phone records show 13 calls between his phone and Mr. Dutt's phone that day. Ten of those calls were placed by Mr. Narwal.

[36] Mr. Dutt testified that he was "told" by Mr. Narwal to write a letter to the Crown retracting his complaint. Mr. Dutt composed the letter while Mr. Narwal was sitting beside him. It reads, in material part, as follows:

To Crown:

I, Parminder Dutt have no interest in pursuing any matter in regards to [this] file. As far as I recall I had no altercation with the accused relating to this file.

9. The Formal Recantations: June 11, 2017

- [37] On June 11, 2017 the complainants, their nephew and niece gave statements to the police recanting their May 29 statements implicating Sarabjit in the assault. Ms. Gill asked to speak with the investigating officer "off the record" and disclosed to him that she felt she had to retract her statement because she had been threatened. She was upset and crying when she made this disclosure.
10. Sarabjit's Guilty Pleas
- [38] On September 7, 2017, Sarabjit pleaded guilty to assault with a weapon arising out of his attendance at the complainants' home on May 29.
- [39] On July 23, 2018, Sarabjit was also charged with obstruction of justice on a joint indictment with Mr. Narwal and Ms. Dhanda. On September 10, 2019, he pleaded guilty to that offence as well.
11. The Appellants' Arrest and Mr. Narwal's Statement to the Police: June 24, 2018
- [40] The appellants were arrested on June 24, 2018. As he was being booked, Mr. Narwal said that he wanted to speak with the police to tell his side of the story. Immediately after being released, he was interviewed by the police. The interview was conducted partly in English and partly in Punjabi. The transcription of Mr. Narwal's statement, in translated form, is 99 pages. It is not easily summarized.
- [41] When asked why he thought he was at the police station, Mr. Narwal replied that there was some problem with the kids. He directed the conversation to the May 29 meeting. He said Mr. Dutt initiated the meeting by saying that the kids are fighting and inviting Mr. Narwal to sit down, talk, and end the conflict. When Ms. Gill said there was "this problem", Mr. Narwal mentioned that his house had been vandalized too. He said he agreed with Ms. Gill that there was no point in making life difficult for one another.
- [42] He said the complainants spontaneously offered to "take the case back". He, in turn, agreed to tell Sarabjit not to fight or argue with anyone and guaranteed that, if the statements were recanted, nothing else would happen. He suggested that he was just trying to help out and resolve the issue. He said that Mr. Dutt offered to put his recantation in writing.
- [43] He said he went to court with Mr. Dutt at Mr. Dutt's invitation. Mr. Dutt handed in his recantation to the "court guy". When asked whether he suggested to Mr. Dutt that Mr. Dutt write the letter, Mr. Narwal agreed that was possible and that he may have "told" Mr. Dutt to write the letter "taking the case back". He said that his entire conversation with Ms. Gill and Mr. Dutt occurred during the May 29 meeting. He reiterated that the problem was with the kids, and that he did not want it to escalate to the adults.
- [44] Mr. Narwal told the police that after the May 29 meeting, Mr. Dutt changed his mind about recanting. Mr. Narwal said he told Ms. Gill and Mr. Dutt, "[y]ou guys do what you want I don't care".

- [45] Mr. Narwal denied knowing or hearing anything about threats being made to Ms. Gill. He said he was 99 percent sure that Sarabjit never intimidated or threatened the complainants. He said Ms. Gill told him she was feeling bad about Sarabjit being in jail because of the kids.
- [46] Mr. Narwal said that he didn't threaten anyone and had nothing to do with that.
- [47] With respect to Ms. Gill's implication of Sarabjit in the May 29, 2017 assault, Mr. Narwal said that Sarabjit did not have a knife and that Ms. Gill was mistaken about this. He said the report she gave to the police was all wrong.
- [48] When confronted with the existence of the NFPC intercepted telephone calls and asked whether he ever spoke with Sarabjit while Sarabjit was incarcerated, Mr. Narwal said, "I don't remember".

III. The Closing Submissions of Mr. Narwal's Trial Counsel

- [49] In brief closing submissions, counsel for Mr. Narwal at trial (not counsel on appeal) submitted that the May 29 meeting was initiated by Mr. Dutt to resolve disputes between the two families, largely arising out of the vandalism allegations each had made against the other. He submitted that Mr. Narwal's statement to the police confirmed this. He characterized Mr. Narwal's role as that of a peacemaker. He submitted that Mr. Narwal did not threaten the complainants, but attended the May 29 meeting to settle issues between the kids. I think it fair to say that defence counsel did not emphasize Mr. Narwal's statement in his closing address and, with the exception noted above, did not highlight for the judge the exculpatory portions of the statement he was relying on to seed a reasonable doubt.

IV. Reasons for Judgment

- [50] In reasons for judgment indexed as 2019 BCPC 328, the judge found that the events giving rise to Sarabjit's armed attendance at the complainants' home arose out of Ms. Gill's refusal to lie for Ms. Dhanda in connection with Ms. Dhanda's ICBC claim: at paras. 140-141.
- [51] She found the complainants to be forthright and reliable witnesses: at para. 142.
- [52] She concluded that, prior to the May 29 meeting, Mr. Narwal was aware of the vandalism to the complainants' home, that his daughters had been driving back and forth in front of the complainants' residence, and that an unknown male had threatened Ms. Gill. Mr. Dutt and Ms. Gill came to the meeting upset and afraid because of these events. Mr. Narwal raised Sarabjit's criminal history during the May 29 meeting with the intention of conveying to the complainants that the threat of harm was real. She noted that Ms. Gill was not challenged in cross-examination on this portion of her evidence. She found that, in addition to threatening the complainants during the May 29 meeting, Mr. Narwal subsequently participated in a campaign of harassment and intimidation to ensure that the complainants followed through with their agreement to recant their statements. She also found that Mr. Narwal followed up on Sarabjit's direction to him to tell the complainants that, "if there's any

problems they won't be spared": at paras. 144-151.

- [53] The judge concluded that Mr. Narwal threatened Ms. Gill and Mr. Dutt at the May 29 meeting and that these threats were intended by him to induce the complainants to recant their statements to the police so the assault charge against Sarabjit would not be prosecuted: at para. 159.
- [54] With respect to Ms. Dhanda, the judge acknowledged that the case against her turned on the intercepted calls she had with Sarabjit while he was in custody, and the inferences that could be drawn from those conversations. She concluded that Ms. Dhanda "knew what had transpired between Mr. Dutt and Mr. Narwal following the May 29th meeting at the Dutt residence, and was keenly aware of what needed to be done in anticipation of [Sarabjit's] upcoming June 8th court date". The judge concluded, based on the intercepted calls, that Ms. Dhanda provided specific direction to Mr. Narwal on what Mr. Dutt needed to say to retract his statement. The judge also found that Ms. Dhanda's subsequent interactions with the complainants and their family members formed part of the same chain of events designed to dissuade them from giving evidence against Sarabjit: at paras. 164-171.
- [55] The judge referred to Mr. Narwal's statement on several occasions in her reasons for judgment.
- [56] She acknowledged that the case against Mr. Narwal included his warned statement to the police: at para. 33.
- [57] In reviewing the evidence concerning the May 29 meeting, the judge noted:
- [83] In his statement to police, Mr. Narwal admits the fact that a meeting took place with Mr. Dutt and Ms. Gill at their home on May 29th but denies having threatened them.
- [58] In summarizing her factual findings, the judge said this:
- [158] I find that Mr. Narwal concocted the story of an "escalating dispute" between the young adults of the two families in an attempt to deflect the very real concerns expressed to him at the meeting by Ms. Gill and Mr. Dutt, namely, that his daughters were possibly involved in the vandalism of their home.
- [59] Finally, having confirmed her understanding that the evidence before her included Mr. Narwal's out-of-court statement to the police in which he denied threatening the complainants, the judge found as a fact that, "on a consideration of the evidence as a whole Mr. Narwal threatened Mr. Dutt and Ms. Gill at the meeting on May 29th" (emphasis added): para. 159.

V. Grounds of Appeal

- [60] Mr. Narwal advances four grounds of appeal, which are framed in his factum as follows:

1. The trial judge erred by failing to fully apply the test from *R. v. W.(D.)* to the appellant's exculpatory statement;
2. The trial judge erred by giving insufficient reasons for deciding that the appellant's exculpatory statement was concocted;
3. The trial judge erred by drawing inferences based on speculation; and
4. As a result of her other errors, the trial judge gave unbalanced consideration to the appellant's statement in comparison with the complainants' evidence.

[61] In oral argument, Mr. Narwal characterized grounds 3 and 4 as "lesser issues".

[62] Ms. Dhanda relies entirely on Mr. Narwal's first ground of appeal. She submits that Mr. Narwal's statement to the police was relevant to the determination of her guilt, and that the judge's failure to properly consider it is an error of law that ought to result in a new trial for both appellants. Ms. Dhanda submits that the judge's factual findings about what was discussed at the May 29 meeting was foundational to her conclusion that Ms. Dhanda was aware of the content of the discussion as testified to by the complainants. This, in turn, coloured the judge's view of her subsequent conduct, including the statements she made to Sarabjit in the intercepted NFPC telephone calls. She submits that if Mr. Narwal's exculpatory version of events was accepted, the judge may have entertained a reasonable doubt about her guilt. For example, if the judge found that the complainants decided to withdraw their statements as an exercise of their own free will in the absence of any threats or inducements, her subsequent actions and statements may have been viewed in a different light.

VI. Analysis

1. Ground of Appeal Common to Both Appellants: Did the Judge Fail to Consider Mr. Narwal's Exculpatory Statement to the Police?

[63] I am of the view that Mr. Nawal's out-of-court statement to the police is best characterized as a mixed statement with inculpatory and exculpatory components. As a consequence, the judge was obliged to consider the statement as evidence favourable to the defence and capable of seeding a reasonable doubt.

[64] For the purposes of this analysis, I am prepared to set aside my view that the principal exculpatory features of Mr. Narwal's statement--that the May 29 meeting was about problems between the kids, that he was a peacemaker who did not threaten or coerce the complainants, and that the complainants suggested retracting the statements on their own accord--run contrary to the evidence as a whole. Indeed, the claim that the May 29 meeting was to resolve problems between the kids borders on the fanciful. In this regard, I note that neither the testimony given by the complainants about the May 29 meeting and the events that followed (much of which was not challenged in cross-examination), nor the intercepted calls had anything to do with conflicts between the children. The written recantation offered

by Mr. Dutt was in relation to the charge against Sarabjit. All of this evidence had everything to do with dissuading the complainants from giving evidence at Sarabjit's upcoming trial and nothing to do with childish pranks.

- [65] I recognize, however, the institutional disadvantage of appellate courts in this context. We should be cautious in making findings about the potential effect exculpatory evidence--whether improperly excluded or admitted but not considered--might have had on the deliberative process. Any doubt about the impact such evidence might have had on the trier of fact should enure to the benefit of the accused: *R. v. Wildman*, [1984] 2 S.C.R. 311 at 329, 1984 CanLII 82; *R. v. Perkins*, 2016 ONCA 588 at para. 31.
- [66] I am also prepared to ignore, for the purposes of this analysis, that Mr. Narwal's statement to the police has assumed an import on appeal far beyond that which was accorded to it by Mr. Narwal's trial counsel. While reasons for judgment are generally reviewed in a way that is responsive to the manner in which the case was presented at trial, I accept that the trial judge had an independent obligation to consider whether Mr. Narwal's statement raised a reasonable doubt about the guilt of either or both of the appellants.
- [67] Implicit in this approach is my preparedness, for present purposes, to ignore the reality that Mr. Narwal's trial counsel had strategic reasons not to emphasize the statement in his closing submissions. Indeed, the statement reflects not only a general evasiveness and cat-and-mouse strategy on Mr. Narwal's part, but also remarks that so defy common sense as to lead a reasonable person to the conclusion that portions of the statement must be untrue. For example, it would be extremely difficult to credit Mr. Narwal's contention that he had no recollection of speaking with Sarabjit when Sarabjit was in custody at NFPC. It would be equally difficult to credit Mr. Narwal's statement to the police that he did not care whether the complainants recanted their statement. His subsequent conduct, including his participation in the intercepted phone calls, his many calls to Mr. Dutt around the time of Sarabjit's court appearance, and his attendance at the courthouse with Mr. Dutt would all suggest that he very much cared about whether his brother-in-law was prosecuted.
- [68] The inculpatory features of the statement were also highly damaging to Mr. Narwal, and it is understandable that trial counsel would not wish to highlight them. Here, I have in mind Mr. Narwal's acknowledgement that he accompanied Mr. Dutt to Sarabjit's court appearance on June 8 and told him to write the recantation letter.
- [69] Again, however, I proceed on the footing that this Court must be cautious in making predictive observations about how a trial judge might have integrated into their deliberative process exculpatory evidence an appellant says was not, but should have been, considered.
- [70] Even so, there are, in my view, two insurmountable hurdles the appellants face in the prosecution of this ground of appeal.

- [71] First, the judge did not ignore Mr. Narwal's statement to the police. She referred to the statement several times in her reasons for judgment, noting that Mr. Narwal advised the police that he did not threaten the principal complainants during the May 29 meeting. In discussing the evidence as a whole, the judge concluded that Mr. Narwal "concocted the story" that the meeting was about an escalating dispute between the children. Mr. Narwal's "story" must be a reference to his statement. Mr. Narwal concedes as much on appeal, arguing in his second ground that the judge erred by giving insufficient reasons to support her conclusion that the appellant's statement was concocted.
- [72] I can only read these portions of the reasons for judgment as confirming the trial judge's understanding that the appellant's statement, including its exculpatory components, was admissible in support of the defence. In my view, the reasons for judgment also confirm that the judge gave substantive consideration to whether Mr. Narwal's statement raised a reasonable doubt about his guilt. The judge concluded that it did not.
- [73] Second, the exculpatory features of Mr. Narwal's police statement highlighted by counsel on appeal (and summarized herein at para. 64) were put to the principal complainants in cross-examination. They rejected suggestions put to them in cross-examination that the meeting was about escalating problems between the children, that Mr. Narwal played the role of peacemaker during the meeting, and that the idea of retracting the statements was something they came up with on their own, independent of anything said to them by Mr. Narwal.
- [74] The judge specifically noted the main areas canvassed by Mr. Narwal's trial counsel in the cross-examination of Mr. Dutt:
- [155] One of the main area[s] canvassed with Mr. Dutt in cross-examination involved the assertion there was an escalating dispute between the young adults that involved vandalism to the homes of both families. It was suggested to Mr. Dutt during cross-examination that Mr. Narwal performed the role of peacemaker to resolve this dispute at the May 29th meeting, the upshot of which resulted in the complainants' decision, on their own initiative, to recant their statements.
- [75] In the end, the judge found the evidence of the principal complainants to be credible and reliable. She found that the behaviour of the appellants, their children, and Sarabjit was not sourced in concerns about childish pranks, but in Ms. Gill's refusal to lie in connection with Ms. Dhanda's ICBC claim. She found that Mr. Narwal was well aware of the events that preceded the May 29 meeting, including the attendance of the unknown male who threatened Ms. Gill and her family. She found that Mr. Narwal threatened the complainants with the intention of coercing them to retract their statements implicating Sarabjit in the commission of the assault.
- [76] Implicit in these finding is a rejection: (1) of Mr. Narwal's statement that he acted as a peacemaker to the end of facilitating the resolution of disputes between the children; and (2) that it was the complainants who spontaneously offered to retract their statements to the

police. Indeed, the judge found that Mr. Narwal's story on this point--which was the foundation for the exculpatory claims made in his statement--was concocted. She also found that, following the May 29 meeting, Mr. Narwal participated in further acts designed to dissuade the complainants from giving evidence against Sarabjit.

- [77] Accordingly, in accepting the evidence of the principal complainants, the judge necessarily rejected the exculpatory portions of Mr. Narwal's statement. It follows that there is no risk in this case the convictions were entered without the trial judge having considered and addressed, within the W.(D.) framework, admissible evidence favourable to the defence. For this reason, *R. v. Sanhueza*, 2020 BCCA 279 is of no assistance to the appellants.
- [78] For the foregoing reasons, I would not give effect to this ground of appeal.
- [79] This conclusion disposes of Ms. Dhanda's appeal in its entirety. I find it unnecessary to consider whether the curative proviso could be applied to sustain the conviction in relation to Ms. Dhanda as a consequence of the incriminating statements she made to Sarabjit and Mr. Narwal in the intercepted telephone calls. In the result, I would dismiss Ms. Dhanda's appeal.
- [80] I turn next to consider the remaining grounds of appeal raised by Mr. Narwal.
2. Did the Judge Give Insufficient Reasons for Determining that Mr. Narwal Concocted the Story that the Events in Issue were Sourced in an Escalating Dispute Between the Children?
- [81] Mr. Narwal does not suggest the judge erred by relying on her finding that he "concocted" a story about the genesis of the dispute between the families as affirmative evidence of his guilt. Rather, he suggests that the judge gave insufficient reasons for coming to this conclusion.
- [82] The jurisprudence concerning the factual sufficiency of a trial judge's reasons is well-settled. The governing principles were most recently reviewed in *R. v. G.F.*, 2021 SCC 20 at paras. 68-73. They are not in dispute here. Suffice it to say that factual sufficiency ordinarily posits "a very low bar" which takes account of the ability of an appellate court to assess whether the reasons, read as a whole and in the context of the trial record, explain the decision in a manner that permits effective appellate review: *G.F.* at paras. 69-71.
- [83] I see no merit in this ground of appeal. The appellant's story that the May 29 meeting was prompted by escalating disputes between the adult children of both families was inconsistent with the evidence of the complainants, which was accepted by the judge. It was also inconsistent with any reasonable interpretation of the events that followed the May 29 meeting. Viewing the reasons in the context of the record as a whole, I have no difficulty understanding why the judge found that Mr. Narwal concocted the narrative set out in his statement to the police.
3. Did the Judge Err by Drawing Inferences Based on Speculation?

- [84] Mr. Narwal submits that the judge engaged in impermissible speculation by inferring: (1) that he was aware of the disturbing events described by the complainants before the May 29 meeting took place; and (2) that he carried out directions given to him by Sarabjit during the May 30 telephone call from NFPC that were designed to maintain pressure on the complainants to retract their statements.
- [85] On the first point, Ms. Gill and Mr. Dutt both testified they quickly formed an impression during the May 29 meeting that Mr. Narwal was aware of the critical events that preceded the meeting.
- [86] As Ms. Gill explained in cross-examination, "[i]t seemed like he knew the [unknown] guy came there. It - the way he didn't deny any guy, he didn't say no, he knew about the vehicles that were driving around. He agreed to everything."
- [87] Mr. Dutt's evidence on this point, although somewhat confusing and internally inconsistent, was, on occasion, even more direct. He testified that when he asked Mr. Narwal why his family was being threatened, Mr. Narwal, "acknowledged the person that was at our house and he told me that these guys are very bad and he - he could make it all stop if we take back our statements". Mr. Dutt also testified that Mr. Narwal "said he knew about everything and he could make it all stop".
- [88] The judge found as a fact that Mr. Narwal knew, before attending the May 29 meeting, that the complainants' home had been vandalized and that they had been threatened. It is this finding that Mr. Narwal says is rooted in speculation.
- [89] Despite making this submission, Mr. Narwal acknowledges in his factum that "at some point the appellant may likely [have] received information [about what had occurred] from his family members". That he would have received this information prior to the May 29 meeting only makes sense. It would be unreasonable to suppose that, prior to the May 29 meeting, Mr. Narwal knew nothing about the events that culminated in a violent altercation involving his brother-in-law and wife's former friend.
- [90] More importantly, there is nothing speculative about the judge acting on the evidence of Mr. Dutt that Mr. Narwal said he knew of the critical events leading up to the May 29 meeting.
- [91] The second complaint is grounded in the following excerpt from the reasons for judgment:
- [150] Mr. Narwal maintained the threat for harm by telling Mr. Dutt in follow-up telephone calls that "it's only gonna get worse" when the complainants did not act quickly enough with the police to retract their statements.
- [151] Mr. Narwal implemented [Sarabjit's] direction during the May 30th telephone call from [NFPC] to "tell them for once that, if there's any problems they won't be spared." Mr. Narwal indeed conveyed words to this effect to Mr. Dutt during one of their follow-up conversations as Mr. Dutt described in his testimony.

- [92] The judge was mistaken in her conclusion that Mr. Narwal said to Mr. Dutt in telephone calls post-dating the May 29 meeting that it would only get worse if the complainants did not move quickly to retract their statements. In fact, it was Ms. Gill who testified that Mr. Narwal said this, and that he did so during the May 29 meeting.
- [93] With respect to the judge's conclusion that Mr. Narwal implemented Sarabjit's direction to further threaten the complainants in advance of the June 8 court appearance, the following evidence is relevant. Sarabjit directed Mr. Narwal during the May 30 NFPC call to "[t]ell that sister-fucker for once that, if there's any problem, he [Mr. Dutt] won't be spared". The judge concluded that Mr. Narwal implemented this direction by conveying "words to this effect" in one of their subsequent telephone calls. Mr. Dutt's evidence on this point was that Mr. Narwal hounded him every day after the May 29 meeting to take his statement back, and that he felt threatened by these calls. His evidence went no further than this, and it is a stretch to suggest that Mr. Narwal conveyed to Mr. Dutt words similar in effect to those suggested by Sarabjit.
- [94] In my view, the judge misstated (or overstated) the evidence on these two points.
- [95] The appellant did not, however, advance misapprehension of the evidence as a ground of appeal in his factum, nor did he seek leave to raise it as a new ground of appeal when the matter was raised by the Court in oral argument. I take from this that what amounts to a concession was made on behalf of the appellant that neither of these misstatements played an essential role in the reasoning process that resulted in his conviction: *R. v. Lohrer*, 2004 SCC 80 at para. 2. I agree with counsel's assessment of the matter.
- [96] More importantly, and regardless of the precise language used, it is obvious that Sarabjit implored Mr. Narwal to continue pressuring the complainants to recant, and that Mr. Narwal did just that. The judge did not engage in speculation by concluding that Mr. Narwal did so in response to Sarabjit's direction. Indeed, it will be recalled that Mr. Narwal placed a telephone call to Mr. Dutt immediately after the intercepted May 30 call between the appellants and Sarabjit.
- [97] Accordingly, I would not give effect to this ground of appeal.
4. Did the Judge Err by Giving Unbalanced Consideration to the Appellant's Statement Compared to Her Treatment of the Complainants' Evidence?
- [98] As this Court recently observed, it is highly doubtful that "uneven scrutiny" is a freestanding ground of appeal: *R. v. Li*, 2023 BCCA 47 at para. 89. Even if it is, the ground is notoriously difficult to successfully advance. Appellate courts are wary that grounds of appeal like this may be, and sometimes are, thinly veiled invitations to reassess on appeal credibility determinations made at trial: *R. v. Murray*, 2020 BCCA 42 at para. 82. In *R. v. S.S.*, 2022 BCCA 392 at para. 75, it was suggested that counsel might be wise to avoid use of the phrase "uneven scrutiny" and focus instead on whether there is reversible error in the trial judge's credibility findings.

[99] Further, where this type of complaint surfaces on appeal, it generally arises in a case where both the accused and the complainant(s) have testified, and the judge's credibility findings are said to reflect an unbalanced consideration of that evidence. For obvious reasons, it is unusual to advance this ground of appeal in a case where the accused has not testified or adduced any defence evidence but relies, instead, on the exculpatory portions of a mixed statement tendered by the Crown to seed a reasonable doubt.

[100] Against this background, Mr. Narwal submits that his statement was exculpatory and largely consistent with the other evidence, including many aspects of the complainants' testimony. I do not agree with either assertion. First, the statement is a mixed statement with inculpatory and exculpatory portions. Second, it is inconsistent with the complainants' evidence and, in its most salient features, inherently implausible on the evidence as a whole.

[101] In my view, the appellant has failed to point to anything in the reasons reasonably giving rise to a concern that the judge treated evidence potentially favourable to the defence more dismissively than evidence relied upon by the Crown, including the evidence of the complainants. I would not give effect to this ground of appeal.

VII. Conclusion

[102] In the result, I would dismiss the appeals of both appellants.

"The Honourable Mr. Justice Fitch"

I agree:

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Justice Skolrood"

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